REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 75 OF 2017

NYANDO ENTERPRISES LIMITED.............................. PLAINTIFF

VERSUS

BARCLAYS BANK KENYA LIMITED..........................DEFENDANT

RULING

[1] The Notice of Motion dated **20 February 2017** was filed herein by the Plaintiff/Applicant, **Nyando Enterprises Limited** under **Sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; Sections 96(2) and (3), 97(1), 103 and 104 of the Land Act, No. 6 of 2012.** The application was also filed pursuant to **Order 40 Rule 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010**. It seeks orders that:

[a] Spent

[b] Spent

[c] That a Temporary Injunction do issue restraining the Defendant whether by itself, its agents, servants or employees, from selling or offering for sale, transferring, charging, leasing or in any other way alienating or disposing of all that property known as Land Reference Number 330/382 Nairobi, pending the *inter partes* hearing and determination of this suit;

[d] That the costs of the application be provided for.

[2] The application was brought on the grounds that the Plaintiff is the registered proprietor of the property known as **LR No. 330/382, Nairobi** (the Suit Property), which was mortgaged to the Defendant, **Barclays Bank of Kenya Limited**; and that the same had been advertised for sale by public auction yet no statutory notice had been served prior thereto. It was further contended that no valuation had been done to establish the true and accurate value of the property prior to the publication of the Notification of Sale.

[3] The application was supported by the affidavit of the Plaintiff's Managing Director, **Mr. Eric Nyamunga**, sworn on **20 February 2017.** According to the Plaintiff, the Defendant granted financial advances amounting to **Kshs. 45,000,000/=** to **Supplies and Marketing Limited** ("the Borrower") in

respect of which it was the Guarantor. The borrowing was secured by a mortgage in favour of the Defendant over the Suit Property dated **1 August 2011.** A copy of the document marked **"A"**in the Plaintiff's Bundle of Documents filed with the Plaint. It was further averred on behalf of the Plaintiff that the Borrower thereafter ran into financial difficulties and was unable to repay the loan; and that by a Further Mortgage dated **23 March 2012,** a further loan in the sum of **Kshs. 40,000,000/=** was secured by the same property; thus the aggregate debt came **Kshs. 85,000,000/=.** That whereas the Borrower was in default, the Defendant was under obligation to comply with the mandatory provisions of the **Land Act** by serving the requisite statutory notices not only on the Borrower, but also on the Plaintiff and the tenant.

[4] It was further the contention of the Plaintiff that the Defendant and its agent, **Garam Investments Auctioneers**, grossly undervalued the mortgaged property at **Kshs. 150,000,000** instead of the correct market value of **Kshs. 300,000,000**; and therefore that it would be inequitable for the sale to proceed in the circumstances. On another plane, the Plaintiff averred that, whereas it is ready and willing to pay the debt, it required time to dispose of another piece of property through **Tysons Limited** to be able to fully redeem the mortgaged property on which there is a school with over 100 children.The document marked**"G"**in the Plaintiff's Bundle was referred to as proof of these endeavours. **Mr. Nyamunga** added that he is overburdened by a neurological and progressive medical condition since **2016,** which requires daily medical response; and which has affected the Plaintiff's and the Borrower's business affairs. He produced medical records in support of the averment (see the document marked **"F"**in the Plaintiff's Bundle). He therefore urged for the issuance of the orders sought in order to avert the irreparable loss and damage that would otherwise be suffered by the Plaintiff as well as its tenant, **Play Farm Kindergarten**.

[5] The application was resisted by the Defendant, on whose behalf a Replying Affidavit was sworn on **27 February 2017** by **Lucas Gikungu,** the Defendant's Business Support and Corporate Recoveries Manager. It was confirmed by **Mr. Gikungu** that the Plaintiff agreed to offer its property **LR No. 330/382** as security for facilities that the Defendant advanced to the Borrower**, Supplies& Marketing Limited**; and that the Borrower defaulted in making repayments to the Defendant on multiple accounts it held with the Defendant, including Current Account Number [...] and Loan Account Numbers [...], [...] and [...].

