



**Cordeiro & another v Shamji (Civil Suit 329 of 2014)
[2015] KEHC 6977 (KLR) (Civ) (3 February 2015) (Ruling)**

Albert Mario Cordeiro & another v Vishram Shamji [2015] eKLR

Neutral citation: [2015] KEHC 6977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL

CIVIL SUIT 329 OF 2014

F GIKONYO & RE ABURILI, JJ

FEBRUARY 3, 2015

BETWEEN

ALBERT MARIO CORDEIRO 1ST PLAINTIFF

FARIDA REHMAT KHAN 2ND PLAINTIFF

AND

VISHRAM SHAMJI DEFENDANT

Interpretation of Notice to sell under the Land Act, vis a vis the Auctioneers Rules.

Reported by Andrew Halonyere

***Land law** – Charges and Mortgages – Notice to sell under the Land Act vis a vis the Auctioneers Rules – whether there was a clear legal split between the provisions of the Land Act and the Auctioneers Rules*

***Land law** – Charges and Mortgages – notice to sell - where notice to sell had not been issued but statutory notice had been served – whether the failure to issue the notice to sell under the Land Act would invalidate the Statutory Notice which had been properly issued.*

***Land law** – Charges and Mortgages – charge instrument – failure to include the terms and conditions of sale in the charge instrument – whether such omission would render the charge defective - Land Act section 90, 96(2) – Auctioneers Rule 15 (c).*

Brief facts

The plaintiff brought an application before the High Court seeking an order for injunction restraining the defendants from selling or in any manner whatsoever interfering with the suit land and that the defendants statutory power of sale be suspended or postponed for a period of twenty four (24) months or for such other period as the court may determine to enable the Plaintiffs redeem the suit land.

The plaintiff submitted *inter-alia* that the Defendant had neither served a statutory notice upon the Plaintiffs nor issued a statutory notice that complied with section 90(1) and 90(2)(b) of the Land Act, 2012.



The defendant/respondent on their part submitted that the plaintiff/applicant purchased the suit premises from the defendant/respondent for Kshs. 70,000,000 and that the plaintiff/applicants were not able to pay the entire sum and requested the defendant/respondent for a financial accommodation. The defendant/respondents further submitted that they agreed to the request and they registered a charge against the title to secure the repayment of Kshs. 22,500,000 together with interest at 18% per annum. The plaintiff/applicants never made any repayment up to the time the redemption date became due.

Issues

1. Whether the charge instrument was in compliance with section 80(3) of the Land Act that makes provisions for requirements of a charge instrument.
2. Whether the notice to redeem issued under rule 15(d) of the Auctioneers Rules could serve as a notice to sell under the Land Act.
3. Whether the defendant served the applicants with a statutory Notice pursuant to section 90(2) of the Land Act.

Relevant provisions of the Law

Land Act, 2012

Section 96(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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell.

Section 90 (2)

(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.

Auctioneers Act

Rule 15

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

Held

1. Although under section 90 (5) of the Land Act, the Cabinet Secretary, in consultation with the National Land Commission was required to prescribe the form and content of a notice to be served, unfortunately, the said form or content had not been prescribed as yet. Chargees had to formulate the form and content of the notice to be served which had to comply with the express provisions of section 90 of the Land Act.
2. Section 80(3) of the Land Act provided that every charge Instrument shall contain the terms and conditions of sale, an explanation of the consequences of default and the reliefs that the chargor was entitled to including the right to sell. The said provision of the Act was a mandatory provision of



- the law, however the details under the section were not contained in the charge before the Court, therefore, the charge was defective, null and void. In the circumstances, the said charge did not afford the Defendant the powers reserved for chargees in the Land Act and the Chargee could not exercise any power of sale on that charge.
3. There was clear legal split between the provision of the Land Act and the Auctioneers rules and any attempt to fuse the two could only increase the confusion of the purpose of section 96(2) of the Land Act. The requirements under section 96(2) of the Land Act were mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act was also mandatory but it is issued separately from and after the one under section 96(2) of the Land Act strictly in that sequence.
 4. When Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution, rule 15 of the Auctioneers Rules applied to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee it was not specially tailored for purposes of section 96(2) of the Land Act.
 5. Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But later it had gained statutory expression in section 89 of the Land Act which provided expressly that equity of redemption would not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale would only extinguish the Chargor's Equity of Redemption if it was strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act was one of the provisions of the Land Act which reinforced the Chargors Equity of Redemption. Section 96(2) of the Land Act was not an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.
 6. In the absence of a Notice to sell under section 96(2) of the Land Act, the Statutory Power of Sale could not be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice had been issued. That was a strong ground for an injunction. However, the failure to issue the said Notice under section 96(2) of the Land Act would not invalidate a Statutory Notice which had been issued properly under section 90 of the Land Act.
 7. A Statutory Notice should be very clear that should there be non compliance with the demands of the notice the suit property shall be sold. Although the notice was not as clear as it ought to have been, it notified the Chargors of an intention to invoke statutory right of sale of the charged property. The overall purport of the letter was that the property would be sold unless the entire sum was paid within the 90 days. Therefore, it was not true that the Notice did not give a notification of the sale of the property in the event of non-compliance with the Notice.
 8. The Notice to sell did not merely threaten that recovery proceedings would be taken if payment was not made; the Notice adequately informed the Chargors of the nature and extent of the default; i.e. the entire sum of Kshs. 22,000,000 together with interest, legal charges and related expenses; and that the default consisted of complete non-payment of loan advanced under the purported Charge, which made the entire debt payable at once.
 9. A notice seeking to sell the charged property had to expressly state that the sale shall take place after the three months' period. To omit to say so or to state a period of less than three months for sale was to deny the mortgagor a right conferred upon him by statute. That clearly had to render the notice invalid.
 10. The relevant provision on service was Rule 15(c) of the Auctioneers Rules which required the auctioneer to locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect.
 11. It was not enough to indicate that the notification had been served without identifying the person served, the place and the manner it was served. There was ample evidence, however, that the Plaintiffs



were aware of the Notification of Sale and all subsequent correspondences were titled Notification of Sale.

