**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 25 OF 2019**

**MOSES KIMUTAI KASASAM.....1ST PLAINTIFF**

**JOSEPH KIMAIYO AMAI.....2ND PLAINTIFF**

**PAUL KOLIL BUSIENEI.....3RD PLAINTIFF**

**STANLEY KIPTENAI SAINA.....4TH PLAINTIFF**

**SAMUEL KIPTARUS MITEI.....5TH PLAINTIFF**

**MARY JEPKEMBOI LAGAT.....6TH PLAINTIFF**

**ISAAC TOO, SILAS BIWOT & BARNABAS KIRWA (**suing as officials of

**SCHEMERS COMMUNITY BASED ORGANIZATION).....7TH PLAINTIFF**

**-VERSUS-**

**AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT**

**JAMES NJOROGE MBATIA T/A JOYLAND AUCTIONEERS.....2ND DEFENDANT**

**RULING**

**[1]** The Notice of Motion dated **27 May 2019** was filed by the Plaintiffs herein under **Sections 1A, 1B, 3A** and **63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 40 Rules 1, 2, and 9 as well as Order 50 Rule 1 of the Civil Procedure Rules, 2010**. It seeks the following orders:

**[a]** Spent

**[b]** Spent

**[c]** That the Court be pleased to grant an order of injunction restraining the Defendants whether by themselves or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of that parcel of land, namely **UASIN GISHU/TAPSAGOI EXTENSION/237, LR NO. TURBO EAST/LESERU BLOCK 4 (SAMBUT)/191, TURBO EAST/LESERU BLOCK 4(SAMBUT)/33, TURBO EAST/LESERU BLOCK 4 (SAMBUT/42 AND TURBO EAST/LESERU BLOCK 2(AINAPNGETIK)/158** pending the hearing and determination of the main suit.

**[d]** That the Plaintiffs be allowed to liquidate the outstanding loan arrears by way of reasonable instalment;

**[e]** That the costs of the application be provided for.

**[2]** The application was supported by the grounds set out on the face thereof and the Supporting Affidavit sworn by the 1st Plaintiff, **Moses Kimutai Kasasam.** The grounds are basically that the Plaintiffs are *bona fide* members of a registered community-based organization (CBO) known as **Schemers Community Based Organization**; and that they stood as guarantors in respect of loans given to their organization by the 1st Defendant; which loan are yet to be fully repaid. As would be expected in such circumstances, the 1st Defendant took steps, through the 2nd Defendant, to realize the securities, thereby provoking this suit and the instant interlocutory application. While they admit that their organization is indebted to the 1st Defendant, their contention is that the Defendants did not follow the due process set out under **Sections 96 and 97** of the **Land Act, 2012** in that, other than a Redemption Notice served by the 2nd Defendant, they were neither served with the requisite statutory notices, nor were their properties valued to determine their forced sale value prior to sale as required by **Section 97** of the **Land Act.**

**[3]** In response to the Notice of Motion, the Defendants relied on the affidavit of **Mainga Evans, Advocate**, sworn on **26 June 2019**, averring that the Plaintiffs approached the 1st Defendant as members of **Schemers Community Based Organization**, seeking a facility and were given a loan of **Kshs. 33,640,000/=;** and that as security for the loan they offered their individual titles to the following parcels of land:

**[a] KAKAMEGA/SERGOIT/49**

**[b] SOY/SOY BLOCK 8 (SERGOIT) 536**

**[c] TURBO EAST/LESERU BLOCK 4 (SAMBUT)/42**

**[d] UASIN GISHU/TAPSAGOI EXTENSION/237**

**[e] TURBO EAST/LESERU BLOCK 4 (SAMBUT)/191**

**[f] TURBO EAST/LESERU BLOCK 2(AINAPNGETIK)/158**

**[g] TURBO EAST/LESERU BLOCK 4(SAMBUT)/33,**

**[4]** According to **Mr. Mainga**, the 1st Defendant exercised due diligence by conducting a search at the lands registry to confirm title and to ensure the Charges were duly registered to protect its interest. That thereafter, on the **10 December 2014,** the Plaintiffs applied for further financing and accordingly received a further **Kshs. 36,000,000/=** in the name of their organization. The two Letters of Offer were exhibited as **Annexures MEE 1 and MEE4** to the Replying Affidavit. The loan proceeds were intended to enable the members purchase farm inputs to grow 2,486 acres of maize; and was to be fully repaid after harvest.

