



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 135 OF 2018**

**ASSET & CARGO LTD.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**HOUSING FINANCE KENYA LTD....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUGANDA WASULWA T/A**

**KEYSIAN AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. What is for determination before this Hon. Court is the Notice of Motion application dated 25<sup>th</sup> March, 2021 instituted by the Plaintiff/Applicant filed in court on 30<sup>th</sup> March, 2021. It is brought under the provisions of Order 45 Rule 1, Order 40 Rule 1 and Order 50 Rule (1) of the Civil Procedure Rules, 2010 Sections 1A, 1B, 3A of the Civil Procedure Act Cap 21.

**The Plaintiff's/Applicant's Case**

2. The Plaintiff/Applicant seek to be granted the following order *inter alia*:-

**a) Spend**

**b) That an order of interim injunction do issue against the Defendant/Respondent, their agents, servants, nominees and/or employees from attaching, removing, repossessing and/or in any manner interfering with the Plaintiffs property being the family house on Plot No. LR. MN/SEC/1/16043 pending the hearing and determination of this application inter - partes.**

**c) That Honorable court be pleased to review and/or set asked its ruling and orders issued on 7<sup>th</sup> July, 2020 and all other constitutional orders.**

**d) That the Defendant/Respondent be directed to explore all other means and remedies available to wit vide a loan restructure to the agreed sums of Kshs. 25,120,582.--/= and the Plaintiff/Applicant to be given adequate time to settle the said restructured loan via installments.**

**e) That the costs of this Application be borne and/or be provided for.**

3. The Notice of Motion application is premised and founded on the grounds and testimonies of the deponent contained in the 13 Paragraphed Supporting Affidavit of CRISPUS WAITHAKA GACHINI sworn and dated 25<sup>th</sup> March, 2021 and filed in court on 30<sup>th</sup> March, 2021 and the annexures thereof. He deposed that he was the Director of the Plaintiff/Applicant's Company duly authorized to make and swear the said affidavit. He held that the Plaintiff/Applicant was offered a mortgage facility by the 1<sup>st</sup> Defendant/Respondent for sum of Kenya Shillings Twenty Six Million Six Hundred and thirty thousand (Kshs. 26,630,000.00/=) which the Company utilized to procure a Matrimonial home for its directors. The Plaintiff/Applicant had been servicing the said mortgage as per the payment receipt which the Direct annexed hereof.

4. The Director of the Plaintiff/Applicant deposed later on they entered into a discussion and agreed to have the loan restructured to a sum of Kenya Shillings Twenty Five Million One hundred and Twenty Thousand Five Hundred Eighty Two (Kshs. 25,120,582.00/=) although the discussion had not been completed since the time for commencement of the restructured loan was not agreed upon. The Director for the Plaintiff/Applicant held that, in the course of time they moved this Honorable Court to have the Consent set aside but the said application

was dismissed on 7<sup>th</sup> July, 2020.

5. Thus, the Plaintiff/Applicant filed the instant application seeking for a review of the aforesaid Ruling on grounds that they had been affected by the economic situation impacted by Covid - 19 Pandemic and which caused the Central bank of Kenya to give guidelines to Commercial Banks to restructure the loans and to accommodate borrowers including the Plaintiff/Applicant. They averred that the Defendants needed to restructure the loan to the agreed sum of Kenya Shillings Twenty Five Million One hundred and Twenty Five Eighty Two Thousand (Kshs. 25,120,582.00/=) and allow reasonable timelines to enable the Plaintiff/Applicant pay them. They felt that, the Defendants/Respondents ought to have exhausted all avenues to facilitate the Plaintiff/Applicants comply with the mortgage terms as provided for under the provisions of Section 104 of the Land Act. To them one of the avenues available to the Defendants was in facilitating the Plaintiff/Applicant to comply with the mortgage terms by restructuring the loan facility to the already agreed sum of Kenya Shillings Twenty Five Million One hundred and Twenty Five Eighty Two Thousand (Kshs. 25,120,582.00/=) and give the Plaintiff/Applicant timelines upon which they would settle the said sum smoothly.

6. The Director for the Plaintiff/Applicant held that the said premises was home not only to the Plaintiff's directors but also their children and these were ordinary factors to be considered as set out under the Provisions of Section 104 of the Land Act.

For these reasons, the Plaintiff/Applicant urged court to review its ruling delivered on 7.7.2020 by setting aside and/or varying it. He held that if the orders sought were not granted the suit premises would be sold off at a throw away price and rendering this application nugatory.

