REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 3 OF 2018

MOTION CITY LTD.....APPLICANT

VERSUS

IDB CAPITAL LTD.....1ST RESPONDENT

NDUTUMI AUCTIONEERS.....2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Otieno Advocate for the applicants

Mr. Kabaru advocate for the respondents

RULING

The applicant, Motion City Limited by a notice of motion dated 25th April, 2019 pursuant to Order 40 Rule 3 of the Civil Procedure Rules, Section 1A, 1B, 3A and 63 of the Civil Procedure Act seeks orders in terms of prayer No. (2), (3), (4) and (5) : -

> ***1. An injunction order do issue to restrain the defendant/respondent by themselves, their servants, workmen, agents, heirs, personal representatives or otherwise however form putting into effect and/or executing the Statutory notice of sale issued on the 15th of February, 2019 and/or advertising for sale, selling, subdividing and/or dealing with, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon and/or continuing to build and construct any structures or trespassing into or from in any way whatsoever and howsoever interfering with the plaintiff's peaceful possession and enjoyment of all those parcel of lands known as Subdivision No. 725 (Original Number 162/2) of Section Number IV, MN, Kilifi and subdivision No. 726 (Original Number 162/2) of Section number IV, MN, Kilifi.***
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> ***2. That Officers and/or Directors of the defendants/respondents be committed to civil jail for a term of six (6) months for contempt of court for having deliberately disobeyed orders of this court issued on the 18th of October, 2018.***
>
> ***3. That the honourable court do issue further orders of the court geared towards protecting the dignity and authority of the court.***
>
> ***4. That the costs of this application be borne by the defendant/respondent.***

The notice of motion is based on the grounds on the face of it. In addition an affidavit sworn by **Samson Chome Ngallah** in his capacity as the Head of operations of the applicant company duly authorized to sign court documents on behalf of the company as hereinunder briefly stated:

> ***1. That the plaintiff/applicant is the legal and rightful owner of all those parcels of lands known as Subdivision No. 725 (Original Number 162/2) of Section number IV, MN, Kilifi and Subdivision No. 726 (Original Number. 162/2) of Section Number IV, MN, Kilifi.***
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> ***2. That the plaintiff/applicant created a charge in favour of the 1st defendant/respondent over all those parcel of lands known as subdivision No. 725 (Original number 162/2) of Section number IV, MN, Kilifi and subdivision No. 726 (Original Number 162/2) of Section number IV, MN, Kilifi.***
>
> ***3. That in the month of May 2018 or thereabout, the defendants/respondents, without any justifiable cause, unlawfully seized and***

took away the plaintiff/applicant's goods of services and/or trade, work objects and/or machineries and equipment's crippling the operations of the plaintiff/applicant company and completely rendering it incapable of providing any services at all necessitating an unplanned for shutdown consequently occasioning the plaintiff/applicant insurmountable loss.

4. That the plaintiff/applicant filed an application before this honorable court seeking injunctive relief which application was determined to finality and this honorable court issued a mandatory order compelling the defendants/respondents to return all the equipment and machines that they unlawfully took and/or charted away from the applicant's property. In addition, the honorable court issued an order restraining the defendants/respondents from trespassing or in any manner barring the plaintiff from accessing or its continued operation on its rightful property or removing any of the remaining equipment belonging to the plaintiff of selling, transferring, charging or in any way alienating the plaintiff's parcel of land being sub division No. 725 (original number 162/2) of section number IV, MN, Kilifi and Sub Division No. 726 (original number 162/2) of section number IV, MN, Kilifi.

5. That the defendants/respondents have refused to comply with order 4 which was a mandatory order compelling the defendants/respondents to return all the equipment and machines that they unlawfully took and/or charted away from the applicant's property and they further proceeded to issue a statutory notice of sale of the plaintiff's property in blatant disregard and disobedience of the court orders issued on the 18th of October 2018.

6. That defendants/respondents' have blatantly ignored and/or disobeyed he conditional orders of the court whereby they were to release the plaintiff/applicant's tools of trade and that therefore, the defendants/respondents actions have occasioned the plaintiff/applicant irreparable loss and damage and the plaintiff/applicant continues to stand greatly prejudiced. In bid of belaboring the plaintiff/applicant's operations the 1st defendant/respondent has further issued a statutory notice to sell the plaintiff/applicant's properties by public auction and/or private treaty in blatant disregard of the court orders issued herein.

