REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO 145 OF 2019

FRANCIS MBARIA WAMBUGU.....PLAINTIFF/APPLICANT

VERSUS

JIJENGE CREDIT LIMITED.....1ST DEFENDANT/RESPONDENT

NAIROBI CHANNELS AUCTIONEERS.....DEFENDANT/RESPONDENT

R U L I N G

1. **Francis Mbaria Wambugu** approached **Jijenge Credit Limited**, a licenced financial institution, about April 2018 seeking a loan facility in the sum of KShs.3,653,708/=. He offered as collateral his land parcel described in the charge instrument executed between the parties on 6th April 2018 as **KIAMBU MUNICIPALITY BLOCK II/120/KIAMBU TOWN**. The charge is in respect of a sum of KShs.3700,000/= which sum, by virtue of recital **C** of the charge, the borrower acknowledged receipt.

2. The charge was registered on 12th April 2018. By the instrument, the borrower created a legal charge over the land parcel KIAMBU MUNICIPALITY/BLOCVK II/120 and developments thereon (hereafter the suit property). The open market value of the suit property as per the valuation report by **GIMCO Ltd** dated March 16, 2018 was KShs.36,800,000/= while the mortgage and forced sale value were stated to be KShs.29,440,000/= and KShs.27,600,000/=, respectively. The loan was apparently to be repaid in one instalment by 30/6/18 per the terms of the Loan Agreement executed and on 31st May 2018 by **John Mbaria Wambugu** the borrower, his wife **Mary Waithira Mbaria** (the latter being described as co-borrower/guarantor), of the one part, and **Jijenge Credit Limited ,** the lender**,** of the other part**.** According to the said agreement and **clause 3:1** of the charge instrument, the loan would attract an interest rate of 8.0% p.m. and a default (penalty) interest of 30% p.m., among other charges.

3. It appears that the John Mbaria Wambugu was unable to meet his obligation to repay the debt when it fell due, as a consequence of which Jijenge Credit Limited served several demand notices among these dated on 4th July 2018, 12th July 2018 and 19th July 2018 upon the borrower, but not the co-borrower/guarantor. The debt however was not paid and in August 2018 the lender commenced the process of realization of the security by issuing the relevant notices and at the same time effected the Deed of Assignment of Rental Income apparently executed between the lender, borrower and co-borrower/guarantor contemporaneously with the charge instrument. Thus, by May 2019, the total recoveries from direct payment by the borrower and from rents collected by the lender was about KShs.2000,000/= odd.

4. The borrower, John Mbaria Wambugu (hereafter the Applicant) approached this court under certificate of urgency on 25th February 2019 after Jijenge Credit Ltd, (hereafter the 1st Respondent) through Nairobi Channels Auctioneers advertised the intended public auction of the suit property on 27th February 2019. It appears that by February 2019 the total outstanding loan stood at KShs.45 million odd. In his application brought under Order 40of the Civil Procedure Rules and filed simultaneously with the plaint, the Applicant sought to restrain the Respondents "from dealing, interfering, alienating or otherwise *disposing the Plaintiffs property known as LR No. KIAMBU MUNICIPALITY/BLOCK II/120"* (sic) pending the determination of the application and of the suit.

5. There are four core complaints stated in the grounds supporting the application and the supporting affidavit. These are:

(a) that the suit property is matrimonial property and that the Applicant's wife who had given spousal consent to the charge had not been served with the statutory notices.

(b) that no current valuation report had been served on the Applicant.

(c) that the 1st Respondent had applied punitive interest and penalties as a result of which the debt had grown exponentially making it impossible for the Applicant to settle his liabilities.

(d) that in light of the foregoing the 1st Respondent's statutory power of sale has not arisen and that the intended public auction was unlawful and if not stopped, would cause the Applicant irreparable damage.

