REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 28 OF 2020

(FORMERLY ELDORET ELC NO. 42 OF 2020

PROF. JULIUS ONYANGO OCHUODHO AND 31 OTHERS.....1ST PLAINTIFF

-VERSUS-

KISONY WELFARE GROUP LTD.....1ST DEFENDANT

BASIL OKONGO.....2ND DEFENDANT

HENRY OCHIENG GAND.....3RD DEFENDANT

DUNCAN KIBOYE OKOTH YOGO.....4TH DEFENDANT

JOHN OMIRO ALILO.....5TH DEFENDANT

FRANCIS ODIPO OSANO.....6TH DEFENDANT

SIDIAN BANK LIMITED.....7TH DEFENDANT

CHIEF LAND REGISTRAR.....8TH DEFENDANT

ATTORNEY GENERAL.....9TH DEFENDANT

RULING

[1] The Notice of Motion dated **27 July 2020** was filed herein by the 31 plaintiffs pursuant to **Sections 1A, 3, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Sections 90 and 104(2)** of the **Land Act** and **Order 40 Rule 1** of the **Civil Procedure Rules, 2010,** seeking that:

[a] Spent

[b] A temporary injunction be issued prohibiting the defendants, **Sidian Bank Ltd** and **Keysian Auctioneers** either acting by themselves, their servants and/or agents acting on their behalf from alienating, advertising for sale, taking possession of, appointment of a receiver, leasing, and or otherwise disposing off by way of public auction or private treaty, the whole of that **Land Reference No. KIBOS-LONDIANI LR. 7536 (IR NO. 6286)** pending the hearing and determination of the application and thereafter pending the hearing of the main suit.

[c] An order of inhibition be issued restraining the 8th defendant from making entries and/or any dealings on **Land Reference No. KIBOS-LONDIANI LR. 7536 (IR NO. 6286)** pending the hearing and determination of the application and thereafter pending the hearing of the main suit.

[d] Any such and further relief as the Court may deem appropriate be granted.

[e] Costs of the application be provided for.

[2] The application was predicated on the grounds that the Plaintiffs are the proprietors of all that leasehold parcel of land known as **KIBOS-LONDIANI LR 7536**, measuring approximately 52.5 acres; and that the 7th defendant through its agent **Keysian Auctioneers** *via* a notice dated **25 June 2020,** intended to sell the said property through public auction. It was further the assertion of the plaintiffs that the intended sale was irregular as it was premised on an illegal charge. The plaintiffs further complained that, due to the ongoing COVID-19 pandemic, the intended sale was unlikely to attract a sufficient number of bidders due to lockdown and other containment measures put in place by the government. It was therefore the contention of the plaintiffs that they stand to suffer irreparable loss and damage from what would be an irregular exercise of the chargee's statutory power of sale; hence their prayer for temporary injunction.

[3] In support of the application, the plaintiffs relied on the affidavit sworn by **Prof. Julius Onyango Ochuodho**, sworn on **24 July 2020** along with the documents annexed thereto. They averred that, along with the 2nd, 3rd, 4th, 5th and 6th defendants, they entered into a contract with the original owner of the suit property, a **Mr. Humphrey Ochieng,** for the sale of the suit property at **Kshs. 10,000,000/=** only; and that it was agreed that the said property would be purchased through and be registered in the name of the 1st defendant. **Prof. Ochuodho** further averred that it was agreed that the 1st defendant would obtain a loan from the 7th defendant and charge the suit property as security to pay the purchase price of **Kshs. 10,000,000/=;** and thereafter the purchasers would repay the loan by paying the purchase price for their respective portions through the office of **M/s G.O. Obudho & Co. Advocates.**

[4] Prof. Ochuodho further averred that, on the basis of the agreement aforementioned, the plaintiffs took possession and occupation of the suit property and have remained in quiet possession thereof to date. He pointed out that, at all material times, it was understood by the plaintiffs and the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th defendants that the 1st defendant would hold the suit property in trust for and on their behalf as beneficial owners; and that it was on that understanding that they proceeded to take possession of, develop and cultivate their respective portions of the suit land as they paid the purchase price apportioned to each of them. It was therefore the assertion of the plaintiffs that they were shocked to learn that the suit property had been put up for sale in respect of an additional facility of **Kshs. 10,000,000/=** that the 1st, 2nd, 3rd, 4th, 5th and 6th defendants obtained in **October 2012** from the 7th defendant without their knowledge or consent.

