



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO 23 OF 2018

STEPHEN SONTU SIPALA.....PLAINTIFF/APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD....1ST DEFENDANT/RESPONDENT

MELLECH ENGINEERING AND

CONSTRUCTION CO LTD.....2NDDEFENDANT/RESPONDENT

RULING

A. BACKGROUND OF THE CASE

[1] The second Respondent in 2011 applied to the 1st Defendant for a loan facility and approached the Applicant to stand as its guarantor for the maximum amount of Kshs. 100,000,000/=. The agreement between the Applicant and the 2nd defendant was that this guarantee was to be in the form of a charge over parcel of land known as KAJIADO/LORNGUSUA/1449.

[2] In March 2017, the Applicant received a notice from the first Defendant threatening to take action over the suit property. The sole explanation given in this demand was that the 2nd Defendant had defaulted and was in arrears of Kshs. 308, 40, 395.57. This was contrary to the maximum cap of Kshs. 100, 000, 000/= that the Applicant had consented to when signing the Guarantee of Indemnity Agreement.

[3] The above series of events has led the Applicant to approach this court vide an Application dated 20th June 2017 in which he is seeking the following prayers;

- a) An order for an injunction to restrain the 1st Defendant by itself, its servants, agents or any one of them from interfering with the property known as KAJIADO/LORNGUSUA/1449 either by way of sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever pending the hearing and final determination of the suit herein.
- b) That the 2nd Defendant be compelled to provide an account statement showing all the payments made to the 1st Defendant and further the second defendant be compelled to make any payments that may be due to the 1st Defendant.
- c) That an order be issued directing the defendants to provide properly all the documentation relating to the loan account including reconciled accounts.

[4] The Applicant has raised the following issues for determination:

1. Whether the Applicant is entitled to the relevant account statements and documentation relating to the loan.
2. Whether the Applicant is entitled to an injunction at this point

B. The Applicant's Case

[5] In support Affidavit dated 31st July 2017; copies of documentations pertaining to the transaction in question as well as copies of the bank statements have been annexed. The documents showed the following;

1. There were several payments which were made to the second defendant which are not explained

2. The 1st Defendant seems to have extended further facilities to the second defendant without involving the Plaintiff/Applicant

3. Section 97(1) of the Land Act provides that the chargee owes a duty of care to the charger or any guarantor, including the Plaintiff. The first defendant has not shown efforts at recovery made against the second defendant before embarking on the Plaintiff

4. The account statements show that there is an irregularity surrounding the charge registered against the plaintiff's property. The first defendant illegally gave out more funds than the value of the security in place.

5. It is trite law that if the amounts claimed are excessive or tinctured with illegal charges and interest, the mortgagee may be restrained from exercising its statutory power of sale. They urge the court to do so

6. The 1st Defendant has not given any explanation for all the charges levied on the account and the Applicant should not lose his property on the basis of uncontractual charges. First, the penalties charged and compounded interest is illegal. The Defendant single handedly levied penalties, which amount to increase in the interest rates it applied on the Plaintiffs accounts. The defendant does not pretend that it sought the approval of the minister of Finance to vary the interest rates.

[6] Section 44 of the Banking Act states that;

“No Banking Institution shall increase its rate of banking or other charges except with the prior approval of the minister.”

The plaintiff further stated the provisions of Legal Notice No 34 of 2006 regulation 2, which reads thus;

“An application for approval of increase in the rate of banking or other charges under section 44 of the Act shall be in the form set out in the schedule and shall be submitted to the minister through the governor of the Central Bank of Kenya.”

7. The first defendant has not provided the charges showing how the amount rose astronomically beyond what he had purportedly guaranteed.

[7] The Applicant also prays for an order for injunction to be issued against the Defendants. They seek to rely on the case of *Giella v Cassman Brown Limited* [1973] EA 348 in this regard. The case summarised the issues to be addressed by the court as follows;

“First an Applicant must show that there is 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 damage, which would not be adequately compensated by an award of damages. Thirdly if the court is in doubt, it will decide the application on a balance of convenience”.