12. The Statutory Notice was issued in accordance with the law and was sufficient in the circumstances of the suit. As injunction was an equitable remedy, a court of equity would have denied the remedy sought if the conduct of the applicant was such that it did not receive approval of equity. All the other legal thresholds might have been suppressed by the offensive conduct relevant to the transaction and litigation before the court. That notwithstanding, the Court would take a path which was fair and just to all, and which carried the lower risk of injustice.

Application allowed in part.

Orders

Injunction to restrain the sale of the suit property granted, on condition that Chargee was at liberty to issue a Notice to sell under section 96(2) of the Land Act and thereafter have the property sold in accordance with the Auctioneers Act and Rules.

The Statutory Notice was proper served, re-issuance not required.

Citations

Cases

1. Act Fast Security Limited v Equity Bank Limited (Civil Suit 76 of 2013; [2014] KEHC 4495 (KLR)) — Explained
2. Kuhiguka, David Gitome v Equity Bank Ltd (Civil Case 94 of 2013; [2013] KEHC 1901 (KLR)) — Explained
3. M'Mella v Savings and Loan (K) Limited (Civil Appeal 260 of 2001; [2007] eKLR; [2007] 1 KLR 418; [2007] 2 EA 316) — Explained
4. Mrao Limited v First American Bank of Kenya Limited & 2 others (Civil Appeal No 39 of 2002; [2003] eKLR; [2003] KLR 125) — Explained
5. Ochieng & another v Kenya Commercial Bank (Civil Appeal 148 of 1995; (1996) eKLR' [1996] KLR 388) — Explained
6. Palmy Company Limited v Consolidated Bank of Kenya Limited (Civil Suit 527 of 2013; [2014] KEHC 4811 (KLR)) — Explained
7. Suleiman v Amboseli Resort Ltd (Civil Case 1078 of 2003; [2004] eKLR; [2004] 2 KLR 589) — Explained
8. Trust Bank Ltd v Eros Chemists Ltd & another (Civil Appeal 133 of 1999; [2000] KECA 219 (KLR); [2000] 2 EA 550) — Explained
9. Yator, Moses Kibiego v Eco Bank Kenya Limited (Environment & Land Case 426 of 2013; [2014] KEELC 449 (KLR)) — Explained
10. Giella v Cassman Brown & Co. Limited ((1973) EA 38) — Explained
11. Films Rover International Ltd v Cannon Film Sales Ltd ((1986) 3 All ER 772) — Mentioned

Statutes

1. Auctioneers Rules (cap 526 Sub Leg) — rule 15 — Cited
2. Civil Procedure Act (cap 21) — section 1A; 1B — Cited
3. Constitution of Kenya — article 159 — Cited
4. Evidence Act (cap 80) — section 107 — Cited
5. Land Act (cap 280) — section 78; 80(3); 82; 83; 90; 96; 97; 98; 99; 100; 101; 104; part VII — Cited
6. Land Registration Act (cap 300) — section 56 — Cited
7. Registered Land Act repealed (cap 300) — section 74(1) — Cited
8. Transfer of Property Act 1882 repealed — section 69(A)(1) — Cited

Texts



1. Sally Wehmeier, Colin McIntosh, Joanna Turnbull (2005), Oxford Advanced Learners Dictionary (Oxford University Press; 8th Edn)
2. Sir Dinshaw Fardunji Mulla (1995), Mulla's Transfer of Property Act (N.M. Tripathi, Bombay, 8th Ed, pg 602)

Advocates

None mentioned

RULING

Temporary Injunction

1. I have before me the Plaintiff's Motion dated 30th July, 2014 which is seeking for the following orders:
 - i. That pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the Defendant/Respondent whether by himself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on his behalf and/or under his mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with Land Reference Numbers 9104/231 (Original Number 9104/231).
 - ii. That in the alternative to prayer 3 above, the time for compliance and/or for rectifying any default to redeem Land Reference Numbers 9104/231 (Original Number 9104/231) be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under section 104(2) as read with section 90 of the Land Act, 2012.
 - iii. That in the alternative to prayer 3 and 4 above, the Defendant/Respondent's statutory powers of sale be suspended and/or postponed for a period of twenty four (24) months or for such other period as the court may determine to enable the Plaintiffs/applicants redeem Land Reference Numbers 9104/231 (Original Number 9104/231).
 - iv. Costs of this application to be provided for.
2. The Application is supported by the Affidavit sworn by Albert Mario Cordeiro, the 1st Plaintiff, on 30th July, 2014. It is also based on the following grounds:
 - a. That the suit property was advertised for sale on July 15, 2014 when the 1st Plaintiff was out of the country. The 1st Plaintiff returned on 24th July 2014 and legal advice was sought. This is the reason why the application has been delayed.
 - b. The purported Charge which the Defendant seeks to rely on is defective, null and void and of no legal effect whatsoever.
 - c. The purported Charge is contra-statute. In particular, the same is not in compliance with section 80(3) of the Land Act as it does not contain:
 - i. The terms and conditions of sale;
 - ii. An explanation of the consequences of default; and
 - iii. The reliefs the Chargee is entitled to including the right of sale.



