



REPUBLIC OF KENYA



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**Dixit & another v Bank of Baroda (Kenya) Limited & another (Civil Case E011 of 2021) [2023] KEHC 23528 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23528 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E011 OF 2021  
RE ABURILI, J  
OCTOBER 11, 2023**

**BETWEEN**

**JIGISHKUMAR SHIRISHKUMAR DIXIT ..... 1<sup>ST</sup> PLAINTIFF**

**RIYA INDUSTRIAL SUPPLIES LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BANK OF BARODA (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT**

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

**RULING**

1. This Ruling determines the plaintiffs/applicants' Notice of Motion dated 12<sup>th</sup> July 2021 brought under certificate of urgency seeking the following prayers:
  - i. That the Court be pleased to certify this matter as urgent (spent).
  - ii. Service of this summons be dispensed with in the first instance (spent).
  - iii. That a temporary injunction to issue restraining the Defendants by themselves, their servants and or agents or Advocates or any of them or otherwise from interfering, trespassing, wasting, damaging, removal, disposition, advertising for public auction or offering for sale by public auction or purporting to sell by public auction the 1<sup>st</sup> Plaintiff's parcel of land being Title No. Kisumu Municipality/Block 10/718 Milimani Estate Kisumu Town located in Kisumu town within Kisumu County pending hearing and determination of this application.
  - iv. That a temporary injunction to issue restraining the Defendants by themselves, their servants and or agents or Advocates or any of them



or otherwise from interfering, trespassing, wasting, damaging, removal, disposition, advertising for public auction or offering for sale by public auction or purporting to sell by public auction the 1<sup>st</sup> Plaintiff's parcel of land being Title No. Kisumu Municipality/Block 10/718 Milimani Estate Kisumu Town located in Kisumu town within Kisumu County pending hearing and determination of this suit.

- v. An order compelling the Defendant to provide a current overdraft statement to inform a court ordered audit and determination of the 2<sup>nd</sup> Plaintiff's true level of indebtedness by an auditor jointly appointed by the parties or the Honourable Court.
  - vi. The Notice for sale issued by the 2<sup>nd</sup> Defendant be revoked/rescinded/voided or postponed and the 2<sup>nd</sup> Defendant be restrained from undertaking the public auction of the property known as Title No. Kisumu Municipality/Block 10/718 Milimani Estate Kisumu Town.
  - vii. A court mandated independent valuation of the suit property be conducted by a registered valuer jointly appointed by the parties or by the Honourable Court pending the hearing and final determination of the main suit.
  - viii. The costs of this application be provided for.
2. The application is predicated on seven grounds on the face of the application where the applicants aver That the Applicants took overdraft facilities which has no term owing to the nature of their business; the Title No. Kisumu Municipality/Block 10/718 Milimani Estate Kisumu Town was used as security for the facility advanced to the 2<sup>nd</sup> Applicant; the 1<sup>st</sup> Respondent and its agents have issued a notification of sale showing That the suit property would be sold by public auction on 14<sup>th</sup> July 2021; That the last valuation commissioned by the 1<sup>st</sup> Respondent grossly undervalued the property and if the same is allowed to proceed the Applicant shall be greatly prejudiced.
  3. The said application is supported by the affidavit sworn by the 1<sup>st</sup> Applicant Jigishkumar Shirishkumar Dixit reiterating the grounds in the application and relied on a copy of Letter to Bank dated 13<sup>th</sup> May 2021 as Annexure JSD-1 in which the Applicants sought to inform the 1<sup>st</sup> Respondent Bank That it was pursuing a restructure of the 2<sup>nd</sup> Applicant Riya Industrial Supplies Limited, due to Covid 19 Pandemic which affected the Applicant's business adversely hence making it impossible to service the overdrafts.
  4. According to the Applicants, the 1<sup>st</sup> Respondent had grossly undervalued the security which was valued at Kshs 65 million in 2015 to Kshs 31,500,000 in 2023. That the 1<sup>st</sup> Respondent has never furnished the Applicants with statements of account of the overdrafts plus interest due on the amounts due and owing and has refused to allow the applicants to restructure its business with a refinancing option to enable them repay the amounts due or even sell the property by private treaty and settle the outstanding amount.
  5. The application was opposed by the 1<sup>st</sup> Respondent who file a replying affidavit sworn on 15<sup>th</sup> March 2021 by Dennis Onyoro the Assistant Manager for the 1<sup>st</sup> Respondent Bank.
  6. According to the 1<sup>st</sup> Respondent, pursuant to an application for financial facility by the 2<sup>nd</sup> Applicant, the Bank, after requisite negotiations agreed to advance a Term Loan facility to the borrower M/S Riya Industrial Supplies Limited, the 2<sup>nd</sup> Applicant, vide Letters of Offer dated 2<sup>nd</sup> July 2014 as regards account referenced as 00XXXXXXXXXXXX1 which Letter of Offer was duly executed and provided