[5] It is manifest from paragraphs 15 to 23 of **Prof. Ochuodho's** Supporting Affidavit that the plaintiffs have accused the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants of fraud and have consequently lodged a complaint at Eldoret Police Station vide **OB. NO. 107/17/2/2017**. They simultaneously filed this suit seeking the following reliefs:

> **[a]** A declaration that the 1st defendant is registered as the proprietor of **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286)** in trust for and on behalf of the plaintiffs;
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> **[b]** A declaration that the entry in the encumbrance section in the register of **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286)** of the Further Charge is illegal, null and void and of no effect in law;
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> **[c]** A declaration that the registration of the Further Charge in favour of the 7th defendant in respect of **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286)** was fraudulent, illegal, null and void *ab initio* and ineffectual to confer a good interest upon the 7th defendant; and that the suit property be discharged and any monies advanced to the 1st defendant to accrue as liability *in personam* without any attachment of **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286).**
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> **[d]** An order that the 1st, 2nd, 3rd, 4th, 5th and 6th defendants do supply the 7th defendant with alternative security in place of **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286)** to secure the loan advanced by the 7th defendant to the 1st defendant;
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> **[e]** An order that accounts be taken and the plaintiffs and the defendants to jointly appoint a consultant to prepare and file a report on accounts as to the status, credit and debit balances, outstanding balances in respect of all loan accounts with the 7th defendants;
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> **[f]** A declaration that the 7th defendant is in breach of its contractual obligations contained in the various facility documents; namely, Letters of Offer, Charge and Further Charge, Debentures, and Letters of Guarantee and Indemnity; and that they cannot rely on the same contracts;
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> **[g]** A permanent injunction restraining the 7th defendant either by itself or through its servants, agents or otherwise howsoever from advertising or offering for sale, or purporting to sell or in any other way alienating **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286).**
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> **[h]** A permanent injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants from discharging, executing and/or effecting any powers by virtue of the appointing instruments or in any other way interfering with **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286).**

[6] It was consequently the contention of the plaintiffs that, in the circumstances, the 7th defendant's statutory power of sale has not yet accrued, and therefore that an attempt to sell the suit property would be unlawful. They further asserted that the 7th defendant is yet to serve them with the requisite statutory notices required under **Section 56** of the **Land Registration Act**, as well as **Sections 90 and 96** of the **Land Act.** The plaintiffs further averred that the 7th defendant has grossly undervalued the suit property and is therefore in breach of its duty of care under **Section 97** of the **Land Act**. Thus, it was their prayer that the application be allowed and the orders sought for be granted pending hearing and determination of the suit.

[7] In response to the application, the 7th defendant (also referred to hereinafter as "the Bank") relied on the Replying Affidavit sworn by its Legal Officer, **Beverline Chweya** on **11 August 2020**. She averred that the 1st defendant, **Kisony Welfare Group Ltd,** has been the Bank's

customer for many years; and that in **June 2010**, the Bank granted the 1st defendant a term loan of **Kshs. 10,000,000/=** to purchase **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286);** which facility was secured by a legal charge over the suit property. She exhibited copies of the Letter of Offer and the Charge instrument together with the title for the suit property as **Annexures BC-1, BC-2** and **BC-3** to her affidavit.

[8] Ms. Chweya further averred that, in **October 2012,** the 1st defendant requested for an additional term loan facility of **Kshs. 10,000,000/=,** part of which would be used to clear the loan balance on the first facility and the rest was to be given to its members. She explained that this additional facility was secured by way of a Further Charge over the suit property. She, likewise, attached copies of the relevant Letter of Offer and Further Charge as **Annexures BC-4 and BC-5** to her affidavit; and added that there was a third facility extended to the 1st defendant by the 7th defendant, namely, an overdraft facility for **Kshs. 1,500,000/=** to be used by the 1st defendant as working capital. **Ms. Chweya** explained that the overdraft facility was applied for and granted in **November 2014;** and in proof thereof, she exhibited the Letter of Offer dated **20 November 2014** as **Annexure BC-6** to the 7th defendant's Replying Affidavit.