6. The court granted exparte the prayer seeking injunction pending the determination of the application and directed that hearing proceeds on 12/3/19 but the matter was adjourned on that date. On 17th Mary 2019, the 1st Respondent filed its Replying affidavit through **Peter Macharia Kamau**, described as the Managing Director (MD) of the 1st Respondent herein. The deponent disputed claims that the charged property was matrimonial property and asserted that the Applicant was the sole proprietor thereof and sole loan Applicant. Recounting the 1st Respondent's compliance with statutory requirements upon the Applicant's default, the deponent stated that a current valuation report was available upon request; that the loan outstanding as at May 2019 was KShs.103,347,960/= due to penalties arising from default by the Applicant; that the 1st Respondent had only realized KShs.400,000/= paid directly by the Applicant and KShs.1,551,870/= under the Deed of assignment of rental income and that the 1st Respondent is entitled to realize the security; and finally, that the motion by the Applicant is without merit.

7. Subsequently the Applicant filed a further affidavit reiterating earlier depositions and supplying annexures in support thereof. On 17.9.2019 directions were made for the filing of skeletal written submissions in preparation for the canvassing of the application. The parties complied and only reiterated the contents of their respective written submissions at the hearing.

8. The Applicant's submissions were premised on the principles enunciated in **Giella v Cassman Brown and Co. Ltd. (1973) EA 358.** Firstly, it was argued that the 1st Respondent had not complied with the requirement of Section 97(2) of the Land Act before seeking to exercise its right of sale, in that no forced sale valuation had been undertaken. It was the Applicant's position that the valuation report dated 16th March 2018 was not current at the time the chargee sought to exercise its statutory power of sale as one year had already lapsed. The case of **David Gitome Kuhiguka v Equity Bank Ltd [2013] e KLR** was relied upon in that regard. It was also the Applicant's contention that the terms of the charge , specifically what are referred to as "punitive" interest and penalty charges were crafted in a manner to render it impossible for the Applicant to ever repay the loan thereby defeating the Applicant's proprietary rights in the charged property.

9. The Applicant asserts that the said loan agreement contains unconscionable terms and citing as evidence, the exponential growth of the debt in one year. Relying on several decisions, including the Court of Appeal decision in **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Ltd [2014] e KLR** the Applicant urged the court to invoke its equitable jurisdiction and to intervene in his favour. Finally, the Applicant asserted that the 1st Respondent had failed to comply with the requirement in Section 96(3)(c) of the Land Act by its failure to serve the notice of sale upon the Applicant's wife who had given spousal consent to the charge. On damages, the applicant asserted that he stands to suffer irreparably if he loses the charged asset which is a prime property, and contends that in view of its value, the 1st Respondent will not lose its money. And that the balance of convenience tilts in favour of the Applicant. The court was urged to allow the application.

10. For the Respondents, it was submitted that the 1st Respondent had duly complied with the provisions of Section 97(2) of the Land Act by obtaining a recent valuation prior to advertising the suit property for sale by public auction. The Respondents cited as evidence of such compliance the valuation reports dated 16th March 2018 and 26th February 2019, the latter which was annexed to the submissions. On this score it was noted that the Respondents' affidavit in reply had contained two valuation reports marked annexure **JCL 3** and **JCL 9** but both were dated 16th March 2018. The valuation report attached to submissions is also marked as annexure **JCL 3** but bears the date 26th February 2019. Thus, the Respondents asserted that the annexure to their submissions rebuts the Applicant's assertions concerning their non-compliance with Section 97(2) of the Land Act.

11. Further, the Respondents submitted that the Applicant had freely entered into the loan agreement with and executed the charge in favour of the 1st Respondent and that his complaints that the terms thereof were onerous are an afterthought. Besides, the courts do not bear the duty to rewrite contracts between parties. Concerning service of notice upon the Applicant's spouse, the Respondents assert that the suit property was not matrimonial property, that the role of the said wife was that of a guarantor and that the Respondents had confirmed that the charged property solely belonged to the Applicant. Emphasizing that the Applicant was in default, the Respondents state that they stand to suffer more losses if the application is allowed. They urged the court to dismiss the application.