- d. The alleged realization process commenced by the Defendant/Respondent is a nullity in law.
 - e. The Defendant/Respondent has not served upon the Plaintiffs/Applicants a statutory notice at all.
 - f. The Defendant/Respondent has not issued a statutory notice that complies with the section 90(1) and 90(2)(b) of the Land Act, 2012.
 - g. The Defendant/Respondent has not issued at all the 40-day statutory notice under section 96(2) of the Land Act, 2012.
 - h. The instructed auctioneer did not give the Plaintiffs/Applicants the Notification of Sale as required under the Auctioneers Act.
 - i. The statutory power of sale in favor of the Defendant/Respondent regarding the suit property has not arisen and/or cannot arise at all.
 - j. The provisions of section 104(2) of the Land Act provide for cancelling, varying, suspending, or postponing any scheduled sale or extending the period of time for compliance by the chargor or substitution of a different remedy than outright sale.
 - k. If the illegal sale goes ahead, the Plaintiffs' losses shall be irreparable and not capable of compensation by way of award of damages as the same constitutes the Plaintiffs' matrimonial home.
 - l. It is now desirable, fair and just that this court should intervene.
- 3 The Applicant submitted that the Land Act, 2012 which came into force on 2nd May 2013, brought fundamental changes to the law relating to land generally and more fundamentally on Charges/ Mortgages, what they must contain and how realization of charged securities must be effected. Section 78 of the Land Act, 2012 provides as follows:

“This Part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically referred to in any section in this Part.”

The Part referred to in Section 78 of the Land Act is Part VII of the said Act and comprises Sections 78 to 106. The Applicant stated that Part VII is critical in this case as he will shortly. He submitted that the charge registered against the suit property is contra-statute and on cannot be a basis for the Defendant to exercise statutory powers of sale under the Land Act. In particular, the charge instrument is not in compliance with Section 80(3) of the Land Act which provides that:-

“Every charge Instrument shall contain:-

- a. The terms and conditions of sale;
- b. An explanation of the consequences of default and;
- c. The reliefs that the chargor is entitled to including the right to sell.

Section 80(3) of the Land Act is a mandatory provision of the law. The details under this section are not contained in the charge before the Court. Therefore, the Charge is defective, null and void. In the circumstances, the said charge does not afford the Defendant the powers reserved for chargees in the Land Act and the Chargee cannot exercise any power of sale on that charge. The Applicant relied on



the case of *M'Mella v Savings and Loan (K) Limited* [2007] 2 EA 316 (CAK) where the Court of Appeal stated:

.....could one say that because the charge was not valid, the appellant was released from his duties under the charge? The answer is, in our view, yes, during the period when the charge remained invalid. But we make haste to add that the appellant was only released from his duties under the charge and not under the contract.

- 4 In addition, the Applicant urged that the Defendant has neither served a statutory notice upon the Plaintiffs nor issued a statutory notice that complies with the section 90(1) and 90(2)(b) of the *Land Act*, 2012. The Plaintiff has categorically denied that he was served with the statutory notice (please see AMC-5 at page 33 of the Supporting Affidavit.) and so the onus is upon the chargee to prove service of statutory notice. They relied on the case of *Nyangilo Ochieng & another v Kenya Commercial Bank*, Court of Appeal at Kisumu, Civil Appeal No 148 of 1995 (1996) eKLR where the Court of Appeal stated as follows :-

“It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the *Registered Land Act*. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.

5. Besides the foregoing, the Applicant submitted on section 90 of the *Land Act* 2012 which lays down the requirements for a valid statutory notice. Section 90(1) provides that:-

“if the 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 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 the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

According to 90(2) of the said Act, the notice to be served shall adequately advise the chargor of:

- 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 (3) months, by the end of which the payment in default must have been completed.
- c. (Not relevant to these circumstances)
- 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.

And 90(3), provides that if the chargor does not comply within two (2) months after the date of service of the notices under subsection (1), the chargee may:

- a. sue the chargor for any money due 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
6. Although under Section 90 (5) of the Land Act, the Cabinet Secretary, in consultation with the National Land Commission is required to prescribe the form and content of a notice to be served, unfortunately, the said form or content has not been prescribed as yet. Meanwhile, Chargees have to formulate the form and content of the notice to be served which must comply with the express provisions of section 90. The Defendant has exhibited as VS5 at page 33 of the Replying Affidavit of Vishram Shamji what is said to be a statutory notice. It is a letter dated Tuesday October 15, 2013. The said letter states as follows:

We act for our client Mr. Vishram Shamji who has instructed us to address you as under.

That our said client is the Chargee of the property know as Land Reference 9104/231 and you are the Chargors thereof. In terms of the charge registered on the 19th December 2012, the redemption date was 30th June 2013 now past. You have failed to honor and make the payments in accordance with the repayment terms. Consequently, our client now intends to invoke his statutory right of sale of the said property to recover the amounts due.

The amount due as at October 2013 is Kenya Shillings Twenty Three Million (Kshs 23,000,000/=) which amount continues to accrue interest on daily basis until payment in full.

As advocates, agents and on instructions of the Chargee we do hereby give you this NINETY (90) DAYS notice to pay up all the amounts due together with the accrued interest, legal charges and related expenses.

TAKE NOTICE that if the said sum is not paid forthwith and in any event within the notice period, we have instructions to take out recovery proceedings to recover the entire amount together with costs and interest without further reference to you whatsoever.

According to the Applicant, the letter of 15th February 2013 does not comply with the provisions of Section 90 on statutory notice as:

- a. Does not notify the intended recipients that the charged property could be sold if compliance therewith was not made.
- b. Merely threatened that recovery proceedings will be taken if payment was not made.
- c. Fails to adequately (or at all) inform the intended recipient of the nature and extent of the default, if any;.
- d. And since the alleged default consisted of alleged non-payment of money due under the purported Charge, it failed to specify the amount that must be paid to rectify the alleged default.
- e. Further, it gives the recipient thereof a period of 90 days instead of the statutory three months as per the Land Act.