[6] The Defendant however refuted the Plaintiff's contention that it was not aware of the Borrower's default and asserted that formal letters of demand were sent to the Plaintiff, notifying it of the default, as far back as **12 November 2015**. Copies of the said letters were exhibited to the Replying Affidavit and marked **Annexure "LG 1".** It was further contended that as the Borrower continued to default on its obligations in spite of the formal letter of demand, the Defendant instructed its advocates to issue a statutory notice to the Borrower in accordance with **Section 90** of the **Land Act**; and that this was done through a letter dated **7 June 2016** (marked **Annexure "LG 2")** and sent by registered post to its address in accordance with **Clause 41** of the Mortgage and Further Mortgage. In addition, it was averred, the Defendant caused its advocates to issue a second statutory notice under **Section 96** of the **Land Act**, due to the persistent default of the Borrower; and that upon the expiry of the second notice, the Defendant instructed its advocates to issue a letter of instruction to **Garam Investments Auctioneers** for the issuance of the Notification of Sale in accordance with Rule 15 of the Auctioneers Rules. Copies of these notices were annexed to the Replying Affidavit and marked **Annexures "LG 5"** to "**LG 7"** to demonstrate that the Plaintiff was fully aware of the Borrower's indebtedness, and that it was accommodated by the Defendant on numerous occasions to no avail; while **Annexure "LG 7"** was exhibited to prove that the mortgaged property was valued prior to the commencement of the process of exercising the Defendant's statutory power of sale.And in response to the Plaintiff's averment that its tenant, **Play Farm Kindergarden**, was not notified of the Defendant's intention to sell the Suit Property, a Further Affidavit was filed herein, sworn by **Lucas Gikungu** on **25 May 2017**, to show that such a notice (marked **Annexure "LG 1"** to the Further Affidavit) was subsequently served and receipt thereof acknowledged.

[7] The Defendant conceded that, in a bid to regularize the Borrower's account, and subsequent to the issuance of the statutory notice, the Plaintiff's Managing Director, **Mr. Eric Nyamunga** approached it with an indication that he was in the process of selling a property known as **LR No. 209/5990/15** (**the Hatheru Road Property**) for **Kshs. 260,000,000/=.** To that end, the Defendant received two letters from

the Plaintiff's lawyers, **Omulele & Tollo Advocates** (marked **Annexures "LG 3" and "LG 4").** However the Plaintiff did not regularize the Borrowers account and neither was any money received in respect of the purported sale of the **Hatheru Road Property.** Thus, it was the averment of the Defendant that it was mischievous for the Plaintiff to claim in these proceedings that it was in the process of selling the same property so as to redeem the Borrower's loan account without disclosing these material facts.

[8] Pursuant to the directions of the Court given on **31 July 2017** Learned Counsel for the parties filed written submissions herein, which were highlighted on **20 November 2017**. The Plaintiff's Counsel, **Mr. Munene**, in his written submissions filed herein on **8 September 2017**, reiterated the Plaintiff's averments in the Supporting Affidavit and stressed the point that failure to serve the Plaintiff's tenant with a copy of the 40 days' Notice to Sell under **Section 96** of the Land Act rendered the subsequent processes by the Auctioneer unlawful. In particular, **Mr. Munene** took issue with the failure by the Defendant to serve a copy of the **Section 96** Notice on the Plaintiff's tenant, **Play Farm Kindergarten**. The cases of **Josiah Kamanja Njenga vs. Housing Finance Company of Kenya [2014] eKLR; Moses KibiegoYator vs. Ecobank Kenya Limited [2014] eKLR**and **Olkasasi Limited vs. Equity Bank Limited [2015] eKLR** were cited in support of this argument. It was further the submission of Counsel for the Plaintiff that, since the last valuation of the property was conducted on **30 May 2016**, over 16 months had since elapsed prior to the intended sale; and therefore that it was only prudent that a current valuation be obtained before the auction could be conducted. Thus, it was the contention of Counsel that an auction or sale that is not preceded by the issuance of the requisite notices or a current valuation of the property set to be auctioned, would occasion irreparable harm to the mortgagor for which damages would not be adequate as a remedy. He accordingly urged the Court to grant the Plaintiff the injunctive orders sought pending the hearing and determination of this suit.

