REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL TAX AND ADMIRALTY DIVISION

CIVIL CASE NO 211 OF 2014

ANTHONY MUTHUMBI WACHIRA…..……...……1ST APPLICANTS

DR. BERNADINE NANJALA MUTHUMBI…….…….2ND APPLICANTS

Versus

HOUSING FINANCE COMPANY OF KENYA…….RESPONDENT

RULING

Injunction application

[1] This is a Motion dated 22nd May 2014 seeking for injunctive relief. The Motion is expressed to be brought under Order 40 rules 1 and 2 of the civil procedure Rules, Section 3A and 59 of the Civil Procedure Act, Section 52 of the Indian Transfer of Property Act (ITPA) as well as other enabling provisions of the law. The application seeks for inter alia for;

a. ***An injunction to restrain the Respondent whether by itself or through its agents from selling or interfering with the Applicants' possession or ownership of Maisonette unit 2 erected on LR.5/153 located in Lavington, Nairobi pending the hearing of the suit.***
b. ***An Order under Section 52 of the Indian Transfer of Property Act (ITPA) prohibiting any change in ownership or interests whatsoever of Maisonette Unit 2 erected on LR no. 5/153***
c. ***An order for costs.***

[2] The Application is premised on the affidavit of the Applicants and on other grounds in the application and the submissions filed herein.

Some preliminary matters

[3] The Respondent in the replying affidavit sworn by the Assistant Manager Legal and dated 9th June 2014 stated that the application is fatally defective having been brought under a repealed Statute. Secondly, that the exhibits to the Notice of Motion offended mandatory provisions of Rule 9 of the Oaths and Statutory Declarations Rules. And thirdly, that the Applicants were guilty of material non-disclosure and so they did not come to court with clean hands. Therefore, the Application is an abuse of court process being an attempt to avoid a contractual obligation.

Applicability of ITPA

[4] The general rule is that a repealed Act of Parliament will continue to govern all rights or obligations and liabilities which had accrued or been incurred, respectively, under the repealed law. For better elucidation I am content to adopt a work of the Court in the case of **Argos Furnishers Limited v Ecobank Kenya Limited & Another [2014] eKLR** where it expressed itself as follows**:**

> ***'I wish to state that, a repealed law continues to apply to transactions which were carried under the repealed law. The basis of that approach is the too familiar constitutional philosophy that there should be no wrong suffered without a remedy. The aim of the law here is; to preserve a right which had accrued; and enforce obligation or liability which had attached. There are ample decisions on this subject but see section 23(3) of the Interpretation and General Provisions Act which provides:***
>
> ***(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—***
>
> ***(a) …….***
>
> ***(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or***
>
> ***(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or***
>
> ***(d) ……; or***
>
> ***(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.***
>
> ***Therefore, ITPA would still apply on all mortgages done under it.'***

[5] The Registration of Land Act which repealed the ITPA also provided for saving clauses in sections 106 and 107 as follows:-

> ***Transitional provisions on rights, liabilities and remedies of parties over land***
>
> ***106. (1) On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies.***
>
> ***(2) Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts.***
>
> ***(3) For the avoidance of doubt—***
>
> ***(a) any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act; and***
>
> ***(b) the memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the Act under which the memorandum was first registered.***
>
> ***(4) Notwithstanding this section, any notice in writing required to be served under the***

repealed Acts upon any of the parties under any mortgage, charge, memorandum of equitable mortgage or memorandum of charge by deposit of title may be served in accordance with this Act, and such service shall be deemed to be effective for all purposes.

Savings and transitional provisions with respect to rights, actions, dispositions

107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.

Accordingly, I find and hold that ITPA will govern rights, liabilities and remedies, actions and dispositions of parties which had accrued or incurred or acquired under the mortgage immediately before commencement of the current land laws.

Lis pendens

[6] *Lis pendens* was codified as a statutory provision in section 52 Indian Transfer of Property Act (ITPA)-now repealed, and is a form of remedy. But when does it accrue? *Lis pendens* relates to acts which are done during the pendency of a suit. Pendency of a suit commences from the time suit is filed. See ***Mulla*** on ***Transfer of Property Act, 1182*** Ninth edition, Lexis Nexus: Butter-worth. My own view, therefore, is that these proceedings arose after the ITPA was already repealed and *lis pendens*, unless it has been specifically provides for in a statute should apply as a common law principle within the current constitutional structure and land law regime of the nation. But the decision in the case of **Aprotech Services Ltd v. Savings & Loan Kenya Ltd [2001] LLR 1498 (CCK)** is conclusive on the application of *lis pendens* on mortgages as follows:

"The Applicants floated the side that section 52 ITPA protected it and no sale of the suit premises would go on until and unless this court so ordered. The section 52 as it appeared in the 1992 copy of ITPA available, reads.