for the creation of a Legal Charge over the property Kisumu Municipality/Block 10/718 in the name of Jyoti Jigish Dixit aka Dixit Jyoti Jigish for the initial maximum principal amount of Kshs 12,000,000/= (Twelve Million Shillings) and That the Applicant assented to this arrangement and executed all the necessary documents and subsequently the instrument of Legal Charge dated 9<sup>th</sup> July 2014 was prepared between Jyoti Jigish Dixit aka Dixit Jyoti Jigish as the Chargor and the Bank and was registered against the respective Certificate of Lease on 15<sup>th</sup> July 2014 and for which spousal consent had been obtained from the Applicant Jigishkumar Shirishkumar Dixit as per annexure DO1 and DO2.

7. The deponent further stated That a review of the existing credit facilities to provide for the creation of a Further Legal Charge of Kshs 18,000,000/= (Eighteen Million Shilling) over property number Kisumu Municipality/Block 10718 registered in the name of Jyoti Jigish Dixit aka Dixit Jyoti Jigish to cover borrowing of Kshs 18,000,000/= to the 2<sup>nd</sup> Applicant M/s Riya Industrial Supplies Limited, and according to Bank regulations which were strictly adhered to by the Bank and contemporaneous to finalization of requisite documentation with regard to the Bank granting requisite financial facilities. – Annexure ‘DO-3’.
8. The deponent stated That the 2<sup>nd</sup> Applicant subsequently defaulted in the repayments as shown in the loan statement of accounts attached as Annexure ‘DO-4’.
9. The deponent stated That the 2<sup>nd</sup> Applicant’s continuing default prompted the Bank to issue the following notices:
  - i. 90 days’ Statutory Notice dated 5<sup>th</sup> February 2020 – Annexure ‘DO-5’.
  - ii. 40 days’ Notice to sell dated 15<sup>th</sup> July 2020 – Annexure ‘DO-6’.
  - iii. 45 days’ Redemption Notice and Notification of Sale dated 8<sup>th</sup> February 2021 together with certificate of service – Annexure ‘DO-7’.
10. The deponent deposed That the suit property was valued by M/s Chrisca Real Estates on 14<sup>th</sup> February 2021 – Annexure ‘DO-8’ and a newspaper advertisement in the Daily Nation newspaper of 21<sup>st</sup> June 2021 – Annexure ‘DO-9’.
11. It was the 1<sup>st</sup> Respondent’s case That the Applicants are not deserving of the Honourable Court’s equitable remedy as the 1<sup>st</sup> Applicant has feigned ignorance of his obligations under the loan granted and have deliberately misrepresented and/or withheld relevant material facts with a view to misleading the Honourable Court.
12. The deponent further deposed That the Applicant had not provided an undertaking as to damages should the application and suit fail.
13. Lastly, the deponent stated That the Applicants have not demonstrated That they have an arguable case or That the loss they may suffer cannot be compensated by way of damages hence the application ought to be dismissed with costs.
14. The application was canvassed by way of written submissions. The Applicants filed their submissions on 19<sup>th</sup> April 2023 reiterating the prayers sought and depositions by the 1<sup>st</sup> Applicant.
15. The Applicants framed the following issues for determination by this court.
  - i. Whether the 1<sup>st</sup> Plaintiff is entitled to the injunctive reliefs sought;



