REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E030 OF 2020

BETWEEN

INNERCITY PROPERTIES LIMITED.....PLAINTIFF

AND

HOUSING FINANCE.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

AND

JOSEPHINE MUKUHI.....1ST INTERESTED PARTY

HENRY NGANGA WAWERU.....2ND INTERESTED PARTY

RULING NO. 2

Introduction

1. The application for consideration in this ruling is the plaintiff's Notice of Motion dated 12th February 2020 made under **Order 40 rule 1** of the ***Civil Procedure Rules*** and it seeks the following order:

> *[3] THAT a temporary injunction restraining the 1st and 2nd Defendants whether by themselves, their servants and their agents from selling, dealing, interfering, alienating or disposing off all that parcel known as Apartments Nos. A2, A3, A9, B1, B2, B3, B4, B7, B8, B9, B10, C1, C2, C3, C9 and C10 on Title Number Dagoretti/Riruta/1807, within the development known as Zahara Gardens Apartments situated along Ngong Road, Nairobi pending the hearing and determination of the suit.*

2. The application was supported by the affidavit of Wilson Kirungie Gachanja sworn on 12th February 2020 ("the Supporting Affidavit") and his further affidavit sworn on 12th March 2020 ("the Further Affidavit"). The defendant opposed the application through the replying affidavit of Joseph Lule sworn on 19th February 2020 ("the Replying Affidavit").

3. Before the hearing of the application, the parties consented to Josephine Mukuhi Nganga and Henry Nganga Waweru being joined as interested parties. They also agreed that the affidavit of Henry Nganga Waweru sworn on 18th February 2020 be deemed to be the interested parties' affidavit in response to the application.

4. Both counsel for the plaintiff and respondent filed brief written submissions in support of the respective positions which they highlighted.

Background and undisputed facts

5. The plaintiff is the registered proprietor of a development known as Zahara Apartments situated on Dagoretti/Riruta/1807 ("the suit

property") on which it has constructed 30 residential apartments. In order to finance the development, it approached the 1st defendant ("the Bank") which, by a letter dated 17th July 2013, offered to advance it Kshs. 80,000,000/= repayable in 24 monthly instalments. The plaintiff accepted the offer and executed a charge dated 5th September 2013 in favour of the Bank.

6. The plaintiff admits at paragraph 10 of the Supporting Affidavit that as a result of the economic downturn, it could not sustain the sale of the apartments in the project which, *"rendered it difficult for the Plaintiff to keep up with the loan repayments in accordance with the agreed schedule."* The Bank therefore issued a statutory notice dated 13th October 2017 pursuant to **section 90** of the ***Land Act, 2012*** demanding Kshs. 92,198,438.75 due and owing as at 31st October 2017. Thereafter it issued a notification of sale dated 2nd February 2018 pursuant to **section 96(2)** of the ***Land Act, 2012*** notifying the plaintiff of its intention to sell the property for failure to pay Kshs. 83,395,645.85 due and owing as at 28th February 2018.

7. The Bank did not proceed to sell the suit property after the parties held a meeting on 26th July 2019 and 1st August 2019. In due course, the Bank through the 2nd defendant ("the Auctioneer") issued a 45-day notice dated 10th December 2019 and advertised the suit property for sale by public auction on 18th February 2020. The plaintiff moved this court for injunctive relief and on 14th February 2020, I did issue a temporary injunction restraining sale pending determination of the application now before the court.

Plaintiff's Case

8. The grounds upon which the plaintiff's application is based, are set out on the face of the application, the depositions and oral and written submissions made by counsel for the plaintiff. The plaintiff contended that the statutory notice and notification of sale issued by the Bank are null and void in so far as they referred to its intention to sell the suit property despite the fact that it knew that the plaintiff had already sold a significant number of apartments and paid over the proceeds to the Bank in accordance with the terms of the loan agreement.