[9] At paragraphs 8, 9 and 10 of her Replying Affidavit, **Ms. Chweya** deposed that, in spite of two requests for restructuring of the facilities, the 1st defendant persistently defaulted in its repayment obligations, such that by **2019**, the outstanding amount was **Kshs. 7,524,169.69** on the term loan and **Kshs. 150,276.49** on the overdraft. Consequently, the Bank commenced the process of exercising its statutory power of sale to realize the security. She was categorical that the Bank could not have acted otherwise than in accordance with the applicable law, and after due diligence; and therefore that the requisite notices were served and valuation undertaken. She accordingly prayed for the dismissal of the application.

[10] The 7th defendant filed a Supplementary Affidavit on **18 August 2020** with the leave of the Court, to underscore the fact that the subject loan continues to attract interest and will soon outstrip the value of the charged property, thereby exposing the bank to risk of total loss of the sums lent. In addition, **Ms. Chweya**, the deponent of the Supplementary Affidavit annexed additional documents to demonstrate that the 1st defendant's board of directors passed a resolution to borrow from the Bank and to charge the suit property as security for the facilities. A copy of the said Minutes was annexed and marked **Annexure BC-1.**

[11] In addition to the Supporting Affidavit of **Prof. Ochuodho**, the plaintiffs relied on the Further Affidavits sworn by **Dr. Duncan Angayo Amoth** on **31 August 2020** and **Bernard Onyango Rombo** on **31 August 2020. Dr. Amoth** averred that, although his name appears in the 1st defendant's CR-12 along with **Prof. Peter Ndege, Rose K. Omondi** and **Dr. Damaris Odero**, he was never informed by the 7th defendant of the transactions surrounding the 2nd term loan; and that instead the 7th defendant opted to deal with persons who were not directors of the Company. He further averred that, in spite of numerous letters from him and other members of the Company cautioning the Bank against granting the 2nd term loan, the Bank went ahead and approved the transaction and disbursed the 2nd facility. He added that the suit property along with the developments thereon is currently valued at **Kshs. 130,000,000/=,** per the alternative Valuation Report by **Real Appraisals Ltd**, marked **Annexure DR. DAA-13;** and therefore that the Valuation Report relied on by the 7th defendant is misleading.

[12] Mr. Rombo, also impugned the valuation report prepared by **CMT Realtors** on behalf of the 7th defendant, terming it inaccurate. He posited that the said report has been availed for the sole purpose of misleading the Court. He explained that he bought one acre jointly with his son, the 28th plaintiff; and that they proceeded to construct a 3-bedroom bungalow thereon at a cost of **Kshs. 3,000,000/=.** He produced a bundle of photographs of his house to disprove the assertions made at Clauses 7.0 and 8.0 of the Valuation Report.

[13] Counsel for the 7th defendant thereafter filed a Notice of Preliminary Objection dated **22 March 2021** seeking that the entire suit be struck out on the following grounds:

> **[a]** That the suit property, namely **Land Reference No. KIBOS-LONDIANI LR 7536 (GRANT NO. I.R. 6286)**, is registered in the name of the 1st defendant.
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> **[b]** That the said 1st defendant is pleaded to be a duly registered limited liability company under the **Companies Act, Chapter 486 of the Laws of Kenya,** whereas the plaintiffs and the 2nd to 6th defendants are pleaded to be members of the 1st defendant.
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> **[c]** That so long as the injunction orders sought are in respect of property owned by the 1st defendant, the proper plaintiff is the company and the company only in accordance with **Section 19** of the **Companies Act, 2015** and the rule in **Foss vs. Harbottle.**
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> **[d]** That in any event, no permission has been sought or obtained by the plaintiffs, or any of them, under **Section 239(1)** of the **Companies Act, 2015,** to continue this claim as a derivative action.
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> **[e]** That in any further event, the plaintiffs are not, or have not been shown, to be minority members of the 1st defendant as to be entitled to prosecute a derivative action on behalf of the 1st defendant.
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> **[f]** That the alleged trust sought to be enforced against the suit property in favour of the plaintiffs is in contravention of **Section 104(1)** of the **Companies Act, 2015** and amounts to a criminal offence under **Section 104(2)** of the Act.
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> **[g]** That consequent to paragraphs **[a]** to **[f]** above, the plaintiffs' claim is unsustainable under the doctrine of *ex turpi causa non oritur actio.*