"51 During the active prosecution in any Court having authority in British, India, or established beyond the limits of British India by the Governor -General in council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party tou he suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose"

Although Mr Machira invoked this section to apply here, and Mr. Bundotich did not so much allude to it, this court is not persuaded that Mr. Machira's point should be upheld in his client's favour. This section appears to have been intended to preserve any property, parties are litigating about in court, for one kind of relief or another. <u>It did not mean to be applied to situations of mortgages. If it were, it would be a great clog to commercial activities involving land as security. In any case section 52 does not say that notwithstanding any other provisions under ITPA, it shall apply. Without more may that point rest there.</u>

See also the literary writing of **B. B Mitra on the Transfer of Property Act, 1882** on the application of *lis pendens* (section 52 ITPA):

"This section does not apply to a suit for redemption brought by the mortgagor who has given to

the mortgagee under the mortgage an express power of sale. Therefore, a private sale of the mortgaged property by the mortgagee in exercise of such power is not affected by the doctrine of lis pendens, and is valid though made during the pendency of a redemption suit filed by the mortgagor-Ramkrishna v. Official Assignee 45 Mad 774 (776), 43 MLJ 566, AIR 1922 Mad, 69 IC 407.

That rendition settles the prayer for lis pendens order. I will not determine the request for an injunction on the basis of *lis pendens*.

Citing provisions of repealed law as enabling law

[7] Whereas I do not agree entirely with the Respondent that citing provisions of repealed law as the enabling provisions of the application makes the application fatally defective, however, there is merit in the argument that such impleading is problematic. My view is that, the current law which saves the repealed law would be the enabling law as opposed to the repealed law. Provided, however, a party in a suit is not precluded from citing the specific provisions of the repealed law. That is permissible in and does not really offend the law. I admit there is much room for a debate on this subject. I find, therefore, that the application is not fatally defective for citing provisions of repealed law.

Sealing of exhibits

[8] The Respondent argued that the purported "*supporting*" affidavit dated 22nd May 2014, refers to copies of documents which are not annexed and marked in accordance with **Rule 9** of the *Oaths and Statutory Declarations Rules* which provides as follows:

"All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner and shall be marked with serial letters of identification."

They relied on the case of **Fredrick Mwangi Nyaga v Garam Investments & another [2013] eKLR** and **Abraham Mwangi v S. O. Omboo & Ors HCCC No. 1511 of 2002.**

[9] The Applicant argued that the deponent, Anthony Muthumbi of the impugned affidavit has merely referred to documents already on the court's record and contained in the Applicants list and bundle of documents dated 22nd May 2014. Therefore, they urged that provisions of rule 9 of the oaths and statutory declaration do not apply.

[10] Rule 9 of the Oaths and Statutory Declarations Act has been interpreted by courts in past cases, and the golden thread running through the judicial decisions is that it is directory rather than mandatory. Any irregularity which does not go to the substances is regarded as a matter of form and is excused by the court. But where loose documents are just thrown at the court and are not even identified in the affidavit, or marked or sealed by the Commissioner for Oaths, the court will not hesitate to treat them as foreign material and strike them out. See the decision of ***Kimondo, J,*** in the case of ***Milimani ELC No. 45 of 2012*** stated, that,

"I have then looked at the letters of allotment annexed to the Applicants's supporting affidavit. For starters, they are not marked or identified in the affidavit…The documents are just attached to the affidavit and thrown to the court. I would thus strike out the annexures."

[11] But the circumstances of this case are different. The affidavit refers to a bundle of documents which are already filed in court without annexing them to the affidavit. Of course, such reference is not *strict sensu* securing the exhibits to affidavits; such reference cannot be securely sealed thereto under the seal of the Commissioner and be marked with serial letters of identification. Nonetheless, there is nothing wrong with making reference to other documents filed in court. The documents referred to in the affidavit are filed in court pursuant to the law and have even been referred to by the Respondent. And any party as well as the court may make reference to it in respect of any issue in controversy in this case whether it is in an interlocutory application or in the hearing. Such references of documents filed in court is incapable

of being expunged or struck out in the manner an improper annexure to the affidavit may be expunged or struck out. The documents form part of the Applicants's case and are part of record unless they are disallowed or refused admission in the trial. For those special circumstances of this case, I find the affidavit does not offend rule 9 of the Oaths and Statutory Declarations Rules. Now that the preliminary issues are out of the way, I will decide the application herein on merits.