9. The plaintiff also contended that following meetings held on 26th July 2019 and 1st August 2019, the parties discussed and reached an agreement which was memorialized in a letter dated 3rd August 2019 written on behalf of the plaintiff by Mr Gachanja. According to the plaintiff, the parties agreed as follows:

> *(i) Housing Finance to provide a rebate on the interest levied and discount the amount due on the Zahara loan account to the total sum of Kshs. 78M ("the Settlement Amount") in full and final settlement of the loan (thereby according Innercity rebate of approximately Kshs. 16M);*
>
> *(ii) The Settlement Amount be raised from the sale of the remaining 16 Apartments, which Apartments shall be sold by Housing Finance at the open market for a minimum and further discounted amount of Kshs. 5.25M per Apartment;*
>
> *(iii) The proceeds shall be applied towards the payment of the Zahara Loan account and any surplus shall be credited into the Riara Loan account.*
>
> *(iv) Housing Finance shall accord Innercity time to address the issue of the Riara loan and assist Innercity with joint marketing and sale of other properties earmarked by Innercity for sale with the aim of liquidating the Riara Loan Account.*

10. The plaintiff averred that following the agreement, the plaintiff ceded its responsibility to sell and market the apartments to the Bank as evidenced by the fact that the Bank embarked on a marketing promotion by offering the remaining apartments for sale at a discounted price of Kshs. 5,250,000/=. Further, the plaintiff did issue and execute letters of offer to 3rd party purchasers nominated by the Bank.

11. The plaintiff complained that in turn of events, the Bank forwarded to it a letter of offer dated 22nd August 2019 which was contrary to the agreement reached. In that letter, the Bank made a counteroffer of Kshs. 84,000,000/= in full and final settlement of the plaintiff's indebtedness subject to the following terms and conditions;

> *i) That the selling price of Kshs. 5.25M shall be communicated to all interested buyers throughout the marketing/sales period.*
>
> *ii) That vacant possession of all the 16 rented units shall be availed to the interested buyers with effect from 30th September 2019.*
>
> *iii) That you shall on or before 30th August 2019 serve all tenants in the development with a notice to vacate the premises, with the tenants required to have vacated on or before 30th September 2019.*
>
> *iv) That the settlement amount is to be raised from the sale of the remaining 16 apartments through intense marketing by HFC and agents of your choice at the agreed price of Kshs. 5.25 Million per unit. That this price shall only be reviewed with the written consent of yourself and the Bank.*
>
> *v) That all sales proceeds shall be channeled to HCF by [RTGS to its named Bank Account].*
>
> *vi) That the title documents and a duly executed partial discharge of charge shall be released to the purchasers advocates upon receipt of the entire purchase price or against acceptable bank undertakings in case of Bank financing.*
>
> *vii) That upon receipt of the agreed settlement amount of Kes. 84,000,000/= as stipulated above, the company shall liquidate all your indebtedness relating to this account and forego any resultant shortfall that shall arise on the loan balance. Please note that*

the company shall not be responsible for any incidental costs or losses that may arise out of this transaction.

viii) That in the vent of undue delays in the remittance of the negotiated amount or non-cooperation from yourselves, the concession shall be rescinded and the Bank shall claim the full amount outstanding plus interest at the rate of 13% per annum over and above the subsisting rate of interest, currently 13% (which may be varied by the lender) until full redemption.

12. The plaintiff's contention is that the letter dated 22nd August 2019 by the Bank was in breach of the parties negotiated agreement. The plaintiff contended that the parties had agreed on Kshs. 78,000,000/= as the full and final settlement and that by acting the terms of the negotiated agreement, they became bound by it. The plaintiff urged that it relied on the agreement to its detriment as it was led to believe that it was legally binding. Counsel submitted that on the basis of the facts, the agreement had all the ingredients of a valid and enforceable contract. Counsel cited the case of ***Eldo City Limited v Corn Products Kenya and Another*** **HCCC No. 37 of 2013 [2013] eKLR**.

13. The plaintiff submitted that the effect of the agreement was to compromise the statutory notice issued by the Bank and it became null and void and could not support the proposed sale of the suit property by public auction. The plaintiff further argued that the process of sale was irreversibly compromised once the parties agreed to sell the apartments by private treaty and when the Bank took control over the sale of the apartment at an agreed price of Kshs. 5,200,000/= which was sufficient to liquidate the outstanding loan.

