REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 24 OF 2019

MAIZE MILLING COMPANY LIMITED.....1ST PLAINTIFF

TRIDENT INSURANCE COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

SPIRE BANK KENYA LIMITED.....1st DEFENDANT

JOSRICK MERCHANTS AUCTIONEERS.....2nd DEFENDANT

RULING

1. By a motion brought on notice dated 9th August, 2019, the plaintiff herein seeks the following orders:

1) **Spent.**

2) **Spent.**

3) **Spent.**

4) **THAT** pending the hearing and final determination of this suit an injunction do issue restraining the Defendants, by themselves, servants, auctioneers, or advocates or any of them or otherwise from advertising or offering for sale, or purporting to sell, or in any other way alienating the 2nd Plaintiff's Property known as Land Reference Number 19841 (Title No. IR 85900) situate in Maanzoni, Machakos County, or otherwise howsoever dealing with the aforesaid Property.

5) **THAT** an order for proper accounts to be taken by both parties to ascertain the proper amount payable under the Facility Letter dated 28th September 2017 be made by this Honourable Court.

6) **THAT** The costs of this application be provided.

2. According to the Plaintiffs, the 1st Plaintiff and the 1st Defendant entered into a Loan Facility Agreement dated 28th September 2017 for restructure of a then existing overdraft facility amount of Kshs. 184,122,271.00. The said Facility was secured by *inter alia* a Legal Charge for Kshs. 150,000,000/- registered against the 2nd Plaintiff's Property known as Floor Number 2 of Tower 1 on Land Reference Number 209/9769 Capitol Hill Towers. The 1st Plaintiff also offered a Legal Charge over Land Reference Number 19841 (Title No. IR 85900) situate in Maanzoni, Machakos County in the name of **Trident Insurance Company Limited**, to secure a sum of Kshs. 25,500,000/-, as well as guarantees by **Trident Insurance Company Ltd**, **Diamond Hasham Lalji** and **Shahid Diamond Lalji**.

3. According to the plaintiffs, it was an express and implied term of the aforesaid Facility Agreement and the various Charge Documents that the interest would be charged on the loan account at the agreed rate and the 1st Defendant would not vary the agreed rate of interest upwards without serving the 1st Plaintiff with a proper Notice requiring payment of such higher interest as the Defendant may desire from time to time. It was further an express term that of the Facility Agreement and the Charge Documents that the 1st Defendant would only charge such maximum interest, penalties and other charges as allowed and approved by the ***Central Bank of Kenya Act*** and the regulations made thereunder from time to time, the ***Banking Act*** and other relevant and applicable statutory provisions. It was further an express and implied term that the 1st Defendant would at all times keep the 1st Plaintiff's accounts in good and proper order and shall not unreasonably clog the

Plaintiffs' right to redeem the loan facilities.

4. The Plaintiffs complained that in breach of the Facility Agreement and provisions of the Charge instruments, the 1st Defendant charged exorbitant and illegal interest on the facilities, and demand full payment of the sum of Kshs. 207,987,567.69. The Plaintiffs aver that the amount of Kshs. 207,987,567.69 which is alleged to be owing as at 4th July 2019 is illegal as the same constitutes interest, and penalty charges illegally and irregularly charged to the 1st Plaintiff's account, amounting to Kshs. 24,340,810.07.

5. According to the Plaintiffs, owing to the 1st Plaintiff's constrained cash flows being experienced not only by the 1st Plaintiff but by companies across board, the Plaintiffs requested the 1st Defendant for indulgence to enable them sell one of the charged properties, being Floor Number 2 of Tower 1 on Land Reference Number 209/9769 Capitol Hill Towers to Kenya Orient Insurance, and apply the proceeds thereof towards settling part of the debt. Accordingly, the Plaintiffs instructed Lloyd Masika Ltd to conduct a valuation of the said property, to facilitate negotiations and sale of the property and the said property was valued at Kshs.140,000,000/-. However, Kenya Orient underwent some management changes leading to delays in conclusion of the negotiations, and by extension, the intended sale.

6. In an effort to resolve the dispute over the debt, the 1st Plaintiff and the 1st Defendant agreed to refer the matter to mediation before **Aasif Karim** but in the course of the mediation, and without any disagreement, the 1st Defendant, in a clear demonstration of bad faith, called up the 1st Plaintiff's directors' personal guarantees, and proceeded to commence bankruptcy proceedings. By its aforesaid actions, the 1st Defendant orchestrated and deliberately occasioned the failure of the mediation process.