- ii. Whether the 1<sup>st</sup> Plaintiff will suffer any prejudice if the orders sought are not granted;
16. On the first issue of whether the 1<sup>st</sup> Plaintiff applicant is entitled to the injunctive reliefs sought, the applicants submitted relying on the case and principles set out in *Giella v Cassman Brown & Co. Limited* [1973] KAR on the three conditions precedent for the grant of interlocutory injunctions namely, a prima facie case with probability of success, whether the applicants will suffer irreparable injury not atonable by way of damages and lastly, in whose favour does the balance of convenience tilt.
  17. On the first condition, the Applicant relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR and submitted That the 1<sup>st</sup> Applicant in good faith pleaded with the 1<sup>st</sup> Respondent to allow him restructure the 2<sup>nd</sup> Applicant's business due to the Covid 19 pandemic effects to enable him plan to settle the amount due through refinancing.
  18. On whether the Applicants stand to suffer irreparable injury unless the orders sought are granted, it was submitted That the applicants will lose their proprietary interests in the property due for sale as the sale scheduled was irregular and That the said property had been undervalued. It was submitted That under Rule 11 (b) (x) of the Auctioneers Rules, a professional valuation of the reserve price must be carried out not more than 12 months prior to the proposed sale and That as such, a forced sale value ought to have been obtained within a year of the intended sale, which was not the position in this case. Relying on the case of *Exclusive Estates Ltd v KPTC Ltd and another* CA 62 of 2004, it was submitted That a temporary injunction serves the purpose of preserving the property in dispute in the suit of the rights of parties under determination in the suit pending disposal of the suit to preserve the subject matter.
  19. In the condition of balance of convenience, it was submitted relying on the case of *Amir Suleiman v Amboseli Resort Limited* [2004] eKLR where the Court elaborated what is meant by the balance of convenience to be the lower rather than the higher risk of injustice and urged the court to find That there is a lower risk in granting the orders sought than not granting them.
  20. The applicants concluded That they do not dispute the fact That the 1<sup>st</sup> Respondent's statutory power of sale had arisen and has demonstrated willingness to settle the debt due upon verification of the amount by the current overdraft statement.
  21. On the part of the 1<sup>st</sup> Respondent, it was submitted framing the following issues for determination:
    - i. Whether the conditions for issuance of an injunction have been met.
    - ii. Whether the right of statutory power of sale has accrued.
    - iii. Whether the suit property is being sold at an undervalue.
    - iv. What is the appropriate relief.
  22. On whether the conditions for issuance of an injunction have been met, the 1<sup>st</sup> Respondent submitted That the Applicants' complaint is found in the grounds of the application dated 12<sup>th</sup> July 2021 which are reiterated in the supporting affidavit sworn by the 1<sup>st</sup> Applicant and which is That the 1<sup>st</sup> Respondent is preparing to sell the suit property at an undervalue.
  23. The 1<sup>st</sup> Respondent submitted That the status quo in the present case is That the 1<sup>st</sup> Respondent had issued 45 days' Redemption Notice and Notification of Sale in respect of the suit property in issue Kisumu Municipality Block 10/718 and advertised it for sale via public auction. Relying on the locus



classicus case of *Giella v Cassman Brown* [1973] EA 358 it was submitted That the Applicants are required to demonstrate the three conditions for the grant of a temporary injunctions as stated above.

24. On whether a prima facie case had been established with probability of success, it was submitted relying on the definition of *prima facie* case as stated in the [Mrao Limited v First American Bank of Kenya Limited](#) [2003] KLR at page 38, lines 1-5 as:

“ a prima facie case is more than an arguable case. It is not sufficient to raise issues. 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.”

