REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 2 OF 2019

JOSEPHAT MWANGI MORACHA.....1st PLANTIFF/APPLICANT

JIPA OIL COMPANY LIMITED.....2ND PLAINTIFF/APPLICANT

-VERSUS-

HFC LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The applicants herein sought and obtained a banking facility from the respondent for completion of an ongoing construction on the 1st

2. Applicant's land parcel No. Kisii Municipality/Block111/195 (herein "the suit property"). To secure the facility of a sum of Kshs. 416,650,000/=, the suit property was charged in favour of the respondent. Alleging default in repayment of the loan facility, the respondent issued statutory notices of sale. This prompted the applicants to file suit simultaneously with the instant application in which they seek the following orders.

a) Spent;

b) Spent;

c) Spent;

d) The honorable court be pleased to grant an order of temporary injunction restraining the defendant/respondent either by herself, nominated agents, servants and/or anyone claiming and/or acting under the said defendant/respondent from exercising the statutory power of sale over and in respect of **LR No. Kisii Municipality/Block III/195**(hereinafter referred to as the suit property) and in particular, advertising for sale, selling vide public auction and/or private treaty, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1stplaintiff's / applicant's title, rights and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.

e) The honorable court be pleased to grant an order for the maintenance of status quo and in particular, preserving and/or conserving **LR No. Kisii Municipality/Block III/195**(hereinafter referred to as the suit property) and barring and/or prohibiting the defendant/respondent and/or nominated agents from advertising for sale, selling vide public auction and or private treaty, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1st applicant's title, rights and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the instant suit.

f) Costs of this application be borne by the defendant/respondent

g) Such further and/or other orders be made as the court may deem fit and expedient.

3. In support of the application, the 1st applicant averred in his supporting affidavit sworn on 8th April, 2019 that he was a managing director of the 2nd applicant. He stated that the applicants approached the respondent for a banking facility to enable them complete the construction of a building commenced on the suit property. The request was approved and the suit property was charged in favour of the respondent.

4. The 1st applicant deposed that the respondent agreed to disburse the money in tranches, subject to the issuance of interim certificates by the designated contractor. He avers that the contractor was to be appointed by the applicants with the approval of the respondent. A contractor was duly appointed and proceeded with the construction.

5. The applicant avers that the selected contractor issued two interim certificates for the sum of Kshs. **45,144,960/=** and Kshs. **34,457,221.73/=** but the respondent failed to settle the monies sought. He claims that the failure to pay the interim certificates by the respondent caused the construction to stagnate for more than 1 year. The respondent is accused of charging interest amounting to Kshs. **99,698,628.13**/= during that period of 12 months and is also accused of delaying on the restructuring of the facility for a period of more than 22 months after the initial contractor had abandoned the site. It is averred that despite this, the respondent levied a sum of Kshs. 49,303,710.40/= as interest for that period. The 1st applicant claims that the 33 months 'delay impacted on their rental income to a tune of Kshs. 438,570,000/= which they claim against the respondent.

6. The 1st applicant further avers that notwithstanding the breach of contract, the respondent issued statutory notice dated 21st November 2018 intending to exercise its statutory power of sale. The applicant states that the monies claimed by the respondent in the statutory notice are coupled with illegitimate interests charged contrary to the requirement that the applicant would be informed of any variation in interest rates.

7. The applicant further avers that the secondary notice dated 4th March 2019 was issued prematurely since the initial redemption notice dated 21st November 2018, was received by the applicants on 9th January, 2019. The applicant also complained that the respondent intended to exercise its statutory power of sale, without complying with the statutory requirement to undertake a valuation of the charged property before commencing the process of realization.

8. The applicant deposed that the notices had been issued in contravention of **sections 84(1), 90, 96 and 97(2)** of the **Land Act** rendering the intended exercise of statutory power of sale invalid and therefore urges the court to grant the prayers sought.

9. Joseph Lulue, the respondent's legal officer swore a replying affidavit on 7th May 2019rebutting the applicant's averments. In his affidavit, he confirmed that the applicants had obtained banking facilities from the respondent and registered a charge on 13th December 2012 over the suit property in favor of the respondent as security for the repayment of a maximum principal sum of Kshs. 416,650,000/=.

10. He avers that Standard Chartered Bank (K) limited had a charge over the suit property and the respondent had to pay a sum of Kshs. 212,000,000/= to discharge the property. This was part of the first tranche of the loan facility disbursed to the applicants on 18th January 2013. It is deposed that interest became payable upon this partial disbursement of the facility.

