REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

COMMERCIAL CAUSE NO. 7 OF 2019

BETWEEN

MWANGANGI MUTULA MUTUA....................................PLAINTIFF

VERSUS

EQUITY BANK LIMITED..1ST DEFENDANT

TRIPPLE M CONSTRUCTION CO LTD................2ND DEFENDANT

OKUKU AGENCIES LTD...3RD DEFENDANT

RULING

1. By a motion brought on notice dated 7th March, 2019, the plaintiff herein seeks an order of injunction restraining the 2nd Defendant from selling Land Parcel No. Mitaboni/Thinu/2114 (hereinafter referred to as "the Suit parcel) to any third party, wasting, damaging, alienating, altering, disposing of or in any other way dealing with the suit parcel until the hearing and determination of this suit.

2. According to the Plaintiff/Applicant, he is the owner of the suit parcel which in 2011 he offered as a collateral for a loan of Kshs 2.1 million from the 1st Defendant which loan was to be serviced within 6 years. According to him, prior to the loan application, the said property was valued at Kshs 6,000,000/=and it comprised of a school with dormitory and classes, Biblia Husema Broadcasting Building and most of the Royal Media Services. At the time of swearing the affidavit in support of the application, he disclosed that the property was approximately Kshs 10,000,000/=.

3. According to the Applicant, in 2014 his school was performing badly and there arose issues of arrears and oppressive disputed interests giving rise to Machakos CMCC No. 592 of 2014 which was later transferred to Nairobi and by the time of the filing of the suit was still pending.

4. However, on 19th February, 2019, one of the Applicant's tenants, Royal Media Services, received a letter dated the same day directing them to pay rent to the 2nd Defendant as the new owner of the said property. It was averred that the 2nd Defendant is a company owned by the Applicant's uncle, one **Jackson Musembi**, who is well conversant with the issues surrounding the said loan and the applicant's sickness.

5. Upon conducting the search, the Applicant discovered that the suit property was transferred to the 2nd Defendant on 20th December, 2018 and upon further inquiries from the 1st Defendant, the Applicant learnt that his said uncle had offered to offset the said loan by instalments but was yet to complete the payments.

6. From the statements, the Applicant deduced that the property was transferred on 20th December, 2018 before the loan was cleared; that the last instalment was made on 23rd January, 2019; that the 2nd Defendant had been servicing the loan at will commencing 19th October, 2018; that it was not discernible how the 2nd Defendant knew the Applicant's loan account number and why the same was given in the first place; that it was not clear how much the property was sold for and when and in what manner; and that it was not clear how the 2nd Defendant was allowed to pay loan arrears and full purchase price.

7. In the foregoing premises, the Applicant believed that the sale was just a charade as the loan arrangement was fraudulent because the Defendants colluded not to notify him as there was no advertisement and the transfer was done during Christmas period when the Applicant

was hospitalised, a fact which the 2nd Defendant was well aware of.

8. There was a further affidavit sworn by the plaintiff on 17th May, 2019 in which he pointed out what in his view were discrepancies in the process of the alleged sale of the suit property.

9. In support of the application the applicant filed written submissions in which he reiterated the foregoing and relied on the case of **Kariuki Karisa kaniki vs. Commercial Banks Ltd & 2 Others [2016] eKLR** and **Maina Wanjigi & Another vs. Bank of Africa Kenya Ltd & Others [2015] eKLR**.

10. In opposing the application, the 1st and 3rd Defendant filed both a notice of preliminary objection and a replying affidavit. In the preliminary objection it was contended that the suit is *sub judice* as there is a pending suit between the same parties relating to the suit property being Civil Suit No. 592 of 2014; and that the suit property had already been sold in an auction to a third party hence any orders granted would be in vain.

11. In the replying affidavit, it was averred that the Plaintiff used the suit parcel as a collateral to secure a loan of Kshs 2.1 million from the 1st Defendant but defaulted in paying the same prompting the 1st Defendant to commence recovery process. In so doing, the 1st Defendant contended that it followed the due process in issuing all the relevant notices prior to the sale as provided by law. The said Defendants however disputed the assertion that the property is valued at Kshs 10 million and asserted that they contracted an independent licensed valuer (Accurate Valuers Limited) before the sale to prepare a comprehensive report in which they found that the structures on the suit parcel were dilapidated due to disuse and weathering and hence the current market value of the property was placed at Kshs 5,000,000/= while its forced sale value was placed at Kshs 3,750,000/=.