[14] Although the application was specific to the 7th defendant, an affidavit in response thereto was filed by **Henry Ochieng Ganda,** the 3rd defendant herein. He averred that he filed the affidavit on behalf of the 1st to 5th defendants, contending that they had legal authority to borrow for and on behalf of the company; and that the members of the company gave powers to the directors to purchase the suit property

and subdivide the same amongst its members and would-be members. While conceding that a complaint had been filed by some of the plaintiffs at Eldoret West DCI office, **Mr. Ganda** averred that the complaints were driven by personal vendetta against the leadership of the company, particularly by **Dr. Amoth** (the 4th plaintiff).

[15] Mr. Ganda further averred that the directors have made efforts to reduce the outstanding sums due to the 7th defendant by making a lump sum payment of **Kshs. 500,000/=.** At paragraphs 10 and 11 of his affidavit, **Mr. Ganda** appeared to blame the 7th defendant, accusing it of failure to account for all the payments made to it despite numerous requests. He accordingly reiterated the commitment of the directors to repaying the loan and added that they are in the process of making a further payment of **Kshs. 499,252.95** vide the cheque whose copy was annexed as **Annexure HOG4**. Thus, **Mr. Ganda** concluded his averments by stating that the sale is premature, unlawful and unfounded in law for failure by the 7th defendant to comply with the provisions of **Sections 96 and 97** of the **Land Act**.

[16] Another Replying Affidavit was filed by **Francis Odipo Osano**, the 6th defendant herein. The said affidavit was filed herein on **24 March 2021** to confirm that the suit property was purchased from **Humphrey Kamire Ochieng** and was subsequently registered in the name of the 1st defendant. **Mr. Osano** further confirmed that the 1st defendant took out a loan of **Kshs. 10,000,000/=** in **2010** from the Bank to finance the purchase of the suit property, on the understanding that the property would be subdivided and sold to the members.

[17] Mr. Osano further confirmed that he was aware that the directors of the Company negotiated a further loan of **Kshs. 10,000,000/=** in **2012** and that, although he was one of the persons who signed the Letter of Offer for the 2nd loan, dated **9 November 2012**, he withdrew his support for the borrowing on **28 November 2012** vide a letter marked **Annexure DAA-4** to the plaintiff's Further Affidavit. He denied having served as a director or official of the Company; or having been allocated with a portion of the suit property. Thus, he denied having been a party to the additional facility. He likewise denied that he was involved in the transactions or illegalities alleged herein by the plaintiffs.

[18] The application, including the Preliminary Objection, were canvassed by way of written submissions, pursuant to the directions of the Court, made on **29 September 2020** and **20 April 2021**. On behalf of the plaintiffs, two sets of written submissions were filed herein dated **22 March 2021** and **5 May 2021**; the latter being in respect of the 7th defendant's Preliminary Objection. Counsel for the 7th respondent filed one set of submissions in respect of both the application and the Preliminary Objection. I propose to first consider the Preliminary Objection. This is because, as was well articulated by **Law, J.A. in Mukisa Biscuits Manufacturing Ltd vs. West End Distributors Ltd** [1969] EA 699:

> **"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit..."**

[19] The 7th defendant's preliminary objection attacks the plaintiffs' *locus standi* to file this suit, granted that the suit property belongs to a separate legal entity, namely, **Kisony Welfare Group Ltd**, a limited liability company, with distinct right to sue and be sued. **Mr. Otieno,** learned counsel for the 7th defendant, relied on **Salomon vs. Salomon & Co. Ltd** [1896] UKHL 1, **Foss vs. Harbottle**, **Accredo Ag & 3 Others vs. Steffano Uccelli & Another** [2017] eKLR; **Parag Bhagwanjibhai Savani vs. Jitu Tribhovanshai Savani & 2 Others** [2017] eKLR and **Section 19** of the **Companies Act, 2015**. Accordingly, it was the submission of **Mr. Otieno** that the only way members of a company can sue on behalf of a company is if they are in the minority and have proceeded to invoke the procedure provided for in **Sections 238 and 239** of the **Companies Act** for filing derivative suits; which procedure has not been invoked in this instance.