[9] Learned Counsel for the Defendant, **Mr. Mwangi**, countered**Mr. Munene's** arguments and reiterated the Defence's posturing that all the requisite notices, including the Notice to Sell under **Section 96** of the **Land Act** were duly served. He submitted that upon the lapse of the statutory notices, the Defendant, through its advocates, issued instructions to **Garam Investments Auctioneers** to prepare and issue a Notification of Sale in accordance with **Rule 15** of the **Auctioneers Rules**, **1997**; which was done and served upon the Plaintiff's Managing Director, **Mr. Eric Nyamunga**. Thus, the Court was urged to find that the conduct of the Plaintiff, in denying service of the statutory notices, and in concealing the fact that it had failed to follow through on its offered to sell an alternative property to redeem the suit property, is such as not to endear it for equitable relief. Counsel relied on **Caliph Properties Limited vs. Barbel Sharma & Another [2015] eKLR**and **Ibrahim Mungara Kamau vs. Francis Ndegwa Mwangi [2014] eKLR** in support of this contention. He also relied on the **Olkasasi Limited Case** (supra) but for the proposition that an injunction which is granted on the ground that the notices issued are not proper, or not issued at all, is not an absolute prohibition; and that such injunction will only subsist for as long as the Bank has not issued a proper notice. He therefore submitted that since the Defendant has since served a copy of the **Section 96 Notice** on the Plaintiff's tenant, it should be allowed to proceed with the exercise of its statutory power of sale.

[10] With regard to the valuation of the Suit Property, Counsel for the Defendant submitted that, since the Plaintiff did not commission another valuation to demonstrate the alleged appreciation of the value of the Suit Property since **May 2016**; or to counter the Defendant's Valuation Report, the Plaintiff's position and figures set out in Paragraph 11 of its Supporting Affidavit are merely speculative. The cases of **Palmy Company Limited vs. Consolidated Bank of Kenya Limited [2014] eKLR** and **ZumZum Investment Limited vs. Habib Bank Limited [2014] eKLR** were cited for the proposition that the onus of establishing a prima facie case, that an applicant's right had been infringed by the Defendant by failing to discharge the duty of care under **Section 97(1)** of the **Land Act,** lies on the applicant. Hence, Counsel urged the Court to find that the Plaintiff herein has failed to discharge its duty to justify why another valuation ought to be carried out; and that, in any event, any difference between the sale price of the Suit Property and its purported market value is quantifiable, for which reason, damages are an adequate remedy; and therefore the apprehended loss cannot be said to be irreparable.**Mr. Mwangi** accordingly urged for the dismissal of the Plaintiff's application with costs.

[11] The Court does have jurisdiction, under **Sections 1A, 1B, 3A and 63(c) and (e)** of the **Civil**

Procedure Rules, to grant the orders sought by the Plaintiff per Prayers (3) and (4) of the Notice of Motion dated **20 February 2017;** and it was on the basis of those powers that, on **21 February 2017**, an interim order of injunction was granted to stop the sale of the Suit Property as proposed by the Defendant and its agents.That order was however conditional on the payment, by the Plaintiff, of the Auctioneers' charges. It has since emerged, from the submissions of **Mr. Mwangi** that the Plaintiff is yet to pay the Auctioneers' charges, and is therefore in default of the Court Order. This point was raised by the Defendant to justify its arguments that the injunction ought to be discharged forthwith, granted the undeserving conduct on the part of the Plaintiff; and is a point I will revert to shortly.