[8] The Applicant contends that, he accepted to act as a guarantor and have his property charged whose cap was Ksh. 100, 000, 000/=. He has insisted on the fact that he was not aware of any amendments to the security details despite the fact that the same were amended on several occasions by the defendants. Some exhibits have been annexed namely JM8 and JM9.

[9] He contends that failure to inform him of these facilities by the Respondents was a breach of not only the guarantee contract but also the fiduciary relationship between the parties.

The Applicant referred to the case of *Kanyoro v Wakarwa Printers Ltd & another* [2005] eKLR, which Justice JB Ojwang observed as follows;

“The governing principle of Law is clearly stated in Halbury's Laws of England, 4th Edition Vol. 30 para 253; any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor”.

[10] The Applicant further submits that his signature was forged in a letter dated 25th March 2014. He claims that he gave his consent with regards to the very first letter of offer.

C. Submissions by the Applicant

[11] Mr. Makori learned counsel for the applicant submitted on the issues raised in the notice of motion to persuade this court exercise discretion in favour of the applicant. It was submitted that certain occurred between the 1st defendant and 2nd defendant without the knowledge of the applicant. Mr. Makori pointed out and invited the court to appreciate that there are irregularities surrounding the charge against the applicant property. Further Mr. Makori contended that various tariffs and charges have been levied in the loan account which are far beyond the agreement. Mr. Makori argued that the amount of interest charged by the 1st defendant is far much above what is proved for under section 44 of the Banking Act.

[12] Mr. Makori referred me to the principles in *Giella V Cassman Brown Ltd 1973 EA 348* for the well-known test for the grant of interlocutory injunction as applicable to this case pending the hearing and determination of the suit.

[13] In buttressing the various threshold principles in matters to do with a relief of injunctions to the effect that the applicant will suffer irreparable harm Mr. Makori placed reliance on the case of *Sharok Kher Mohammed Ali & Another V Southern Credit Banking Corporation*

Ltd 2008 eKLR. Mr. Makori submitted that the 1st defendant intended action whether through exercise the statutory powers of sale or private treaty would be in bad faith.

[14] The first Defendant in his affidavit points to the fact that the Plaintiff had an agreement with the 2nd Defendant in which he was supposed to be receiving a specific amount of money on a monthly basis as a guarantee. The Plaintiff contends that while this was the agreement between him and the 2nd Defendant, he only received the monies once and has since never received any payments. The Plaintiff contends that the 2nd Defendant breached this particular contract when he stopped making the payments as agreed upon by the parties.

[15] The Plaintiff submits that he will suffer irreparable damage should the Court allow the Defendants to sell his property because it belongs to his family and he resides on the said piece of property. He also practices farming and it is through the same that he is able to feed and provide for his family.

[16] The Plaintiff also urges the court to note that the contract between the first and second defendant is for a specific time, which has not lapsed. The contract is still in force. The first Defendant should not be allowed to attach the property until the expiry of the contractual period.

They relied on the case of *Sharok Kher Mohammed Ali & another v Southern Credit Banking Corporation Limited* [2008] eKLR.

[17] The Plaintiff further submits that to loose property which is over 400 acres of land when it may turn out that the charges are not genuine would occasion the plaintiff an injury, which cannot be adequately compensated by damages.

[18] The Plaintiff's final submission was that there existed a conspiracy between the Defendants to purposely extend the facilities to the 2nd Defendant contrary to the initial agreement. The Plaintiff contends that in choosing to do so, the Defendants essentially tempered with an important term that existed in the guarantee contract effectively breaching the same.