12. According to the said Defendants the plaintiff was duly notified of the intended sale and given the mandatory legal notices before the 1st Defendant exercised its right of sale. It was disclosed that on 11th December, 2013, the 1st Defendant wrote to the plaintiff notifying the plaintiff of the 1st Defendant's intention to exercise its statutory power of sale and gave him the mandatory 90 days' notice. Further, on 16th June, 2018, the 3rd Defendant served the plaintiff with a 45 days' mandatory notice of sale whose receipt the plaintiff acknowledged by signing in the presence of one **Griffin Makori**. Thereafter, on 22nd October, 2018, the 3rd Defendant advertised the intended sale by auction of the suit property in the Newspapers with nationwide circulation. It was therefore denied that the plaintiff had no knowledge of the sale, a claim which the 1st Defendant termed not only a lie but also malicious aimed only at wasting precious judicial time and resources.

13. It was disclosed that the said CMCC No. 592 of 2014 has not been prosecuted by the plaintiff and that the 1st Defendant's efforts to have the same fixed for hearing have been futile. It was averred that when the interim orders of injunction therein were vacated in February, 2016 the 1st Defendant proceeded to re-advertise the property for sale in order to recover its unserviced loan. The 1st Defendant accused the plaintiff of having illegally leased the suit property without informing the 1st defendant chargee and diverted the rent proceeds to his personal use instead of applying them in servicing the loan facility. Referring to the statements, the 1st Defendant asserted that the plaintiff had defaulted in his loan repayment obligations and had not made any efforts to repay it. The said Defendants insisted that this suit is *sub judice* and forms part of a series of many scandalous and frivolous suits filed by the plaintiff against the 1st Defendant in order to frustrate the Chargee's efforts to recover its money. It was therefore averred that the plaintiff has not come to equity with clean hands and should therefore not be allowed to benefit from the equitable remedy of injunction.

14. It was the said Defendant's position that this application had been overtaken by events as the suit property was legally sold and title transferred to the 2nd Defendant on 18th October, 2018 through an auction conducted by the 3rd Defendant and an injunction being an equitable, equity aids the vigilant and not the indolent.

15. The 1st Defendant denied that there was collusion between it and the 2nd Defendant in the sale of the suit property as the 2nd Defendant bought the same at Kshs 3,750,000/= which was the forced sale value hence the application ought to be dismissed with costs.

16. As regards the preliminary objection, the 1st and 3rd Defendants submitted that both the Application and the suit dated March 7th, 2019 are *sub-judice* and therefore an affront to justice and offends the modesty of this honourable court since the Plaintiff and the Defendant in Civil Suit Number 592 of 2014, which is still pending in court, are the same Plaintiff and the 1st Defendant herein; the subject matter in both suits is Parcel No. L.R Mitaboni/2114 situated at Mitaboni; and that the issues in both suits are substantially the same in both suits and applications. It was therefore submitted that this court cannot continue to hear the present case while CMCC No. 592 of 2014 is still pending in court as doing so violates the provisions of section 6 of the ***Civil Procedure Act***.

17. In the said Defendants' view, in order to avoid a multiplicity of suits, the 2nd and 3rd Defendants, who were not parties in CMCC No. 592, would have been properly enjoined in the same suit as the 3rd Defendant herein is an agent of the 1st Defendant while the 2nd Defendant simply purchased the suit property from the 1st Defendant. It was therefore prayed that the application and the suit be struck out with costs.

18. It was further submitted that since the suit property has already been sold any orders granted in this case may be in vain. If the applicant feels aggrieved by the manner in which the suit property was sold, the only cause of action is in damages and they relied on **Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others [2018] eKLR** and **Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 others [2005] eKLR.**

19. According to the said defendants, there is evidence that the suit property was on 17th October 2018 sold to the 2nd Defendant. Accordingly, if the Plaintiff/Applicant feels aggrieved by the decision of the Bank to exercise its statutory power of sale, then he should seek for damages instead of inconveniencing the purchaser with endless facetious and flippant injunctions. In their view, the continued pendency of this suit is an abuse of process of this court as the prayers sought cannot stand in law hence the application ought to be dismissed and the

suit be struck out with costs.