11. The legal officer denies the applicants' claim that two interim certificates that were issued by the contractor were not paid. He avers that the interim certificate dated 23rd April, 2013 shows that the installment of Kshs. 45,144,960/= was paid.

12. It is also deposed that the interim certificate was rectified and was not in fact payable for reasons *inter alia* that the applicants had failed to disclose that a sum of Kshs. 20,000,000/= was outstanding from a previous interim certificate. The legal officer averred that this revealed that there was a need to reconcile accounts and also brought to the fore the fact that the project had been poorly managed. He deposes that due to this, the services of the project manager and contractor were terminated by the 1st applicant. He asserts that the termination of the services of the contractor were not due to any breach on the part of the respondent. He blames the 1st applicants for delay who only finalized the appointment of a new project manager on 5th January 2014.

13. The legal officer avers that in light of the need to reconcile accounts, it became untenable for the respondent to make further disbursements. The 1st applicant is also accused of failing to comply with a condition precedent of the facility to deposit a sum of Kshs. 40,073,000/= to cater for payment of interest during the construction period. The legal officer avers that the facility had to be restructured after which the respondent made further disbursements.

14. He further deposes that the 1st applicant requested for a further loan facility of Kshs. 49,000,000/= to complete construction which was accepted and a further legal charge dated 11th February 2016, created. It was agreed in the deed that the rental income derived from the suit property be assigned to the bank for purposes of repayment of the amount secured by the legal charges. He also claims that a second further charge dated 23rd August 2017 was created to secure repayment of Kshs. 128,940,000/=.

15. The legal officer avers that the applicants were bound by the legal charges created over the suit property to pay the amounts secured in default of which the respondent became entitled to the remedies conferred under the charges and the Land Act. He avers that the applicant has failed to repay the sums secured and as a result, the facility has fallen into arrears of Kshs. 201,414,121.91 while the total outstanding balance as at 21st March 2019 was Kshs. 809,566,197.20/=.

16. The legal officer avers that the respondent issued a statutory notice dated **21st November 2018** which was dispatched to the applicants by registered post on **28th November 2018**. A secondary 40 days' notice dated 4th March 2019 was also issued and copied to the 1st applicant, his spouse, Petiro Ongwacho a guarantor in respect of the secured facility as well as tenants in occupation of the suit property.

17. The respondent avers that statutory notices were duly served and the applicants notified of the variation in interest rates through addendums which were duly accepted by the applicants. The legal officer further avers that they instructed a valuer to prepare a valuation report and it could not therefore be said that the respondent was in breach of **section 97** of the **Land Act**.

18. The legal officer avers that the conduct of the applicants disentitles them from the reliefs sought. The court is urged to consider that the suit property has been developed by substantial funds provided by the respondent and that the property is generating income which is not being directed to the settlement of the debt. The respondent argues that the suit property is a commercial property whose value is ascertainable and that in the unlikely event that the court finds that the respondent was not entitled to sell the property, its value would be ascertainable and can be paid to the applicants by way of compensation in damages and that being a financial institution, it would be capable of paying the same.

PARTIES' SUBMISSIONS

19. When the application came up for hearing, Mr. Oguttu learned counsel for the applicant, sought prayers 4, 5 and 6 of the motion. He submitted that the respondent in issuing the statutory notice had failed to comply with **section 90 (2) (d)** of the **Land Act**. He argued that the exercise of statutory power of sale could only arise 3 months after service of the notice and not 3 months from the date of issuance of the notice. That in this case, it was not disputed that the notice had been received on the 19th January 2019 by way of post. According to the certificate of postage annexed to the respondent's affidavit (marked "JL 25"), the statutory notice had been served upon the applicants through postal address 3041-40200 Nairobi yet the applicants' postal address is 3041-40200 Kisii. He blamed the error in the address for the late receipt of the notice.

20. Secondly, counsel contended that the respondent had not complied with **section 96 (2)** of the **Land Act** which envisages the issuance of a secondary notice after the lapse of the 3 months' notice provided under **section 90(2)**of the **Land Act**. He submitted that the secondary notice had been issued prematurely and was not served on the persons stipulated in the provision. Counsel argued that the respondent was required to serve the tenants as persons with a stake in the property but there was no evidence of such service to the tenants at the time. One of the guarantors, who was the 2nd applicant's directors, Petiro Ongwacho had also been served through address 1197 -00621 Nairobi, yet the only known address was 3041- 40200 Kisii.