25. According to the 1<sup>st</sup> Respondent, the Applicants seek an equitable remedy which requires them to come to the Honourable Court with clean hands. It was submitted in contention That there is no justification for issuance of the Notification of Sale dated 8<sup>th</sup> February 2021 (Annexure DO-7). That the 2<sup>nd</sup> Applicant being the borrower having subsequently breached the terms of the agreement between the parties by failing to liquidate its debt fully and is indebted to the 1<sup>st</sup> Respondent cumulatively in the sum of money in excess of Kshs 17,090,071.90 as at 30<sup>th</sup> April 2021 upon issuance of the 45 days’ notice and which sum continues to accrue interest until payment in full, the 1<sup>st</sup> Respondent was entitled to sell the security for recovery of the amounts due.
26. Further, That the 1<sup>st</sup> Applicant’s contention That the 2<sup>nd</sup> Applicant is undergoing a restructure as shown in its letter dated 31<sup>st</sup> May 2021 (Annexure JSD-1) is a red herring to hoodwink the Honourable Court into issuing injunctive order That is not deserved and That the issue was only brought to the 1<sup>st</sup> Respondent’s attention after advertisement of the suit property for sale via public auction.
27. It was submitted That due to default in repayment, the 1<sup>st</sup> Respondent was constrained to issue statutory notices demanding payment of the said arrears in the following manner.
- i. 90 days’ Statutory Notice dated 5<sup>th</sup> February 2020 pursuant to Section 90 of the [Land Act](#), 2012 – Annexure ‘DO-5’.
  - ii. 40 days’ Notice to Sell dated 15<sup>th</sup> July 2020 pursuant to Section 96 (2) of the [Land Act](#), 2012 – Annexure ‘DO-6’.
  - iii. 45 days’ Redemption Notice and Notification of Sale dated 8<sup>th</sup> February 2021 pursuant to Rule 15 of the [Auctioneers Act](#) – Annexure ‘DO-7’.
28. That the suit property were also visited by M/S Chrisca Real Estates on 14<sup>th</sup> February 2021 in compliance with Section 97 (2) of the [Land Act](#) and a report of the same was made as shown in Annexure ‘DO-8’ and a newspaper advertisement in the Daily Nation newspaper of 21<sup>st</sup> June 2021 – Annexure ‘DO-9’.
29. It was submitted That the Applicants are only content to ask for an injunction while parading unclean hands in so far as the loan repayment are concerned. Further, That Courts have stated in a number of authorities That a dispute as to the amount owing is not a basis for grant of injunction. Reliance was placed on the case of [Deniel Kamau Mugambi v Housing Finance Company of Kenya Limited](#) [2006] eKLR F. A. Ochieng J in an application for injunction where a dispute as to the amount owing was in contention stated as follows:

“From the foregoing, it is abundantly clear That the Plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems as unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect That the said



charges were unlawful, illegal or unreasonable, it would be presumptuous of the plaintiff to make any presumptions. It is not for a borrower to choose to stop making payments because he had reasons to believe That his accounts had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it is only when the court makes an adjudication on the issues That the borrower would know whether or nor his beliefs had gained judicial recognition.”

30. It was submitted That due diligence as provided under Sections 90, 96, and 97 of the *Land Act*, 2012 having been followed by the 1<sup>st</sup> Respondent, there is no valid ground to interfere with the exercise of its right under the Charge instruments.

31. On the nugatory aspect, it was submitted That the Applicant in the grounds upon which his application is based has not stated what irreparable harm he may suffer if an order of injunction is not granted. That on the other hand the 1<sup>st</sup> Respondent deposed at paragraph 11 in its Replying Affidavit That it had adhered to the law applicable to financial facilities and it is owed by the 2<sup>nd</sup> Applicant. Reliance was placed on the *Kihara v Barclays Bank (K) Limited* [2001] 2 EA at page 421, where Ringera J held as follows:

“To my mind, a person who offers his property as security for a borrowing does so knowing only too well That in the event of default in repayment of the loan such property. To put in another way, to offer a property as security for a loan is to convert it into a commodity for sale. And there was no commodity for sale whose loss cannot adequately be compensated in damages.”

32. On the other hand, it was submitted That the Bank is a reputable financial institution with the ability to make refund if the Court so orders whereas the Applicant have not given an undertaking as to damages should the application and suit fail not has even offered security deposit of the forced sale value of the property for the grant of injunctive orders.