14. Counsel for the plaintiff also submitted that the statutory notice was illegal, fatally defective and void on the ground that the loan was advanced for development of 30 apartments on the suit property which were to be sold to liquidate the entire loan hence it was improper for the Bank to purport to sell the entire property when it had already sold specific apartments.

15. As regards the Auctioneer's 45-day notice dated 10th December 2019, the plaintiff submitted that this was issued contrary to the agreement reached by the parties. The plaintiff decried the fact that the auctioneer's notice listed Apartments No. A2, A3, A9, B1, B2, B3, B4, B7, B8, B9, B10, C1, C2, C3, C9 and C10 as subject of the public auction yet the statutory notices did not make reference to those apartments. Further, that auctioneer's notice ought to have been preceded by the 90-day statutory notice and a further 40-day notice indicating the specific property subject of the sale since the earlier notice had been compromised by the agreement.

16. The plaintiff also complained about the valuation of the suit property. It submitted that the auctioneer's notice indicated that the forced sale value of each apartment as Kshs. 4,200,000/= which it contended represented a gross undervalue and which was reached without the benefit of an independent valuation. In its view, the sum of Kshs. 5,250,000/= for each apartment was the agreed forced sale value which was arrived at by computing the 75% of the open market value known to both parties at approximately Kshs. 7,000,000/= as the Bank had sold the apartments at between Kshs. 7,000,000/= and Kshs. 7,500,000/=. The plaintiff added the valuation report provided by the Bank also contradicts the value of Kshs. 7,500,000/= given by the Government Valuer.

17. The plaintiff also complained that the Auctioneer's 45-day notice claimed Kshs. 104,074,484.85 as due whereas the parties had agreed on Kshs. 78,000,000/= as the full and final settlement of the loan account. In any event, it argued that the amount claimed was grossly inflated and that the Bank failed to apply the interest rate caps and the *in duplum* rule under the ***Banking (Amendment) Act, 2016***. Apart from the exorbitant and unlawful interest rates, the plaintiff submitted that since the notice exposes the plaintiff to further costs and charges not envisaged under the agreement, its right to redeem the property was fettered and hence an injunction was justified.

18. The plaintiff stated that it would suffer irreparable loss and damage as the Bank was undertaking two parallel processes in total disregard of the agreement. Despite seeking to auction the suit property, it was still aggressively marketing the apartments on its website and other forums and indeed promoting rival apartments in the area to the detriment of the plaintiff as intended purchasers were now spoilt for choice. Counsel relied on ***Beatrice Wathanu Waithaka v Kenya Women Micro-Finance Limited and Another*** **ELD HCCC No. 20 of 2018 [2019] eKLR** to submit that the court ought to grant an injunction in view of the demonstrated grounds for relief.

Interested Parties Position

19. The interested parties informed the court that they had purchased apartments Nos. B3 and B4 from the plaintiff, paid the full purchase price and were currently in occupation. They supported the plaintiff's application since the two apartments were scheduled for auction as evidenced by the Auctioneer's 45-day notice and advertisement for sale. They submitted that if the apartments are sold, they would suffer substantial loss and damage.

Defendants' Case

20. The defendants opposed the plaintiff's application. They contended that the plaintiff had admitted that it had defaulted in its loan obligations and that the outstanding amount as at 31st January 2020 was Kshs. 106,766,744.77. That the Bank had issued the requisite statutory notice including the auctioneer's notice which entitled it to exercise its statutory power of sale. The Bank stated that the suit property was duly valued by Pinnacle Valuers as demonstrated by the valuation dated 1st November 2019.

21. The Bank denied that there was any agreement as alleged by the plaintiff. According to the Replying Affidavit, after the Bank expressed it desire to exercise its statutory power of sale, the plaintiff approached it to seek accommodation. Following discussions, the Bank made an offer to the plaintiff contained in the letter dated 22nd August 2019 on an, *"exceptional and without prejudice basis"* and which was tenable for 7 days. The Bank stated that the offer was ultimately not accepted by the plaintiff hence there was no agreement.