D. The 1st Defendant's Case

[19] Through a replying affidavit sworn by Jama Michael the Remedial Management Officer dated 31st July 2017, the 1st Defendant denied all the allegations by the Plaintiff and set out the basis for issuing the Statutory Notice of Sale on the following grounds;

1. That the 1st Defendant advanced a sum of Kshs. 45, 000, 000.00 to the 2nd Defendant being an overdraft facility which was secured by among others Legal Charges over LT No. Sigona/195 and LR Kajiado/Elanagata Wuas/290. Exhibit is marked as JM1
2. The 1st Defendant enhanced the overdraft limit for the 2nd Defendant from Kshs. 45, 000, 000.00 to Kshs 105, 000, 000.00 which was secured by among other legal charges over LR No Sigona/195, LR No Kajiado/Elanagata-Wuas/290 and LR No Kajiado/Ewasokedong/2154. Exhibit is marked as JM2
3. The 1st Defendant amended the security clause of the previous Letters of Offer dated 4th May and 31st October 2011 in the security clause to include Legal Charge over LR No Kajiado/Lorngusua/1449 registered in the name of the Plaintiff in the sum of Kshs. 100, 000, 000.00 as one of the securities to secure the facility advanced to the 2nd Defendant. This was in addition to the existing securities over LR No Sigona/195, LR No Kajiado/Elanagata-Wuas/290 and LR No Kajiado/Ewasokedong/2154. Exhibit is marked as JM8.
4. The Plaintiff affixed his thumbprint to the said Letter of Offer and this can be seen at page 58.
5. The Plaintiff executed a Legal Charge dated 15th December 2011 over his property Title No Kajiado/Lorngusua/1449 marked as JM-34.
6. The 1st Defendant amended the security clause of the preceding Letter of Offer to include Legal Charge over LR No Kajiado/Lorngusua/1452 in the sum of Kshs 33, 000, 000.00 as one of the securities over LR No Sigona/195, LR No Kajiado/Elanagata-Wuas/290, LR No Kajiado/Ewasokedong/2154 and Title No Kajiado/Lorngusua/1449.
7. The 1st Defendant agreed to advance additional facilities to the tune of Kshs 128, 000, 000.00 and to restructure the existing facilities owing to from the 2nd Defendant to the tune of Kshs 103, 437, 500.00. These facilities were secured by among others the Plaintiff's property. The Plaintiff duly accepted and executed the letter of offer.
8. The 1st Defendant agreed to a restructure of the existing facilities to the 2nd Defendant to the tune of Kshs. 204, 289, 095.00 and which facility was secured by among other the existing charge over the property of the Plaintiff. The Plaintiff executed an acceptance form to the said Letter of Offer.
9. After the restructure the 2nd Defendant fell into arrears to the tune of Kshs. 290, 786, 001.00 and the 1st Defendant issued a 30 days Demand Notice which was produced in court
10. The 2nd Defendant failed to clear the sum as demanded which now stood at Kshs. 308, 470, 395.57 as at 15th March 2017 and the 1st Defendant issued a 90 days' Statutory Notice to the 2nd Defendant as well as the Plaintiff and other guarantors. Copies of the Demand Notices and Certificates of Postage have been produced in Court and marked. Exhibits are marked as JM 41 and JM 42.

11. All relevant documents including the Letters of Offer, the Guarantees as well as the Demand Notices and the Statements of account have been annexed in the Replying Affidavits and their accuracy has not been controverted.

E. The first Defendant's Submissions

12. Mr. Mulondo made submissions in reply on behalf of the 1st defendant/Respondent. In the present application Mr. Mulondo submitted that from the facts of the case there are no reasonable grounds for the exercise of discretion to injustice. The 1st defendant statutory power of sale. It was Mr. Mulondo submissions that in a case restraining the mortgage from realizing the security of a mortgage or who has defaulted it would be in contribution of the well-established principles in *Giella V Cassman, and Mrao Ltd V First American Bank of Kenya Ltd & 2 Others 2003 eKLR*.

13. Mr. Mulondo further submitted and appraised the court of the existence of the various agreements duly excluded by the applicant and the 1st defendant.