- f. It did not give the recipient thereof any opportunity to rectify and/or restore the default to normalcy as intended by the section 90(2) of the *Land Act*;
 - g. It did not inform the recipient that they had a right to apply to court for relief; and
 - h. It brazenly took away statutory rights bestowed under section 90(2) of the *Land Act*.
7. The Applicant referred the Court to the case of *Trust Bank Ltd v Eros Chemists Ltd* [2000] 2 EA 550 (CAK) and concluded on the issue that the letter above gave the chargor a 90 days period which is not equivalent to three months.
8. The Applicant went on to submit that section 90 provides that if the default consists of any non-payment of any money due under the charge, then the notice must adequately inform the Chargor “the amount that must be paid to rectify the default.” The operative word here is to rectify which is not defined in the Act. but in the *Oxford Advanced Learner’s Dictionary*, 7th Edition it is defined as “to put right something that is wrong”. Further, the word rectify is synonym with “correct.” Based on the foregoing, the Applicant submitted that Section 90(2) (b) denotes that it is only that portion of the amount in default or in arrears which can be demanded in the envisaged notice and not the entire sum secured by the charge. Therefore, the entire amount of the charge cannot be the amount in default. If the law intended the contrary, it would have used the phrase “redeem the property” instead of the phrase “to rectify the default.” The Applicant drew further support of his stated position from section 96(1) which provides that:-
- “...where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.”
9. Thus, according to the Applicant, should the chargor be able to rectify the default, then the charge/ Mortgage’s terms shall be reinstated and the power to foreclose shall therefore not be available until another default shall have been made and similar notices issued but not complied with. Mortgages are meant to be long term facilities an understanding which informs section 90 of the *Land Act*. When the default is rectified, interest and other charges should be applied to protect the lender from inflation and loss of value of money over the period of the default but which has been rectified. Therefore, the Applicant thinks that if the mortgagor of a mortgage of 25 years falls into default merely installments of only 3 months, the entire sum should not be recalled. That kind of interpretation will defeat the objects of the Act. Even if the chargor does not rectify the default within 3 months, the Chargee will be at liberty to proceed to exercise any of the remedies specified in section 90(3), including sale of the charged land.
10. The Applicant averred that the Defendant has to date not served the Plaintiffs with a Notice to sell as mandatorily required under section 96(2) of the *Land Act* which provides as follows:-
- “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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.



The above provisions are well affirmed in the case of Act Fast Security Limited v Equity Bank (2014) eKLR where the court stated that:-

“ Before exercising that power of sale however, as above, the charge must give a further Notice as required under section 96(2)”.

This failure alone is enough to support a grant of an injunction. But generally, failure to comply with statutory provisions gives rise to *prima facie* case with serious chances of success.

11. Further submissions were made by the Applicant that under Rule 15 the Auctioneers Rules a Notification of sale must be served prior to a sale of immovable property. The Notification of sale should give the chargor Forty Five (45) days upon which to redeem the property. The Notification ought to be served on the registered owner or an adult member of his family residing or working with him, and where the person refuses to sign the Notification, the auctioneer needs to sign a certificate to that effect. The Notification of Sale annexed to the Replying Affidavit does not indicate as to when and where the Notification was served; does not bear the signature of the Plaintiffs; and no certificate from the Auctioneer is attached to state that the registered owner refused to sign. The Auctioneer has not sworn Affidavit of Service. They referred the court to the case of Moses Kibiego Yator v Ecobank Kenya Limited [2014] eKLR, it where it was stated as follows:

“...the Applicant stated that he found the Notification of sale on 29 August, 2013 in his home, the Prudent thing for the Defendant to have done would have been to have the Auctioneer swear an Affidavit and say, when, and upon whom, he served the Notification of sale. If the proprietor refused to sign, then the requisite certificate ought to have been attached. None was done and I have no material to doubt the averments of the Plaintiff that he was not served property...”.

Absence of proof of service of the Notification of sale upon the Plaintiff means that the Defendant has not discharged the burden of proof under Section 107 of the Evidence Act. And, therefore, the Plaintiffs aver that, the failure by the Defendant to serve the Plaintiffs with a Notification of sale is a clog on the equity of redemption. When the chargee chooses to sell the charged land as the remedy, then the provisions of sections 96, 97, 98, 99, 100 and 101 of the Land Act come into play. These provisions are meant to ensure that the sale attracts market value or at the very least the reserve value. It is now a requirement that the chargee shall have the duty to “obtain the best price reasonably obtainable at the time of sale.” Section 97(2) of the Land Act requires.. “A Chargee shall, before exercising the right to sale, ensure that a forced sale valuation report is undertaken by a Valuer. The Defendant purported to sell the charged property without conducting a valuation of the charged property which could cause the Plaintiffs irreparable loss and damages which cannot be compensated with damages. See the case of David Gitome Kubiguka v Equity Bank Ltd [2013] eKLR where Havelock J stated that:-

“...the obligation on chargee to ensure that a forced sale valuation is undertaken by a Valuer comes under the heading to section 97 of the Land Act, 2012- “Duty of charge exercising power of sale”. To my mind, such a duty is obligatory.”

12. The Plaintiffs are convinced that they have satisfied the Principles of granting an injunction as set in Giella v Cassman Brown & Co. Limited (1973) E.A 38 at 360:

“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 be adequately be compensated by an award of



damages. Thirdly if the court is in doubt, it will decide the application on the balance of convenience.

The Plaintiffs submitted that the above violations of law constitute a *prima facie* case with a high probability of success. Similarly, they have shown that they will suffer irreparable loss and which loss cannot be compensated by an award of damages. Importantly, the charged property is a matrimonial home and if the same is sold, the Plaintiffs family shall be rendered homeless. The Plaintiffs further submitted that the Defendant's assets is unknown hence unable to ascertain if the Defendant is capable of compensating the Plaintiffs adequately. For the reasons set out in the above submissions, the Plaintiffs urged the Honourable Court to allow their Application.