7. That defendants/respondents 'actions have indeed occasioned the plaintiff/applicant irreparable loss and damage and the plaintiff/applicant continues to stand greatly prejudiced if the situation is not remedied and the plaintiff/applicant is not able to services the loan as directed by the court since their goods or service and/or trade are still being held by the defendants/applicants and now the 1st defendant/respondent has issued a notice intending to sell the plaintiff/applicant's properties (parcels of land).

8. That it is only just and fair that the orders sought in the application of instance be allowed as prayed failure to which the plaintiff/applicant is prone to suffer immensely and irreparably.

As far as the respondent is concerned a replying affidavit by Priscilla Njuguna dated 8th May, 2019 objected to the grounds set out in the supporting affidavit premised on the key material evidence discerned as follows:-

1) That the said borrowings were further secured by two legal charges by one Fredrick Tsofa Mweni, the plaintiff's guarantor, over his properties MN/IV/725 and 726 Kikambala.

2) That the plaintiff subsequently defaulted in paying the said loans and to date the debt stands at over Kshs.80 million.

3) That the plaintiff has in any event been placed under statutory administration and has no powers to file these proceedings which can only be instituted by its Administrator (Section 581 of the Insolvency Act No. 18 of 2015).

4) That the conditional injunction having lapsed when the plaintiff failed to service the loan, we could not have been in contempt of any court orders.

5) That since the issuance of the order on 18th October, the plaintiff has never made any payments and the loan now stands in excess of Kshs.80 million and the plaintiff having borrowed such a huge loan and refused/neglected to service it is not entitled to the reliefs sought.

Submissions by the applicant's counsel

Mr. Otieno who appeared for the applicant submitted that the respondent has failed to comply with the court orders issued for return of all the equipment and machines that they unlawfully took and or charted away from the applicant's premises. Counsel's contention is that by the disobedience of the court orders, respondent is in contempt calling for sanctions on the aforesaid orders issued on 18th October, 2018.

On the face of the express provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules counsel pointed out that the applicant has disclosed a prima facie case for grant of an injunction. In this connection counsel referred this court to the cases of **Giella v Cassman Brown & Co. Ltd, Paul Gitonga Wanjau v Gathuthi Tea Factory Co. Ltd & 2 others 2016 eKLR, Vimalkumar Hhimji Depar Shah & another v Stephen Jennings & 2 others 2016 eKLR, Mbuthia v Jimba Credit Corporation Ltd and American Cynamid v Ethecan Ltd.** From these decisions the applicant counsel submitted that the facts in the motion do establish the key principles upon which this court can exercise discretion to grant the relief of interlocutory injunction.

Counsel further submitted that on the basis of the affidavit evidence applicant has demonstrated that the respondent conduct of disobeying court orders calls for punishment as there is no explanation and that is self-evident. The applicant counsel relied on the decisions of **Margret Nyaga (supra)**. for the proposition that the contempt of court orders has been proved in order to safeguard the rule of law and integrity of the judiciary in administration of justice. He argued that courts ought to come out strongly to deal with such a breach to preserve and safeguard the rule of the law.

Counsel further argued that the loan in question was secured by an instrument of mortgage executed in relation with the suit property and also secured by guarantee by the directors. According to learned counsel contention the issuance of the requisite statutory notices had not ripened for the 1st respondent to exercise its power of sale under the mortgage by way of a public auction. Learned counsel's contention was that in the initial application for injunction it was established as a fact among other issues than the statutory notice was unforceable as a result of it being tainted with illegality. Counsel maintained that even in the instant application that omission by the 1st respondent to comply with the provisions of Section 90 (1) and (2) of the Land Act 2012, had not been rectified by the defendant. Further, counsel argued and submitted that a breach of Section 90 of the Act without more renders the action by the 1st respondent invalid, illegal and or unenforceable. Therefore, counsel on his part relying on the principles of the case in **Giella vs Cassman Brown (Supra)** the court has the power to restrain the 1st respondent from exercising its power of sale.

The 1st respondent through counsel **Mr.Kabaru** submitted and argued that the court order being referred to was conditional on the part of the applicant to continue payment of the loan instalment due and owing to the 1st respondent. The respondent counsel contention is that the conditional orders lapsed without any compliance from the applicant to that effect counsel submitted that there was nothing left to disobey.