14. In reliance on these issues Mr. Mulondo referred this court to the legal charge dated 1st December 2011 over property title Kajiado/Lorngusua/1449 seeking a loan amount of Ksh. 100,000,000 registered in the applicant. Secondly Mr. Mulondo contended that the mortgage contract is based solely on this legal charge and the various letters of offer duly executed by the applicant and the 2nd defendant Mr. Mulondo further submitted that the letters of offer issued on diverse dates between 4/5/2011 and 29/5/2015 show that the loan was advanced to the 2nd guarantee of indemnity from the applicant. Mr. Mulondo submitted that the security offered by the applicant is to be enforced in strict compliance with all the terms of the legal charge registered in favour of the 1st defendant. Mr. Mulondo contends that the applicant and the 2nd defendants are in default of the terms of the contract and the total amount due to it remains unpaid in principle and interest.

F. Analysis

15. The law relating to the grant of injunctions is well settled. However, it is governed by the principles set out in various cases by the superior court both within our jurisdiction and elsewhere.

16. As was stated in Halsbury's Law of England 4th Edition Volume paragraph 863. These principles to guide the court are as follows:

"Interim injunctions are generally grounded only when the applicant has established a serious issue to be tried, damages will not be adequate remedy, the balance of convenience lies in favour of granting the injunction in that it will do more good than harm and the applicant is and will be able to compensate the respondent for any loss which the order may cause him in the event that it is later adjudged that the injunction should not have been granted."

17. To the foregoing can be added the authoritative words of Justice Bosire as he then was in the case of **Kenleb Cons Ltd V New Gratitude Service Station Ltd & Another** where he held:

"To 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."

G. Issues for Determination

[20] The case of *Giella v Cassman Brown & Co Ltd* [1970] EA 358 shall be applied to determine the merits of this case as below;

1. Whether a prima facie case has been established by the Applicant to warrant grant of an Injunction
2. Whether the Applicant shall suffer irreparable harm if the order is not granted
3. Whether balance of convenience tilts in favour of the prayers sought.

1. Whether the Applicant has established a prima facie case

[21] It is trite law that an interlocutory injunction can only be granted where the Applicant has established a prima facie case with a probability of success.

In a well celebrated case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] eKLR, the court observed as follows;

... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.

[22] It is the Applicant's case that he accepted to act as a guarantor and had his property charged as a facility whose cap was Kshs. 100, 000, 000/=. The Applicant further insists that he was not aware of any amendments to the security details despite the fact that the 1st Defendant

amended the same on several occasions. This is shown by the exhibits annexed and marked as **JM8** and **JM9** being letters in which the 1st Defendant altered the facilities offered from Kshs. 45, 000, 000/= to Kshs. 105, 000, 000/= in one occasion. The property of the Applicant is listed as security and only one guarantor one Swali Ole Sipala signed this extension and not the Applicant. The Applicants have cited and relied on the case of *Kanyoro v Wakarwa Printers Ltd & another* [2005] eKLR.

[23] The Plaintiff agreed to secure the facility by virtue of various Deeds of Guarantee and Indemnity executed in favour of the 1st Defendant and the charge he executed over his property.

[24] In this case the Plaintiff can only be said to have established a prima facie case if it places evidence before this court that there is a violation or a threat to violate which must be prevented by issuing an injunction.

I agree with the 1st Defendant, that the documents in their totality created a binding agreement to pay the 1st Defendant in the event of default.

In the foregoing, the simplest question to be answered by the court is therefore, whether the Applicants rights as a guarantor have been infringed.

[25] Through the evidence and the submissions by the Plaintiff, it is not in dispute that he agreed to secure the facility by virtue of the various deeds of Guarantees and Indemnity executed in favour of the 1st Defendant and the charge he executed over his property.