The Respondent opposed application

13. The Respondent opposed the Plaintiffs' Motion dated 30th July, 2014. They filed a Replying Affidavit sworn by Vishram Shamji, the Defendant, on 5th September, 2014. The Defendant noted that prayer 4 is in the alternative to prayer 3 and prayer 5 is in the alternative to prayer 3 and 4. He also noted that the Plaintiffs are husband and wife. He made more substantive submissions on the facts of the case to be that: the plaintiff purchased the suit premises from the respondent for Kshs 70,000,000. The Plaintiffs were not able to pay the entire sum and requested the defendant for a financial accommodation. The plaintiff agreed to the financing and the same was to be secured by a charge registered against the title. A charge dated 14/11/2012 was registered against Land Reference No 9104/231 on the 19th December, 2012 to secure the repayment of Kshs 22,500,000 together with interest at 18% per annum. The Plaintiffs were to repay the entire sum on the 30th June, 2013.
14. The Plaintiffs never made any repayment up to the time the redemption date became due. The Respondent exhibited a letter dated 10th July, 2013 detailing the attempts made to recover the amount due from the applicants. The contents of the said letter have not been denied. The respondent through their advocates on record gave the requisite notice dated 15th October, 2013. The same was sent through the respondents address provided in the charge document. The letter is found at page 33 and the certificate of posting is found at page 35. There is no denial of the postal address. The allegation that the notice was not received cannot be true. The plaintiff did not respond to the said notice. However by the Advocates letter dated 11th March, 2014 the Plaintiff requested for a meeting to discuss and sort out the matter. A meeting was held on 14th March, 2014 among the Plaintiff's advocates, the Defendant advocates and the 1st Plaintiff, where the plaintiff sought more time. The letters exchanged are contained at pages 37, 40, 41 and 42 of the Defendants reply. The Plaintiffs did not cooperate at all and so the Defendant commenced the process of sale; the property was advertised and the Plaintiff was served with the notification of sale at page 38 of the affidavit. The Plaintiff filed this suit after the sale of the property was advertised in the local dailies.
15. The Plaintiffs' main grounds in support of the application are that:
 - a. the charge is invalid
 - b. no statutory notice was served and even if it was the same was defective
 - c. the process of sale was unlawful and this of no consequences



The charge in issue is dated and executed on 14th November, 2012 and duly registered in compliance with the Land Registration Act. The Plaintiffs has acknowledged in the said charge that the charge is in compliance with Section 56 of the Land Registration Act. The Acknowledgement states:

"We, Albert Mario Cordeir and Farida Rehmat Khan being the above named Borrowers hereby acknowledge and confirm that pursuant to the provisions of Section 56 of the Land Registration Act (Act No 3 of 2012) and further that there shall be reserved in favour of the Lender the full right pursuant to Sections 82 and 83 of the Land Act, No 6 of 2012 of agreed that none of our property or assets which at the date hereof are subject to a Charge or charge vested in favour of the Lender shall be redeemed except on payment not only of all monies secured thereby but also of all monies hereby secured and that the Lender's rights under the said sections be noted against the register of title".

16. The Defendant submitted that a perusal of the charge shows that it was executed and registered in full compliance with the law and the alleged defect does not go to the substance of the charge. There is not any allegation that the charge was not executed by the Plaintiffs and/or that the Plaintiffs do not owe the money. They admit having borrowed and have not alleged any payment. The Plaintiffs derived advantage and benefit out of the said charge and so it is a mockery to our justice system for the same beneficiaries to come to Court seeking discretionary orders. Section 1A & 1B of CPA enjoins this Court to look beyond the reasons advanced by a party in its quest to render justice and doing so expeditiously. The Plaintiffs are estopped from alleging invalidity of a charge which they have taken benefit of. The Defendant sees a clear contradiction when the Plaintiffs seek an injunction both in the plaint and the application and in the alternative they seek extension of time to comply with the terms of the charge. The Plaintiffs are seeking 24 months to comply. The Defendant quips: What will the Plaintiffs comply with if they sincerely believe that the charge cannot stand in law? The Plaintiffs are further seeking that the Defendant's statutory power on sale to be suspended or postponed yet they claim there is not any statutory power of sale. The Defendant feels this is gambling with the Court. .
17. The Respondent contended that they gave the Plaintiff a notice for 90 days. The said period expired and the Plaintiff cannot be said not to have been given adequate time. Ninety days, (90) translate to 3 months. The Plaintiffs want the Court to delve into the details whether 90 days are equivalent to three (3) months. There is no standard format of the notice and the Chargee would be at liberty to do a notice that sufficiently complies with the law. The Defendant urged the court to note that, even upon the expiry of the said notice the Respondent did not move to realize its security. The Respondent gave the Plaintiffs time, entered to discussions and no action for the sale was taken until the Plaintiffs had been given an opportunity to redeem and adequate time to make sufficient arrangements. The defects which the Plaintiffs have identified in the statutory notice do not affect the notice. The entire loan was payable by the 30th June, 2013, and so the notice clearly spells out the amount due as at the date of the notice i.e. 15th October, 2013, In the spirit of the law, 90 days cited is sufficient. The Defendant admits that the notice was delivered to the house and a copy sent by registered post to the address in the charge. The certificate of postage is annexed.
18. The Defendant believed that the Plaintiffs have raised an issue in Section 96(2) of the Land Act so that they do not pay up. In the Replying Affidavit at page 38 the Respondent has annexed the notification of sale giving the Plaintiff 45 days after which the property will be sold. This notice was followed with the Plaintiffs' Advocates letter annexed at page 37 calling for a meeting. More time was given in the advert in the Local Media. From the foregoing, The Defendant is sure the Applicant has a *prima facie* case upon which the Court can issue injunction order. They are not giving any reason why they would wish the repayment postponed by 24 months or any other period as the Court may direct. In seeking



the alternative remedies the Applicants have not brought themselves within the ambit of Section 104 of the *Land Act*. They have not convinced this Court that the remedy proposed by the Defendant should not be approved. Indeed under Section 104 (1) (d) the Court may authorize or approve the remedy applied for or proposed by the Chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with the remedy. The circumstances under which a Court can refuse to authorize a remedy proposed by the Chargee are set out in Section 104 (4) which the Respondent submitted that, the applicants have not given any evidence and/or placed material before the Court to enable the Court disapprove of the remedy sought by the Chargee. The application is purely made in bad faith and the applicants are not worthy of the discretionary orders.