22. Mr Lule explained that between December 2013 and 2016, the plaintiff approached the Bank seeking consent to sell various apartments. The Bank gave its written consent as requested for apartments A1, C4, A7, C7, A4, A10 and B6. Those apartments were not listed for sale by auction as they had either been paid for in full or in part. As regards the position of the third parties, Mr Lule deponed that the sale to them was without consent of the Bank. On the basis of the evidence, counsel for the defendant submitted that the sale of the suit property would be

subject to the registered interests of the 3rd party purchasers. He added that the interested parties herein having purchased their apartments with the Bank's consent could not make any claim against the Bank. Counsel cited ***Kenya National Capital Corporation Limited v Albert Mario Cordeiro and Another*** **NRB CA Civil Appeal No. 274 of 2003 [2014] eKLR** and ***Agriculture Finance Corporation v Lengetia Ltd*** **[1985] eKLR** to support the position that the 3rd party, having no direct contract with the Bank, had no cause of action against the Bank.

23. Counsel for the Bank submitted that the Bank complied with all the requisite provisions of the law regulating the Chargee's statutory power of sale. That following admitted default by the plaintiff, it was entitled to exercise its power of sale. Counsel cited several decisions among them ***Mrao Limited v First American Bank of Kenya Ltd & 2 Others*** **MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR**, ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd and Another*** **NRB CA Civil Appeal No. 95 of 199 [2001] eKLR** and ***Joppa Villas LLC v Private Investment Corporation and 2 Others*** **MKS HCCC No. 215 of 2008 [2009] eKLR** and submitted that the court should not intervene whether the plaintiff admitted default of the loan agreement and that in the circumstances it was inequitable to grant any injunction in the plaintiff's favour.

Determination

24. The application before the court is for an interlocutory injunction under **Order 40 rule 1** of the ***Civil Procedure Rules***. The principles for the grant of an injunction are well settled. The Court of Appeal in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** recently reiterated the settled principles set out in ***Giella v Cassman Brown*** **[1973] EA 358** 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.*
>
> *These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.*

25. The plaintiff seeks to restrain the Bank for exercising its statutory power of sale. It does not dispute that it is indebted to the Bank. Its case is that the Bank is claiming more than it had agreed to accept from the plaintiff to settle its indebtedness and that the amount claimed includes interest that is contrary to the provisions of the ***Banking Act***. The plaintiff does not dispute that the Bank issued and that it received the requisite notices under **sections 90** and **96** of the ***Land Act, 2012*** and the auctioneer's 45-day notice issued under **Rule 15** of the ***Auctioneers Rules***. It argues that the same are null and void in view of the agreement reached by the parties to resolve the matter and proceed with a different mode of recovery of the outstanding amount as agreed.

26. I am aware that this is an application for interlocutory injunction and in assessing whether there is a prima facie case, I am not called upon to determine and I should not pronounce myself definitively on contested issues of fact or law. Having considered the facts presented in the respective depositions and the submissions, I find that there are two issues for determination;

> (a) Whether the parties entered into an agreement which superseded the Bank's right to exercise its statutory power of sale.
>
> (b) If so, whether the Bank's statutory power of sale has accrued.

27. It is not disputed that the plaintiff and defendant representatives had a meeting on 26th July 2019 and 1st August 2019. According to the plaintiff, the parties reached an agreement which it captured in the letter dated 3rd August 2019. The Bank takes the view that following the discussions, it considered the plaintiff's proposed terms and it made a counter-offer in its letter of offer dated 22nd August 2019 which was not accepted.

28. For there to be a valid agreement, the must be a valid offer which must be accepted by the other party. There is evidence that there were oral discussions between the parties but they did not result in an agreement. After setting out the terms of what it considered was the agreement reached at the meeting in the letter dated 3rd August 2019, the plaintiff concluded that, *"We trust that the foregoing captures the outstanding issues and would be grateful to receive your response."* The response received from the Bank was in terms of the letter of offer dated 22nd August 2019. I therefore hold that there was no agreement reached by the parties. Even if I accept that there was an agreement, Clause 30.11 of the Charge documents provides that, *"No alteration, amendment, variation or addition to this Charge shall be effective unless made in writing and executed by the Chargee."* This clause forecloses an oral agreement or an agreement not executed by the Bank. Although the letter of offer was executed by the Bank, it was not accepted by the plaintiff.