12. The court has considered the rival affidavit material and parties' submissions. The basic facts leading up to this cause are not in dispute. The Applicant and the 1st Respondent entered into a loan agreement as borrower and lender, respectively in May 2018. As security for the loan facility the Applicant created a charge in favour of the 1st Respondent over the Applicant's property namely **LR NO. KIAMBU MUNICIPALITY/BLOCK/II/120**. Although the Applicant claims to have received a sum of KShs.2,600,000/= only the loan account, the charge was in respect of a sum of KShs.3,700,000/= to be advanced to the Applicant and the receipt thereof was acknowledged in the recitals part of the charge document. Be that as it may, under the loan agreement the loaned sum attracted interest at 8% p.m. and a penalty levied at 30% p.m. in the event of default. The loan amount was to be repaid by 30th June 2018. The Applicant defaulted in repaying the loan on the dates agreed. Whereupon the 1st Respondent initiated the process of realizing the security by serving requisite notices and eventually advertising the property for sale by public auction.

13. In the meantime the 1st Respondent had taken steps to enforce the deed of assignment of rental income apparently executed contemporaneously with the charge, and as at May 2019 had collected rent from the charged property to the tune of KShs.1.5 million odd. Admittedly, the Applicant had by that date directly paid some KShs.400,000/= odd on the loan account. According to the 1st Respondent , the sums outstanding as at May 2019 stood at KShs.103,347,960/=.

14. The court must determine whether the Applicant has made out a case for the grant of an interlocutory injunction. Although the Applicant has not invoked the provisions of Order 40 Rule 1 of the Civil Procedure Rules in the motion it is clear that the motion is bought under the said provisions which state:

"1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,-

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".

15. The principles governing the grant of interlocutory injunctions are settled. In **Ngurumani Limited v Jan Bonde Nielsen & 2 others [2014] e KLR** the Court of Appeal restated the principles enunciated in the *locus classicus* **Giella v Cassman Brown & Co. Ltd [1973] EA 358** at page 360 where it was stated that;

"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 the application on the balance of convenience. (E. A Industries vs Trufoods [1972] EA 420)."

16. The Court of Appeal further stated in Nguruman Ltd that:

"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at lease over four decades since Giella case, they could rather be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief 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) demonstrated irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor."

17. In addition, the Court emphasized that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

18. As to what constitutes a *prima facie* case, the Court of Appeal expressed itself as follows: -

"Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for *"prima facie case"* in civil cases in the following words:

"In civil cases, a *prima facie* case 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 to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that 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."

19. The Applicant in this case has raised three distinct core complaints against the Respondents, more specifically the 1st Respondent. The first relates to the alleged failure by the 1st Respondent to comply with the provision of Section 97 of the Land Act subsection (1) and (2) there of which provide that:

"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."

20. On a plain reading, these provisions impose a duty on the chargee to ensure that a forced sale valuation is undertaken by a valuer before exercising the power of sale which has arisen. The chargee contends that its statutory power of sale had arisen by the date of advertising the sale of the suit property by public auction. The 1st Respondent attached two valuation reports marked **JCL 3** and **JCL 9** to its replying affidavit. Both bear the same date i.e 16th March 2018 and as the terms of reference therein indicate, had been prepared for the purpose of advising on the market value of the suit property for purposes of the mortgage. Even if this court were to accept that the filing of two similar reports was an error on the part of the said Respondent, and therefore deem the valuation report surreptitiously attached to the 1st Respondents submissions, and dated 26th February 2019 (also marked annexure **JCL3**) as the proper valuation report intended to be annexed to the Replying affidavit, that would not mark the end of the matter.