[20] The second limb of the 7th defendant's Preliminary Objection is in connection with the plaintiff's allegation that the 1st defendant was registered as the proprietor of the suit property in trust for all the members of the company. **Mr. Otieno** submitted that such an argument cannot stand in the face of **Section 104(1)** of the **Companies Act**, which prohibits companies from accepting or entering in their register of members notice of any trust, expressed or implied or constructive. Counsel further posited that, since a trust affects title to land, in order for a party to obtain such a declaration under **Section 28** of the **Land Registration Act**, that party would have to first prosecute a declaratory suit in the Environment and Land Court in accordance with **Article 162(2)(b)** of the **Constitution** and **Section 13(1)** of the **Environment and Land Court Act**; and not seek such a declaration in commercial proceedings before the High Court. Thus, **Mr. Otieno** urged the Court to find that, on both fronts, the plaintiffs' suit is untenable and ought to be struck out with costs.

[21] Ms. Chesoo, counsel for the plaintiffs pointed out that the Preliminary Objection was premised on the assumption that the facts as pleaded are admitted. She pointed out that not all the plaintiffs have admitted that they were shareholders or members of the 1st defendant; and that to the contrary, the Plaint does not contain such averments or admissions. She submitted that the plaintiffs have consistently maintained they were and are mere purchasers of defined portions of the suit property; and therefore that their allegations of trust can only be determined at the hearing of the substantive suit. She cited **the Mukisa Biscuits case** and **Oraro vs. Mbaja** [2005] 1 KLR 141 for the proposition that a preliminary objection ought not to be raised if any fact has to be ascertained by the Court.

[22] On whether this suit ought to have been filed as a derivative suit, **Ms. Chesoo** took the view that since this suit has been brought by individuals for breach of trust, it is not a suit filed for or on behalf of the 1st defendant; and therefore the argument that it ought to have been commenced as a derivative suit is misplaced. She accordingly urged the Court to dismiss the 7th defendant's preliminary objection with costs and to allow the plaintiffs' Notice of Motion dated **27 July 2020.**

[23] I have carefully considered the 7th defendant's Preliminary Objection in the light of the grounds raised and the written submissions filed in respect thereof. Needless to say that a preliminary objection ought not to be raised where reliance is placed on disputed facts which are yet to be proved; or where, to arrive at its determination on the preliminary points raised, the Court must embark on an inquiry to ascertain the underlying facts. Hence, the expressions of **Sir Newbold, P.** in the **Mukisa Biscuits Case** are apt. Here is what he had to say:

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually raised**

on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

[24] It is manifest from the submissions filed herein by learned counsel that the parties are not in agreement as to the exact nature of the plaintiffs' claim. While the 7th presumes that it is a suit by members of a company against the company, the pleadings appear to suggest otherwise. For instance, at paragraphs 8 and 9 of the Plaint the plaintiffs averred that they entered into contracts of sale with the former registered owner of the suit property, **Mr. Humphrey Ochieng,** for the purchase of the suit property; and that they thereafter caused it to be registered in the name of the 1st defendant for the purpose of facilitating the payment of the purchase price. For the Court to ascertain the truth or otherwise of that averment, it would have to make an inquiry and consider the documents annexed to the various affidavits filed herein by the parties.

[25] It is noteworthy too, that while the 7th defendant proceeded on the assumption that all the plaintiffs are members or shareholders of the 1st defendant, the 6th defendant stated on oath that he is not. Again, it would require proof for the Court to arrive at a finding as to whether or not all the 32 plaintiffs are all shareholders of the 1st defendant; and whether they are in the minority. It is likewise a question of fact as to whether or not a constructive trust ought to be inferred in the circumstances of this case. The Court would have to look at all the agreements and instruments relied on by the parties to make a determination on the issue.