7. It was averred that the 1st Defendant debited the 1st Plaintiff's account with a sum of over Kshs.5 Million as fees for the mediator, when it had in fact sabotaged the very process, thereby occasioning the Plaintiffs loss and damage.

8. The 2nd Defendant, it was deposed, has issued a Notification of Sale of the Property known as Land Reference Number 19841 (Title No. IR 85900) dated 11th July 2019, and unless the prayers in the Notice of Motion herein are granted, the 2nd Defendant will go ahead and advertise the Property for sale. If not stopped, the Defendants are set to sell the 2nd Plaintiff's Property on 12th September 2019 as indicated in the Notification of Sale.

9. The Plaintiffs averred that despite the depressed state of the economy, the 1st Plaintiff is willing to settle any amounts due and has offered various options to the 1st Defendant. However, the insistence on clogging the 2nd Plaintiff's right of redemption is mischievous, illegal and oppressive action on the part of the Defendants and should be addressed and stopped by the Honourable Court. The Plaintiffs further lamented that the Defendants are making a misguided attempt at clogging the Plaintiffs' right of redemption, in a bid to unfairly profit from the sale of the 2nd Plaintiff's Property as the 1st Plaintiff's attempts at arrangements to settle the facilities continue to be frustrated by the 1st Defendant, and the Defendants insist on taking damaging action including sale of the charged property, as well as commencement of bankruptcy proceedings, which makes it near impossible for the Plaintiffs and their directors to secure credit from other institutions. Consequently, the 1st Plaintiff is unable to bring willing investors on board and recapitalize the business without an indication from the 1st Defendant of willingness to settle this matter, or withhold any adverse action in respect of the personal guarantees.

10. The Plaintiffs were apprehensive that the Defendants may be intending to sell the charged property at a throw-away price. In fact, the notification of sale does not indicate the value of the property hence it is not clear what the market value or the forced sale value is. This has placed the Plaintiffs in the dark as regards the values ascribed to the prime property.

11. It was averred that the Defendants' repudiation of the contract, refusal to accept various payment proposals and insistence on selling the 2nd Plaintiff's property, are not only oppressive but also goes against the grain and all known principles of law.

12. It was the Plaintiffs'' case that if the Defendants are not stopped from selling the 2nd Plaintiff's property, appointing a receiver and or in any other way interfering with the Plaintiff's businesses and operations, the Plaintiffs will jointly and severally suffer irreparable loss to their business, goodwill and reputation.

13. The Plaintiffs disclosed that the 2nd Plaintiff is willing to henceforth surrender the entire rent collected from Floor Number 2 of Tower 1 on Land Reference Number 209/9769 Capitol Hill Towers to the 1st Defendant towards part payment of the undisputed portion of the loan facilities. However, if the orders prayed for herein are not granted, the Plaintiff will suffer irreparable harm and damage.

14. In response to the Application, the Respondents averred that the 1st Plaintiff approached the 1st Defendant then known as **Equatorial Commercial Bank Limited** before the Change of name to **Spire Bank** for an overdraft facility of Kenya Shillings One Hundred Million Shillings only (Kshs. 100,000,000/-) and that facility to the 1st Plaintiff herein was secured inter alia by a legal charge over floor number II Capital Hill Towers situate on Land Reference Number 209/9769 in the name of **Capitol Second Limited** the 2nd Plaintiff herein securing Kshs. 150,000,000/-. According to the Defendants, the overdraft facility above was available for twelve (12) months and renewable annually and the 1st Defendant was to review the facility by 31st of March 2013.

15. It was averred that upon the lapse of the facility above, the 1st Defendant issued the 1st Plaintiff with a further facility vide a letter of offer dated 20th May 2013 for an overdraft facility of Kshs. 100,000,000/- and an Asset Finance of Kshs. 146,413,000.00. which was duly accepted and executed. The terms of the letter of offer inter alia provided;-

i. Overdraft facility shall be for a period of 12 months renewable;

ii. The 1st Defendant shall review the facilities by 31st May 2014;

iii. The securities inter alia included first Legal Charge Over Floor Number II of Capitol Hill Towers Over Land Reference Number 209/9769 Nairobi for Kshs. 100,000,000/-; and

iv. Personal Guarantees by Diamond **Hasham Lalji** and **Shahid D Lalji.**

16. It was deposed that subsequently the 1st Defendant renewed the Overdraft facility and a letter of offer issued on the 21st of May 2014 with the Overdraft facility of Kshs. 150,000,000/- and an Asset Finance of Kshs. 36,679,000/ whose terms inter alia provided;-

i. Overdraft facility shall be for a period of 12 months' renewable;

ii. The 1st Defendant shall review the facilities by 31st May 2015;

iii. The securities inter alia included first Legal Charge Over Floor Number II of Capitol Hill Towers Over Land Reference Number 209/9769 Nairobi for Kshs. 100,000,000/-; and

iv. Personal Guarantees by **Diamond Hasham Lalji** and **Shahid D Lalji**.