Is the injunction merited?

The threshold

[12] As it has been stated by many judges in the past that the law on injunctive relief is not static. It has ***always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before***. See the decision of Ojwang Ag. J (as he then was) in **Suleiman vs. Amboseli Resort Ltd (2004) e KLR 589.** Therefore, in dealing with an application for an interlocutory injunction, the court should take into account all the circumstances of the case while applying the principles set out in the case of Giella Vs Cassman Brown which are:

a) H*as the *applicant must show a prima facie case with a probability of success? Or

b) If the injunction is not granted, will the Applicant suffer irreparable injury that cannot be compensated by an award or damages? And

c) If the court is in doubt, where does the balance of convenience lie?

Applicants: We are entitled to relief.

[13] The Applicant argued that they are entitled to an injunction. Basing their arguments on the case of ***MRAO vs. FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125***, the Applicants stated that they are the registered owners of the suit property, and that they have paid more than double the loan amount. They allege that their case is founded on breach by the Respondent and fetter of their right to equity of redemption. Secondly, thy alleged that the Respondent is guilty of fraud and recklessness in its conduct and that the Respondent acted illegally towards the Applicants. They alleged that the Respondent failed to accurately credit sums received into the loan accounts and that it also arbitrarily increased the applicable interest rates with over 6% of the agreed rate. In support of this assertion the Applicants have produced bank statements for verification by the Honourable court. They cited the case of **Samaki Industries Ltd –vs- Bullion Bank Ltd,** where Hayanga J held;

"The term for interest here provides interest will be 36% but the bank has the right to vary the rate of interest without notice to the borrower……. This kind of clause is a deviation from the very principles of standard contract imposed by the economically stronger party on the weaker party ……to take it or leave it……..these terms make a mockery of the principles of freedom of contracting because they are not open to negotiations"

They also relied on the case of **Givan Okallo Ingari & Another Vs HFCK Ltd,**where the Court stated that;

"The question is whether the Respondent is entitled to debit or charge the various charges and varying rate of interest in the Applicants's account without any legal basis. To my mind the legality of the charges debited or loaded into the Applicants's account is a prima facie issue which must be determined by the Court upon hearing of all the evidence by the parties"

And further that;

"Equally, it is not in the interest of the Respondent to milk the Applicants dry and drain all blood from them. The Court exists for the sole purpose of determining as who is entitled to what. In my view the Respondent cannot be allowed to engage in acts of omissions which are in

contravention of the law….."

[14] The Applicant made further arguments on the alleged Respondent's recklessness in not demanding payment from the Applicants' insurer as provided under the insurance policy and proceeded to fraudulently penalize the Applicants and charging interest on the penalties. The Applicants further asserted that as a result of this recklessness and fraudulent actions of the Respondent, they were forced to pay more than double of the loan advanced by the bank which has resulted in the subject property being threatened with sale.

[15] They went on. The Respondent has acted illegally in exercising its statutory power of sale by failing to issue proper notice as envisioned under the Land Act, 2012. The Respondent is purporting to exercise its power of sale where the Applicants have clearly redeemed the property. They were convinced that these facts establish a prima facie case with a high probability of success.

[16] The Applicants also submitted that the suit property is their matrimonial home and if it is sold, they will suffer irreparable injury that cannot be compensated by an award of damages. The entire family will be left homeless should the unfortunate sale take place. Again, the suit property carries great sentimental value to the Applicants which would be impossible to value or compensate in form of damages. They refered to the case of **Ngei Matibo v Lawi Nyateng [2014] eKLR** where Gitumbi J held that;

'Land is unique and no one parcel can be equated in value to another. The value of the 1st and 2nd Plot can be ascertained. However, it would not be right to say that the Applicants/Applicant can be compensated in damages'

On the other hand, the Applicants argued that the Respondent will not suffer any prejudice since the suit property is already charged to them and are still holding the title to the property. The Defendant's claim can be adequately be compensated by an award of damages. They also cited the case of **Dhaliwal Hotels Limited Versus Southern Credit Banking Corporation Limited (pg. 88-95)** where the court held that;

"However, where there is doubt as to the legal right an interlocutory injunction will be granted…..it is necessary that the court should find a case which would entitle the Applicants to relief at all events. It is quite sufficient for it to find a case which shows that there is a substantial question to be investigated and that the status quo should be preserved until the question can be finally disposed of"

On that basis they believe they deserve an injunction.