[26] Accordingly, I would adopt the words of **Hon. Ojwang, J.** (as he then was) in **Oraro vs. Mbaja [2005] 1 KLR 141,** which I hereby do, that:

"...A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

[27] Although **Mr. Otieno** introduced the angle of jurisdiction and postulated that the plaintiffs ought to have filed their suit before the Environment and Land Court for a declaratory order on trust, the fact of the matter is that the suit was indeed filed before the Environment and Land Court before being transferred to this Court. The transfer was made on the premise that predominant issue is neither ownership of the suit property nor the issue of trust, but the ripeness or otherwise of the 7th defendant's statutory power of sale; granted that the suit property was charged to for a financial facility accorded the 1st defendant by the 7th defendant. Thus, in the transfer order dated **28 July 2020**, the Environment and Land Court stated thus:

"I have looked at this matter and notice that it should be filed in the High Court as it involves sale by public auction in respect of the enforcement of statutory sale and order that it should be transferred to the High Court for hearing and determination."

[28] Thus, for the plaintiffs, the High Court was not their first port of call; and it was not at their instance that the suit was transferred to the High Court. No doubt the Environment and Land Court, in causing the matter to be transferred to the High Court had in mind the decision of the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [**2017] eKLR, in which the Court of Appeal held that the dominant issue in that case was not the issue of title, ownership or use of land, but the settlement of amounts owing from the respondents to the appellant on account of a contractual relationship of a banker and lender; and therefore that the High Court, as opposed to the ELC, had the requisite jurisdiction to handle the suit. Thus, the Court of Appeal concluded that:

"... it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

> **41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under *Section 13* of the *ELC Act* ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court."**

[29] Accordingly, **Mr. Otieno's** submission that this Court lacks jurisdiction to entertain the suit, including the instant application from the standpoint of **Article 162(2)(b)** of the Constitution and **Section 13** of the **Environment and Land Court Act,** are untenable; with the result that the 7th defendant's Preliminary Objection cannot stand and is hereby dismissed.

[30] Turning now to the application dated **27 July 2020**, I note that one of the enabling provisions cited therein is **Order 40 Rule 1(a)** of the **Civil Procedure Rules,** which provides that:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... 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."

[31] There is no dispute that the suit property, namely, **KIBOS-LONDIANI LR. 7536 (IR NO. 6286)** measuring 52.5 acres**,** was charged as security by the 1st defendant in favour of the 7th defendant. A copy the Letter of Offer dated **25 June 2010** was annexed to the Replying Affidavit of **Ms. Chweya** as **Annexure BC-1.** The facility for **Kshs. 10,000,000/=** was to be repaid in 36 monthly instalments of **Kshs. 346,653.29**, payable on the 5th day of every month. It is also common ground that, on account of default in repayment, the 7th defendant initiated the process of realizing its securities by exercising its statutory power of sale over the charged property; a process that was resisted by the plaintiffs, upon being notified that the suit property had been put up for sale by **Keysian Auctioneers**.

[32] In the premises, the key issue for the Court's determination is whether the Plaintiff has satisfied the conditions for granting a temporary injunction for purposes of **Section 63(c)** of the **Civil Procedure Act** and **Order 40 Rule 1** of the **Civil Procedure Rules;** and the touchstone in this regard is the case of **Giella vs. Cassman Brown & Co. Ltd** (supra), wherein it was held that:

> **"The conditions for the grant of an interlocutory injunction are ...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."**

[33] As to what amount to a prima facie case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 furnished the following helpful definition:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."**

[34] Hence, in considering whether or not a *prima facie* case has been made out, the Court is not required to go into an exhaustive evaluation of the merits of the Plaintiff's case. This caution was aptly expressed by the Court of Appeal in ***Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR*** *thus:*

> ***"... in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

[35] The contention of the plaintiffs was that they were not served with the requisite statutory notices under **Sections 90 and 96** of the **Land Act**. They also contended that **Section 97** of the **Land Act,** which requires that a current valuation of the charged property be obtained prior to sale, was not complied with by the 7th Defendant. It is therefore crucial to ascertain whether these allegations have been proved, albeit on a *prima facie* basis.

On Whether the Plaintiffs were served with the requisite Statutory Notices under Sections 90 and 96 of the Land Act:

[36] Section 90 of the **Land Act** provides as follows in part:

> **(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 in 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) The notice required by subsection (1) shall adequately inform the recipient of the following matters--**
>
> **(a) the nature and extent of the default by the chargor;**
>
> **(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**
>
> **(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;**
>
> **(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**
>
> **(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.**
>
> **(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.