21. Counsel also argued that the interest rates on the charged property had been varied and adjusted to the applicants' detriment. He submitted that the requisite notice stipulated under **section 84** of the **Land Act** had not been issued or served. Counsel urged the court to consider the doctrine of *lis pendens* and the authorities cited by the applicants in support of the application.

22. Learned counsel for the respondent, Mr. Mutua started by submitting that the applicants had elected not to file a response to the respondent's replying affidavit, which left the factual matters deposed therein uncontested. He submitted that the principles by which this court is required to consider the application are well settled. He cited the case of ***Giella -v- Cassman Brown & Company Ltd (1973) EA 358***which requires the sequential evaluation of an application for injunction to establish a *prima facie* case before considering whether failing to grant the application will cause irreparable loss and damage.

23. Counsel urged the court to consider the uncontested facts in determining the application. He submitted that one such fact was that the suit property was charged by the 1stapplicant to secure monies duly disbursed to the 2ndapplicant under a legal charge. It was not in dispute that the secured funds had not been paid in accordance with the terms of lending which meant that the respondent had become entitled to realize the suit property by virtue of the legal charge registered in its favour.

24. Counsel acknowledged that the notices stipulated under **section 90** and **96** of the **Land Act** are mandatory. He however submitted that the respondent had issued a notice dated 21st November 2018 to the 1stapplicant who acknowledged receipt of the notice but alleges that the same was received on 9th January 2019. It was argued that there was no proof that the 1st applicant had received the notice on 9th January 2019.

25. Further, that the charge instrument makes a provision for the manner in which service is to be effected at **clause 30.5**which indicates that a notice sent by registered post is deemed to be duly served. Counsel submits that the notice was issued to the proper address in Kisii and the error in the certificate of postage did not diminish the fact that the notice had been served as the applicants had confirmed receipt.

26. As for the notice required under **section 96(2)** of the **Land Act**, the respondent's counsel submitted that there was no dispute that the notice had been issued to the 1st applicant. He submitted that the respondent had served notices to the chargor, the chargor's wife, the borrower and the tenants none of whom had filed affidavits disputing service. It was further submitted that despite the applicant's claim that the guarantor's address was alien, the director had not filed an affidavit to that effect and in any case he was the 2nd plaintiff's director whose address was shown as 1197 -00621 Nairobi. Counsel alsocontended that lack of proper notice could not be a basis for granting an injunction. The case of ***National Bank of Kenya Limited vs Shimmers Plaza Ltd Civil Appeal 26 of 2002 [2009] eKLR*** was cited in support of this submission.

27. Counsel dismissed the claim that the interest rate had been altered. He argued that the applicant did not disclose the applicable interest and what it had been varied to. He contended that there were no such variations and if there had been, it could not be a basis to grant the injunction.

28. On the doctrine of ***lis pendens***, the court was urged to look at the matter in a way that makes commercial sense. Counsel submitted that if every chargor was entitled to an injunction, no lender would be prepared to lend. Counsel submits that the courts have held that the doctrine of *lis pendens* has no application between a chargor and chargee where the right to sell has accrued. He pointed to the cases of ***Jackson Mutugi Mwangi vs Equity Bank Limited Civil Suit No. 302 of 2017 [2019]eKLR*** and the case of ***Madhukar Nivrutti Jagtap & Ors vs SMT. Pramilabai Chandulal Parandekar & Ors., Supreme Court of India Civil Appeal No. 5382 of 2007*** in support of this. He differentiated the case of ***Nfatali Ruthi Kinyua vs Patrick Thuita Gachure & Another Civil Appeal No. 44 of 2014 [2015] eKLR*** cited by the applicant as there was no contest on the title in that case.

29. Counsel urged the court to dismiss the submissions that valuation of the charged property according to **section 97**of the **Land Act** predicated the right to sell. He argued that the applicants had frustrated the valuer who was only able to conduct the valuation upon the court's intervention. He argued that the respondents had exercised their statutory power of sale correctly and to stop them would be denying them the payments due to them.

30. In response, Mr. Oguttu countered that the certificate of postage annexed to the respondent's affidavit was the only evidence of service of the notices to the applicants. He argued that there was an admission of a defect in the postal address which the respondent attributed to the postal co-operation but the mistake could not be explained from the bar. He argued that where there is a dispute on the time of service it was upon the respondent to show such service as was held by the Court of Appeal in the case of ***Cooperative Bank vs Patrick Kang'ethe***

31. Counsel went on to submit that computation of time could only begin running when the registered parcel was directed to the address indicated in the charge instrument and that where there is an error on such on the address clause 30.5 of the charge was inapplicable as in this case. Counsel also submitted that service to stakeholders under **section 96 (3)** was mandatory and that the doctrine of *lis pendens* applies to all land matters without distinction.