17. It was averred that subsequently the 1st Plaintiff applied for a further overdraft facility and a further legal charge over Land Reference Number 209/9769 dated 10th February 2015 was created in an accumulative sum of Kshs. 200,000,000.00. under the following terms:

i. The Overdraft facility was for a period of 12 months' renewable at the discretion of the 1st Defendant;

ii. The Purpose of the facility was to finance working capital; and

iii. Interest will be charged at 18% per annum on reducing balance and default rate at 2.71% per month above the interest rates.

18. According to the Defendants, the Plaintiffs defaulted in the repayment of the facility this resulting to the 1st Defendant exercising its statutory Power of sale. On 22nd June 2017 the 1st Defendant approached the 1st Defendant for restructuring of the facility and the 1st Defendant responded to the said request to restructure the facility and accepted the restructure on condition; -

i. Upfront payment of any amount above the approved overdraft limit of Kshs. 150m;

ii. Evidence of cash flows to support repayment;

iii. Provision of financial and other supporting information to enable the Bank make a decision.

19. However, as the 1st Plaintiff did not respond to the 1st Defendants letter on restructuring of the facility, the 1st Defendant issued all the necessary notices required in exercise of its statutory power of sale and a sale was slated for the 22nd of August 2017. Before the sale of charged property Land Reference Number 209/9769 the Plaintiff's herein filed a suit in HCCC No. 324 of 2017 **- Maize Milling Company Limited Company Limited & Capitol Second Limited vs. Spire Bank Limited & Anor.** inter alia seeking for injunctive orders restraining the 1st Defendant from selling the charged property on similar grounds as the suit before this court. However, in HCCC NO. 324 of 2017 there were no injunctive orders that were granted though the property was not sold.

20. It was deposed that on the 1st of September 2017 the 1st Plaintiff wrote to the 1st Defendant giving a further proposal on the restructuring of the facility and the 1st Defendant accepted to restructure the overdraft facility which stood at Kshs. 184,122, 271.00 and on the 28th September 2017 the 1st Plaintiff was issued with a letter of offer which inter alia provided;-

i. Term Loan facility to be repaid in 60 months with a moratorium of 6 months thereafter Kshs. 2,148,091.00 first 6 equal installments and thereafter 54 equal installments of Kshs. 4,614,959;

ii. Interest rate at CBK rate;

iii. first Legal Charge over Land Reference Number 19841 (I.R 20136/29) Machakos in the name of Trident Insurance Company Limited.

21. This variation, it was averred, was made on the 23rd October 2017 and it provided for additional securities being Legal Charge over Land Reference Number 19841 Machakos in the name **Trident Insurance Company Limited**. On 3rd of August 2018 a charge document was registered in favour of the 1st Defendant over Land Reference Number 19841. Personal Guarantees and Indemnity were also signed by **Diamond Hasham Lalji** and **Shahi Diamond Lalji** as security over the facility.

22. The Defendants contended that the 1st Plaintiff defaulted in the repayment of the facility and on 16th January 2019 a demand was sent out to the 1st Plaintiff by the 1st Defendant demanding the arrears that stood at Kshs. 4,001,966.41. Due to the persistent default the 1st Defendant commenced its Statutory Power of sale and a Statutory Notice was issued on 29th January 2019 over Land Reference Number 19841 (I.R 20136/29) in the name of the 2nd Plaintiff.

23. It was the Defendants' case that the debt was not rectified and subsequently the Bank issued a demand and Notice to enforce Personal Guarantee to **Diamond Hasham Lalji and Shahi Diamond Lalji** but the Guarantors did not make good the demand and on 2nd May 2019 Statutory Demands against the Guarantors were issued. The 1st Defendant also issued the Notice to sell to the suit property.