7. On 24<sup>th</sup> June, 2021 upon being granted leave, On 28<sup>th</sup> July, 2021, the Plaintiff/Applicant filed a further Affidavit dated the same sworn by one COSMAS WAITHAKA GACHINI. He refuted and denied the information adduced by the 1<sup>st</sup> Defendant/Respondent from the Replying Affidavit as being factually incorrect holding that the Plaintiff/Applicant had never refused to pay up onto the loan account as alleged. They held there existed an issue of accounts as taking that they had made lump sum deposits there but which had never been accounted till todate.

8. They also challenged the interest and penalties charged for being punitive. On an attempt to resolve the matter they had drawn up a tentative agreement which dealt with these charges and had also invoked the provisions of Section 104 of the Land Act. They opined to have done so in order to save the only matrimonial home meant for the Plaintiff/Applicant's directors and their families whom would be rendered destitute if the said premises was to be disposed of altogether. In summary, they contended that the issues raised were weighty and urged court to take them into account.

## **II. THE 1<sup>ST</sup> DEFENDANTS/RESPONDENT'S CASE**

9. The Plaintiff/Applicant's application was vehemently opposed. On 9<sup>th</sup> June, 2021 the 1<sup>st</sup> Defendant/Respondent filed a 38 Paragraphed Replying Affidavit sworn and dated by one Mary Gathungu – dated the 8<sup>th</sup> June, 2021. She informed court that currently she was employed by the 1<sup>st</sup> Defendant/Respondent as a Debt management Officer and had the full authority and capacity to swear and make the affidavit. From the onset, she averred that the application was incompetent, marred with non-disclosure of material facts and an abuse of the due process of the law.

10. The officer provided a brief background to the matter. She stated that on 2<sup>nd</sup> May 2013 the Plaintiff/Applicant's company was offered a Mortgage facility for a sum of Kenya Shillings Twenty Three Thousand Six hundred and Thirty (Kshs. 23,630,000/=). On 14<sup>th</sup> May, 2013, the Plaintiff/Applicant's director accepted it. The strict term of the loan facility was for the Plaintiff/Applicant would service it in full with interest of 180 monthly installments for a sum of Kenya Shillings Three Hundred and Ninety Seven Nine Thousand Fourty Nine (Kshs. 397,949/=). Upon being granted the facility, at the initial stage the Plaintiff/Applicant serviced it as and when it fell due. It was until sometimes in the year 2014, when they began to default in their loan obligation which prompted the 1<sup>st</sup> Defendant to exercise its statutory powers of sale over the charged property by issuing them with the requisite statutory notices to the Plaintiffs/Applicants to rectify its default. The 1<sup>st</sup> Defendant filed a suit being HCCC No. 108 of 2015 – is a bid to stop the 1<sup>st</sup> Defendant/Respondent from exercising their right of sale under the charge.

11. The Officer the 1<sup>st</sup> Defendant held that while the suit was pending the Plaintiff/Applicant held discussion with the 1<sup>st</sup> Defendant and requested the 1<sup>st</sup> Defendant to hold any precipitate recovery action on their charged property as they made arrangements to service the mortgage facility in full. In light of this request, an agreement was reached between the Plaintiff/Applicant and the 1<sup>st</sup> Respondent whereby the Plaintiff/Applicant were to withdraw the aforementioned suit with costs to the 1<sup>st</sup> Respondent in addition to paying the five (5) subsequent monthly installments arrears of Kenya Shillings Three Fifty Five Thousand (Kshs. 355,000/=) and maintain an active current account with the 1<sup>st</sup> Defendant/Respondent.

12. The officer deposed that on 1<sup>st</sup> February, 2016 the suit was withdrawn by consent. But despite the indulgence accorded to the Plaintiff/Applicant by the 1<sup>st</sup> Defendant, they still persisted in being in defaulting a fact which prompted the 1<sup>st</sup> Defendant/Respondent to issue a letter dated 6<sup>th</sup> May, 2016 demanding for payment of the outstanding arrears. The letter was not honored. It led the bank to issue a statutory notice dated 15.6.2016. Upon the expiry of the 3 months Statutory Notice, the 1<sup>st</sup> Defendant/Respondent issued a 40 days' notice notifying the Plaintiff/Applicant it would proceed to exercise its statutory power of sale over the charged property after the expiry of the 40 days from the date of service of the notice unless the Plaintiff/Applicant rectified its default and settled in full all outstanding balances.