It is the 2nd defendant's case that the documents signed by both parties in relation to the contract created a binding agreement to pay the 1st Defendant in the event of default by the 2nd Defendant. The 1st Defendants are inviting the court to enforce this contract.

[26] Parties are bound by the terms of the contract they voluntarily enter into unless the said contract is vitiated by coercion, duress, undue influence, fraud or mistake to the terms of the contract. It is fair to point out at this stage that the Applicant has not proven an existence of any one or more of the above mentioned vitiating elements in the contract between him and the 2nd Defendant.

In another celebrated case of *National Bank of Kenya Ltd v Pipe plastic Samkolit (K) Ltd & another* [2001] eKLR.

[27] There is a Letter of Credit Agreement, which was produced and marked as JM-14 and annexed herein. The 2nd Defendant would pay the Applicant a sum of Kshs. 175, 000/= per month as appreciation for offering his property as security for the facilities advanced by the Plaintiff.

On this premise therefore, I hold that the Applicant has not proved his allegations that he has not received any payment from the 2nd Defendant as an appreciation.

[28] It is the 1st Defendant's case that it has made several attempts to recover the said debt from the principal borrower; as summarized as below; grievous

1. Vide a letter dated 4th July 2016; the 1st Defendant demanded from the 2nd Defendant that it settles its arrears then standing at Kshs. 253, 697, 440. 96/=.

2. Another letter dated 21st July 2013 the 1st Defendant issued a notice to the 2nd Defendant that it would forward its name for listing by the Credit Reference Bureau.

3. Vide a letter dated 24th August 2016; the 1st Defendant demanded from the 2nd Defendant that it settles its arrears then standing at Kshs. 290, 786, 701.55.

4. The 1st Defendant has corresponded with the 2nd Defendant on the matter severally with a view of clarifying any questions that might have arose in the cause of the dealings. These letters are annexed to the 1st Defendants Replying Affidavit, which are marked as **JM39** and **JM40**.

[29] The Applicant contends that the 1st Defendant ought to have pursued the principal borrower before getting at him is against the provisions of the Law on Guarantee and Indemnity. The law provides that the primary liability is on the guarantor. I seek to adopt the reasoning of the court in the case of *Rose Chepkirui Mibei v Jared Mokuia Nyariki & others* [2015] eKLR, the court observed as follows;

“... the second argument of the Applicant is that the bank ought to have pursued the borrower before proceeding to offer the suit property for sale. The husband of the plaintiff acted as guarantor. There has been default. Once there is default and notice is given to the guarantor, his obligations under the guarantee must take effect immediately. Unless the parties have agreed through a contract, that the guarantor will not be called upon to make good money owed by the principal debtor, the creditor is under no obligation to first pursue the principal debtor and leave alone the guarantor. I have not seen any provision in the charge instrument, which obligates the bank to first pursue the principal debtor before proceeding to sell the suit property. The property herein is charged, and there is no provision in the law, that the charge cannot pursue her statutory power of sale, before first exhausting any remedies that he may have against the principal debtor. [Emphasis ours] The argument that the bank first ought to have pursued the principal debtor has no basis and must fail.”

[30] In the foregoing it is very clear that the duty of the guarantor is not primary to that of the principal debtor. As was also observed albeit as

an obiter in *Koileken Ole Kipolonka v Mellech Engineering & Construction Limited & 2 others* [2015] eKLR in the following words;

[31] On the basis of these findings, temporary relief in favour of the Plaintiff is unmerited. The Plaintiff is a guarantor and his liability arises once the borrower defaults and he should always ensure that the borrower pays up lest his property be sold.

[32] Deeds of Guarantees and Indemnities dated 6th December, 2011, 21st February, 2013 and 25th March, 2014 annexed as **JM13**, **JM21** and **JM28** have been presented in court where the Applicant agreed to pay the sums secured on demand. His liability was activated upon default by the 2nd Defendant and demand by the 1st Defendant.