[12] Order 40 Rule 1(a) of the **Civil Procedure Rules**, which is one of the enabling provisions cited by the Plaintiff in support of its application, provides 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."**

[13] There is no dispute that the Plaintiff and the Defendant are Mortgagor and Mortgagee respectively by dint of a Mortgage dated **1 August 2011**, and Further Mortgage dated **23 March 2012** over the Suit Property. Copies of the instruments were exhibited as annexures to the Plaintiff's Supporting Affidavit, and they were in connection with borrowings by **Supplies & Marketing Limited** of **Kshs. 45,000,000/=** and **Kshs. 40,000,000/=,** respectively, for which the Plaintiff was the Guarantor. It was expressly admitted by the Plaintiff that the Borrower did not honour its obligations under the Mortgage Instruments; and that, following the Borrower's persistent default, the Plaintiff offered to sell off the **Hatheru Road Property** and use the proceeds from the sale to settle the amounts owing to the Defendant. The documents marked **Annexure "LG 3"** and **"LG 4"** to the Replying Affidavit further confirm this common position. It is also the parties' common position that it was the failure by the Borrower to settle the outstanding loans and the failure by the Plaintiff to honour its promises that led to the commencement of the process by the Defendant, or realizing its statutory power of sale. Consequently, the Suit Property was put up for sale on **21 February 2017** at 11.00 a.m. by **Garam Investments** on notice as per the documents marked "**C", "D"** and **"E"** in the Plaintiff's Bundle of Documents. This is what precipitated the filing of this suit and the instant Notice of Motion. It is pertinent therefore to ascertain whether the Plaintiff has met the conditions for the issuance of a temporary injunction, as laid down in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**. It was held thus, in that case:

> **"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."**

[14] And in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 a *prima facie case* was defined thus:

> **"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."**

[15] Moreover, this being an interlocutory application, the Court need not examine closely the merits or otherwise of the Plaintiff's case. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012,** the Court of Appeal made this point thus:

"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."

[16] With the foregoing principles in mind, I have given due consideration to the Plaintiffs' application and noted that it comprises of two arguments, namely: that the Defendant did not serve the requisite statutory notices under **Sections 90** and **96** of the **Land Act**; that a current valuation was not obtained by the Defendant as required by **Section 97** of the **Land Act.** It is therefore necessary to restate the provisions of**Section 90** of the **Land Act,** which providesthat:

(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 remiedies 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 member 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.

[17] There being no dispute that the Borrower was in default, there cannot be any gainsaying that the Defendant's right to sell the mortgaged property donated by **Section 90(3)(e)** of the **Land Act,** had indeed crystallized. The Defendant annexed to the Replying Affidavit, as **Annexure "LG 1"** a set of letters dated **12 November 2015** addressed to the Plaintiff, its Director and the deponent to the Supporting Affidavit, **Mr. Eric Opon Nyamunga**, in his capacity as a Guarantor, **Mr. Michael Tuju,** also a Guarantor. They were duly notified of the Borrowers default and the amount due as at that date, being **Kshs. 96,029,256.15;** and that if payment was not forthcoming within 30 days then action would be taken by the Defendant to recover the outstanding amount.

[18] In addition to the Demand Letters aforementioned, the Defendant demonstrated, vide **Annexure "LG 2",** that a Statutory Notice under **Section 90** of the **Land Act** was duly issued on behalf of the Defendant by their Advocates, **Mohammed Muigai Advocates**. It was not the Plaintiff's contention that the notice did not contain the particulars set out in **Section 90(2)** of the Land Act. There is further proof that the said notice was dispatched by registered post to the Plaintiff's correct address that was provided by it in the Mortgage Instrument; and that in response thereto, the Plaintiff's Advocates, **Omulele & Tollo**Advocates responded to the notice vide their letter dated **20 July 2016** thus:

"...As was discussed, we act for our client Engineer Eric Opon Nyamunga, who we hereby confirm is in the process of disposing his parcel of land property known as Nairobi land Reference Number 209/5990/15 for Kshs. 260,000,000.00 (Two Hundred and Sixty Million Kenya Shillings) to Tonson Holdings Limited...We now expect the sale agreement to be executed by both parties within two weeks from today...We do promise to update you immediately upon its execution. Find enclosed a copy of the yet to be executed contract sale."