29. The plaintiff relied on the doctrine of estoppel to argue that to support its case. In ***John Mburu v Consolidated Bank of Kenya*** **CA Civil Appeal No. 162 of 2015 [2018] eKLR,** the Court of Appeal affirmed the position regarding estoppel elucidated by Lord Denning, MR in ***D & C Builders v Sidney Rees*** **[1966] 2 QB 617** as follows:

> *It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when*

it would be inequitable having regard to the dealings which have taken place between the parties.

30. The plaintiff referred to the fact that the Bank continued to aggressively advertise sale of the apartments on its website at the price of Kshs. 5,250,000/= purportedly agreed upon and that the plaintiff had accepted offers from purchasers referred to it by the Bank. I have seen the letters of offers dated 6th September 2019 for Apartment B9, 13th September 2019 for Apartment C9 and the letter of offer dated 8th October 2019 for apartment B2. The letters of offer were not signed by the Bank. The plaintiff did not produce any sale agreement which would follow the offer letter nor adduce evidence of payment of a deposit to the Bank. There is no evidence that the Bank consented to any sale or indeed received any money on account of the letters of offer exhibited by the plaintiff. I find and hold that the evidence of estoppel produced by the plaintiff is featherweight.

31. In so far as the plaintiff's case is founded on an agreement or on estoppel based on the parties' agreement, I find that the plaintiff has not established a prima facie case with a probability of success. It follows that the statutory notice and all subsequent notices were not compromised and are indeed valid.

32. Turning to the statutory notice and the Auctioneer's 45-day notification of sale, the gravamen of the plaintiff's case is that the Bank was attempting to auction the entire suit property yet it had already sold some apartments. It argued that the statutory notice was irregular, illegal, null and void to the extent that the exercise of the power of sale over the suit property including the apartments already sold with the Bank's consent.

33. I reject the plaintiff's argument. The subject charge is in respect of the entire suit property and not part of it. Where an apartment is sold with the consent of the Bank, it only goes to clear part of the debt and the Bank issues a partial discharge only to the extent of the apartment. Thus when the charged property is sold, it is sold subject to the registered interests of the purchasers of those apartments that have been sold. The statutory notice referring to the entire property is therefore valid.

34. Besides, the statutory notice is intended for the Chargor to know the amount he should pay to redeem the entire property subject to the interests of the registered owners who purchased the apartments. The amount demanded includes credit for the amount received on sale of the apartments. The fact that the statutory notice does not refer to the sold apartments does not in any way impede the Chargor's equity of redemption. On the other hand, the notification of sale and advertisement must state the apartments available for sale as this determines the value of the property. Further, any bidder is entitled to know that the property on sale is subject to the interests of the bona fide purchasers who are registered owners of apartments purchased with the consent of the Bank. I therefore hold that the 45-day auctioneer's notice cannot be challenged on that basis.

35. Under **section 97** of the ***Land Act***, a chargee is expected to exercise a duty of care towards a chargor, failing which it would be liable for breach of duty of care. The relevant provisions states as follows:

> *97(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 a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced 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.* [Emphasis mine]

36. The aforesaid provision is to be read with **Rule 11 (b) (x)** of the ***Auctioneers Rules*** which stipulates that:

> *The reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.*

37. The effect of these provisions is that the Bank is required to carry out a valuation 12 months prior to the proposed sale. Pinnacle Valuers Limited carried out a valuation dated 1st November 2019 which is about 6 months prior to the proposed date of sale. The valuation established that the market value of each apartment was Kshs. 5,500,000/= and the forced sale value was Kshs. 4,200,000/= making the forced sale value of the apartments on sale Kshs. 67,200,000/=.