[33] It is the Applicant's submission as well, that the 1st Defendant has advanced additional facilities to the 2nd Defendant without his knowledge. In response to that, the 1st Defendant presented evidence to rebut these allegations as follows;

- a) The Plaintiff affixed his thumbprint to the Letter of Offer dated 22nd November 2011 as seen at page 58 of the 1st Defendants bundle of annexures.
- b) The Applicant duly executed an Acceptance to the Letter of Offer dated 19th February 2013 advancing additional facilities to the 2nd Defendant as seen at page 254.
- c) The Applicant equally executed an Acceptance form to the said letter of Offer Addendum dated 29th May, 2015 advancing additional facilities to the 2nd Defendant this can be seen at page 320 of the 1st Defendants bundle of annexures.
- d) The Applicant also executed a Guarantee and Indemnity dated 21st February 2013 produced and marked as JM21.
- e) The Applicant also executed a Guarantee and Indemnity dated 25th March 2014 produced and marked as JM26.

[34] It is the Plaintiff's further submission that he did not sign the additional Letters of Offer. He claims that his signatures were forged. It is my view that the allegations for forgery must be pleaded and cogent proof of the same presented in court. The Applicant has not shown proof of the alleged forgery and therefore it remains an allegation yet to be proved. See the case of *David Maina Ngugi v William Kibowen & 3 others* [2017] eKLR.

[35] Following the above observations, I find that the Applicant has not disputed that he guaranteed the 2nd Defendant. He has not disputed the outstanding sum nor has he alleged having made some payments to the 1st Defendant in respect of the debt owed.

[36] The Applicant has also not proven the allegations of violation of his rights and that there is a probability of success.

[37] A court has way to glance at the facts apply the evidence and legal mind to the dispute in order to understand the scope whether the applicant has satisfied the legal threshold. When considering the rival affidavit evidence and submissions the approach I take is in line with the principle in the case of *AIB Group V Mark REDLER & Co. 2015 ORSC 58* where the House of Lords held: "As a commercial matter the transaction was executed or completed when the loan moneys were released to the borrowers. At that moment the relationship between the borrowers and the bank became one of contractual borrower and lender and that was *fait accompli*."

[38] it is not denied that there exists an enforceable guarantee notwithstanding the issues raised by the applicant in his affidavit in an attempt to impeach the contract.

[39] the 1st defendant in his affidavit and submissions has answered correctly some of the relevant issues to this claim. It is not in dispute that the applicant was not the main borrower but did provide a guarantee form of deed which persuaded the 1st defendant to advance the loan amount to the 2nd defendant.

[40] The instructions of charge though vigorously attacked by counsel for the applicant in the course of his submissions certain facts remain unchallenged. For the applicant to succeed in this interlocutory injunction against the defendant he has to show by way of evidence that he has taken possible steps to satisfy the conditions in the guarantee because he was a party to the mortgage contract. From what has been brought to my attention in the course of the hearing of this application there appears to be a binding contract between the applicant and the 1st defendant and on the other hand with the 2nd defendant as the principal debtor.

[41] The ground upon which the applicant can discharge himself from any liability is to pay the amount guaranteed and thereafter sue the 2nd defendant for recovery of the amount paid to the 1st defendant. The failure by the 2nd defendant to perform his obligations in the contract put the applicant in breach of the terms and considers of the guarantee.

In this case, I do find that the Applicant has not established a prima facie case with a probability of success.

ii) Whether the Applicant will suffer irreparable harm if the order is not granted.

[42] This is one of the tests required for the grant of an interlocutory or preliminary injunction. The party requesting the injunction must show to the court that (if the injunction is not granted) it will suffer harm that may not be compensable (reparable) by imposition of a fine on the opposing party at the end of the trial.

[43] In his affidavit, the Applicant points out the fact that the suit property in question belongs to his family and that he resides on the said piece of land. The Plaintiff also practices farming on the said property and that it is with the same that he is able to feed and provide for his family. That the decision to sell the property is likely to leave the Applicant and his family destitute, and without a place to call home.