Counsel has argued that the sale of the charged property **L.R. MN/IV/725 and 726** is registered in the name of one **Fredrick Tsofa Mweni** who has not been sued by the applicant in this proceedings. That the effect of such an omission contended counsel is that a valid statutory notice of sale to this effect is to be served upon the registered owner of the suit property. That therefore submits counsel does not permit the applicant any legal right/interest to challenge the statutory power of sale in order to obtain an injunction.

Counsel further submitted on the particulars that can be of greened from the plaint and affidavit evidence indications of which the applicant being under statutory administration by virtue of the debenture which had crystalized. He also submitted that it was anticipated the applicant to know the provisions of Section 581 of the Insolvency Act which provides as follows: -

> ***"A company under Administration not to perform management functions which administrators ....."***

In the instant respondent counsel also submitted that there is a fundamental issue given the fact that the applicant is not the registered owner of the suit property. It was his contention that even on this ground on right of ownership there is no claim that can be made to justify grant of an injunction against the respondent. In this respect counsel urged this court to uphold the preliminary objection in terms of Section 581 of the Insolvency Act.

On the face of the plaint, defence and notice of motion dated 25th April, 2019 together with submissions by the respective counsels the following issues form subject matter of this application: -

> ***1) Whether the conditions for granting a temporary injunction have been set by the applicant.***
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> ***2) Whether the respondent is in contempt of court orders issued on 30th May, 2018 and subsequent ruling with corresponding orders dated 18th October, 2018.***
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> **Analysis**
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> **The Law**

The question for consideration in this notice of motion falls within the scope of Order 40 Rule 1(a)(b) of the Civil Procedure Rules which provides as follows: -

> ***"Where in any suit it is proved by affidavit or otherwise: -***
>
> ***(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev.2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;***
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> ***(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any degree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."***

It is trite that the principles for grant of injunctive relief are well settled starting with the celebrated case on **Giella v Cassman Brown Co. Ltd 1973 E.A. 358, the House of Lords case of American Cyanamid v Ethicon [1975] 1 All ER 504** where the courts have laid the foundational threshold as follows:

> ***"a). The governing principle is that the court should first consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an injunction. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appears to be at that stage.***
>
> ***b). If, on the other hand damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted the defendant would be adequately compensated under the plaintiff's undertaking as to damages. If damages in***

the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

c). It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

In Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another, Justice Bosire thus remarked:

"[T]o succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction."

I have considered the notice of motion, affidavits by the applicant and the respondents for and against grant of interlocutory injunction, my task is threshold to consider whether the applicant has satisfied the threshold set in the above authorities.

Is there a serious issue to be tried pursuant to the plaint filed in court 24.5.2018. The crux of the applicant's claim is based on a loan agreement entered into with the 1st respondent which it has continue to service though there are outstanding arrears yet to be paid. Further, without knowledge or authority of the applicant, the 1st respondent has caused a charge registered in his favor on the suit property reference as held **LR46294** to be sold by the 2nd respondent in exercise of the statutory power of sale under Section 90 (1) & (2) of the Land Act 2012.

The applicant avers that the purported sale in respect of the suit property is questionable, irregular and devoid of procedure. The applicant asserted that when the 2nd defendant under instructions from the 1st defendant entered into the suit property vandalized and chattered away the applicant's equipment and machinery without any redemption notice for proclamation.

Learned counsel arguing on behalf of the applicant and in support of the averments in the affidavits by **Mr. Chome** submitted that the plaint raises issues on whether the provisions of the Banking Act are applicable to the applicant in so far as the capping of interest is concerned. Similarly, counsel submitted that there is a fundamental question whether the attachment of the applicant moveable properties by the 2nd respondent was lawful given the manner it was charted away unproceduraly.