**[5] Mr. Mainga** averred that the Plaintiffs failed to adhere to the terms of the loans and therefore did not repay the agreed instalments as they fell due; thereby constraining the 1st Defendant to serve them with several demand notices. Copies thereof were exhibited as **Annexure MEE 6**. Ultimately, the 1st

Defendant was left with no choice but to activate its statutory power of sale. On whether the Defendants complied with the relevant provisions of the **Land Act, Mr. Mainga** exhibited copies of the said notices as **Annexure MEE 8** to confirm compliance on the part of the Defendants. He further averred that the properties were also valued and copies of the Valuation Reports were attached as **Annexure MEE 9.** It was therefore his assertion that these proceedings have been brought in bad faith, with the sole object of frustrating the 1st Defendant's statutory power of sale; and should therefore not be entertained.

**[6]** The Plaintiffs filed a Further Affidavit in response to the averments made in the Defendants' Replying Affidavit and stressed the point that the Defendants were under obligation to not only serve each of the Plaintiffs, but to also prove such service; which in their view had not been done.

**[7]** The application was urged by way of written submissions, which I have given careful consideration to. Both sides relied on, *inter alia*, the case of **Giella vs. Cassman Brown & Company Ltd [1973] EA 354**; and while Counsel for the Plaintiffs urged the Court to find that only some of them were served; and that even then, there was a mix-up with some notices being served on the wrong parties; Counsel for the Defendants reiterated their stance that all the applicable requirements of the law were complied with.

**[8] Order 40 Rule 1(a)** of the **Civil Procedure Rules recognizes** that:

> **"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."**

**[9]** The Plaintiffs are apprehensive that, unless the Court intervenes in the manner proposed, they risk suffering irreparable loss of their respective properties. Hence, the key issue for the Court's determination is whether the Plaintiffs have satisfied the conditions for granting a temporary injunction for purposes of **Section 63(c)** of the **Civil Procedure Act** and **Order 40 Rule 1** of the **Civil Procedure Rules.** The applicable conditions were well explicated in **Giella vs. Cassman Brown & Co. Ltd** (supra), wherein it was held that:

> **"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

**[10] As to what amount to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123**furnished the following helpful definition:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter."**

**[11]** There appears to be no dispute herein that the Plaintiffs, as members of **Schemers Community Bases Organization**, applied for a loan from the 1st Defendant in **2014** to enable them procure farm inputs. In the 1st Letter of Offer dated **10 February 2014**, it was a term of the Offer that the Plaintiffs would pay interest on the loan upfront; and the principal sum of **Kshs. 33,640,000/=** after the harvest. In the second instance, they were to repay the loan of **Kshs. 36,000,000/=** by way of a standing order of **Kshs. 1,161,619/=** for 36 months effective **25 February 2015**.

**[12]** There is similarly no dispute that the Plaintiffs failed to repay the loan as agreed; and that although

their contention is that they have made efforts to clear one of the loans over time, it is common ground that there is a substantial amount that remains unpaid. Thus, according to the Redemption Notice served by the 2nd Defendant on **24 April 2019,** an amount of **Kshs. 54,533,613.86** was still outstanding when instructions to realize the securities was given. It is noteworthy, too, that the Plaintiffs admit their default, not only at paragraph 5 of the Notice of Motion but also in paragraph 6 of the Supporting Affidavit; hence their prayer to be allowed to liquidate the outstanding loan arrears by way of reasonable instalments. The 1st Defendant also exhibited correspondence to demonstrate that, arising from the Plaintiffs' default, they applied for a restructuring of the loan, which request was granted by the 1st Defendant (See **Annexures MEE7a** and **MEE7b** to the Replying Affidavit).