21. This is because, the 1st Respondent had proceeded to instruct Nairobi Channels Auctioneers (the 2nd Respondent herein) to sell the suit property as early as July 2018 *vide* the letter of instruction dated 5/07/2018 (annexure **JCL 5**); and had thereafter served three subsequent demand notices upon the Applicant by November 2018 , before issuing yet another letter of instruction to the same auctioneers on 15.11.2018 (Part of annexure **JCL 4**). The auctioneers subsequently proceeded to advertise the suit property for sale by public auction *vide* advertisements in the Standard Newspaper of 11th and 25th February 2019 [annexure **JCL 6**). The auction was set for 27th February 2019. All these realization steps were taken before valuation was undertaken as the valuation report presented with submissions by the 1st Respondent is dated 26th February 2019.

22. The requirements of Section 97(2) of the Land Act are not a mere formality but are intended to ensure that the charged property obtains the best price reasonably obtainable at the time of sale. Section 97 imposes a duty of care upon the chargor to the chargee whose breach may lead to the consequences set out in the section. The 1st Respondent's letter of instruction to the valuer attached to the report filed at the hearing of the application is dated February 2019 and although the actual date is illegible, the letter bears a received stamp by **Gimco Ltd,** the valuer, dated 19/2/2019. Evidently several realization steps had already been taken by that date. The exercise of the chargee's power of sale around the time when the chargee effects the service of notification of sale and gives the instructions to the auctioneer to conduct a public auction. It does not start at the public auction but with the commencement of the attendant steps leading up to the sale. .

23. It is therefore not open to a chargee to so to speak run ahead of himself by putting in place plans for the sale of the chargor's property before taking mandatory steps in compliance with Section 97 (1) and (2) of the Land Act. The receipt of the forced sale valuation by the 1st Respondent on the eve of the scheduled public auction in this case does not appear consistent with the diligent performance of the duty of care imposed upon the chargee, and suggests that the 1st Respondent treated the requirement in Section 97 (2) of the Land Act as a casual step. Thus, the chargor's earlier steps in effecting sale were based on a 2018 valuation. The Applicant's complaint on this score has considerable merit in my considered view.

24. The second, and in my opinion more serious complaint raised by the Applicant adverts to the clogging of his equity of redemption, based on the interest and penalty rates levied in the charge document. The Applicant asserts that these charges rendered it impossible for him to ever repay the loan and therefore redeem his property. To which the 1st Respondent responds, correctly, that courts do not rewrite contracts for parties. But it is necessary to further examine the complaint. The loan documents indicate that the advanced sum was to be repaid in one instalment in June 2018. Interest was set at 8% per month and penalty levied with default at 30% per month.

25. Consequent to the Applicant's default, the debt exponentially mounted so that by May 2019 (a period of one year since the advance) it stood at over KShs.100,000,000/=. Even assuming that the Applicant received the entire loan sum of KShs.3,700,000/= in May 2018 and did not pay back any money, the resultant debt after a year is ex facie remarkable. The bargain may or may not be harsh and unconscionable as asserted by the Applicant but the more pertinent but related concern in the court's mind is the application of the common law *In duplum* rule to the facts of this case, and tied to that, the apparent threat to the Applicant's equity of redemption.

26. Concerning the *In duplum* rule imported via the enactment of Section 44A of the Banking Act in 2007 , the Court of Appeal stated in **Kenya Hotels Ltd v Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited) [2019] e KLR** that:

"*In duplum"* is a Latin phrase derived from the word *"in duplo"* which loosely translates to *"in double".* Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May, 2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga V. Habib Zurich Finance (K) Limited & another [2016] eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.

"The *In duplum* rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the *in duplum* rule is meant to protect both sides".

See Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR

See **Mwambeja Ranching Company Limited & Another v Kenya National Capital Corporation [2019] e KLR.**

27. The rule was recently reiterated by the Court of Appeal in **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & Another [2020] e KLR** as in the following terms:

> **"As we have shown section 44A of the Banking Act came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A(2):**
>
> **"The maximum amount referred in subsection (1) is the sum of the following –**
>
> **a) The principal owing when the loan becomes non -performing;**
>
> **b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non- performing; and**
>
> **c) Expenses incurred in the recovery of any amounts owed by the debtor."**
>
> **By that provision if a loan becomes non -performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing. In addition, by** section 44A (6) **it is provided:**
>
> **"This section shall apply with respect to loans made before this section comes into operation, including loans that have become nonperforming before this section comes into operation."**
>
> **That is to say that the provision applies to loans and has retrospective effect……**
>
> **The rationale for the "in duplum" rule was explained by this Court in the recent case of Mwambeja Ranching Company Limited and Another v Kenya National Capital Corporation [2019] eKLR as follows:**
>
> **"<u>The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."</u>**
>
> **Section 44A has retrospective effect and this was explained by this Court in the case of James Muniu Mucheru v National Bank of Kenya Limited Civil Appeal No. 365 of 2017**.

(emphasis added).

28. The 1st Respondent though a registered as a microfinance institution [see annexure **JCL 1**] under the Microfinance Act to operate as a financial institution is on the face of it not excempt from the provisions of Section 44A of the Banking Act. The Applicant's was loaned a sum of KShs.3,700,000/= in May 2018 and by July 2018 the loan was rendered non -performing due to his default in repayment. His default prompted the issuance of notices on 4.7.2018, 12/7/2018 and other demand notices all the way to November 2018. By the date of the scheduled auction, just over 7 months since default, the Applicant's total debt stood at a staggering KShs.100,000,000/= and as at May 2019 had risen to KShs.103,347,960/= despite rent collections amounting to KShs.1.5M odd and payment of KShs.400,000/= odd by the Applicant. His complaint that he may never be able to repay the debt and therefore redeem his charged property does not, in view of the foregoing, appear an exaggeration.

29. That an original debt of KShs.3.7 million could multiply in this manner calls for an interrogation of the question whether the 1st Respondent is in breach of the *In duplum* rule. The less said on this the better; the trial court will examine the facts and draw its conclusions. Suffice to say that on the material before the court the Applicant's equity of redemption appears under threat of infringement.

30. The third complaint is more straight forward. The Applicant complains that his wife **Mary Waithira Mbaria** was not served with the notification of sale even though she had executed a spousal consent to the charge. The parties' arguments on this point appear amiss. In supporting denial that the charged property was matrimonial property, the 1st Respondent denied that the Applicant's wife gave spousal consent to the charge. The question was not so much whether the charged property was matrimonial property but whether as a guarantor to the loan, **Mary Waithira Mbaria** was entitled to such notice. Evidently, from the material proffered in the replying affidavit, she was a guarantor to the loan and had only executed the spousal consent in respect of the Deed of Assignment of the Rental Income. That being the case, the 1st Respondent was under duty by dint of the provisions of Section 96(3)(h) of the Land Act to serve her with a copy of the notice to sell prior to exercising the statutory power of sale. There was apparently no compliance with this requirement.

31. The Applicant has asserted that his prime property is at risk of unlawful sale which will cause him irreparable damage. On the face of it, even if the property were sold, the proceeds could not possibly cover the accrued debt which at this time far outstrips the value of the charged property. Moreover, because of the manner in which the debt has accumulated, the Applicant's equity of redemption appears a mere pie in the sky. The said equity would have been permanently defeated if this court were to decline to halt the sale of the charged property pending

the determination of the suit. The court is persuaded, reviewing all the material before it to grant prayer (3) of the motion filed on 25th February 2019. Costs will abide the outcome of the suit.

32. Parties are hereby directed to comply with the provisions of Order 11 of the Civil Procedure Rules in any event before the expiry of three months of today's date, in order to facilitate early hearing of the suit .

SIGNED AND DELIVERED ELECCTRONICALLY THIS 9TH DAY OF OCTOBER 2020

C. MEOLI

JUDGE