The respondent in answer to the applicant's concern learned counsel for the defendant relied on the affidavit by **Priscilla Njuguna**, Manager legal affairs and the skeleton submissions to provide evidence that there is no serious issue to be tried as the loan agreement. In advancing the contention the that court should not come to the aid of the applicant counsel drew support from the mortgage contract that the charged property **LRNMN/IV/725 & 726** are registered in the name of **Fredrick Mueni** who is not a party to this suit. Counsel maintained that the applicant lacks locus standi on the various aspects of the suit to restrain the 1st respondent from exercising his power of sale. Further, learned counsel was equally forceful in his submissions that contrary to the arguments by the applicant counsel there is no question that the stated company **(Motion City Ltd)** is under statutory administration in terms of Section 581 of the insolvency Act. In his contention therefore, that the company being under the administrator appointed by debenture holders cannot purport to sue or defend a claim in court without the consent of the administrator. It was counsel's contention that there are therefore special rules that have evolved in the event that a company has been placed under statutory administration. Counsel submitted and argued that the applicant has not challenged the validity of the mortgage instrument and on the basis of it a legal charge in the name of **Fredrick Mueni** was registered to secure the loan. Learned counsel making reference to the ruling by **Justice Korir** dated 18.10.2018 concerning an order compelling the return of all the equipment and machinery to the applicant contended that his compliance was conditional that the applicant continue to service the loan.

In addressing this ground whether there is a prima facie case with a real prospect of success on the plaint filed by the applicant, I make the following observations: First, the instrument of charge in favor of the 1st respondent although challenged by the applicant counsel they were executed admittedly by director of the company one Fredrick Mueni who has not been enjoined as a party to this proceeding. Second, the agreement between the 1st defendant and the applicant was for the repayment of the mortgage loan as evidenced by clause 6 of the letter of offer dated 31.1.2013.

The applicant and the 1st respondent agreed to the said loan agreement subject to terms which included the execution by the borrower of a debenture over the present and future assets including a 1st legal charge over a title number **MN/IV/725&726 Kikambala Kilifi** the joint and personal guarantees of the directors of the company. It could not be misleading to infer that the repayment of the mortgage loan by the applicant was still outstanding due and owing.

Third, the question is whether as correctly submitted by counsel for the applicant the exercise of the 1st respondent statutory power of sale had matured. It is not in dispute that the mortgage contract was only enforceable ones the requisite statutory notice under Section 90 (1) of the Land Act to redeem the property must be complied with by the 1st respondent as against the applicant and guarantors. Although, this issue was extensively submitted by the applicant earlier on before my brother **Justice Korir** in October 2018 and in the instant application the 1st respondent has not shown that the statutory power of sale had arisen in its favor to put up the suit property for sale. The conduct of the 1st respondent falls squarely within the principles in the case of **Elizabeth Wambui Njuguna –vs- Housing Finance Co. of Kenya Ltd [2006] eKLR** where the court held that:

"…. the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is fundamental breach of the statute, which derogates from the chargor's equity of redemption."

By virtue of the fiduciary relationship between the mortgagee and mortgagor under Section 96 (2) of the Land Act there is mandatory notice

of right of redemption which explicitly prohibit the purported sale and from effecting any transfer of the suit land.

I make reference to the importance of this provision to the principle articulated in the case of **Albert Mario Cordeiro & Another v Vishram Shamji [2015] eKLR** where the court rendered itself thus:

> ***"Before exercising the power to sell the charged land, the charge shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the date of the service of the notice to sell." Further in the case of Palmy Company Limited vs Consolidated Bank of Kenya [2014] eKLR that:***
>
> > ***"As far as I am aware, this requirement of a notice to sell under Section 96(2) of the Land Act, and that the charge shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell, are still points of judicial debate. Some courts have dealt with that requirement for instance in MALINDI ELC COURT LAND CASE NO. 1'B' OF 2014 JOSIAH KAMANJANJENGA v HOUSING FINANCE CORPORATION OF KENYA & ANOTHER, Angote J. stated that: Having analyzed the chronology of events, I take the view that the auctioneer's fees is only payable once the bank gives to the auctioneer lawful instructions. Section 96 (2) of the Land Act stipulates that the bank cannot exercise its power to sell the charged property until at least 40 days have lapsed.***

Given the particular circumstances, though the mortgage debt remained unpaid there is no question that the outlined legal position sanctioned under Section 90(1) - 96 (2) of the Land Act 2012 was not followed by the 1st respondent bank. It is effect is to deprive the applicant its rights under the mortgage deed.

Special reference to the mortgage agreement was made by the 1st respondent counsel with regard to the statutory power of sale and appointment of an administrator vide notice of the High Court of Kenya at Milimani in the matter of the Insolvency Act dated 21.6.2017.