[37] In response to the assertions by the Plaintiff, the Defendant annexed to its Replying Affidavit a copy of the Statutory Notice served by it in accordance with the requirements of **Sections 90** of the **Land Act** (See **Annexure BC-10(b)** to the Replying Affidavit). That notice is dated **14 January 2020.** It was issued pursuant to **Section 90** of the **Land Act** and is explicit as to the nature and extent of the default by the chargor; and the amount that needed to be paid by the Plaintiff to rectify the default. More importantly, the notice is specific as to the three months' period within which the Plaintiff had to pay the arrears to rectify his default, failing which the Defendant would proceed to exercise its right to sell the charged property; among other options. Additionally, the Defendant complied with **Section 90(2)(e)** of the **Land Act** by advising the Plaintiff that he was at liberty to apply to court for any relief that the court may deem fit to grant against the Bank's statutory power of sale.

[38] The aforementioned notice is expressed to have been dispatched by way of registered post to the 1st defendant as well as members of its Management Committee. That address is the same as the address used in the Letter of Offer dated **25 June 2020** and the Charge made on **25 October 2010.** The 7th defendant further furnished proof that the notices were duly served by way of registered post**.**

[39] Section 96 of the **Land Act,** on the other hand, states thus:

(1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the 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.

[40] Again, the 7th defendant sufficiently demonstrated, on a *prima facie* basis, that it served the **Section 96** Notice as required by producing a copy thereof as **Annexure BC-10(c)** to the Replying Affidavit. The notice is dated **6 May 2020** and was similarly sent by registered post to the 1st defendant's address. Its purpose was to give the 1st defendant the requisite **40** days' Notice to Sell. The said notice also contained all the requisite particulars for purposes of **Section 96** of the **Land Act.**

[41] In the light of the foregoing, and the *prima facie* demonstration of service of both notices under **Sections 90 and 96** of the **Land Act**, the burden of proof shifted to the chargor, in this case the 1st defendant, to demonstrate that it did not and could not have received the said notices. In **Nyagilo Ochieng & Another vs. Phanuel B. Ochieng & 2 Others [1996] eKLR,** the Court of Appeal pronounced itself on this point thus:

Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.

[42] And, **Section 3(5)** of the **Interpretation and General Provisions Act**, provides that:

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."

[43] In the premises, there being no proof to the contrary, service herein is deemed to have been duly made of the **Section 90** and **Section 96** Notices. As for the Redemption Notice issued under **Rule 15** of the **Auctioneers Rules**, a copy was exhibited as **Annexure PJOO 2** to the plaintiff's Supporting Affidavit sworn by **Prof. Ochuodho**; an acknowledgement that the Redemption Notice was duly served. Clearly therefore, there is *prima facie* proof that that the 7th defendant complied with the requirements of the law and served the requisite Statutory Notices on the 1st defendant and its directors/guarantors.

[44] It is noteworthy however that in the affidavit of **Prof. Ochuodho**, there is an assertion that the plaintiffs entered into individual apportionment agreements with the 1st defendant that gave them the right to take possession of and develop their respective portions of the suit property. Copies of the said agreements were annexed to the affidavit of **Prof. Ochuodho**. And, in the affidavits of **Dr. Duncan Amoth**, and **Bernard Onyango Rombo,** sworn on **31 August 2020,** it was averred that a significant number of the purchasers have developed their

respective portions of the suit property; such that the current value of the property is no less than **Kshs. 130,000,000/=.** In proof thereof, the plaintiffs relied on photographs of the developments as well as the Valuation Report prepared by **Real Appraisals Ltd**, marked **Annexure DR. DAA-13.**

[45] That being the case, it was imperative that the Notice to Sell issued under **Section 96(2)** of the **Land Act** be served on the plaintiffs as well. **Subsection (3)** of **Section 96** is explicit on this. It provides thus in **Subsection (3)(i):**

> **"A copy of the notice to sell served in accordance with subsection (2) shall be served on—**
>
> **any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property;"**

[46] To the extent therefore that the plaintiffs have challenged service of the notice to sell on them, they have demonstrated a *prima facie* case with a probability of success; and I so find.