13. She deposed that in order to obtain the best price from the sale of the suit property they engaged the services of a professional and reputable legal valuers the firm of M/s. Njihia Mwoka Rashid & Co. Limited to value and submit a report at the market value. At the same time, the 1<sup>st</sup> Defendant/Respondent engaged the services of the Keysian Auctioneers to sell off the suit property via a public Auction at a price not below the reserve price of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/=) or any higher amount that would be obtained in the market. The 2<sup>nd</sup> Respondent issued the requisite notification of sale and redemption notice of the suit property in accordance with the Auctioneers Act. On 27<sup>th</sup> February, 2017 the suit property was advertised for sale and on 24<sup>th</sup> March 2017 the sale was scheduled to

take place. Immediately, the advertisement of sale was published the Plaintiff/Applicant instituted a suit being ELC No. 93/2017 seeking for injunction orders restraining the 1<sup>st</sup> Defendant/Respondent from exercising their right of sale under the law.

15. She deposed that, on 30<sup>th</sup> January 2015 the afore mention by the Plaintiff/Applicant application was dismissed with costs and this led the 1<sup>st</sup> Defendant instructing the 2<sup>nd</sup> Defendant to re-advertise and for the sale of the suit property it was now scheduled to take place on 6<sup>th</sup> June, 2018. Once again, the Plaintiff moved court by filing an application dated 17<sup>th</sup> April, 2019 and 25<sup>th</sup> April 2019 seeking to review the consent judgment and to be allowed to pay the liquidated amount by monthly installments. On 7<sup>th</sup> July 2020 court dismissed the said applications. They also filed another application dated 16.7.2020 for stay of execution which was opposed and also dismissed by court on 16.3.2021

16. In response to the averments raised by the Plaintiff/Applicant she deposed that the Plaintiff/Applicant was still defaulting in the payments and the loan account had never been restructured. She denied there being any discussion and agreement to have the loan restructured to a sum of Kenya Shillings Twenty Five Million One hundred and Twenty Five Eighty Two Thousand (Kshs. 25,120,582.00/=) as alleged. She held that the Plaintiff/Applicant had never approached the Bank to restructure its loan and was merely seeking to enjoy some orders unjustly to frustrate the Defendant/Respondent from exercising its right of statutory power of sale.

17. She held that the Plaintiff/Applicant had not established any mistake or error apparent on the face of the record nor discovery of new important evidence that was not there nor any sufficient reason for review application but held that the Plaintiff/Applicant had been in default of the loan and had not demonstrated any economic hardship to warrant for restructuring of the loan. The bank had exhausted all the avenues for recovery of the loan as per the charge terms and conditions and the Plaintiff/Applicant was still in default to date and the only recourse for the bank was the statutory sale to recover the loan amount.

18. The officer deposed that the issue on Covid - 19 Pandemic alluded to by the Plaintiff/Applicant were just an afterthought only meant to derail court from the provisions of Section 97 (2) of the Land Act 2012. On the assertion that the Defendant/Respondent ought to exhaust all avenues to facilitate the Plaintiff/Applicant comply with the Mortgage terms as provided for in Section 104 of the Land Act, she held that the court could not be called upon to order means and mode of recovery of a loan facility from the charge document was very clear and to which the Respondent duly followed.

19. She held that they engaged the service of the 2<sup>nd</sup> Respondent to conduct a valuation of the suit property so that they would end up obtaining the best price at the market value and to demonstrate that they were not selling the property at a throw away price. They held there was valuer report to that effect. On whether the Plaintiff/Applicant stood to incur substantial and arguable loss if the sale process was allowed to proceed. She averred that the Plaintiff/Applicant had not come to court with clean hands as it had failed to pay up the outstanding arrears making the bank incur huge financial costs defending suits and the interest accrued. She argued that the orders sought by the Plaintiff/Applicant were all meant to delay the cause of justice, frustrate recovery of the loan amount and a continuous legal and financial strain through the rigorous legal tussle as the subject matter had undergone through numerous suits and hence should not be granted the orders as sought.

### **III. The Submissions**

20. All parties took direction of court to have the application be disposed of by way of written submissions. They all fully complied with the courts directions accordingly.