[44] He also disputes the penalties imposed on the debt and he has relied on the decision of *Sharok Kher Mohammed & another v Southern Credit Banking Corporation Limited* [2008] eKLR.

I am still guided by the decision of *Mrao* on the issue of irreparable harm where the Court observed in the following words;

“... but as I earlier endeavored to show, and I cited ample authority for it a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the Applicants case upon trial. On the second factor, the Applicant must establish that he might suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and a burden is on the Applicant to demonstrate prima facie case the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of temporary injunctions is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages [Emphasis ours] An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be an adequate remedy.”

[45] It is worth to note that the 1st Defendant has just begun the recovery process by issuing a 90 days' notice. It is yet to issue a mandatory 40 days and the 45 days Redemption Notice as per the provisions of section 90 of the Land Act as set below;

(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 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 two months 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;*

[46] it is clear from these provisions the purpose of notice is to ensure the applicant is given adequate notice of the default of the loan repayment and the likely consequences that require remedial action. It was to emerge from the pleadings and affidavit in support of the applicant's application that there exist a variation between the amount guaranteed and the amount demanded by the 1st defendant.

[47] Although the purpose of the temporary injunction is to stop the intended sale and preserve the status quo, there must be evidence that the applicant will suffer irreparable harm. I derive considerable comfort from the principle in the case of *Commodore Pty Ltd V Perpetual Trustees*, [1984] 1 NZLR 324 (CA) where the court held inter alia:

“That mere overstatement of the interest would not have invalidated the notice of intention to exercise the power of sale.”

[47] In relation to the question of the test on irreparable harm not capable of being compensated by an award of damages, I adopt the reasoning of the Honorable court in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court observed as follows;

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

iii) Whether the Balance of Convenience tilts in favour of the prayers sought

[47] The 1st Defendant is a registered charge over the suit property, the borrower has admitted having fallen into arrears and the Applicant has failed to remedy the default.

The Court in the case of *Peter Kamau Kiriba v City Council of Nairobi & 3 others* [2015] eKLR while dismissing an application for an injunction noted that where there is a valid charge existing and the chargor is in arrears, it would be prejudicial to a charge to grant a temporary injunction hence a balance of convenience tilts in favour of a chargor in such a case. The court therefore observed as follows;

“.....further to this, it has been established that the suit property is currently charged to the 3rd Defendant as a security for a loan Kshs. 3 million advanced to the 2nd Defendant. With such an encumbrance on the title, it is clear that the interests of the 3rd Defendant would be prejudicial should a temporary injunction be issued to the Plaintiff/Applicant as proved. Arising from the foregoing, I find that at this interlocutory stage of these proceedings, the Plaintiff/Applicant has failed to establish a *prima facie* case with high chances of success at the main trial.”

In view of the above I hold that the balance of convenience tilts in favour of allowing the 1st Defendant to proceed with the recovery of the outstanding sums from the Plaintiff and the Application is therefore dismissed.

In light of reasoning and the principles in *Giella V Cassman Brown & Co. Ltd & the American Cynamide Co. V Ethicon Ltd*, I am satisfied that the conditions for grant of an interlocutory injunction have not been met by the applicant. I therefore decline to exercise discretion in favour of the applicant by dismissing the notice of motion for want of merit. In reference to the claim, I find no reason to make the following order that the applicant does deposit the guaranteed amount with the Registrar of the High Court or in the joint account earning interest in any reputable bank pending the determination of the suit. Further that the applicant shall pay costs of the application to the defendants. Leave to appeal allowed.

Dated, Delivered and Signed in open court this 17th September 2018.

.....

R. NYAKUNDI

JUDGE

Representation

- Mr. Momanyi for Makori for the Plaintiff – Present
- Mr. Odongo Holding Brief for Kiplagat for the 1st defendant