20. It was submitted that the most widely accepted legal principles to be considered before issuing the equitable remedy of injunction were enunciated in the *locus classicus* case of **Giella –vs- Cassman Brown [1973] EA 358.**

21. According to the said defendants, for a remedy of injunction to stand, the applicant is required to satisfy the court that he/she has a *prima facie* case with high chances of success a condition which the applicant has not satisfied. In the said defendant's view, the main claim by the applicant is that the sale of the suit property was done with high profile secrecy and that he was never served with any notice of such sale. However, on 11th December, 2013, the Bank wrote to the Applicant, by his registered mail, notifying him of his failures to abide by the terms and conditions of the loan and its intentions to exercise its statutory right of sale. The said notice was in compliance with the dictates of section 96 of the ***Land Act, 2012,*** and the ***Registered Land Act, Cap 300*** (now repealed) as read together with section 108 of the ***Land Registration Act, 2012,*** which effectively gave the applicant 90 Days to comply. Despite the notice, the applicant did not make any effort to repay the outstanding amount.

22. In this case it was submitted that it is not in dispute that the chargor, who is the applicant in this case, was in default of his obligations under the charge. As it is clear from the Bank statements of the Applicant's loan account, the chargor failed to pay the agreed instalments when they were due. Both the agreement between the Applicant and the 1st Respondent herein and the applicable provide guidelines on what is to happen in circumstances where a chargor is in default and is clearly unable to service a loan facility one of which is the chargee's power to sale the charged property to recover the withstanding amount of the loan and any other accrued interest.

23. It was contended that in the present application, the applicant acknowledges the fact that he defaulted in the repayment of the loan and that the only claim made by the applicant is that upon being served with a notice redemption, he sought clarification on 3rd June, 2014 about the amount owing. He also claims to have sought for an amicable way of settling the loan. It should be noted that the Chargee exercised the power of sale on 17th October 2018. From the foregoing, it was submitted that since it is clear that the period between the time when the applicant claims to have sought to settle the matter amicably with the Bank and when the Bank was forced to exercise its power of sale is more than 4 years, if indeed the applicant in this matter was able and willing to repay the loan, then he would have done so within the 4 years. It was the said defendants' case that the Bank was extremely lenient and patient with the Applicant and the claim made by the Chargor that the Chargee had already made up its mind to sell the suit property is lame, hollow, and implausible.

24. Since an injunction is an equitable remedy, one of the doctrines of equity requires those coming to equity to come with clean hands. However, it is clear in the present case that the applicant's hands are soiled. He is the root cause of all the problems that has led to this suit. Accordingly, the applicant should not be allowed to benefit from an equitable remedy. They cited the case of **Bomet Beer Distributors Ltd & another vs. Kenya Commercial Bank Ltd & 4 Others [2005] eKLR.**

25. It was therefore submitted that the applicant has not established a *prima facie* case to warrant an injunction to issue since a mere claim that the respondent fraudulently conducted the sale does not by itself entitle the Applicant orders of injunction.

26. It was further submitted that the plaintiff cannot say that he will suffer irreparable loss, which cannot be compensated by damages if the order of injunction is not granted since the plaintiff knew very well the risks of his failure to honour the terms of the charge.

27. According to the said defendants, since the chargor was made aware of the consequences of the foregoing provision when signing the charge, he cannot turn around and say selling the suit property will cause him irreparable harm as was the case in **Christopher Muroki vs. Housing Finance Company of Kenya Ltd & Anor. (2006) eKLR**.

28. It was submitted that if the court fails to decide on the two principles, it will decide whether or not to grant an injunction based on a balance of convenience. To this end, the said Defendants/Respondents relied on **Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others [2005] eKLR.**

29. Based on the above case, it was submitted that it will be inequitable to keep the 2nd Defendant/Respondent away from his property just because the applicant feels aggrieved by the way the Bank exercised its statutory power of sale.

30. As regards the issue whether the equitable remedy of injunction can issue when the property in question has already been sold in an auction, it was submitted that courts have for long dwelt in this question and gave a long-lasting answer and referred to **Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others [2018] eKLR** and **Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 others [2005] eKLR.**

31. It is submitted that since the property in question has already been sold, if the Plaintiff/Applicant feels aggrieved by the decision of the Bank to exercise its statutory power of sale, then he should seek for damages instead of inconveniencing the purchaser with endless facetious and flippant injunctions.