On Whether there was failure by the 7th Defendant to comply with Section 97 of the Land Act:

[47] Section 97 of the **Land Act** provides as follows:

> **(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
>
> **(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.**
>
> **(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-**
>
> **(a)** ***There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and***
>
> ***(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).***

[48] Hence, while the provision imposes a duty on the chargee to ensure the best interest of the chargor while exercising its statutory power of sale, that duty is limited to ensuring the best sale price is obtained by undertaking a forced sale valuation before sale. In this instance, the 7th defendant presented *prima facie* evidence to demonstrate that valuation was done. It relied on the Valuation Report dated **13 May 2020** prepared by **CMT Realtors Ltd** (marked **Annexure BC-12** to **Ms. Chweya's** the Replying Affidavit). According to the report, the Open Market Value of the property as at the date of valuation was **Kshs. 40,000,000/=;** while the Forced Sale Value was fixed at **Kshs. 30,000,000/=.** It is noteworthy, however, that the said Valuation Report does not account for any developments. It presumed that no improvements had been made on the suit property. As against that valuation, the plaintiffs relied on the Valuation Report by **Real Appraisal** done in **October 2019**, which placed the market value of the property at **Kshs. 130,000,000/=.** The latter report also shows, at paragraph 5.6 thereof, that the property was partly occupied by members of the welfare group.

[49] Given the wide margin of difference between the two reports, it becomes a triable issue as to whether the duty of care imposed by **Section 97** of the **Land Act** was discharged by the 7th defendant before putting up the property for sale by public auction. In this regard, I agree entirely with the decision of the Court in **Zum Zum Investment Limited vs. Habib Bank Limited [2014] eKLR** that:

> **"...Once the Defendant has undertaken a forced valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time...It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time... 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...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 done way before the time of the intended sale..."**

[50] Since such proof can only be furnished at the hearing, it goes without saying that the plaintiffs have demonstrated that they have a *prima facie* case with a probability of success; and that they deserve to be heard before the intended sale is proceeded with.

[51] As to whether the Plaintiffs stands to suffer irreparable loss, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. **In Kanorero River Farm Ltd and 3 others –vs- National Bank of KenyaLtd** (2002) 2 KLR 207 for instance, **Ringera, J.** (as he then was) held as follows:

> **"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion,**

no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

[52] Similarly **Warsame, J**. (as he then was) in the case of **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR** held as follows:

> ***"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."***

[53] *The same position was taken in* ***Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation*** *[2008] eKLR thus:*

> ***"I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR)***

[54] *As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in* ***Charter House Investments Ltd vs. Simon K. Sang and Others,*** *Civil Appeal No. 315 of 2004, is instructive. The Court of Appeal held that:*

> ***"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.***

[55] *In this respect, courts* have opted for the path that leads to the lower rather than the higher risk of injustice, in line with the case of **Suleiman vs. Amboseli Resort Ltd** (2004) 2 KLR 589 in which **Hon. Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd** (1986) 3 All ER 772:

> **"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …"**

[56] In the instant matter, the path leading to the lower risk of injustice would be to stop the impugned auction pending the hearing and determination of the plaintiffs' case, noting that some of them are already in occupation of the suit property.

[57] In the result, *there is merit in the plaintiff's Notice of Motion dated* ***27 July 2020.*** *The same is hereby allowed and orders granted as hereunder:*

[a] A temporary injunction be and is hereby issued restraining the defendants, either acting by themselves, their servants and/or agents from alienating, advertising for sale, taking possession of, appointment of a receiver, leasing, and or otherwise disposing of by way of public auction or private treaty, the whole of that **Land Reference No. KIBOS-LONDIANI LR. 7536 (IR NO. 6286)** pending the hearing and determination of the main suit.

[b] An order of inhibition be and is hereby issued restraining the 8th defendant from making entries and/or any dealings on **Land Reference No. KIBOS-LONDIANI LR. 7536 (IR NO. 6286)** pending the hearing and determination of the main suit.

[c] Costs of the application be costs in the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF SEPTEMBER 2021

OLGA SEWE

JUDGE