**[13]** The contention of the Plaintiffs, however, was that they were not served with the requisite statutory notices under **Sections 90 and 96** of the **Land Act**. They also contended that **Section 97** of the **Land Act,** which requires that a current valuation of the charged property be done prior to sale, was not complied with by the Defendant. It is therefore crucial to ascertain whether there is any merit to these assertions bearing in mind the caution sounded by the Court of Appeal in ***Nguruman Limited vs. Jan Bonde Nielsen & 2 Others[2014] eKLR*** *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."***

**On Whether the Plaintiffs were served with the requisite Statutory Notices:**

**[14] Section 90** of the **Land Act** is explicit in terms. It provides that:

> **(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.**

**(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may--**

**(a) appoint a receiver of the income of the charged land;**

**(b) apply to the court for an order to--**

**(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;**

**(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.**

**[15] Section 96** of the **Land Act**, on the other hand, stipulates that:

**(1) Where a chargor is in default of 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 charge may exercise the power to sell the charged land.**

**(2) Before exercising the power to sell the charged land, the charge shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.**

**(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on –**

**…**

**(f) any person who is a co-owner with the chargor;**

**…**

**(i) Any other person known to have a right to enter on and use the land…**

**[16]** In response to the assertions by the Plaintiffs, the 1st Defendant annexed to its Replying Affidavit copies of the Statutory Notices served by it in accordance with the requirements of **Sections 90** and **96** of the **Land Act**. Those documents confirm that, first and foremost, the 1st Defendant served the Plaintiffs with a series of demand letters as evidenced by the bundle of documents marked **Annexure MEE 6**. The notices were served directly on the borrower and are dated between **4 April 2017** and **12 February 2018**.

**[17]** Similarly, there is *prima facie* evidence that the **Section 90** Notice dated **8 May 2018** was also served. However, the Plaintiffs took issue with the fact that no separate notices were served on the Plaintiffs as Chargors; that in some instances, the charged properties were wrongly described; and that in some instances the Chargors were not served at all. Thus, having looked at the **Section 90 Notice** dated **8 May 2018** exhibited as **Annexure MEE 8** to the Replying Affidavit, it is the case that same addressed to the borrower; though all the Plaintiffs signed their respective copies. There is no other copy or copies showing that such notices were addressed to each of the Chargors as individuals.

**[18]** There is another reason why the said notice appears deficient. It seems not to accord with **Section 90(2)(b)** of the **Land Act** in that no specific amount was set out for payment to rectify the default. Instead, the 1st Defendant appears to have called up the entire loan then outstanding. It reads:

> **"In view of the infringement of the covenants contained in and/or implied in the loan agreement(s) executed by you in favour of this Corporation by non-payment of installments, this is now to DEMAND from you payment of the sum of Kenya Shillings FORTY NINE MILLION THREE HUNDRED FIFTY SEVEN THOUSAND AND THREE ONLY (Kshs. 49,357,003.00) Principal sum and interest owed by yourself as at 7th August, 2018. By this STATUTORY NOTICE therefore your loans are recalled and must be fully redeemed forthwith…"**

**[19]** Other than the foregoing deficiencies in respect of the **Section 90 Notice**, there appears to be no indication that the same was followed up with a Notice to Sell in the manner specified in **Section 96** of the **Land Act**. In Subsection 2 the provision is explicit that:

> **"Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."**

**[20]** In his written submissions, Counsel for the Defendants seemed to front the view that the two notices served by the Auctioneer, namely, the 45 days Redemption Notice and the Notification of Sale annexed to the Plaintiffs' Supporting Affidavit. That argument is however untenable, granted the clear provisions of **Sections 90 and 96** of the **Land Act.** In this connection, I would endorse the position taken by **Gikonyo, J**. in **Palmy Co. Ltd vs. Consolidated Bank of Kenya [2013] eKLR,** that:

> **"The Notice issued on 25th September, 2013 together with a Notification of sale of the same date by the auctioneer was on the instructions of the Respondent Bank. Both were served and received … I think, the Notice to Sell the suit premises required under section 96(2) of the Land Act should be seen within the land reforms and the constitutional desire to protect the chargor's right to property by allowing reasonable opportunities to redeem the charged property. Therefore, section 96(2) of the Land Act should be seen in that light and thus, places a separate obligation on the charge to issue a notice to sell which is quite apart from the obligations placed on the auctioneer under the Auctioneers Act to issue a redemption notice before selling an immovable property on instructions of a charge or court order. A fusion of the notice under section 96(2) of the Land Act and that under rule 15(d) of the Auctioneers Rules, will not only obfuscate a clear distinction between the two, but will also bear the innuendo of a clog on the equity of redemption of the charger…"**

**[21]** It is on account of the aforementioned infractions of the law that I find the facts of this case distinguishable from the facts at play in **Francis J.K. Ichatha vs. Housing Finance Company of Kenya Ltd [2005] eKLR**, a case that was decided on **3 June 2005** before the **Land Act** was passed. In the **Ichatha Case**, the dispute was simply on accounts. In the instant case, the Plaintiffs, appear to have a genuine grievance against the Defendants that is worth calling upon the Defendants to answer. It matters not therefore that the Redemption Notice and the Auctioneer's Notification of Sale were served.