It is trite, that the power of sale and appointment of an administrator are all powers converged on the 1st respondent and exercisable under the legal instrument but with notice or demand to the applicant. It is to be noted subsequent in that notice of 21st June 2017, **Mr. Rao** infact pursuant to Section 581 of the insolvency Act was required to take over the administration of the applicant's company. This validity and exercise of power by the 1st respondent in accordance with the dictates of Law was not extensively ventilated in October 2018 before Hon. Korir J nor appropriately tested in this 2nd application.

Why do I say so? The issue was raised as a preliminary objection by the 1st respondent counsel but cautiously the operation and efficacy of it to the mortgage deed was not exhaustively dealt with by counsel in his submissions. However, the counsel has reasonably demonstrated that the 1st respondent had taken reasonable steps to have the applicant company placed under receivership. The case for the applicant as pleaded therefore sounds strange in view of the fact that he intends to restrain the 1st respondent by way of a permanent injunction whereas on record the company Motion City Ltd is more accurately is under receivership. The applicant apparently seems to oppose the action by the 1st respondent to place its management under a receiver manager. Whether in the circumstances of the case the company is under receivership or it is at the stage where the directors are still in control cannot be resolved by the conflict of evidence on affidavit by the claimants to the suit. It seems therefore there are serious issues that ought to be ventilated based on the proprietary interest of the suit property and the illegal manner the 1st respondent has moved to exercise the statutory power of sale. It follows therefore that the applicant has satisfied the criterion of a prima facie case for this court to exercise discretion grant an interlocutory injunction.

On the issue of receivership what the Supreme Court said in **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR** while making reference to the case of **Omondi & Another v National Bank of Kenya & 2 Others [2001] KLR 579** equally applies to the applicant's case where it was held:

> ***"A provision in a debenture empowering the receiver to bring an action in the name of the company who assets charged was merely an enabling provision, investing the receiver with a capacity to bring such an action, and did not divest the company's directors of their power to institute proceedings on behalf of the company provided that the proceedings did not interfere with the receiver's function of setting in the company's assets or prejudicially affect the debenture holder by impelling the assets."***

Further

> ***"And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors functus officio, it does not destroy the corporate existence and personality of the company. That appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled."***

It is quite obvious from the facts of this application that the 1st respondent through an order of the court issued by Commercial Division an order to place the applicant's company under receivership and appointment of an administrator was made on 21st June 2017.

In my opinion, the evidence as adduced did not establish whether the purpose and objectives for the requirements of the Act had been satisfied following the appointment of the administrator. The parties engaged in this litigation without going into detail as the effect of an order under Section 581 of the Insolvency Act. The key question is whether in absence of Gazette Notice attached to affidavit evidence the applicant's company is indeed under receivership and for what period will it be under administration.

Finally, this application will be incomplete without mentioning the mandatory injunction issued by the court in very clear terms on 18.10.2018 as follows:

> ***"That an order of mandatory injunction is hereby issued compelling the 1st and 2nd Respondents to return all the equipment and machines that they unlawfully took and or charted away from the applicant's property namely;***
>
> ***Ø Wheel loader KHMA 996J***
>
> ***Ø Nine (9) rails***
>
> ***Ø Four (4) big cutting discs***
>
> ***Ø Spanners and pliers***
>
> ***Ø Hanger support rods among others"***

The Court of Appeal reiterated the principle that must be followed on the issue of mandatory injunction in **Kenya Breweries Ltd & Another v Washington O. Okeyo [2002] eKLR** held:

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff on a mandatory injunction will be granted on interlocutory application."***

Applying these principles to this case a mandatory injunction was issued against the respondent to return equipment and machinery charted away from the applicant premises in their original condition in order prevent them from any intermeddling, alienation, wastage, transfer, assignment, sale or in any other way dealt to the detriment of the applicant.

From the record, it is well established that the respondents though ordered by a writ of mandatory injunction have continued to neglect and act in disobedience to satisfy the orders of the court. By the reason of wrongful detention and the seizure of equipment and machinery the applicants have suffered loss and damage since the goods were seized and from the period of the court order of 18th October 2018.

Am unable to agree with the view taken by the respondent counsel that the reason on non-compliance was as a result of the applicant not also continuing to repay the loan instalment.

Whatever might have been the case the original entry and the carrying away of the goods was found to be unlawful. I can find nowhere in the affidavit by the respondent prove by way of tangible evidence of disobeying such a clear mandatory injunction to restore the particularized equipment and machinery to the applicants.