ANALYSIS AND DETERMINATION

32. In determining an application for injunctive relief, the court is required to consider three factors which were set out by Spry J. VP in the case of ***Giella -v- Cassman Brown & Company Ltd (1973) EA 358***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. (E.A. Industries v Trufuoods, [1972] E.A. 420)"*

33. What constitutes a prima facie case was defined by the Court of Appeal in the case of ***Mrao Ltd v First American Bank of Kenya Ltd& 2 others Civil Appeal No 39 of 2002 [2003] eKLR*** as follows;

> *"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

34. There is no dispute that the applicants herein obtained a loan facility from the respondent for an initial sum of Kshs. 416,650,000/=. It is also agreed that to secure the facility, the applicants registered a charge on 13th December 2012 against the 1st applicants land parcel land parcel no. Kisii Municipality/Block111/195 in favour of the respondent. The respondent alleges default of repayment of the facility and has issued notices intending to exercise its statutory power of sale.

35. The applicants' main contention is that the respondent has failed to comply with the law in issuing statutory notices under **section 90, 96 (3)** and **section 84** of the **Land Act**. The applicants argue that the statutory notices issued by the respondent were invalid and that if the court fails to grant the orders sought, the intended sale will alienate the suit property beyond redemption.

36. Regarding the notice under **section 90** of the **Land Act**, the applicants contend that the notice dated 21st November 2018 was sent through an improper address which was only received by the applicants on 19th January 2019. They contend that service was improper and that computation of time could only commence once the notice had been received.

37. **Section 90** of th**e Land Act** provides;

> ***90 (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—*
>
> *(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;*

38. The respondent argues that the parties had agreed that service of notices by registered post by virtue of **clause 30.5** of the charge instrument which provides;

> *30.5 Notices*
>
> *That any notice required or authorized by law or by this Charge shall be deemed to have been properly served by the Chargee on the Chargor if served on any one of the directors or on the secretary of the Chargor or delivered to the Chargor at its registered office or at any of its principal places of business in Kenya or sent by registered post to its last known postal address or left at the Charged Property or sent by telex or facsimile to the Chargor's last known relevant address. Any notice hand-delivered as aforesaid shall be deemed to have been give upon delivery at the relevant address and any notice sent by registered post shall be deemed to have been served on the addressee at 10:00 a.m. on the seventh succeeding business day following the day of posting notwithstanding that it be undelivered or returned undelivered and, in proving service, it shall be sufficient to prove that the notice or demand was properly addressed and posted. Any notice or demand sent by telex or facsimile shall be deemed to have been served at the time of transmission.*

39. In the notice dated 21st November 2019, the respondent informed the applicants that they were in arrears of Kshs. 147,174,299.32/= and the total outstanding sum as at 30th November 2018 was Kshs. 777,498,736.69/-. The notice indicates the address for service as P.O. Box 3041 40200, Kisii. The charge instrument also provided the address for service upon the applicants as P.O. Box 3041- 40200, Kisii. However, the evidence on record shows that service might not have been properly effected as the certificate of postage annexed to the

respondent's affidavit and marked "JL 25"indicates that the notice was dispatched to Nairobi via P.O. Box 3041- 40200, Nairobi.

40. In the case of ***Cooperative Bank vs Patrick Kang'ethe Njuguna & 5 Others (Supra),*** the Court of Appeal held, that the statutory notice under **section 90** of the **Land Act** becomes operational upon service of the same upon the mortgagor and where there is doubt, then the matter is to be interrogated through evidence. The court further held that in the interim, the same attracts issuance of injunctive orders.

41. Upon issuance of the notice under **section 90** of the **Land Act**, a chargee who intends to exercise the statutory power of sale is also required to issue a notice under **section 96** of the **Land Act** which provides;

> ***96. (1)*** *Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.*
>
> ***(2)*** *Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.*

42. My understanding of the foregoing provision is that a notice of not less than 40 days shall be served on the chargor upon expiry of the 3 months' notice provided under **section 90**. The applicants contend that the notice under **section 96** was premature, as it was issued before the expiry of 90 days.