32. In this case it was submitted that the applicant's claim that he was not informed of the Bank's intention to exercise its statutory power of sale is confounded and pestiferous. To them, the Bank made sure that the Chargor was properly and adequately informed of its intention to exercising its statutory power of sale. As can be confirmed from the record, there is an array of notices sent by the Bank to, and received by, the applicant informing the latter about the intentions to sell the suit property should he fail to honour his obligations under the charge.

33. It was submitted that the foregoing provisions form the main legal framework to be adhered to when a chargee wants to exercise its statutory power of sale. In this case the Bank went over and above its duty by serving the Applicant all the necessary notices before exercising its power of sale. The first notice to be served was a Statutory Demand Notice**,** which was sent to the Plaintiff/Applicant on 17th July 2013 by his registered mail. In the demand, the Bank notified the Applicant that he had fallen into arrears and that as at the date of the

letter, the applicant had an outstanding amount of Kshs. 1, 923, 529.25 in arrears. The Demand Letter gave the applicant THREE (3) MONTHS within which to settle the outstanding amount failing which the Bank would proceed to exercise its statutory power of sale. The applicant ignored and/or disregarded the said demand

34. Again, on 11th December, 2013, after the expiry of the 3 months, the Bank went on to give the applicant yet another NINETY (90) DAYS notice to sell under section 96 of the ***Land Act.*** Again, the applicant ignored and/or disregarded the notice. When the 1st respondent went ahead to serve the applicant with a redemption notice, the latter ran to court to file a suit, i.e Civil Suite No. 492 of 2014 alongside an application similar to the present one where he sought orders that are similar to the ones he seeks in this application.

35. The court heard the application and issued a temporary injunction. Once the applicant got the interim orders, he disappeared and until today, the said Civil Suite No. 492 of 2014 has never been prosecuted to the end. It was submitted that the applicant failed to prosecute the said suit to the end because he had no evidence to prove the claims made therein in the first place.

36. Once the interim orders were vacated on February 2016, the 1st applicant went ahead to issue the redemption notice and ultimately sold the suit property. For clarity, on 16th June 2018, the 1st Respondent, through its agent Ouko Agencies Auctioneers served the Applicant a FORTY-FIVE (45) Days' Notice of the intended sale**,** which notice was acknowledged by the applicant by signing. On 2nd October 2018, the 1st Respondent, through its agents, advertised the intended sale by auction of the suit property in the Dailies, which are newspapers of nationwide circulation. Accordingly, it was submitted that the applicant was adequately notified of the sale before the Bank exercised its statutory power of sale.

37. According to the Respondent, while the Applicant, in his Further Affidavit, complains that the Respondent relied on a Statutory Notice dated 11th December 2013 to sell the suit property and that the Respondent ought to give a fresh and new statutory notice once each and every interim order issued in his multiple applications is vacated, it was the Respondents' understanding that after the interim orders were vacated, the 1st Respondent did not have to start issuing notices afresh and they relied on **Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others (2018) eKLR.**

38. In addition to the notices, it was submitted that the 1st Respondent undertook all the necessary requirements, including conducting a valuation, before auctioning the property. The Bank gave instructions to Accurate Valuers Ltd on 17th May, 2018 to conduct a valuation of the suite property. On 6th June 2018, the said valuers tendered their report advising the Bank on the Current Open Market and Forced Sale Values of the suite property. The Bank used this report to set the Reserve Price during auctioning of the property. The claims by the applicant that the property was sold at an under-valued price is baseless and unfounded as he did not carry out an independent valuation to challenge the report tendered by Accurate Valuers Ltd. There is no evidence to prove that the 1st Respondent connived or colluded with the purchaser of the suite property (the 2nd Respondent) in the sale. Furthermore, the purchaser bought the piece of land at Kshs. 3,750,000/=, which is the forced sale value indicated on the report tendered by the contracted valuers.

39. Regarding the contention that the suit property is misdescribed in the newspaper as not fit for residential houses, it was submitted that that statement is clearly misleading. To begin with, the Applicant has attached a newspapers dated April 23, 2018 where Timeless Dolphin Auctioneers had advertised the suit property for sale in a public auction. However, the said newspaper advertisement is irrelevant in the present circumstance because it was never relied on when selling the property. The suit property was sold pursuant to a newspaper advertisement published on October 2, 2018 by Okuku Agencies Auctioneers. The said advertisement clearly stated that the L.R. No MITAMBONI/THINU/2114 registered as a freehold interest I.N.O. MWANGANGI MUTULA MUTUA was suitable for residential development. In the conditions for sale, all interested purchasers were invited to visit, view, and verify the details of the property as the auctioneer or chargee did not warrant any such description.