24. It was averred that the 1st Defendant approached the Plaintiff's for a mediation in an attempt to settle the matter wherein **Aaasif Karim** was appointed as a mediator between the parties herein and vide a letter dated 2nd May 2019, the 1st Defendant wrote to the mediator setting down the case summary and as a start of the mediation process. However, the Plaintiffs frustrated the mediation process by giving unreasonable demands on withdrawing of the Statutory demands which had been issued. On the 21st of May 2019 the 1st Defendant responded to the 1st Plaintiff's Advocates and assured them that in light of the mediation process no adverse action would be taken on and until 31st July 2019. The 1st Plaintiff upon receipt of the letter responded vide a letter dated 22nd May 2019 and 3rd June 2019 and declined the assurance granted by the 1st Defendant. The 1st Defendant vide its letter dated 7th June 2019 reiterated the contents of its letter dated 21st May 2019 and informed the 1st Plaintiff that it cannot have an open ended slate. However, the Plaintiffs continued to frustrate the mediation process and failed to sign the settlement agreement.

25. It was the Defendants' position that though at all material times the 1st Defendant was willing and ready to complete the mediation process, due to the frustrations by the 1st Plaintiff in the mediation process the 1st Defendant continued with its statutory power of sale which was communicated vide an email dated 28th June 2019.

26. It was disclosed that on the 4th of July 2019 the Plaintiff's withdrew the suit in HCCC 324 of 2017 - **Maize Milling Company Limited Company Limited & Capitol Second Limited vs. Spire Bank Limited & Anor.** and the 1st Defendant upon the lapse of the statutory notices instructed the 2nd Defendant who issued the necessary notices and the sale of the suit property is slated for 12th of September 2019 by public Auction.

27. According to the Defendants, the current outstanding amount on the facility stands at Kshs. 209,899,101.46. It was their case that the 1st Defendant has conducted a valuation report on the parcel of land wherein the property was valued at a market Value of Kshs. 25,000,000/-.

28. In response to the Plaintiffs' allegation that the Interest Rate is exorbitant, the 1st Defendant stated that the Interest rates utilized are contractual and the same in line with the terms agreed upon by the parties. It was disclosed that the 1st Defendant had numerous Letters of offer that were issued and in the Letter of offer dated 28th September 2017 it was explicit on the interest rate as follows;-

i. Interest will be charged at a rate set by the lender at the lender's sole discretion from time to time and presently as follows;-

a) Interest at Central Bank Rate (currently at 10% plus 4% effective rate of 14% p.a on reducing balance; and

b) In arrears and Default rate 2.71% per month over and above the effective interest rate

29. The Defendants asserted that it is not in dispute that in 2018 the Plaintiff was in default, however a cursory look at page 181 of the Plaintiff's replying Affidavit the issue of arrears and the interest rate was not taken into consideration and that the report attached by the Plaintiff is not a true reflection of the actual situation. From the Advisory report by the Plaintiff it has been pointed out that indeed the Plaintiff still owes the 1st Defendant. In fact, since the amount which is said to be outstanding according to the advisory report of Kshs. 181,496,540.14 the securities herein are not sufficient. In any case the Plaintiffs have not alleged that the Interest Rates charged were either exorbitant or unconscionable hence their allegations is not substantiated.

30. According to the Defendants, though the 1st Defendant has engaged the Plaintiffs in the restructure and further in the mediation process, however there has been no good will demonstrated by the Plaintiffs. Instead, the Plaintiffs are attempting to use the court process in frustrating the 1st Defendant's Statutory Power of sale in bad faith.

31. In view of the above, it was Defendants, position that the Plaintiffs' application now before court is without merit for the following reasons;

a) The Plaintiff is in breach of the contractual terms;

b) The Loan amount was varied and duly acknowledged by both parties;

c) The Plaintiff has not denied the existence of a debt;

d) That an injunction cannot issue where there is a debt and indeed default from an agreement on the payment of the debt;

e) That it is the duty of the court to enforce and/or legitimize what parties have agreed between themselves as that is the essence of contractual relations;

f) The Plaintiff has come to court with dirty hands and undeserving of any injunctive orders;

g) The 1st Defendant's right to exercise its Statutory Power of Sale has crystallized having disbursed the entire loan amount;

h) The Plaintiff had sought for similar orders in HCCC 324 of 2014 thus the suit herein is an abuse of the court process;

i) The Plaintiff has come late in the day to frustrate the 1st Defendant's Statutory Power of Sale.

Determination

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

33. The principles guiding the grant of interlocutory injunction 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."

34. 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.