#### **A. THE PLAINTIFF'S SUBMISSIONS**

21. On 28<sup>th</sup> July, 2021 the Plaintiff's Advocates the Law Firm of Messrs. Bosire & Partners complied and filed their written submissions dated 28<sup>th</sup> July, 2021. The Learned Counsels in their submissions framed several issues to be considered mainly on the threshold of the review of the court's ruling delivered on 7<sup>th</sup> July, 2021, citing the provision of Order 45 91) of the Civil Procedures Rules and Section 80 (1) of the Civil Procedure Act Cap 21 and whether the Applicant would suffer irreparable loss of the orders were not granted as prayed.

They insisted that the Plaintiff/Applicant had offered and still willing to service the mortgage loan vide reasonable monthly installments taking that the suit premise was the only matrimonial house for the Applicant's directors and their families. They urged court to grant the orders for them to pay and liquidate the loan vide a loan restructured and agreed sum of Kenya Shillings Twenty Five Million One hundred and Twenty Five Eighty Two Thousand (Kshs. 25,120,582.00/=) and settle it through reasonable monthly installments. They held that dismissing the application was tantamount to an error apparent on the face of the record.

To buttress on this point they relied on the decision of *Nasibwa Gakenya Moses –VS - University of Nairobi & Another [2019] eKLR*, the issue of the suit premises being the only matrimonial houses for the Plaintiff/Applicant Directors and their families, being sufficient reason for allowing a review.

22. The Learned Counsel further submitted if the orders sought were not granted they would likely suffer irreparable damages that could not be compensated by way of damages. They strongly felt the Defendant/Respondent ought to have exhausted all the remedies available to facilitate the Plaintiff/Applicant comply with the mortgage terms.

23. To support their point, they relied on the provisions of Sections 104 (1) The Land Act, and Article 45(1) of the Laws of Kenya and the decision of *Paul Gitonga Wanjau –VS- Gathuthu Tea Factory Co. Ltd. & 2 others [2016] eKLR*.

Finally, the Advocates submitted that they were entitled to the relief sought. Further they had always kept the Defendant/Respondent in the picture of all the happenings and its financial tribulations caused mainly by the Covid – 19 pandemic which hit the world and drastically affected all the business and economic ventures globally. They were ready and willing to settle the mortgage loan through a structured

arrangement as stated. They prayed to be granted the prayers as sought from the application.

## **B. THE SUBMISSIONS BY THE 1<sup>ST</sup> DEFENDANT/RESPONDENT**

24. On 5<sup>th</sup> September, 2021, the Advocates for the 1<sup>st</sup> Defendant/Respondent – the law firm of Messrs. Miller & Company Advocates complied and filed their written submissions dated 13<sup>th</sup> September, 2021. They submitted that from the facts of the case it was clear that the Plaintiff/Applicant suit and application was an abuse of the court process and hence it should be dismissed with costs. They developed two fold issues which they wished court would rely on being whether the Plaintiff/Applicant had not made out any grounds for review and/or set aside its ruling and orders of 7<sup>th</sup> July 2020 and all the consequential orders and the court could not direct new terms to a contracted agreement between the parties herein to restructure the existing charge agreement.

25. The Learned Counsel submitted that on 2<sup>nd</sup> May, 2013 when the Plaintiff/Applicant's company was offered a mortgage facility of Kenya Shillings Twenty Three Million Six Hundred and Thirty Thousand (Kshs. 23,630,000/=) which they accepted it was on a strict term that it would be serviced in full with interest in 180 monthly installments of Kenya Shillings Three Hundred and Ninety Seven Thousand Nine Hundred and Forty Nine (Kshs. 397,949/=). The Plaintiff/Applicant had confirmed that they were in arrears of the loan amount and had not been paying any monthly repayments as agreed. They further submitted that the Plaintiff/Applicant had failed to establish any mistakes or error apparent on the face of the record nor discovery of new important evidence or any sufficient reason to warrant the review of the ruling as envisaged under the – Order 45 (1) of the Civil Procedure Rules and Section 80 of Civil Procedure Act, Cap. 20. Indeed they held if anything the Plaintiff/Applicant had been in default of the loan amount and had failed to demonstrate any economic hardship as averred. The bond had exhausted all the avenues for recovery of the loan amount as per the charge terms and conditions; no new and important evidence had been established on the argument advanced by the Plaintiff/Applicant to the effect that this was the only matrimonial home for the Plaintiff/Applicant directors and their families and hence not granting order prayed would render them destitute was misleading the court and distorted. Neither, this nor the suggestion on the restructuring of the loan were ..... was not new as they knew it all along. When it applied for the loan and charge the title No. 15978/64 Section I Mainland North where the registered owner was the Plaintiff/Applicant. They were fully bound by these instruments.