40. The Applicant, in his further affidavit, complains that the sale ought to have taken place in Machakos where the land is located and not in Nairobi. However, such argument lacks any legal basis as it is Not supported by statute, equitable principle, or even case law. ***The Auctioneers Act*** stipulates the manner in which sale by auction is to be conducted. Section 21(1) of the Act thus provides:

> "***The date, time and place of every sale by auction shall be advertised in the prescribed manner and such sale shall take place on the date, at the time and at the place so advertised."***

41. Accordingly, the auction can take place anywhere within the Republic of Kenya so long as the place, date, and time of such auction is communicated in the advertisement. In line with the provision, the Auctioneers selling the property clearly stated that the sale would be conducted on 17th October, 2018 at 11 a.m. at their offices located on the 6th floor of Jeevan Bharati Building, Harambee Avenue Nairobi. It was submitted that there is no irregularity in selling the property in the place described.

42. According to the Respondents, the transfer documents of the said land are clearly dated and properly executed. If the documents in possession of the Applicant are not clear, the honourable thing to do is to request the Respondent to furnish him with clearer copies of the documents, or better still ask for an opportunity to view the original copies instead of vexing the court with frivolous applications. The applicant is only shouting in his application that there was a violation of the law without making it clear to the court on which law or the exact legal provisions that were violated.

43. It was therefore concluded that the plaintiff/Applicant has not established a *prima facie* case with high chances of success. Further, there is no evidence that failure to issue the injunction sought will occasion irreparable harm to the applicant, which cannot be cured by the remedy of damages. Moreover, the applicant does not deserve to benefit from an equitable remedy as he has come to equity with unclean hands, having been the main cause of the problem by failing to fulfil his obligations as per the agreement in the charge. According to the Respondent, both statute law, case law, and principles of equity do not allow the remedy of injunction to issue in cases where a chargee has already exercised its statutory power of sale. The only available remedy to an aggrieved chargor who feels the sale by auction was not conducted properly and fairly is in damages. The claims that the respondent violated the law in exercising his statutory power of sale is Not

sustainable as the applicant lacks evidence to support the same. He is also not clear on what law was violated by the respondent. The applicant is simply inviting the court to merry with him in his fantasies and wishes, which lacks legal basis.

44. On its part the 2nd Defendant through an affidavit sworn by **Jackson Maingi Musembi**, its director averred that on 2nd October, 2018 he saw an advertisement for sale of the suit property scheduled for 17th October, 2018 at 11 am. On 16th October, 2018, he paid Kshs 100,000/= being refundable deposit to enable him obtain a bidding number. On the day of the auction, he placed his bid at Kshs 3,750,000/= and he was declared the highest bidder at the fall of the hammer after which he paid Kshs 937,500/= being the 25% and signed a Memorandum of Sale between himself and the 3rd Defendant. It was further disclosed that on 23rd October, 2018, he paid Kshs 2,812,5000/= being the remaining amount of the purchase price.

45. The deponent averred that he then applied for the consent of the Land Control Board which consent was granted by the Board on 21st December, 2018 and a title issued. It was his view that contrary to the assertion by the Applicant, the property was advertised for sale and sold through public auction where he could have moved to redeem the property. While the Applicants admitted that he has not repaid the loan and does not dispute that the 1st Defendant's right to sell had accrued but his only claim was that the property was sold at an undervalue without attaching any valuation report or evidence to support this allegation. The 2nd Defendant's case was that it is a purchaser in good faith for value hence the Applicant cannot claim that the 2nd Defendant colluded with any of the defendants in the sale of the suit property.

46. The 2nd Defendant denied the Applicant's allegation that it never paid the full purchase price and asserted that by 23rd October, 2018 he had paid the same and that if the same has not been credited to the Applicant's loan account, that cannot be its issue as it has no power to direct how the purchase price is applied to the Applicant's account. According to the 2nd Defendant since it was directed to pay money into the Applicant's account held with the 1st Defendant, it cannot be faulted for following the Bank's directions. In its view, there is no law that bars the sale of property in December and that 20th December, 2018 was a working day for all government offices.