[19] Along with the letter, the Defendant also exhibited a copy of the unexecuted contract of sale that it received from the Plaintiff's Advocates as well as copies of related correspondence. In the premises, any averment that no Statutory Notice was served under Section 90 of the Land Act is clearly untenable.It is also immaterial that the **Section 90** Notice was issued in on **7 June 2016**, for, once a valid notice has been given, there is no obligation in law for a Chargee to re-issue a notice, even where the sale is not conducted as initially scheduled. In this respect, I would agree with and endorse the expressions of **Warsame, J** in **Executive Curtains & Furnishings Ltd vs. Family Finance Building Society [2007] eKLR** in which he had the following to say:

"The plaintiff was given an opportunity to redeem the charge property through the statutory notice dated 24th February, 2006. I am not aware of any law requiring the defendant to repeat or reissue the statutory notice once it is issued and served upon the borrower. The purpose of the notice is to warn the borrower that due to his default and due to the outstanding debt, the charged property is susceptible to a sale if he fails to redeem it within the 90 days after service of the notice. The period of 90 days is meant to give the borrower sufficient time within which to make arrangement to redeem his charged property. Any time after the expiry of the 90 days, the charge property is out of the hands of the borrower."

[20] Section 96 of the **Land Act,** on the other hand provides that:

(1) Where a Chargor is in default of the obligation under a charge and remains in default at the expiry of the time provided for the rectification of the default in the notice served on the Chargor under Section 90 (1), a Chargee may exercise the power to sell the charged land.

(2) 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.

[21] Again, the Defendant exhibited a copy of the Statutory Notice that was issued on **9 November 2016** on its behalf by **Mohammed Muigai Advocates** pursuant to **96** of the **Land Act;** which notice was sent to the Plaintiff by Courier as well as registered post. Accordingly, any attempt by the Plaintiff to deny service of this particular notice would be futile. I however note that the contention of the Plaintiff in this regard is that a copy of the said notice was not served on its tenant, Play Farm Kindergarten, as required. Indeed **Section 96(3)** of the **Land Act** is explicit that:

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

(a) the Commission, if the charged land is public land;

(b) the holder of the land out of which the lease has been granted, if the charged land is a lease;

(c) a spouse of the chargor who had given consent;

(e) any lessee and sublessee of the charged land or of any buildings on the charged land;

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

(g) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;

(h) any guarantor of the money advanced under the charge;

(i) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

(j) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

[22] A look at the **Section 96 Notice,** annexed as **Annexure "LG 5" to** the Replying Affidavit, shows that whereas it was served on the Borrower, the Plaintiff as well as the Guarantors, **Eric Opon Nyamunga** and **Michael Tuju, t**here is no indication that it was intended to be served, or that it was served on the Plaintiff's tenant, **Play Farm Kindergarten**. Indeed the Defendant did expressly concede that no such notice was served on the tenant; but that subsequent to the filing of this suit, the Defendant caused a copy of the said notice to be served. This evidence was introduced vide the Further Affidavit of **Lucas Gikungu**, sworn on **25 May 2017** and the annexures thereto. It is therefore manifest that prior to the sale that was scheduled for **21 February 2017**, compliance had not been had with the mandatory provisions of **Section 96(3)(e)** of the **Land Act**.

[23] Although it was the submission of **Mr. Mwangi** for the Defendant that this omission would not necessarily invalidate the proposed sale, the fact that a tenant's interest was noted as one of the interested parties and provided for in **Section 96(3)** as an interested party is sufficient for the Court to ensure that

such interest in equally protected. Needless to say that the Plaintiff's tenant would be adversely affected granted the Plaintiffs uncontroverted averment that it had over 100 pupils at the time. I would accordingly agree with the Plaintiff that a violation of **Section 96** in whatever form does render the subsequent processes invalid; so that, it is inconsequential that valid instructions were given to **Garam Investments Auctioneers**; or that the Redemption Notice under **Rule 15** of the Auctioneers Rules and a Notification of Sale was thereafter served by the Auctioneer. Accordingly, I would agree with the submissions of the Plaintiff that, under those circumstances the Plaintiff ought not to be burdened with the Auctioneer's charges (see **Moses Kibiego Yator vs. Eco Bank Kenya Limited [2014] eKLR,** in which **Munyao Sila, J**. came to the same conclusion). Accordingly, the order of **21 February 2017** in connection with the payment by the Plaintiff of the Auctioneer's charges is hereby vacated.