33. For these reasons, it was submitted That the application should not be granted because the Applicant can be compensated by an award of damages.

34. On the Balance of Convenience, it was submitted That the 1<sup>st</sup> Respondent stands to lose more than the Applicants in the event That this application is granted since the 1<sup>st</sup> Respondent would be deprived of collecting money rightfully due and owing to it, which money it holds in trust for depositors. That in any case, the value of the suit property is ascertainable and it has not been shown That the 1<sup>st</sup> Respondent would be unable to meet the damages in the event That the Applicants succeed in trial. Reliance was placed on the case of *Maithya v Housing Finance Company & Another* [2003] EA 133 where the Court in assessing the balance of convenience held That:

“should the injunction be refused, the Respondent’s security would continue to be eaten away by the mounting redemption money and the security might be insufficient to satisfy the ultimate balance due whereas on the other hand of the scale the Respondent would be able to satisfy whatever decree is passed against it. I therefore hold in the circumstances the balance of convenience does tilt very heavily in favour of the Respondent.”

35. On whether the right of statutory power of sale has accrued, it was submitted That non-compliance with Statutory Notices is an outright justification for the exercise of the power of sale by the Chargee



and therefore compliance with statutory notices is a condition precedent as was held in the case of *Rajnikantkhetshi Shah v Habib Bank AG, Zurich* 92016) eKLR That:

“...the Statutory notification of default and demand is sine qua non liability and basis for seeking payment of the debt.”

36. It was submitted That the 2<sup>nd</sup> Applicant is clearly in default as demonstrated by the 2<sup>nd</sup> Applicant’s loan account statement and That the arguments for taking of accounts are therefore a red herring to beguile this Honourable Court into granting them an injunction. The case of *Maithya v Housing Finance Company of Kenya & Another* (2003) EA 133 at 139 was cited where it was observed thus:

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this county over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized.”

37. On whether the suit property is being sold at an undervalue, it was submitted That there was no attempt by the Applicants to pin down the value of the suit land by way of opinion from an independent expert valuer.

38. The 1<sup>st</sup> Respondent relied on a valuation report dated 15<sup>th</sup> April 2021 by Chrisca Real Estates valuing the suit property at:

1. Current open market value Kshs 42,000,000/=
2. Mortgage value of Kshs 34,000,000/=
3. Forced sale value of Kshs 31,500,000/=
4. Insurance value of Kshs 13,000,000/=

39. Further submission was That, Valuation is a matter of opinion hence it is prudent That evidence touching on the valuation of properties be based on some empirical evidence or date in the absence of which the standard expected cannot be met. That the Applicants cannot be heard to allege That the suit property is valued at Kshs 65,000,000/= without providing evidence of such value.

40. It was submitted That whereas the charge is expected to exercise the power of sale in a prudent way, with due regard to the interests of the charger on the surplus sale moneys, the charge is not a trustee for the charger as regards the exercise of the power of sale and has his own interest to consider as well. Reliance was placed on the case of *Eccon Construction and Engineering Ltd v Giro Commercial Bank Ltd & Another* [2003] 2 EA 426 where cover the amount due to him provided the amount is fixed with regard to the value of the property.

41. It was submitted That the 1<sup>st</sup> Respondent complied with Section 97 (2) the *Land Act* which provides That:

“A charge shall, before exercising the right of sale, ensure That a forced sale valuation is undertaken by a valuer.”



42. On the objection by the Applicants That the valuation report conducted by the 1<sup>st</sup> Respondent does not represent the true market value of the suit property, it was submitted That the 1<sup>st</sup> Respondent complied with Section 97 (2) of the *Land Act* by undertaking the forced sale valuation of the suit property and shifted to the Applicants to prove That the value arrived at by the 1<sup>st</sup> Respondent’s valuer was not the best price reasonably obtainable at the time. The case of *Zum Zum Investment Limited v Habib Bank Limited* [2014] conflicting valuation reports:

“26. Section 97 (2) only bestows a duty on the charge to ensure That a forced sale valuation is undertaken by a valuer a requirement which the Defendant complied with as per the third valuation report by Tysons Limited dated 24<sup>th</sup> April 2023. It was then incumbent upon the Plaintiff to show That the valuation by the Defendant’s valuer did not result in the best price reasonably obtainable for the suit property. Since the Plaintiff only discredited the Defendant’s valuation on the basis That the valuer was inconsistent, That allegation of which I have established to be unfounded, the Plaintiff has not discharged That burden.

27. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant’s valuation report and only rely on the Plaintiff’s valuation reports. It is not sufficient for the Plaintiff to merely claim That the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report That the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, That the Defendant’s valuer is not qualified or competent to carry out the valuation, or That the valuation was carried out in consideration of irrelevant factors or That the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”

43. In conclusion, the 1<sup>st</sup> Respondent submitted That the applicants had come to court to frustrate the only recourse available to the 1<sup>st</sup> Respondent in realizing the security to recover the debt and are therefore not entitled to the reliefs sought. The 1<sup>st</sup> Respondent urged this court to dismiss the application with costs as they have not demonstrated That they have a prima facie case That would succeed against the 1<sup>st</sup> Respondent in terms of an injunction, which in any event should be denied as the Applicant has not given an undertaking as to damages should the application and suit fail.

### **Determination**

44. I have considered all the pleadings, affidavits and submissions on this matter and the main issue for determination is whether the Applicants have satisfied the court That they are entitled to the prayers sought in the Notice of Motion dated 12<sup>th</sup> July 2021.

45. Before I determine this issue, which encompasses the ingredients That must be present for a grant of a temporary injunction, it must not be lost That at this stage of the proceedings; the court must not make any definitive and conclusive findings of law or fact. Rather the court should be contented with a finding That on the basis of the material before it, there is need to have the rights apparently infringed further interrogated and protected. The party accused of wrong doing is then to be called to account.



The court has nonetheless to sway from holding a mini trial: see Nguruman Limited v Jan Nielsen Bonde & 2 Others CACA No. 72 of 2012.

46. The first limb of the prayers is a temporary injunction to issue restraining the 1<sup>st</sup> Respondent from selling by public auction the property in Title No. Kisumu/Municipality/Block 10/718 Milimani Estate Kisumu Town pending the hearing and determination of this suit. The question is whether the applicants have met the conditions for grant of an interlocutory injunction against the 1<sup>st</sup> Respondent as espoused in the Giella v Cassman Brown [1973] EA 360 wherein it was stated as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

47. The Court restated those principles in Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012 and the mode of their application as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case only at a *prima facie* level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Ally any doubts as to (b) by showing That the balance of convenience is in his favour.

This 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 Afraba Education Society [2001] Vol. 1 EA 86. If the applicant established 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.’ (Emphasis added).

48. The applicants have unequivocally admitted to being indebted to the 1<sup>st</sup> Respondent and therefore the other question is whether the 1<sup>st</sup> Respondent was entitled to issue statutory Notices and whether it did so, as required by law, to put in motion the process of disposal of the charged property. Again, the Applicants do not deny That the statutory Notices were issued as required by law which is well stated by the 1<sup>st</sup> Respondent in its replying affidavit and in the written submissions which I have reproduced above. The only issue raised by the applicants is That the property was undervalued and That the 1<sup>st</sup> Respondent did not give them statements of accounts of indebtedness, which loan statement was



availed to this court vide a replying affidavit and there was no rejoinder denying That That statement as annexed is reflective of the true state of affairs of the applicants' indebtedness. It therefore follows That there is absolutely no justification for the applicants to seek for an order of this court compelling the 1<sup>st</sup> Respondent Bank to provide a current overdraft statement or to mandate an audit to establish what the applicants owe the 1<sup>st</sup> Respondent.