47. It was the 2nd Defendant's case that the application does not meet the threshold for the grant of an injunction and in any case no relief is sought against it. It was the 2nd Defendant's position that the Applicant's remedy, if any lies in damages which he seeks in his plaint.

48. It was submitted on behalf of the 2nd Defendant that the applicant in his pleadings and submissions has not urged that he has a *prima facie* case against the defendant. The 2nd defendant relied on **Moses C. Muhia Njoroge & 2 others vs. Jane W Lesaloi and 5 Others (2014) eKLR** where the court while making a determination on the issue of a *prima facie* case with a probability of success cited the Court of Appeal decision in the case of **Mrao Ltd vs. First American Bank of Kenya and 2 Others**.

49. It was submitted that all the allegations are made against the 1st and the 3rd Defendant and none against the 2nd Defendant and particularly on *prima facie* case against the 2nd Defendant even though the orders are sought against it. In the 2nd Respondent's submissions, the Applicant has not alleged and or even demonstrated that the 2nd Defendant is not a purchaser in good faith for value who participated in or knew there was fraud, misrepresentation or dishonesty by the chargee. In this regard the 2nd Defendant relied on section 99 of the ***Land Act*** and submitted that the Applicant has no prima facie case against the 2nd Defendant and therefore no orders can be given against him. Further, section 99(4) of the ***Land Act*** gives the Applicant a remedy of damages against the chargee. In the main suit, there are no allegation against the 2nd Defendant and therefore there can be no prima facie case against the 2nd Defendant. To him, the Applicants only concern against the 2nd Defendant was how it learnt of the sale but this has been explained in the replying affidavit. It was therefore submitted that the applicant has not demonstrated any prima facie case against the 2nd Defendant, let alone one that has chances of success.

50. Accordingly, the statute already knows and has directed the court to always consider damages against the chargee as the remedy unless there is any wrongdoing by the purchaser. In this case it was submitted that the Applicant has not pleaded in all his pleadings that he is likely to suffer irreparable injury that cannot be compensated by way damages unless the order of injunction is issued. Most importantly, the applicant urges that the property was sold at under value and attaches a valuation report stating that the property was to be sold at Kshs 6,750,000. It is therefore possible to quantify the damages and reference was made to the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** as well as the decision of **Ringera, J** in the case **Elijah Kipng'eno Arap Bii vs. Kenya Commercial Bank Limited [2001] eKLR.**

51. It was therefore contended that the Applicant can be compensated by way of damages and since it is possible for the applicant to state with mathematical precision the damages he allegedly suffered or is likely to suffer, shows that any injury occasioned by failure to issue an injunction can be compensated by way of damages. The Court was urged to take judicial notice that the 1st Defendant is one of the biggest banks in Kenya and can afford to pay any damages passed in favour of the Applicant.

52. Regarding the balance of convenience, it was submitted that this head is only considered when the court is doubt on the prima facie case with a probability of success and whether damages can remedy any injury. However, in this case, there can be no doubt that the applicant has not demonstrated a prima facie case against the 2nd Defendant and further, it is crystal clear that any injury can be compensated by way of damages.

53. It was nevertheless submitted that the balance of convenience lies in the order not given for the reasons that the transfer has already been effected and the 2nd Defendant taken possession; that having admitted default in paying the loan, the Applicant has not even given an undertaking or even attempted to remedy the default; and that the Applicant has not indicated that is capable of repaying the admitted loan arrears.

54. The Court was therefore urged to dismiss the application with costs.

Determination

55. I have considered the application, the affidavits both in support of the application and in opposition thereto, the submissions filed and the authorities relied upon and this is the view I form of the matter.

56. The first issue for determination is whether the mater is caught up with the doctrine of sub judice in light of the proceedings in CMCC No. 592 of 2014 pursuant to section 6 of the ***Civil Procedure Act***. The said section provides as follows:

> ***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***

57. The rationale for the sub judice rule was restated by the High Court of Uganda in **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993** where it was held that:

> **"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."**

58. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

> **(1) There must exist two or more suits filed consecutively.**
>
> **(2) The matter in issue in the suits or proceedings must be directly and substantially the same.**
>
> **(3) The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.**
>
> **(4) The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

59. Regrettably, while the Respondents herein were loud in their position that the suit is res judicata neither the pleadings nor the proceedings in the said previous suit were exhibited. In the premises there is no basis upon which the Court can find that the said doctrine applies to the circumstances of this case.