[24] Thus, in the light of all the matters aforestated, I am satisfied that a *prima facie* case has indeed been made out herein by the Plaintiff; and having so found, there can be no question that the omission would occasion irreparable harm to the Plaintiff in whose favour the balance of convenience also tilts. This is because it is now trite that where there is breach of **the law, an applicant cannot be compelled to accept damages as recompense.I would accordingly follow Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR wherein it was** held as follows by **Warsame, J**.:

> ***"... 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."***

*[25] Similarly, in **Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation [2008] eKLR**the trial Court took the position, which I entirely agree with, that:*

"...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)

[26] The second limb of the Plaintiff's arguments was that**,** although the Suit Property was valued for purposes of sale, that valuation was a gross undervalue, making it evident that it stands to suffer loss and damage should the auction be proceeded with. The Valuation Report was annexed to the Replying Affidavit as **Annexure "LG 8".** It shows that the property was inspected for valuation purposes on **30 May 2016**. Thus, the Open Market Value was given at **Kshs. 150,000,000/=.** There was no alternative view or counter-valuation that was placed before the Court to suggest that the Defendant's valuation was either a gross undervalue, or a breach of **Section 97**, which, in any event simply states that:

> **(1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of 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).

[27] In my view, there is *prima facie*evidence of substantial compliance with the above provision and I therefore find no valid basis for complaint. Thus, other than the failure to serve the **Section 96 Notice** on the Plaintiff's tenant, the Defendant cannot be faulted in other respects. Accordingly, I would agree that, in such a scenario, the justice of the case demands that once this anomaly is rectified, the Defendant should be at liberty to proceed with the exercise of its statutory power of sale. In this regard, I am in agreement with the observation of the Court in **Olkasai Limited vs. Equity Bank Limited [2015] eKLR** that:

"...an injunction which is granted on the ground that the notices issued are not proper or none was issued at all, is not an absolute prohibition; such injunction will only subsist for as long as the Bank has not issued a proper Notice. It follows, therefore, that immediately the Bank herein issues a proper Notice of not less than 40 days under section 96(2) of the Land Act, nothing prevents it from giving instructions to the auctioneer who shall upon those instructions issue the Redemption Notice and Notification of Sale as per Rule 15 of the Auctioneers Act, and proceed to sell and conclude a contract of sale of the charged property..."

[28] I note that one of the grounds raised in support of the application, namely Ground 6, it was stated that the Defendant had failed to account for the monies paid so far by the Borrower or render a true and fair account therefor. This ground was however neither supported by any of the averments in the Supporting Affidavit nor the submissions made herein on behalf of the Plaintiff. In any case, a dispute over accounts is no valid ground for the issuance of an injunction, as well explicated in **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725** thus:

"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. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

Similarly, in **Bharmal Kanji Shah And Another V Shah DeparDevji (Supra) it was observed that:**

"…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 a mortgage…"

[29] In the same vein, nothing much turns on the arguments by the Defence touching on the conduct of the Plaintiff in not disclosing its vain promises to pay and the offer to sell an alternative piece of land. This is because the Plaintiff did disclose its intention to dispose of its **Hatheru Road Property** so as to redeem the suit property. Additionally, the Plaintiff did offer an explanation, and a plausible one at that, as to why he has been unable to keep up with his business obligations.

[30] In the result, I would allow the Plaintiff's application and issue an injunction in the manner sought vide Prayer 3 of the Notice of Motion dated **20 February 2017**, namely that a Temporary Injunction be and is hereby issued restraining the Defendant whether by itself, its agents, servants or employees, from selling or offering for sale, transferring, charging, leasing or in any other way alienating or disposing of all that property known as **Land Reference Number 330/382 Nairobi**; but make it clear that this

order will only subsist pending proper service of the **Section 96 Notice** on all the concerned parties by the Defendant, who will thereafter be at liberty to proceed with the sale as by law required. It is further ordered that the costs of the application be costs in the cause.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI 2ND DAY OF MARCH 2018

OLGA SEWE

JUDGE