43. In ***Yusuf Abdi Ali Co Ltd v Family Bank Limited Civil Case No 405 of 2014 [2015] eKLR*** the court held;

> *19. As was rightly pointed out by the Plaintiff, the failure by the Defendant to issue the Notice that strictly complied with the provisions of Section 90 (2) of the Land Act rendered the said Notice of 16th May 2014 defective and null and void ab initio. Any subsequent notices issued pursuant to the Defendant's exercise of its Statutory Power of Sale were therefore invalid and could not confer any right on the Defendant to proceed as such. On this ground only, the purported sale of the subject property had no legal basis.*

44. The applicants have cast doubt on the service of the notice under section 90. If the court finds, upon trial, that the notice was not compliant with the provisions of the law, it would naturally follow that the notice issued under **section 96**was invalid. However, the invalidity of the notices will not necessarily entitle the applicant to the injunctive orders sought. The decision of the Court of Appeal in ***National Bank of Kenya Limited V Shimmers Plaza Limited Civil Appeal 26 of 2002 [2009] eKLR*** is instructive on this. The court in that case held;

> *An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned Judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.*

45. In this case, the applicant also alleged that it had not been notified of variations of the interest rate in accordance with the charge instrument and **section 84** of the **Land Act**. **Clause 3.1.4** of the charge instrument provides;

> *3.1.4. The charge shall pursuant to Section 84 (1) in the LA give the Chargor a Thirty (30) day Notice of the Variation in the interest rate.*

46. The respondent on the other hand argues that once they disbursed the first tranche of Kshs. 258,174,960.20/= on 18th January 2013 to the applicants, interest became payable on those sums. It is my considered view that at this stage, the applicants have not demonstrated that the interest rates were varied to their detriment.

47. The parties have also traded accusations of breach of contract with the applicants accusing the respondent of stalling the construction of the building on the suit property to their detriment. The applicant contends that the charging of interest during this period was usurious, prohibitive and calculated to hinder their right of redemption. In their plaint, the applicants have sought compensation for loss of rental income due to the delay they claim was caused by the respondent.

48. These claims were strongly contested by the respondent which blames the delay of the construction on the applicants. The respondent also accuses the applicants of failing to pay deposit which was a condition precedent for issuance of the facility. These are issues that cannot be settled at interlocutory stage.

49. Having demonstrated a *prima facie* case on the issue of notice the applicants are also required to prove that if the injunction is not granted, they will suffer irreparable injury, which would not be adequately compensated by an award of damages. The courts have held that once property is offered as security, it becomes a commodity for sale which the chargee may dispose of, to recover his debt. Section 99(4) of the Land Act also entitles the owner of any property unlawfully or irregularly sold to claim for damages.

50. I concur with the findings of the court in ***Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited Civil Suit No. 47 of 2018[2019] eKLR***

where the court held;

> *On second issue as to whether the Plaintiff might otherwise suffer irreparable injury which would be adequately compensated by way of damages. From the facts and materials presented, I find that as much as it is important to preserve the Plaintiff's right to property pursuant to article 40 of the constitution of Kenya, it is also of utmost importance that the interest and rights of the Chargee or Defendant Bank to the mortgage in question must be protected. I'm alive to the fact that the Plaintiff is likely to lose the suit property, which is his family home and his only source of livelihood. I wish to associate myself with the case of* ***Andrew M. Wanjohi –v- Equity Building Society & 7 Another (2006) eKLR****, where the court held inter alia that:"……...by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon."*
>
> *I wish to reiterate that since the suit property was given as security for the loan, it became a commodity for sale and it is therefore subject to sale in case of default in loan repayment in the event that the Chargee decides to exercise its statutory power of sale pursuant to the provisions of section 90 and 96 of the Land Act, 2012. The same proposition was taken by Ringera J in* ***Isaac O. Litali v Ambrose W. Subai & Others HCCC No.2092 of 2000(unreported); John Nduati Kariuki T/A Johester Merchants –vs- National Bank of Kenya Limited (2006) 1 EA 96; Thomas Nyakamba Okong'o vs Co-operative Bank of Kenya Limited (2012) eKLR and Maithya –vs- Housing Finance Co. of Kenya & Another (2003) 1 EA 133****.*

51. In the present case, the applicant was issued with a facility for a colossal sum of Kshs. 416,650,000/=. The applicants have not countered the respondents averments that further charges were issued to them or that the arrears on the facility was Kshs. 201,414,121.91/= while the outstanding balance was Kshs. 809,566,197.20 as of 21st March 2019. The respondent has further averred that the applicant had agreed to have the rental income applied towards repayment of the secured facility but this was not done. The applicants have not demonstrated that they are capable of paying the outstanding sums or that they have been paying the monthly installments as agreed. I find that in absence of such evidence the applicants will not suffer irreparable injury.