The applicant's claim against the respondent in respect of this disobedience is to have them cited for contempt with resultant sanctions. The legal proposition in support of this ground can be found in the Court of Appeal decision in **Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union [2015] eKLR** held as follows:

> ***"The power to deal with contempt of court is provided for under Section 5 (1) of the Judicature Act, Section 63 (c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules. Of importance in the determination of this issue is however Section 5(1) of the Judicature Act, since Section 63 (c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor's property."***

In my view, this kind of blatant conduct of disobedience should not go unpunished in a democratic and constitutional society which believes in the rule of law and fair administration of justice.

In the case of **Teachers Service Commission v Kenya National Union of Teachers & 2 others I [2013] eKLR** is on point of this issue where the Judge held:

> ***"The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law."***

Looking back at the application and the order, it can be seen that the respondents have not complied with the order to return the goods forcibly taken away from the premises unlawfully.

The maintenance of the rule of law is governed among others to preserve the integrity and sanctity of the court process. The breadth of the subject matter, was expounded in the persuasive case **Housen v Nikoaisen [2002] 2 SCR,** held that:

> ***"It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced …. Should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationships between the courts."***

It was the 1st respondent obligation to show that the mandatory order to return the equipment and machinery unlawful carried away has been complied with as the order was unconditional.

Counsel for the1st respondent contested the claim relying on a corresponding order regarding the applicant failure to meet the obligation of the mortgage deed.

It is clear from the 1st respondent counsel that the existence of the mandatory order was within their knowledge to obey and fulfil its requirement but blatantly opted for disobedience than obedience. This court doubts the appropriateness of such a blatant disobedience of court orders in absence of a review or an appeal being preferred. In the persuasive case of **Elia Kundiona v the People [1993] ZR** the legal position on the rationale of punishing disobedience of court orders is well set out in line with the above cited case of **Housen (supra)** as follows:

> ***"Contempt of this kind are punished not for purpose of protecting the court as a whole or the individual Judge of the court from a repetition of attack but for protecting the public and especially those who either voluntarily or by compulsion are subject to the Jurisdiction of the court, they will view if the authority of the tribunal was undermined or impugned. It would not be a legitimate object of punishment for an aggrieved Judge to seek solely to vindicate his personal honor or sate his wrath. It is the public which must be protected against loss of confidence and respect of courts engendered by acts calculated to undermine authority as to expose the contempt … A Judge should act of his own motion only when it is urgent or imperative to act immediately. In all he should not take it upon himself to move. He should leave it to the Attorney General or to the other party aggrieved to make a motion in accordance with order 52 of the Supreme Court Rules. The reason is so that he should not appear to be both prosecutor and Judge for that is the role which does not become him well …."***

For these reasons I find the respondents jointly and severally guilty of contempt and breach of the terms of the order issued on 18th October 2018. The question that remains is to pass punishment subject to mitigation by the respondents.

This leads me to the 2nd order whether the applicant has established a prima facie case notwithstanding the provisions of Section 581of the Insolvency Act 2015 on the appointment for the administrator to manage the affairs of the applicant company based under receivership.

Quite apart from that it seems to me there is a triable issue by way of a riposte the applicant's version whether the carrying away of the tools of trade contributed their inability to meet the terms of the loan repayment.

Against the background of all these issues between 18th October 2018 when the mortgagee exercise power of sale was declared unlawful by the court and the filing of the instant application there is prima facie evidence of infringement that entitles the applicant an explanation from the respondents with regard to the duty of care under Section 90 (1), 92 (2), 97 (2) of the Land Act 2012. The status quo on the state of affairs during the period succeeding the lapse of the temporary orders of injunction must be weighed against the conduct of the respondent whose action may have disabled the operations of the company.

The nature of the rights which the respondent asserts and the practical consequences of the plaintiff company being under receivership though it may sound a weak point this is sufficient to justify the granting of an interlocutory injunction.

The applicant has also raised a serious and arguable case on the real risk of the assets charted away by the defendant which have not been returned since making of the order by the court.

For the above reasons, I exercise discretion in favor of the applicant for issuance of temporary order of injunction against the respondent for enforcement of the mortgage agreement.

Accordingly, the notice of motion is hereby allowed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15th DAY OF OCTOBER 2019.

.....

R. NYAKUNDI

JUDGE

In the presence of

Mr. Otieno for the applicant