They averred that the court could not be called upon to re-write these terms of the lease which were binding on the parties. The Plaintiff/Applicant had failed to show good faith in repayment to offset the loan as seen from the account statements of the loan a clear indication that the Plaintiff/Applicant only wanted to avoid repayment of the loan by abusing the court process.

26. The Advocates argued that the said application was made with unreasonable due delay taking that the ruling had been delivered on 7.7.2020 and the application filed on 25<sup>th</sup> March 2021 which was – 10 months down the line without any explanation. On this issue, they relied on the decision of *Ruth Kwachimoi & Another – VS - Charles Nalika Cheloti & Another [2021] eKLR*. The Learned Counsel further submitted that the Plaintiff/Applicant and 1<sup>st</sup> Defendant had a contractual relationship on a loan agreement safeguarded by a security – the duty registered legal charge over LR. No. 16043 (Original No. 15978/64/Section I Mainland North which the Plaintiff/Applicant had breached – by defaulting on the repayment of the loans. By filing this case the Plaintiff/Applicant was trying to make court interfere with an already agreed and binding terms of the loan agreement between parties and to them, court locked jurisdiction to do so but to only uphold the sanctity of the loan agreement on this point they relied on the decision of *Jopa Villas LLC – VS - Overseas private investment & 2 others [2009]eKLR*

27. In response to the argument advanced by the Plaintiff/Applicant to the effect that the charged property was matrimonial property and the Defendant/Respondent ought to have exhausted all remedies available to facilitate the Plaintiff/Applicant comply with the mortgage terms, the Advocates held that the property was registered in the names of the Plaintiff/Applicant Company and not in the original names of the Plaintiff's director's names and the charge were signed for by the Directors of the Plaintiff and not in the individual names of the Directors. In the long run the Advocates held that the 1<sup>st</sup> Defendant had a lawful right of statutory realization owing to non-payment of the loan under Section 97(2) of the Land Act 2012 which provided the bank with a right on the statutory power of sale to recover a loan amount. They held that upholding its duty within the law to obtain the best price in the sale of the suit property the 1<sup>st</sup> Respondent instructed a valuer – the firm of Njihia Muoka Rashid Limited to value the suit property and submit a report from the market value. The 1<sup>st</sup> Respondent submitted that the Plaintiff/Applicant came to court with unclean hands and he who comes to equity must do so with clean hands.

On the costs the 1<sup>st</sup> Respondent held costs follow the cause the plaintiff should be the costs. The Application should be dismissed with costs.

## **III. ANALYSIS & DETERMINATION**

28. The honorable Court had critically read and analyzed all the pleadings filed herein including the written submissions and the authorities by both the Plaintiff/Applicant and the Defendants. It has also assessed the authorities and the relevant law on the matters raised in the notice of motion application dated 25<sup>th</sup> March, 2021 by the Plaintiff/Applicant. In order to arrive at an informed decision it has framed the following issues for consideration

**(a) Whether the Plaintiff/Applicant is entitled to the orders of temporary injunction to restrain the 1<sup>st</sup> Respondent from interfering and/or selling the suit property – L. R. No. MN/SEC/1/16043.**

**b). Whether the Plaintiff/Applicant Notice of Motion application meets the threshold set out under Order 45 (1) of CPR and section 80 of the CPA on the review of the decision delivered on 7<sup>th</sup> July, 2021.**

**(c) Whether the court has power to interfere with the contractual agreement terms and condition between parties.**

**(d) Who will bear the costs.**

**ISSUE No. a). - Whether the Plaintiff/Applicant is entitled to the orders of temporary injunction under Order 40 Rules 1 & 2 of the Civil Procedure Rules to restrain the 1<sup>st</sup> Respondent from interfering and/or selling the suit property – L. R. No. MN/SEC/1/16043.**