19. They relied on the case of *Mrao Limited v First American Bank of Kenya Limited & 2 others* at page 138 the Learned Judge stated:

“The Appellant conceded it had obtained money from the first Respondent, it had given its property as security, it had not repaid the money, and that since the date it executed the agreement dated 3rd May, 1999, it had not made any payment to the first respondent and that with or without a demand it was required to repay the whole debt by 31st May, 2000, which it admitted it had not done. The applicant had come to a court of equity but having failed to show utmost good faith I cannot but hold that it was not entitled to the injunction it prayed for in its application”.

The facts of the above case are truly similar to the facts in the present case. The Court should likewise refuse the injunction sought and dismiss this application.

20. The Defendant submitted on one more important issue; that, since the filing of this suit on the 30th July, 2014, the Plaintiff has not served the Defendant with the summons to enter appearance. This clearly show that the Plaintiff simply intend to end this suit at the stage of his application. These are vexatious proceedings. The sale could not have been conducted without a valuation and there is one in existence. For those reasons, the Defendant submitted that the Plaintiffs do not merit any discretionary orders.

The Determination

The threshold

21. Has the Plaintiffs established *prima facie* case with the probability of success? And is damages adequate remedy? If in doubt, where does the convenience lie? These questions represent the traditional grounds which a court should consider in granting an injunction. But courts are now agreed that these grounds should be considered within the principles of justice under Article 159 of the *Constitution* as well as the Overriding Objective of the law enshrined under sections 1A & 1B of the *Civil Procedure Rules* which commands the court to serve substantive justice by interpreting the law in a much wider manner in order to act justly. This is in line with the legal reality that the law on injunctive relief just like all other law is not cast in stone, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. See the decision by Ojwang Ag. J (as he then was) in the case of *Suleiman v Amboseli Resort Ltd* (2004) eKLR 589. Thus;

“A fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been “wrong”.

See the decision of Justice Hoffman in the English case of *Films Rover International* (1986) 3 All ER 772 at page 780-781.



Issues

22. The court is being called upon to determine the following issues:
- a. Whether the Charge instrument herein is not in compliance with section 80(3) of the Land and, therefore, defective, null and void;
 - b. Whether the Defendant served the Plaintiffs with a Statutory Notice pursuant to section 90(2) of the Land Act;
 - c. Whether the Defendant served the Plaintiffs with a Notification of sale;
 - d. Whether the Defendant served the Plaintiffs with a Notice to Sell pursuant to section 96(2) of the Land Act; and
 - e. Whether the Defendant carried out a valuation of the charged property.

Is the Charge defective, null and void?

23. I will not determine this issue for obvious reasons. Given the nature of this issue, it is one which must be determined in the trial. I am also aware of the argument that even where the charge, the agreement or contract thereof survives, and creates obligations and duties. Except, I should only state that the Charge dated 14th day of November 2012 is subject to the Land Law and Registration of Land Act and more specifically Section 80(3) of the Land Act which provides that:-

“Every charge Instrument shall contain:-

- a. The terms and conditions of sale;
- b. An explanation of the consequences of default and;
- c. The reliefs that the chargor is entitled to including the right to sell.

The Notice under section 96(2) of the Land Act

24. I have decided to deal with this issue first because the Defendant seems to suggest that the Plaintiffs in resorting to the section is merely looking for a reason not to pay up the loan advanced. That may be so as the record shows that the Plaintiffs have not paid a cent towards repayment of the loan advanced to them herein. The frustration of a lender in the face of such a defaulter is also a genuine intuitive reaction as is the case here: this reality is important and will be considered elsewhere when the court makes its final orders. In the meantime, the court needs to discern the nature of the requirement under section 96(2) of the Land Act and the effect of non-compliance thereto. Section 96(2) of the Land Act which provides as follows:-

“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 sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.

25. This section is slowly attracting attention from judges, practitioners as well as scholars of multi-disciplinary fields. And I consider the debate around the subject to be of great jurisprudential value in Kenya especially in the context of the yet-to-be-resolved land question; the provisions on property rights in the Constitution of Kenya, 2010, and the protections of equity of redemption in the new land law. In the cases I have handled on the section, I have seen attempts to fuse the requirement in of section



96(2) of the [Land Act](#) with Rule 15 of the [Auctioneers Rules](#), 1997. Some arguments I have encountered seem to suggest a Notice of Redemption under Rule 15 of the Auctioneers Act is sufficient for purposes of section 96(2) of the [Land Act](#). I think, there is clear legal bifurcation between these two laws and any attempt to fuse the two only increases the confusion of the purpose of section 96(2) of the [Land Act](#). I may speculate here. Perhaps one may think that the Redemption Notice under the Auctioneers Act is sufficient because; it comes after the Statutory Notice; it is for 45 days which is more than the 40 days under section 96(2) of the [Land Act](#); serves the purpose of giving an opportunity to the Chargor to redeem the property; and notifies the Chargor of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice. But I should state that the requirements under section 96(2) of the [Land Act](#) are mandatory and quite separate from the requirements under the Auctioneers Act. The Redemption Notice under the Auctioneers Act is also mandatory but it is issued separately from and after the one under section 96(2) of the [Land Act](#); strictly in that sequence and I will cite ample reasons in support thereof.

26. Of importance, when the Parliament enacted section 96(2) of the [Land Act](#), the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the [Constitution](#). Again, rule 15 of the [Auctioneers Rules](#) applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the [Land Act](#). One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the [Land Act](#) which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the [Land Act](#). Section 96(2) of the [Land Act](#) is one of the provisions of the [Land Act](#) which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the [Land Act](#) is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the [Auctioneers Act](#). The, debate is not, however, closed. I may cite other works of the court for further illumination of the subject. See the rendition in the case of [Palmy Company Limited v Consolidated Bank of Kenya](#) [2014] eKLR that:-

"As far as I am aware, this requirement of a notice to sell under section 96(2) of the [Land Act](#), and that the chargee shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell, are still points of judicial debate. Some courts have dealt with that requirement for instance in Malindi ELC Court Land Case No 1'B' of 2014 *Josiah Kamanja Njenga v Housing Finance Corporation of Kenya & another*, Angote J stated that:

Having analysed the chronology of events, I take the view that the auctioneer's fees is only payable once the bank gives to the auctioneer lawful instructions. Section 96(2) of the [Land Act](#) stipulates that the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. The Plaintiff was served with the 40 days' notice on 18th October 2013, which was the fourth day after the posting of the letter dated 10th October, 2013. The letter, according to the documents annexed on the Replying Affidavit, was received by the post master general on 14th October, 2013.