60. The principles guiding the grant of interlocutory application are now well settled. Those principles were set out in **East African Industries vs. Trufoods [1972] EA 420** and **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court restated the law 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit *"leap-frogging"* by the applicant to injunction directly without crossing the other hurdles in between.**
>
> **It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."**

61. While reiterating the said principles, **Ringera, J** (as he then was) in **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002** stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not

excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true, for example, when he denies being served with the statutory notices and considering the already exposed untruth of the applicant with regard to service of statutory notices one is not inspired to have much confidence in the truth of her deposition that she did not appear before an advocate to execute the charge and have the effects of the pertinent provisions of law explained to her.

62. It was therefore held by **Ringera, J** (as he then was) in **Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001**:

> **"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."**

63. It was therefore held in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991** by the Court of Appeal stated as follows:

> **"The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff's alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing...The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory…As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available."**

64. Therefore, though at an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant "facts" urged by the parties, the remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the ***Civil Procedure Act***, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

65. What then constitutes prima facie case? In the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,** the Court of Appeal held as follows:

> **"The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...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."

66. While adopting the same position the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** added that:

> **"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."**

67. In this case from the plaint, the cause of action is hinged on the fact that the sale of the plaintiff's charged property by the 1st Defendant Bank to the 2nd Defendant was sold without the Plaintiff's knowledge. That is the only ground disclosed in the plaint. Section 96 of the ***Land Act, 2012*** provides that:

> ***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.***

68. Section 90 referred to in the foregoing provision states as follows:

> ***(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.***
>
> ***(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—***
>
> > ***(a) the nature and extent of the default by the chargor;***
> >
> > ***(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;***
> >
> > ***(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;***
> >
> > ***(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and***
> >
> > ***(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.***
>
> ***(3) If the chargor does not comply within NINETY DAYS after the date of service of the notice under, subsection (1), the chargee may—***
>
> > ***(a) sue the chargor for any money due and owing under the charge;***
> >
> > ***(b) appoint a receiver of the income of the charged land;***
> >
> > ***(c) lease the charged land, or if the charge is of a lease, sublease the land;***
> >
> > ***(d) enter into possession of the charged land; or***
> >
> > ***(e) sell the charged land.***

69. The 1st defendant has set out in details the chronology of the events leading to the sale of the suit property. According to the said Defendant the plaintiff was duly notified of the intended sale and given the mandatory legal notices before the 1st Defendant exercised its right of sale. It was disclosed that on 11th December, 2013, the 1st Defendant wrote to the plaintiff notifying the plaintiff of the 1st Defendant's intention to exercise its statutory power of sale and gave him the mandatory 90 days' notice. Further, on 16th June, 2018, the 3rd

Defendant served the plaintiff with a 45 days' mandatory notice of sale whose receipt the plaintiff acknowledged by signing in the presence of one **Griffin Makori**. Thereafter, on 22nd October, 2018, the 3rd Defendant advertised the intended sale by auction of the suit property in the Newspapers with nationwide circulation. It was therefore denied that the plaintiff had no knowledge of the sale, a claim which the 1st Defendant termed not only a lie but also malicious aimed only at wasting precious judicial time and resources.

70. The plaintiff's case seems to be that following the grant of injunctive orders in CMCC No. 592 of 2014, the 1st Defendant ought to have given fresh notices before exercising its statutory power of sale. In my view that position is only correct where there is a finding that the initial statutory notice was improper. With due respect, I do not agree with the plaintiff that that issue establishes a prima facie case with probability of success. In **Kyangavo vs. Kenya Commercial Bank Ltd & Another [2004] 1 KLR 126** it was held that it was not necessary to give another notification for 45 days after the lapse of the previous one since notification need not be given every time as opposed to advertisements which need to be given afresh every time fresh instructions are received by the auctioneer, and the sale should be at least 14 days after the first newspaper advertisement. Again in the case of **Nathakal Monji Rai vs. Standard Chartered (K) Ltd. & Another Nairobi (Milimani) HCCC No. 830 of 1999** it was held that where the auctioneer has given a notice of 45 days and the sale is subsequently stopped by the Court, the auctioneer need not give another notice **just like the chargee is not required to give another notice under section 74 of the *Registered Land Act* (now repealed) every time a sale is suspended to accommodate the chargor.** (Emphasis mine).