49. On the claim That the property was undervalued as the same was valued at 65 million in 2015 hence the same property could not have been valued at 31 million in 2021 as it is expected to appreciate or That the 1<sup>st</sup> Respondent should have approached the applicants for a sale by private treaty, I find That the applicants were bound by the contract which they signed with the 1<sup>st</sup> Respondent to repay the loan or in default, which default is admitted, the Bank would exercise its right to exercise the statutory power of sale after issuing statutory Notices which in this case were duly complied with and no issue has been raised on the said notices, prior to the advertised sale of the charged property.
50. A similar situation arose in the case of *Geoffrey Wabome Muotia v National Bank of Kenya* [2019] eKLR where W. Okwany J had this to say and I adopt her reasoning being the established judicial pronouncement That:

“In the present case, the applicant did not deny That there was a valuation report on the suit property. The contest was That the property had been undervalued. Courts have however held That undervaluation per se cannot form a ground for the issuance of orders of injunction since breach by the charge in selling the property at an undervalue can be remedial through a claim for damages. (See *Jashvantsing L. Solanki v Diamond Trust Bank Ltd* [2014] eKLR.

21. My take is That even assuming That the defendant had not done a valuation of the suit property, That failure alone cannot form a ground for issuance of orders to stop the sale as the defendant can be afforded an opportunity to comply with the provisions of the law on the valuation of the subject property, if they had not already done so.
22. On the ground That the amount of arrears claimed by the defendant was grossly overstated and inaccurate, the applicant appeared to suggest That an injunction should be issued so That proper accounts are taken in order to determine the actual sum due to the defendant. It has severally been held That a dispute of accounts is not a ground for granting an injunction. My humble view is That the proper approach That the applicant ought to have taken would have been to reconcile the accounts with the Defendant and pay what is due. In the instant case the applicant did not indicate That he had made any attempts to reconcile his accounts with the defendant. No material was placed before me to show That the parties herein have held any talks with a view to reaching a consensus on the actual sum due to the defendant. It does appear to this court That this is not something That is difficult to achieve even without a court order or That the defendant would suffer any prejudice if the court was to direct it to furnish the Plaintiff with the Statement of Accounts with a view to resolving this matter.”
51. I wholly agree with the above persuasive opinion of the learned Judge and emphasize That even in terms of accounts, the applicants could have demanded for reconciliation of the same with the 1<sup>st</sup> Respondent Bank before rushing to court to ask for orders compelling an audit. There is no evidence That they ever



had a dispute over what was due prior to the filing of this suit. In addition, the Applicants have been enjoying status quo orders for now almost three years. If they had filed this suit to get time to organize their business and settle the debt due as agreed, they have not demonstrated to this court That during this period of status quo, as he 1<sup>st</sup> Respondent never sold the property as scheduled despite the court herein declining to stop the sale scheduled for 14<sup>th</sup> July 2021, they have made efforts to settle even part of the debt due.

52. The applicants cannot have their cake and eat it through this application by keeping the subject property and at the same time restraining the defendant from realizing its security yet they are not servicing the overdraft.
53. Considering the lapse of time since the filing of this suit and the amount of money advanced to the applicant, no doubt, there is the likelihood That the outstanding amount could outstrip the value of the property thereby putting the 1<sup>st</sup> Respondent's interests in further jeopardy. In *Andrew Muriuki Wanjohi v Equity Building Society Limited & 2 Others* [2006] eKLR the court observed That:
- “...In my considered view, if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk That the debt may outstrip the value of the property as the borrower has not made repayment for more than three years...”
54. The above situation is akin to this case. Additionally, while the grant of temporary injunctions is intended to prevent the ends of justice from being abused: see *Bonde v Steyn* [2013] 2 EA 8, temporary injunctions are equitable remedies and the principles of equity will apply including the fact That the court will closely look at the conduct of the applicant.
55. As has been severally stated by the courts in applications and suits of this nature, an applicant who charges their property in exchange for money advanced must be prepared to repay the money as and when it is due, renegotiate the contract on repayment or be ready to part with the charged property, its sentimental value to the applicant notwithstanding. For those reasons, I find That the applicants have not established a prima facie case with the probability of success.
56. On whether the applicants have demonstrated That if the injunction is not granted, then they will suffer irreparable injury That cannot be compensated in damages, the applicants have submitted and deposed That they risk losing the property which form the subject of the dispute herein which was undervalued and That they will lose their proprietary interest never to enjoy the use of the property. further, That there was no professional valuation of the property not more than 12 months prior to the date of the proposed sale.
57. The Court of Appeal in *Nguruman Limited v Bonde Nielsen & 2 Others* [2014] eKLR held That:-
- “On the second factor, the applicant must establish That he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; That is injury That is actual, substantial and demonstrable; injury That cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by