29. Before embarking on the detailed analysis per excellence of the instant case, it is significant the honorable the court provides brief facts of the case. On 2<sup>nd</sup> May 2013 the company for the Plaintiff/Applicant was offered by the 1<sup>st</sup> Defendant/Respondent a Mortgage facility for a sum of Kenya Shillings Twenty Three Thousand Six hundred and Thirty (Kshs. 23,630,000/=). On 14<sup>th</sup> May, 2013 the Directors of the Plaintiff/Applicants accepted it with all the terms and conditions stipulated thereof. They procured it for purchase of the Matrimonial home for its directors. Thereafter, they claimed to be servicing the said mortgage as per the payment receipt which the Directors annexed. The strict term of the loan facility was that the Plaintiff/Applicant would service it in full with interest of 180 monthly installments for a sum of Kenya Shillings Three Hundred and Ninety Seven Nine Thousand Fourty Nine (Kshs. 397,949/=). Upon being granted the facility, initially the Plaintiff/Applicant serviced it as and when it fell due up until sometimes in the year 2014 when they began to default which prompted the 1<sup>st</sup> Defendant to exercise its statutory powers of sale over the charged property by issuing requisite statutory notices to the Applicant to rectify its default. The 1<sup>st</sup> Defendant filed a suit being HCCC No. 108 of 2015 – in a bid to stop the 1<sup>st</sup> Defendant/Respondent from exercising their right of sale under the charge.

30. Later on, the Plaintiff/Applicant company entered into a discussion and agreed to have the loan restructured to Kenya Shillings Twenty Five Million One hundred and Twenty Thousand Five Hundred Eighty Two (Kshs. 25,120,582.00/=) and a consent was recorded.

31. The 1<sup>st</sup> Defendant/Respondent issued a letter dated demanding payment of the installments arrears but it was not honored. Which led the bank to issue a statutory notice dated 15.6.2016. Upon the expiry of the 3 months Statutory Notice, the 1<sup>st</sup> Defendant/Respondent issued a 40 days' notice notifying the Plaintiff/Applicant it would proceed to exercise its statutory power of sale over the charged property after the expiry of the 40 days from the date of service of the notice unless the Plaintiff/Applicant rectified its default and all outstanding balances owed were settled in full.

32. They also engaged the services of legal valuers M/s. Njihia Mwoka Rashid & Co. Limited to value and submit a report at the market value and the services of the Keysian Auctioneers to sell the property via a public Auction at a price not below the reserve price of Kenya Shillings Thirty Million (Kshs. 30,000,000/=) or any higher amount that would be obtained in the market. The 2<sup>nd</sup> Respondent issued the notification of sale and redemption notice of the suit property in accordance with the Auctioneers Act. On 27<sup>th</sup> February, 2017 the suit property was advertised for sale and on 24<sup>th</sup> March 2017 the sale was scheduled to take place immediately, following the advertisement of sale the Plaintiff/Applicant instituted a suit being ELC No. 93/2017 seeking for injunction orders restraining the 1<sup>st</sup> Defendant/Respondent from exercising their right of sale under the law.

33. On 30<sup>th</sup> January 2015 the application was dismissed with costs and this led to the 1<sup>st</sup> Defendant instructing the 2<sup>nd</sup> Defendant to re-advertise and for the sale which was now scheduled to take place on 6<sup>th</sup> June, 2018. They also filed another application dated 16.7.2020 for stay of execution which was opposed and also dismissed by court on 16.3.2021. The Plaintiff/Applicant moved this Honorable Court to have the Consent set aside but the said application was dismissed on 7<sup>th</sup> July, 2020. Thus, the Plaintiff/Applicant filed this instant application seeking for a review vary and/or set aside of the said Ruling based on several grounds. They held that if the orders sought were not granted the suit premises would be sold off at a throw away price and this application would be rendered a nugatory.

34. The purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the now famous "**Giella V Cassman Brown (supra)**" as follows:

**i. prima facie with a probability of success,**

**ii. the applicant might otherwise might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and**

**iii. if the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.**

The first requirement the applicants is required to establish a prima facie case. The Prima facie case was defined by the **Court of Appeal in MRAO Ltd – versus - First American Bank of Kenya Ltd & 2 others (2003) eKLR** "**so what is "a prima facie case" I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directly 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.**" When examining whether the applicants have established a prima facie case, court ought not to indulge into examining the merits and demerits of the case as it was stated by **Odunga J in Peter Kasimba & 219 others – Versus - Kwetu Savings & Credit Co-operative Society Limited & 11 others (2020)eKLR**, stated that "**at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties.**"

36. The Plaintiff/Applicant cited the provisions of Order 40 (1) & (2) of the Civil Procedure Rules holding that the orders of this court had been prejudicial to the Plaintiff/Applicant who had offered and still was willing to service the mortgage loan vide reasonable monthly installments. This is by taking into account that the suit premise was the only matrimonial house for the Applicant's directors and their families. They had urged for orders to be allowed to pay and liquidate the loan vide a loan restructured and agreed sum of Kenya Shillings Twenty Five Million One hundred and Twenty Five Eighty Two Thousand (Kshs. 25,120,582.00/=) and settle it through reasonable monthly installments.