Respondent: Applicants perpetual defaulters

[17] The Respondent relies on its Replying Affidavit sworn by Patrick Wainaina on 9th June 2014 and filed on 12th June 2014. They submitted that it is not in dispute that on or around July 2006, the Respondent offered Mortgage loan facilities to the Applicants of Kshs. 11,250,000 to be repaid in a period of 13 years. Further particulars of the mortgage were as follows:

1. Clause 4: The total monthly repayment being Kshs. 195,334 including insurance premium
2. Clause 6: The Applicants were to pay interest on the loan at the base rate of 13.75% plus 4% per annum or such other rate as may be determined by the Respondent from time to time.
3. Clause 7: The facility was also subject to a default interest base rate of 13.75% plus 5% per annum.
4. Clause 13: The facility was to be secured by a Charge over L.R No 5/153 Nairobi

The Applicants executed a Charge dated 28th September 2006 over Maisonette No. 2 on Land Reference Number 5/153 Nairobi.

[18] Again, on or around March 2009, the Respondent advanced the Applicants a second Mortgage loan

facility of Kshs. 9,000.000.00. The loan was secured by a further charge dated 27th March 2009 over Maisonette No. 2 on Land Reference Number 5/153 Nairobi. The second mortgage loan facility amended the terms of the 1st mortgage loan facility and both loan facilities became subject to the following terms:

1. Repayment period: 15 years or 180 months
2. Total monthly instalments: Kshs. 263,651.00
3. Interest rate: Base rate of 12.5% plus 3.25 %
4. Default interest rate: Base rate of 12.5% plus 4.25 %

The interest rate was subsequently revised vide a notice to the Applicants dated 18th November 2014 in line with the increased Central Bank Rates.

[19] However, on or around April 2011, the Applicants started defaulting on repayment of the Mortgage loan. The Respondent sent out various communications to the Applicant on the accumulating arrears and the Applicants in various communications admitted to being in default. By a letter dated 30th November, 2011 the 1st Applicants admitted to the poor performance of the loans and promised to regularize the loan accounts. The letter stated that:-

a. The 1st Applicant was in the process of selling two of his properties Nairobi Block 79/71 and Kajiado/Kaputiei North/ 3667.

b. The 1st Applicant was also in the process of selling his house in Buruburu.

c. The 1st Applicant would reduce the outstanding arrears within the next 5 days.

A true copy of the letter has been produced at page 87 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014.

[20] The Applicants wrote other letters, i.e.;

a. Letter dated 25th April 2012 where the 1st Applicant acknowledges that the mortgage accounts are in arrears.

b. Letter dated 19th July 2012 where the 1st Applicant states that *"..I have not been able to put in any amounts for the last 8 or so months..."*

True copies of the said letters have been produced at pages 88 to 90 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014.

[21] According to the Respondent, the exhibits to the Supporting Affidavit of Anthony Muthumbi Wachira dated 22nd May 2014 are statements of account clearly indicating that as at 14th January 2014, the Applicants were in arrears of Kshs. 1,902,273.45 for account number ML 600-0006367. At page 97 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014 is the statement for account No ML 600-0006057 showing arrears of Kshs. 5,372,039.85 as at 20th March 2014. The Respondent sees dishonesty, per jury and an instance of material non-disclosure for the Applicants to aver in paragraphs 5 and 7 of the Supporting Affidavit of Antony Muthumbi Wachira that the Applicants have fully serviced the loan accounts yet they have not paid a single penny since March 2013.

Statutory Notices duly served

[22] The Respondent averred that it issued various statutory notices as follows:

a. Three months statutory notices dated 17th October 2011 and 27th January 2012.

b. Forty days statutory notice dated 19th March 2014
c. 45 days redemption notice dated 24th March 2014
d. Notification of Sale dated 24th March 2014
e. Auctioneer's Certificate of Service dated 25th March 2014

True copies of the notices, certificates of posting and auctioneers certificate of service have been produced at pages 116 to 131 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014. The statutory notices were sent to the last known postal address of the Applicants being P. O. Box 32243-00600 as per Cause 11 and 9(bb) of the Charge and further charge. There has been no notice of change of postal address that has been served on the Respondent.