**On Whether there was failure by the Defendant to comply with Section 97 of the Land Act**:

**[22] Section 97** of the **Land Act** provides as follows:

> **(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**
>
> **(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.**
>
> **(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-**
>
> **(a)** ***There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and***
>
> ***(b) The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).***

**[23]** The 1st Defendant exhibited copies of the Valuation Reports for the charged properties and that seems to have silenced the Plaintiffs as the matter was not taken up in their written submissions.

**<u>On the plea for Payment by Instalments:</u>**

**[24]** As to whether the Plaintiffs should be allowed to liquidate the outstanding loan arrears by way of reasonable instalment, it is now trite that parties to an arm's length agreement cannot be heard to complain when it turns out that theirs was a bad bargain, or that circumstances beyond their control have made compliance impossible. The facilities were given to the Plaintiffs in 2014 and there is ample proof herein that they made several restructure proposals to the 1st Defendant; which were acceded to by the 1st Defendant. An example is the documents marked **Annexure MEE 7(a) and 7(b)** to the Replying Affidavit for accommodation. The Plaintiffs ought to have complied with the renegotiated terms. Indeed, in **<u>National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112</u>**, the point was made by the Court of Appeal thus:

> **"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.**
>
> **As was stated by Shah JA in the case of*Fina Bank Limited vs Spares & Industries Limited*(Civil Appeal No 51 of 2000) (unreported):**
>
> **"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".**

**[25]** Thus, having found that the Plaintiffs have a *prima facie* case in terms of service of the Statutory Notices required under the Land Act, 2012, it would follow that that is in itself a demonstration that they stand to suffer irreparable harm. I would follow **<u>Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR</u>, in which it was** held that:

> ***"...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the***

***law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."***

***[26]*** *The same position was taken* ***in Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation [2008] eKLR*** *thus:*

> ***"... a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case, a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the Plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. (see also Olympic Sports House Limited vs. School Equipment Centre Limited [2012] eKLR.***

***[27]*** *As to whether the balance of convenience is in favour of the Plaintiff, the decision of the Court of Appeal in* ***Charter House Investments Ltd vs. Simon K. Sang and Others Civil Appeal No. 315 of 2004*** *is instructive, that:*

> ***"Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the court requires protection and maintenance of the status quo. The award of temporary injunction by courts of equity has never been regarded as a matter of right, even where irreparable injury is likely to result to the applicant. It is a matter of sound judicial discretion, in the exercise of which the court balances the convenience of the parties and possible injuries to them and to third parties.***

***[28]*** *Moreover, it is imperative that t*he Court opts for the lower rather than the higher risk of injustice. In the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589**, **Ojwang Ag. J** (as he then was) quoted the following words of **Justice Hoffmann** in the English case of **Films Rover International vs. Cannon Film Sales Ltd (1986) 3 All ER 772**:

> **"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeed (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …"**

**[29]** In the instant matter, it is my considered view that the path leading to the lower risk of injustice would be to stop the impugned auction pending compliance with the express stipulations of the applicable law. This means that the Defendant is at liberty to sell the subject properties upon issuing fresh notices in compliance with **Sections 90 and 96** of the **Land Act,** including the Auctioneer's Redemption Notice and Notification of sale. Accordingly, I would grant orders in their favour in the following terms:

> **[c]** That an order of temporary injunction be and is hereby issued restraining the Defendants whether by themselves or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of that parcel of land, namely **UASIN GISHU/TAPSAGOI EXTENSION/237, LR NO. TURBO EAST/LESERU BLOCK 4 (SAMBUT)/191, TURBO EAST/LESERU BLOCK 4(SAMBUT)/33, TURBO EAST/LESERU BLOCK 4 (SAMBUT/42 AND TURBO EAST/LESERU BLOCK 2(AINAPNGETIK)/158** pending full compliance with the provisions of **Sections 90 and 96** of the **Land Act, 2012.**

**[e]** That the costs of the application be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF NOVEMBER, 2019**

**OLGA SEWE**

**JUDGE**