37. From the pleadings, I have noted that on 2<sup>nd</sup> May, 2013 the Plaintiff/Applicant's company was offered a mortgage facility of Kenya Shillings Twenty Three Million Six Hundred and Thirty Thousand (Kshs. 23,630,000/=) which they accepted it was on a strict term that it would be serviced in full with interest in 180 monthly installments of Kenya Shillings Three Hundred and Ninety Seven Thousand Nine Hundred and Fourty Nine (Kshs. 397,949/=). The Plaintiff/Applicant has confirmed that they are in arrears of the loan amount and has not been paying any monthly repayments as agreed. To me they have no prima facie case whatsoever.

The second requirement is for the Plaintiff/Applicant to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. They further submitted that if the orders sought were not granted they would likely suffer irreparable damages that could not be compensated by way of damages.

38. The Plaintiff/Applicant submitted that they were entitled to the relief sought as they had always been keeping the 1<sup>st</sup> Defendant/Respondent in the picture of all the happenings and its financial tribulations. The Plaintiff/Applicant had been diligently servicing the loan until Covid – 19 hit the world and drastically affected all the business and economic ventures globally including that of the Plaintiff/Applicant. They were ready and willing to settle the mortgage loan through a structured arrangement as stated. The Plaintiff/Applicant has stated that it stands to lose the suit property due to the continued interference from the 1<sup>st</sup> Defendant/Respondent. I have noted that if anything the Plaintiff/Applicant has been in default of the loan amount and has failed to demonstrate any economic hardship as averred. The bond had exhausted all the avenues for recovery of the loan amount as per the charge terms and conditions.

39. The provision of Order 40, Rules 1 & 2 of the Civil Procedure Rules, 2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting, damaging, alienation, sale, removal or disposition of the suit property. I am not convinced that the Plaintiff/Applicant stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the **Court of Appeal in Nguruman Limited V Jan Bonde Nielsen & 2 others (2014)eKLR** *"in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."*

When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of the 1<sup>st</sup> Defendant/Respondent to be allowed to exercise its Statutory power of sale under the Provision of Section 97 (2) of the Land Act, 2012 in order to recover its monies.

They submitted that the suggestion on restructuring of the loan is new as nothing like that is in the charge instrument and the Plaintiff/Applicant is fully bound by the said instruments and the court cannot be called up to re-write these terms of the lease which are binding on parties. The Plaintiff has failed to show good faith in repayment to offset the loan as seen from the account statement of the loan a clear indication that the Plaintiff/Applicant only wants to avoid repayment of the loan by abusing the court process.

40. The Advocates argued that the said application was made with unreasonable due delay the ruling having been delivered on 7.7.2020 and the application being filed on 25<sup>th</sup> March 2021 – 10 months down the line without any justifiable and/or reasonable explanation whatsoever. On the issue of the charges property being matrimonial property – where the Respondent should exhaust all remedies avoidable to facilitate the Plaintiff/Applicant comply with the mortgage terms, the Advocate held that the property is registered in the names of the Plaintiff/Applicant Company and not in the original names of the Plaintiff's director's names and the charge were signed for by the Directors of the Plaintiff and not in the individual names of the Directors. In the long run the Advocates held that the 1<sup>st</sup> Defendant had a lawful right of statutory realization owing to non-payment of the loan under Section 97(2) of the Land Act 2012 which provides bank with a right in exercising its right of sole to recover a loan amount – statutory power of sale. They held that upholding its duty within the law to obtain the best price in the sale of the suit property the 1<sup>st</sup> Respondent instructed a valuer – the firm of Njihia Muoka Rashid Limited to value the suit property and submit a report to the market value and which they did. The 1<sup>st</sup> Respondent submitted that the Plaintiff/Applicant came to court with unclean hands and he who comes to equity must do so with clean hands. On the costs, the 1<sup>st</sup> Defendant/Respondent held that costs followed the cause and thus the Plaintiff should bear it.