[23] The Respondent indulged the Applicants on a number of occasions including:

a. Issuing the 3 months statutory notice twice on 17th October 2011 and 27th January 2012. See pages 116 and 119 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014 for copies of the said notices.

b. Postponing the auction scheduled for 27th November 2012, all with the view of giving the Applicants a chance to regularize their accounts, which they failed to. A copy of the Notification of sale dated 25th September 2012 is produced at page 132 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014.

[24] According to the Respondent, the Applicants took out a life assurance cover under the Group Mortgage Protection Assurance Scheme and a true copy of the Proposal forms, confirmation of acceptance terms, letters forwarding declaration forms and the standard policy cover have been produced at pages 190 to 210 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014. The policy was to provide cover for the payment of the principal sum advanced in the event of **death or total or permanent disability due to accident** of the debtor during the currency of the insurance. The policy **DID NOT** cover risks such as termination from employment as claimed by the Applicants. An Insurance Policy covering unemployment is usually taken out by filing the Unemployment Rider Proposal Form which the Applicants did not fill. The cover is meant to cover an amount equivalent to six (6) monthly mortgage repayments from the date of unemployment and is annually renewable. A true copy of the standard form is at page 211 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014. Therefore, the Applicants' unemployment should not affect the chargee's statutory power of sale. There is no insurance policy in place covering the Applicants unemployment.

[25] The Respondent also submitted that the attempt by the Applicants at paragraph 15 of the Supporting affidavit to attack the validity of charge on allegations that it does not comply with various provisions of the law is bare. To them, the charges comply with all the provisions of the law. The charges were duly registered and are valid. The Applicants are just persistent defaulters. See **Maithya v Housing Finance Co. of Kenya & another [2003] 1 EA 133** at page 134 (see page 66) Justice Nyamu addressed the common problem of debtors who persistently default serving the loan. He dismissed the injunction application as he found that no prima facie case had been made out. They also cited the case of **Sports Cars Ltd -vs -Trust Bank Ltd in LLR No. 342 (CCK).** The Applicants have admitted to being in default and they have not paid a single penny since March 2013 and continue to be in arrears.

[26] The Respondent asserted that dispute as to amount due is not a ground for an injunction, and relied on the case of **Morris & Co. Ltd v Kenya Commercial Bank Ltd [2003] 2 EA 605.**

[27] They did not forget to address the other test and submitted that the Applicants will not suffer irreparable damages if an injunction is granted. Of importance, the Respondent argued that the Applicants' argument that the suit property is unique is irrelevant and is never a basis of granting injunctive orders against a mortgagor. They cited the case of **Bii v Kenya Commercial Bank Ltd [2001] KLR 458** where Justice Ringera held that;

Once property is offered as security it by that very fact becomes a commodity for sale. There is no commodity for sale whose loss cannot be compensated in damages.

[28] They also accused the Applicants of being guilty of inequitable conduct and guilty of material non-disclosure. The contentions that they have *"overpaid"* and *"paid double the loan amount"* are not based on evidence. They have always admitted indebtedness and default. And they have been indulged in so many times. They referred to the case of **Thathy v Middle East Bank (K) Ltd & Ano. HCCC No. 302/02.**

[29] The Respondent termed the Applicants as persons who are out to use the judicial machinery to evade their contractual obligations. Such serial defaulters do not merit any equitable remedy. They asked the court to dismiss the application with costs.

DETERMINATION OF MERIT

Bad times

[30] Bad times come. A person is terminated from his employment yet he has a mortgage to pay. He does not repay the mortgage and the debt continues to swell. The debt becomes even bigger because not only is he not repaying the principal sum but the accrued interest too. Now default interest is also charged and rapidly, the debt is of huge proportions. Things become headlong and out of financial grip or control by the Mortgagor. On the other hand, the mortgagee approaches that he wants to enforce his rights. Indeed he has rights. He says that he will do so in accordance with the law. He issues statutory and other notices required in law to sell the mortgaged property. Well and good, the law is happy. But this legal action just adds to the plight of the mortgagor. Here real tribulations of the biblical Job become true. As a natural person one would sympathize with such situation. But as a court of law, such impulsive or intuitive reactions have no place. A court of law looks at every situation presented before it through the lens of the law. I will do exactly that; examine the circumstances of the case and apply the law.