It is only after 27th November, 2013, which was the 40th day after 18th October, 2013, when the Plaintiff is supposed to have been served with the letter, that the 1st Defendant would have instructed the 2nd Defendant to proceed to issue to the



Plaintiff with a notification of sale pursuant to the provisions of Rule 15 of the [Auctioneers Rules](#), 1997 and not earlier than that.

Consequently, the letter of instructions dated 14th November, 2013 by the 1st Defendant addressed to the 2nd Defendant instructing it to sell the suit property was prematurely issued and is contra-statute. The said instructions and the subsequent notification of sale by the 2nd Defendant are therefore, *prima facie*, a nullity and cannot be the basis for the auction which had been scheduled for 26th January, 2014 or the loading of the auctioneer's fees on the Plaintiff's loan account.

The notice to sell should be in the prescribed form but nothing prohibits the said notice being issued on behalf of the chargee by its authorized agents. Although the Defendant submitted that:

"On expiry of the Statutory notice, the plaintiff was served with a further notice for Forty (40) Days and thereafter served with a Redemption Notice on 25th September 2013 requiring it to redeem the charged property within Forty Five (45) Days and a Notification of Sale informing the Plaintiff that the property would be sold on 5th December 2013 unless the sum of Kshs 42,575039.65 being the outstanding loan amount was settled".

...I have not seen any notice to sell the charged land which was issued to the Applicant under section 96(2) of the [Land Act](#). What I see in the documents annexed to the replying affidavit are the Statutory Notice by the chargee's advocates, letter of instruction by the Defendant to the auctioneers, Redemption Notice and Notification of Sale by the auctioneers. In the absence of a notice clearly indicated to be a notice under section 96(2) of the [Land Act](#), I am not able to legally pronounce that such notice was issued. However, I anticipate arguments will be made in the future and there is room to argue that the redemption NOTICE by the auctioneers was also a notice to sell by the chargee as envisioned in section 96(2) of the [Land Act](#) because it was issued by an agent duly instructed by the chargee and also informed the Applicant that its property will be sold after 45 days unless it redeems it. If that argument prevails, needless to state that the Redemption notice is a generous one for it exceeded the minimum 40 days envisaged under section 96(2) of the [Land Act](#). another element would kick in; that the law envisages a minimum of 40 days to elapse before completing a contract for sale of the charged land, which could mean the notice, should be for more than 40 days except any contract for sale of the charged land cannot be completed at least before 40 days have elapsed. That imagination brings me to the question whether the notice to redeem issued under rule 15(d) of the [Auctioneers Rules](#) could serve as a notice to sell under the [Land Act](#). A practical problem would emerge; the notice under section 96(2) of the [Land Act](#) is a notice to sell not a notice to signify an intention to sell. Does it therefore, mean the notice under section 96(2) of the [Land Act](#) should specify the date of sale as does the redemption notice issued under the [Auctioneers Rules](#)? There could be as many and varied arguments on this point. But I will take a more pragmatic and purposive approach of the law.



27. On the basis of the above, in the absence of a Notice to sell under section 96(2) of the Land Act, the Statutory Power of Sale cannot be exercised even if the Statutory Notice, the Notification of Sale and the Redemption Notice have been issued. This is a potent ground for an injunction. None was issued. However, the failure to issue this Notice under section 96(2) of the Land Act will not invalidate a statutory Notice which has been issued properly under section 90 of the Land Act. Therefore, I should determine the other grounds before I make my final decision.

Statutory Notice under section 90 of Land Act

28. The Defendant claims he issued a proper Statutory Notice under section 90(3) of the Land Act. The Notice is contained in the letter dated Tuesday October 15, 2013 which is reproduced below:-

We act for our client Mr. Vishram Shamji who has instructed us to address you as under.

That our said client is the Chargee of the property know as Land Reference 9104/231 and you are the Chargors thereof. In terms of the charge registered on the 19th December 2012, the redemption date was 30th June 2013 now past. You have failed to honor and make the payments in accordance with the repayment terms. Consequently, our client now intends to invoke his statutory right of sale of the said property to recover the amounts due.

The amount due as at October 2013 is Kenya Shillings Twenty Three Million (Kshs 23,000,000/=) which amount continues to accrue interest on daily basis until payment in full.

As advocates, agents and on instructions of the Chargee we do hereby give you this NINETY (90) DAYS notice to pay up all the amounts due together with the accrued interest, legal charges and related expenses.

TAKE NOTICE that if the said sum is not paid forthwith and in any event within the notice period, we have instructions to take out recovery proceedings to recover the entire amount together with costs and interest without further reference to you whatsoever.

29. The letter dated 15th October, 2013 from the advocate for the Defendant was send to the Plaintiffs' address vide Certificate of Posting dated 16.10.2013. Except they have fastened several quarrels on the said Notice. First, the Plaintiff says that even in the absence of the prescribed form under Section 90 (5) of the Land Act by the Cabinet Secretary, in consultation with the National Land Commission, the Notice issued by the Chargee must comply with the express provisions of section 90. According to the Applicant, the letter of 15th February 2013 does not comply with the provisions of Section 90 on statutory notice as:

- a. Does not notify the intended recipients that the charged property could be sold if compliance therewith was not made.
- b. Merely threatened that recovery proceedings will be taken if payment was not made.
- c. Fails to adequately (or at all) inform the intended recipient of the nature and extent of the default, if any;.
- d. And since the alleged default consisted of alleged non-payment of money due under the purported Charge, it failed to specify the amount that must be paid to rectify the alleged default.
- e. Further, it gives the recipient thereof a period of 90 days instead of the statutory three months as per the Land Act.