**ISSUE No. 2 - Whether the Plaintiff/Applicant Notice of Motion application meets the threshold set out under Order 45 (1) of Civil Procedure Rules and Section 80 of the Civil Procedure Act on the review of the decision delivered on 7<sup>th</sup> July, 2021.**

41. Under this Sub – heading, the Plaintiff/Applicant cited the provisions of Order 45 (1) of the Civil Procedure Rules and Section 80 of Civil Procedure Act, Cap. 21. The provisions of Section 45 (1) & (2) of the Civil Procedure Rules provides as follows:

80 of Civil Procedure Act, Cap. 21. ***"Any person who considers himself aggrieved – (a) by a decree or order from which an appeal is allowed by this Act, but from which no so has been preferred, or (b) by a decree or order from which no appeal is allowed by this Act May appeal for a review of Judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.***

The provisions of Section 45 (1) & (2) of the Civil Procedure Rules provides as follows:- ***Any person considering himself aggrieved:- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred or (b) By the decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made, or in account of some mistake or error apparent on the face of the record or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the***

## ***order without unreasonable delay”***

They held that the orders of this court had been prejudicial to the Plaintiff/Applicant who had offered and still was willing to service the mortgage loan vide reasonable monthly installments taking that the suit premise was the only matrimonial house for the Applicant’s direction and their families and they had urged for orders to be allowed to pay and liquidate the loan vide a loan restructured and agreed sum of Kenya Shillings Twenty Five Million One hundred and Twenty Five Eighty Two Thousand (Kshs. 25,120,582.00/=) and settle it through reasonable monthly installments. They held that the application ought not to have been dismissed as this was tantamount to an error apparent on the face of the record.

The issue of the suit premises being the only matrimonial houses for the Plaintiff/Applicant directors and their families being sufficient reason – within the means of the review rules – analogous or genesis to the other reasons stipulate in Order 45 (1) of Civil Procedure Rules.

42. The facts that if the orders sought were not granted they would likely suffer irreparable damages that could not be compensated by way of damages. They reiterated and stressed on the submissions that the suit premises was the only matrimonial homes further Plaintiff/Applicant directors and their families and hence to sell them off would greatly hamper and render them destitute. They pressed on the fact that the Respondent ought to have exhausted all the remedies available to facilitate the Plaintiff/Applicant to comply with the mortgage terms.

They revoked and cited the provisions of Sections 104 (1) The Land Act, and Article 45(1) of the Laws of Kenya.

They held that they were entitled to the relief sought as they had always been keeping the Respondent in the picture of all the happenings and its financial tribulations. The Plaintiff/Applicant had been diligently servicing the loan until Covid – 19 hit the world and drastically affected all the business and economic ventures globally including that of the Plaintiff/Applicant. They were ready and willing to settle the mortgage loan through a structured arrangement as stated they prayed to be granted the prayers as sought from the application.

### **ISSUE No. 3 Whether the court has power to interfere with the contractual agreement terms and condition between parties.**

43. This court has noted that the Plaintiff/Applicant and 1<sup>st</sup> Defendant had a contractual relationship on a loan agreement safeguarded by a security – the duty registered legal charge over LR. No. 16043 (Original No. 15978/64/Section I Mainland North which the Plaintiff has now breached – by defaulting on the repayment of the loans. By filing this case the Plaintiff/Applicant is trying to make court interfere with an already agreed and binding terms of the loan agreement between parties. It is trite law that this court lacks jurisdiction to do so but to only uphold the sanctity of the loan agreement.

### **Determination**

44. From the foregoing analysis, I find that the Notice of Motion dated 25<sup>th</sup> March, 2021 by the Plaintiff/Applicant has no merit and therefore exercising my judicial discretion and powers hereof, I proceed to dismiss it accordingly. For avoidance of any doubt, this court orders :-

**a) THAT Honorable court declines to review and/or set aside its ruling and orders issued on 7<sup>th</sup> July, 2020 and all other consequential orders.**

**b) THAT in order to expediate the hearing and determination of the matter, the same be fixed for hearing in the next 90 days from today. There be a mention for Pre – trial Conference session on 18<sup>th</sup> January, 2022 pursuant to the provisions of Order 11 of the Civil Procedure Rules on case management.**

### **ISSUE No. 4 - Who will bear the costs.**

45. According to the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Costs follow the events. The result of this application is therefore that the Costs is to be borne by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants.

**IT IS SO ORDERED. RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021.**

**JUSTICE L.L NAIKUNI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, MOMBASA**

**In the presence of:-**

*M/s. Yumna – the Court Assistant*

*Mr. Bosire Advocates for the Plaintiff/Applicant.*

*No Appearance for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Respondents.*