which their amount can be measured with reasonable accuracy or the injury or harm is such a nature That monetary compensation of whatever amount, will never be adequate remedy.”

58. In this case, contrary to the Applicants’ assertions and submissions, Annexure DO-8 and DO-9 are the Valuation report by Chrisca Real Estate dated 14<sup>th</sup> February 2021 and Newspaper advertisement dated 21<sup>st</sup> June 2021 for sale respectively show That the valuation was done not more than 12 months prior to the proposed sale hence no law was violated by the 1<sup>st</sup> Respondent. This court is far from being persuaded That the Applicants stand to suffer irreparable loss That cannot be compensated by way of damages as That irreparable loss has not been established. Furthermore, should the applicants wish to exercise their equity of redemption during the sale or negotiate with the 1<sup>st</sup> Respondent for sale by private treaty, nothing prevents them from doing so as they will only settle the outstanding debt and other attendant fees and charges and retain the property.
59. On whether the balance of convenience tilts in their favour, the court has to weigh the hardship to be borne by the Applicants by refusing to grant the injunction, against the hardship to be borne by the Respondents by granting the injunction.
60. In this case, albeit Covid 19 did affect every business enterprise during the period That businesses were closed down in the year 2020, from the Statutory Notices annexed by the 1<sup>st</sup> Respondent Bank, nothing prevented the Applicants from renegotiating with the 1<sup>st</sup> Respondent Bank on restructuring of the debt. There is also no explanation for the delay by the applicants to bring this suit and application from the time That it was issued with statutory Notices which have not been challenged. The Applicants were made aware of their default way back in 2020 and throughout, they never requested for restructuring or rescheduling of the overdraft repayment until they were issued with the letter dated 21<sup>st</sup> January 2021 which they kept until 13<sup>th</sup> May 2021 when they instructed their advocate to respond thereto saying they wanted to restructure their business of the 2<sup>nd</sup> Plaintiff/Applicant for refinancing and asking for suspension of the intended action. At That time, no issue was raised on alleged non-provision of the overdraft statements of indebtedness. Again, the applicants waited until the eve of the scheduled sale on 14<sup>th</sup> July 2021 is when they brought this suit on 13<sup>th</sup> July 2021 seeking to stop the advertised sale. They have not said the they were not aware of the intended sale in good time to seek to stop the same on account of alleged irregularities.
61. In my humble view, the applicants have not come to court with clean hands and therefore they are not entitled to the discretion of this court. I find and hold That balance of convenience does not tilt in their favour. I further find and hold That the balance of convenience tilts in favour of the 1<sup>st</sup> Respondent as this court cannot re-write the contract between the parties hereby by restraining the 1<sup>st</sup> Respondent Bank from exercising its statutory power of sale or sell the subject property Title No. Kisumu Municipality/Block 10/718 Milimani Estate Kisumu Town on condition That it fully complies with the strict provisions of the law including the Auctioneers Rules. For avoidance of doubt, and due to the time lapse since the statutory Notices were issued, the 1<sup>st</sup> Respondent is at liberty to exercise its statutory power of sale of the charged property only upon reissuing of the statutory Notices and valuation of the said property.
62. In the end, I find and hold That the applicants’/Plaintiffs’ Notice of Motion dated 12<sup>th</sup> July 2021 and filed on 13<sup>th</sup> July 2021 is found to be devoid of any merit and the same is hereby dismissed with costs to the Respondents, which shall await the outcome of the main suit to be fast tracked.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023**

**R. E. ABURILI**



**JUDGE**