- f. It did not give the recipient thereof any opportunity to rectify and/or restore the default to normalcy as intended by the section 90(2) of the [Land Act](#);
 - g. It did not inform the recipient that they had a right to apply to court for relief; and
 - h. It brazenly took away statutory rights bestowed under section 90(2) of the [Land Act](#).
30. Does the Notice notify the Chargors that the charged property could be sold if compliance therewith was not made? A Statutory Notice should be very clear that should compliance with the demands of the Notice not be forthcoming in accordance with the Notice, the suit property shall be sold. Although the letter dated 15th October 2013 was not as clear as it ought to have been, it notified the Chargors that he intends to invoke his statutory right of sale of the charged property in its paragraph 2. Even the overall purport of the letter is that the property will be sold unless the entire sum is paid within the 90 days. Therefore, it is not true that the Notice did not notify them of the sale of the property in the event of non-compliance with the Notice. Having said this, I will answer some of the queries by the Plaintiffs in a quick succession: i) The Notice does not merely threatened that recovery proceedings will be taken if payment was not made; ii) The Notice adequately informs the Chargors of the nature and extent of the default; i.e. the entire sum of Kshs 23,000,000 together with interest, legal charges and related expenses; iii) the default consisted of complete non-payment of loan advanced under the purported Charge, which made the entire debt payable at once. The Plaintiffs have gone to great length to define what rectification of default under section 90 means. But, I think the general assumption that where there is non-payment of some instalments the Chargor should only be asked to pay the outstanding instalments and the other terms resumes as a matter of course not to be entirely defensible. I also think that it will not be illegal for a charge to provide that in the event of default in payment of one or more instalments the entire debt becomes due and payable. In such case, the default to be rectified is payment of the entire sum. It is important, however, to visualize the picture painted by the facts of this case; that even after the Notice for 90 days had expired, considerable indulgence was afforded to the Plaintiffs to rectify the default but they remained in default by deliberate choice which can only be of belligerent defaulter who has no intention of repaying the loan advanced. And such conduct as it will become clear shortly will be a major consideration in this decision.
31. The startling yet important query is whether the Notice gives the Chargors ...a period of 90 days instead of the statutory three months as per the [Land Act](#). The law talks of not less than three months and not 90 days. Chargors should use the words used in the statute to avoid such arguments as I see here. I am content to rely on the case of [Trust Bank Ltd v Eros Chemists Ltd](#) [2000] 2 EA 550 (CAK) where Appeal judges stated as follows:

“In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under section 69(A) (1) of the [Transfer of Property Act](#).

The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period. To omit to say so or to state a period of less than



three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute.

That clearly must render the notice invalid. In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice. Without any hesitation, the notice in the Russell case threatening a sale of the charged property on a 14 days' notice was an invalid notice for accrual of a right of sale. It is, however, of interest to add that Mulla on *The Transfer of Property Act* (8th Edn.) at page 602 states as follows:-

"No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning."

32. As I have already noted the facts of this case are such that the Plaintiffs were given sufficient Notice to rectify the default.

What about Notification of Sale?

33. The Applicants alleged that they were never served with a Notification of Sale by the Auctioneer as required under rule 15 of the *Auctioneers Rules*, 1997. Rule 15 of the *Auctioneers Rules*, 1997 provides as follows:-

Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

- a. record the court warrant or letter of instruction in the register;
 - b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
 - c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
 - d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
 - e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.
33. The relevant provision on service is Rule 15(c) of the *Auctioneers Rules* which requires the auctioneer to locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect. It is indicated on the Notification of Sale annexed hereto "Served upon Albert Mwario Cordeiro at 4.10PM". There is no signature by the Chargor or any certificate to the effect that the chargor refused to sign the Notification. The Auctioneer should have acted more diligently by adhering to the law. It is not enough to indicate that the Notification



has been served without identifying the person served, the place and the manner it was served. There is ample evidence, however, that the Plaintiffs were aware of the Notification of Sale and all subsequent correspondences are titled Notification of Sale. The parties and the advocates also negotiated on the matter of Notification of sale and tried to find ways of averting the sale of the property. But, it seems the Plaintiffs are only taking advantage of the legal lapses in this case.

Has chargors' equity of redemption been fettered?

34. If the sale of the suit property is carried through in the absence of a proper Notice to sell it will amount to a clog on the Chargors' Equity of Redemption. I stated earlier and I will repeat again that the chargors herein are belligerent defaulters who are ready to fight on and on not to repay the loan advanced to them herein. Although they do not dispute the debt, they have never paid a single cent towards the repayment of the loan. I also note that much time has passed by during the pendency of this application and the Defendant is yet to recover his money. I have found that the Statutory Notice was issued properly and is sufficient in the circumstances of this suit. And as injunction is an equitable remedy, a court of equity would still deny the remedy sought if the conduct of the Applicant is such that it does not receive approval of equity. All the other legal thresholds may be suppressed by the offensive conduct relevant to the transaction and litigation before the court. But that notwithstanding, I will take a path which is fair and just to all, and which carries the lower risk of injustice. Accordingly, I am prepared to and hereby grant an injunction to restrain the sale of the suit property as long as a proper Notice to sell the property and Notification of Sale under section 96(2) of the *Land Act* and Rule 15(c) of the *Auctioneers Rules* have not been issued, respectively. That is to say, the Chargee is at liberty to issue a Notice to sell under section 96(2) of the *Land Act* and thereafter have the property sold in accordance with the Auctioneers Act and Rules. The Statutory Notice is proper for all purposes and it need not be re-issued. The application dated 30th July, 2014 succeeds only to the extent I have expressly stated in the penultimate order on injunction herein. All other prayers which have not been expressly granted are denied. And, given the conduct of the Applicants in the entire transaction, I will not award costs of the application. Each party shall bear own costs. It is so ordered.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 3RD DAY OF FEBRUARY 2015

F. GIKONYO
JUDGE