71. That was the position in **Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others (2018) eKLR** where the court ruled that:

> **"There is no basis in law, equity, or practice for the Learned Magistrate to conclude that a mortgagee who is exercising a statutory power of sale, which is ephemerally stopped by the court, must issue a new notification of sale to the mortgagor before conducting a sale once the order stopping the sale is lifted."**

72. Whereas the other notices detailing the time and place of sale ought to be given, there is no requirement that a fresh statutory notice be issued.

73. With respect to the amount claimed, there is no allegation made by the plaintiff that the debt is not due. In fact, the plaintiff has clearly admitted in the plaint the contents whereof are verified by an affidavit that at a certain time he fell into arrears since the business was doing badly. He has not stated that the situation improved and that he was able to make good the said arrears. To the contrary the 1st Defendant's contention that the Plaintiff is in arrears with respect to his repayments has not been controverted. Accordingly, this particular issue is only with respect to the amount due. In **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal held that a mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun 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.

74. In **Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien'g Civil Appeal No. 114 of 1991**, the Court of Appeal held that:

> **"Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance they must serve on the chargee three months' written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family…The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim…The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage."**

75. It was therefore held that:

> **"If the relief claimed in the counterclaim in this case had been sought by substantive suit, the Bank would have been bound to prove and plead that the statutory notice had been served, whether the respondent admitted indebtedness or not. It follows that the counterclaim, though wrongly dismissed, cannot proceed it its present form, until the statute has been complied with. The court therefore considers that the counterclaim should be stayed on the lines of the second proviso to subsection (3)(c) until the counterclaim is regularised, the statutory notice has been served, and the period stated in subsection (2), namely three months, has expired."**

See also **Joseph Okoth Waudi vs. National Bank of Kenya Civil Appeal No. 77 of 2004.**

76. Accordingly, the issue of the amount demanded does not, in my considered view, establish a *prima facie* case for the purposes of an injunction.

77. As regards the adequacy of damages, it is clear that the suit property is a commercial property. Its value is capable of being determined. In this regard, **Pall, J** (as he then was) in the case **Muhani & Another vs. National Bank of Kenya Ltd [1990] KLR 73** stated as follows:

"The mortgagor who has given an express power of sale cannot by starting a suit perhaps a perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale".

78. It is not contended that that the plaintiff has any sentimental attachment to the suit property. Even if there was such allegation, it was held by **Ringera, J** in the case **Elijah Kipng'eno Arap Bii vs. Kenya Commercial Bank Limited [2001] eKLR** that:

"…once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages."

79. In the same vein it was observed in **Christopher Muroki vs. Housing Finance Company of Kenya Ltd & Anor. (2006) eKLR** that:

"The Plaintiff's arguments that the suit property is a matrimonial home where he resides with his family, and that its sale would result in irreparable loss, cannot stand since the Plaintiff in offering the suit property as security for loan accepted that in default of repayment the property would be sold."

80. It was therefore held in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** that:

"On the second factor, that the applicant must establish that he *"might otherwise"* suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima face*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot *"adequately"* be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

81. Regarding the third condition, it is clear that whether regularly or not the suit property has changed hands to the 2nd Defendant. As rightly contended by the 2nd Defendant, no allegations are made against it. section 99 of the ***Land Act*** which provides as follows;

(1) This section applies to—

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

82. Dealing with such a scenario, the Court in **Joyce Wairimu Karanja vs. James Mburu Ngure & 3 Others [2018] eKLR** appreciated that:

"both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages."

83. A similar position was adopted in **Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others [2005] eKLR,** where the court held that:

> **“The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie proof that they are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages… What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages…The balance of convenience tilts in favor of the 5th Defendant who purchased the property at the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th Defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction.”**

84. In this case it is clear to me that the Plaintiff/Applicant has failed to satisfy the conditions necessary for the grant of interlocutory injunction.

85. Consequently, the Notice of Motion dated 7th March, 2019 fails and is hereby dismissed with costs to the Defendants.

86. It is so ordered.

Ruling read, signed and delivered at Machakos this 18th day of July, 2018.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Hassan for Mr Maanzo for the 1st and 3rd Respondents

Miss Muthini for Mr Githumbi for the 2nd Respondent

CA Geoffrey