38. The plaintiff's complained that this was an undervalue compared to the value of actual sales and the assessment by the Government Valuer. I find that the Bank discharged its obligation and the report cannot be impugned on the basis stated by the plaintiff in the absence of another valuation report by an expert. In his oral submission, counsel for the plaintiff submitted that the proposed sale could only be on the basis of a valuation conducted before the statutory notice was issued. Counsel relied on the decision in ***Beatrice Wathanu Waithaka v Kenya Women Micro-Finance Limited and Another*** **(Supra)** where the court held that **section 97(2)** of the ***Land Act, 2012*** was violated when the Chargee relied on a valuation report prepared after the statutory notice was sent.

39. The language of **section 97(2)** of the ***Land Act*** and the **Rule 11(b)(x)** of the ***Auctioneers Rules*** does not support the contention that the valuation must take place before the statutory notice is issued. The power of sale is exercised when the actual sale takes place. The Chargee issues the statutory notice only to evince its intention to sell. Such a sale may never take place and to insist that a valuation be done before issuing the notice would, apart from the fact that this is not mandated statute, impose an undue burden on the Chargor who would have to bear the expense notwithstanding that the property may never be sold.

40. As regards the issue of the rate of interest applicable and the allegation that the claim for Kshs. 106,000,000/- violates the *in duplum* rule under the ***Banking Act***, I am not convinced that the same would entitle the plaintiff to an injunction. The plaintiff has already admitted its indebtedness. It has not made any payment for some time and a successful claim on that basis would only reduce the amount due to the Bank. It is trite law that a chargee will not be restrained from exercising the power of sale merely because the amount in issue under the charge is disputed (See ***Kenya Commercial Bank Limited v Pamela Akinyi Ochieng*** **NRB CA Civil Appeal No. 114 of 1991 (UR),** ***Shimmers Plaza***

Limited v National Bank of Kenya Limited **CA Civil Appeal No. 33 of 2012 [2013] eKLR** and ***Joseph Okoth Waudi v National Bank of Kenya Limited*** **NRB CA Civil Appeal No. 77 of 2004 [2006] eKLR**).

41. The interested parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the Bank. Since the Bank is the Chargee, it must give its consent to the plaintiff to sell the property. The interested parties have not shown that they received the Bank's consent to the purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the Bank, the court cannot issue an injunction in their favour. As was stated in ***Agriculture Finance Corporation v Lengetia Ltd*** **(Supra)**,

> *As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him a right to sue or to make it liable upon it.*

42. At this stage I would venture to state that the claim by the interested parties shows that the plaintiff purported to sell apartments B3 and B4 to the interested parties without the Bank's consent and without utilizing the proceeds to settle part of the outstanding debt. This conduct, in my view, would disentitle the plaintiff equitable relief.

43. On the basis of the issues raised, I find that the plaintiff has not established a prima facie case with a probability of success. Even if I were wrong in my conclusion, I still find that the plaintiff has not shown that the damages are not an adequate remedy. The plaintiff in the supporting affidavit stated that it was a property developer and that it developed the suit property with the intention of selling them on the open market. As the plaintiff has admitted its indebtedness, the question of it suffering loss that cannot be compensated by damages does not arise. In any event, there is no evidence that if the plaintiff's case succeeds, the defendant will be unable to compensate it for any loss.

44. Finally, the balance of convenience is against the plaintiff. The grant of an injunction would merely postpone the day of reckoning in view of the admitted indebtedness. During this time the interest would continue to accrue and increase substantially in proportion to the value of the security thus imperiling the Bank's prospects of recovery of the debt.

Disposal

45. For the reasons, I have set out above, I dismiss the Notice of Motion dated 12th February 2020 with costs to the defendants.

DATED and DELIVERED at NAIROBI this 8th day of APRIL 2020.

D. S. MAJANJA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Enonda instructed by Muema Kitulu and Company Advocates for the plaintiff.

Mr Kimani instructed by Walker Kontos Advocates for the defendants.

Mr Gathaiya instructed by Gathaiya and Associates Advocates for the interested parties.