52. In the case of ***Mrao Ltd v First American Bank of Kenya Ltd& 2 others Civil Appeal No 39 of 2002 [2003] eKLR*** the Court of Appeal cautioned;

> *"In recent times a tendency has developed in the Superior Court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction in an ordinary suit. The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-*
>
> *"725 When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."(Emphasis added)*

53. It is apparent that the suit property has been developed using substantial sums given by the respondent. The respondent is apprehensive that the outstanding amounts under the facility might outstrip the value of the security. A look at the valuation report of the suit property dated 3rd July 2019 shows that the respondent's concerns are not farfetched. But having noted that the statutory notices issued under section 90 and 96 of the Land Act are rightly contested, I find that the applicants are entitled to a temporary injunction.

54. It is necessary at this juncture to mention that the doctrine of lis pendens, though still applicable in our legal regime, cannot be applied in this case.

55. In the case of ***Cooperative Bank vs Patrick Kang'ethe Njuguna & 5 Others (supra)*** the Court of Appeal discussed the doctrine of *lis pendens* thus;

> *51. Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:*
>
> *"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."*
>
> *52. Do courts still recognize the doctrine? The ITPA was repealed by the* ***Land Registration Act (LRA) Number 3 of 2013;*** *whose* ***Section 107 (1)*** *of the* ***LRA*** *provides for the saving and transitional provisions of the Act, and provides that:-*
>
> *"Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."*
>
> *53. Presently, the LRA does not prohibit the application of the doctrine of lis pendens; nor does any law for that matter. For this reason and in view of Section 107 aforesaid, this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see.* ***Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR)***

54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed Section 52 of the ITPA, an automatic prohibition of dealings or transfers of the property is only during the 'active prosecution' of the proceedings. Consequently, while the parties are automatically duty bound to preserve the property during the pendency of active proceedings, the same cannot be said of fresh proceedings that have just been filed and whose prosecution is yet to begin.

55. This conclusion is informed by the fact that lis pendens as applied in Kenya is heavily borrowed from the Indian system. However, unlike our system, the Indian one was amended to rid itself of the phrase 'active prosecution.' Consequently, in India, lis pendens kicks in from the moment proceedings are instituted, all the way through to the appellate stage. This has been the position adopted by the Supreme Court of India (see ***Jagan Singh v. Dhanwanti [2012] 2 SCC 628)****. Clearly, the plaintiffs under that system enjoy a wide berth in so far as the doctrine is concerned. To ensure that this new found freedom is not abused by unscrupulous plaintiffs-who may file frivolous suits in a bid to frustrate a legitimate owner's right to deal in his land, several safeguards were put in place; from levies of compensatory costs in frivolous proceedings, to expedited proceedings and compensatory damages against vexatious plaintiffs (see* ***Vinod Seth v. Devinder Bajaj & Another SCC No. Civil Appeal No. 4891 of 2010).*** *In Kenya, however, no such measures have been legislated regarding lis pendens. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in. Consequently, the contention that mere filing of suit operates as an automatic stay of dealings, fails.*

56. In the case of ***Nfatali Ruthi Kinyua vs Patrick Thuita Gachure & Another Civil Appeal No. 44 of 2014 [2015] eKLR***the Court reiterated that the doctrine of *lis pendens* is still applicable but noted that the doctrine can only be applied in certain circumstances. The court noted;

"As to whether the requirements of the principles of lis pendens were met there is no doubt that the instant case concerns property dispute, where the rights of the suit property are in serious contention."

57. In the end, I partially allow the application in the following terms;

a) The defendant/respondent is restrained either by herself, nominated agents, servants and/or anyone claiming and/or acting under the said defendant/respondent from exercising the statutory power of sale over and in respect of **LR No. Kisii Municipality/Block III/195(**hereinafter referred to as the suit property) and in particular, advertising for sale, selling vide public auction and/or private treaty, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1st plaintiff's / applicant's title, rights and/or interests therein, whatsoever and/or howsoever, until such time as the Defendant/Respondent shall have served the Plaintiffs/Applicants with valid statutory Notices in accordance with the law;

b) The costs of this application shall be in the cause.

Dated, signed and delivered at Kisii this 14thday of February 2020

R.E.OUGO

JUDGE

In the presence of;

Mr. Oguttu For the Applicants

Mr. Godia h/b Mr. Mutua For the Respondent

Ms Rael Court Assistant