35. 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."

36. 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."

37. 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.

38. 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."

39. 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."

40. In this case from the plaint, the cause of action is hinged on the allegation that in breach of the Facility Agreement and provisions of the Charge instruments, the 1st Defendant charged exorbitant and illegal interest on the facilities, and demand full payment of the sum of Kshs. 207,987,567.69; that the amount of Kshs. 207,987,567.69 which is alleged to be owing as at 4th July 2019 is illegal as the same constitutes interest, and penalty charges illegally and irregularly charged to the 1st Plaintiff's account, amounting to Kshs. 24,340,810.07; that owing to the 1st Plaintiff's constrained cash flows being experienced not only by the 1st Plaintiff but by companies across board, the Plaintiffs requested the 1st Defendant for indulgence to enable them sell one of the charged properties, being Floor Number 2 of Tower 1 on Land Reference Number 209/9769 Capitol Hill Towers to Kenya Orient Insurance, and apply the proceeds thereof towards settling part of the debt; that the Plaintiffs instructed Lloyd Masika Ltd to conduct a valuation of the said property, to facilitate negotiations and sale of the property which was valued at Kshs.140,000,000/- but Kenya Orient underwent some management changes leading to delays in conclusion of the negotiations, and by extension, the intended sale; that in an effort to resolve the dispute over the debt, the 1st Plaintiff and the 1st Defendant

agreed to refer the matter to mediation but in the course of the mediation, and without any disagreement, the 1st Defendant, in a clear demonstration of bad faith, called up the 1st Plaintiff's directors' personal guarantees, and proceeded to commence bankruptcy proceedings against the Plaintiffs' directors.

41. 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.***

42. 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.***

43. As regards the contentions of the levy of exorbitant and illegal interest on the facilities constituting interest, and penalty charges illegally and irregularly charged to the 1st Plaintiff's account, 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.

44. 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."

45. In this case, the Plaintiffs' case is not that there is no amount due. In fact, the Plaintiff's problems seem to be, according to them, the 1st Plaintiff's constrained cash flows. In my view the Defendants can only be restrained if the Plaintiffs pay the amount claimed into court or claims that having repaid the sum that was lawfully due from them, the claim now being made by the Defendants is, on the terms of the mortgage, excessive. That is not the case before me. Accordingly, the issue of exorbitant levies does not constitute a *prima facie* case for the purposes of restraining the Defendants from exercising the statutory power of sale.

46. As regards the issue of constrained cash flows, while the court may empathise with the circumstances under which the Plaintiffs find themselves due to harsh economic conditions, **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."

47. The Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** held that:

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

48. It follows that the issue of constrained cash flows and the allegation that the Plaintiffs had entered into arrangements with a third party to dispose of one of the facilities in order to reduce their liabilities to the Defendant does not constitute a *prima facie* case to warrant the orders sought herein.

49. The other issue was with respect to mediation. In this case, the process of mediation seems to have been put into motion by the 1st Defendants. Mediation, as opposed to arbitration is a voluntary process. It is a process whereby parties are guided to reach their own solution. It is not a process which can be imposed on the parties. Such a voluntary process, while very commendable and ought to be promoted by this court, is not compellable. In any case, in these proceedings, both parties have laid blame on each other with respect to the frustration of the said process and in light of the counter allegations, the court cannot determine which of the parties is right in order for the court to make a finding that the Plaintiffs, in respect of that issue, have established a prima facie case.

50. As regards the omission to indicate the value of the property in the notification of sale, section 99(4) of the ***Land Act*** provides as follows:

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.

51. 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."

52. 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."

53. Therefore, as the statute provides for a specific remedy, the remedy of injunction is not available in those circumstances.

54. As regards the adequacy of damages, it has not been contended that the value of the suit property cannot be determined. In fact, one of

the allegations is that the property is likely to be sold at an undervalue, an indication that 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".**

55. It is not contended that that the plaintiffs have 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."**

56. 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."**

57. 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."**

58. In this case it is clear to me that the Plaintiffs/Applicants have failed to satisfy the conditions necessary for the grant of interlocutory injunction.

59. Consequently, the Notice of Motion dated 9th August, 2019 fails and is hereby dismissed with costs to the Defendants.

60. It is so ordered.

Ruling read, signed and delivered at Machakos this 9th day of September, 2019.

G.V. ODUNGA

JUDGE

In the presence of:

Mr Kiprop for the Plaintiff/Applicant

CA Geoffrey