Circumstances of case

[31] It is not in dispute that the Applicants were advance loans by the Respondent. The first one was advanced on or around July 2006 and was for the sum of Kshs. 11,250,000 to be repaid in a period of 13 years. It was secured through a mortgage on the suit property. The mortgage provided *inter alia* as follows: Clause 1: The monthly repayment on the principal sum was Kshs. 185,144 plus Kshs. 9,940 being insurance premium, making a total of Kshs. 194,084. Clause 2: The agreed interest on the loan was at the rate of 17.75% per annum. But the Bank retained the right to vary the rate of interest from time to time upon giving notice to the Mortgagor forthwith, and the sum payable shall be at such reduced or increased rate of interest of which the Mortgagor will be accordingly notified. Under this clause, it was also agreed that should any amount including interest remain unpaid on the due date, such amount in arrears will bear interest called default interest at the rate of 18.75% per annum from the time it becomes due to the date on which the outstanding sum together with the default interest is in fact paid. And the default interest at the sole discretion of the mortgagee may at any time be capitalized and added to for all purposes to the loan. The mortgage provides in clause 2(e) that the parties agree that the default interest represents a reasonable or genuine pre-estimate of the loss to be suffered by the Mortgagor in funding the default of the chargor and the mortgagor also agreed that the margin of default interest may be reviewed by the mortgagor to a higher or lower rate should the mortgagee so decided. Again the charge provided that all overdue interest whether capitalized or not and the interest thereon shall be secured in the same manner as the loan and all covenants and provisions of the charge, as well as the remedies and powers shall equally apply to such overdue interest and its payment thereto. Therefore, the terms base lending rate were not incorporated in the charge even if the rate stated in the charge may have been arrived at in the manner described by the Respondent. Nonetheless, the Respondent has used the figures as per the charge. There were other commissions, fees and charges, legal and other costs and expenses in relation to the charge which were to be loaded on the debt on same terms in the charge. From the charge, all these sums were to be and indeed were secured by a Charge over L.R No 5/153 Nairobi. The Applicants executed a Charge dated 28th September 2006 over Maisonette No. 2 on Land Reference Number 5/153

Nairobi.

[32] Another loan of Kshs. 9,000.000.00 was advanced to the Applicants in March 2009. It was secured by a further charge dated 27th March 2009 over Maisonette No. 2 on Land Reference Number 5/153 Nairobi. In accordance with recital (C) of the Further Charge, the second loan was combined with the first loan and both constituted one loan on the new terms agreed under the Further Charge. Accordingly, I agree with the Respondent that the second mortgage amended the terms of the 1st mortgage loan. The loan as described in the Further Charge was subject to the following terms:

1. Repayment period: 15 years or 180 months
2. Contrary to the submissions by the Respondent, the total monthly instalments was not Kshs. 263,651.00 but Kshs. 292,468 which was made up of Kshs. 278.051, monthly repayment of the principal sum, and Kshs. 14,417 being monthly premium for the insurance.
3. Interest rate was 15.75% per annum and not at a Base rate of 12.5% plus 3.25 % as submitted by the Respondent.
4. Default interest rate was agreed at 16.75% and not at a Base rate of 12.5% plus 4.25 % as submitted by the Respondent.

[33] Like the first charge, the Further Charge provided in clause 2 that the Bank retained the right to vary the rate of interest from time to time upon giving notice to the Mortgagor forthwith, and the sum payable shall be at such reduced or increased rate of interest of which the Mortgagor will be accordingly notified. It was also agreed that should any amount including interest remain unpaid on the due date, such amount in arrears will bear interest called default interest at the rate of 16.75% per annum from the time it becomes due to the date on which the outstanding sum together with the default interest is in fact paid. And the default interest at the sole discretion of the mortgagee may at any time be capitalized and added to for all purposes to the loan. The mortgage provides in clause 2(e) that the parties agree that the default interest represents a reasonable or genuine pre-estimate of the loss to be suffered by the Mortgagor in funding the default of the chargor and the mortgagor also agreed that the margin of default interest may be reviewed by the mortgagor to a higher or lower rate should the mortgagee so decided. Again the charge provided that all overdue interest whether capitalized or not and the interest thereon shall be secured in the same manner as the loan and all covenants and provisions of the charge, as well as the remedies and powers shall equally apply to such overdue interest and its payment thereto. Therefore, the terms base lending rate were not incorporated in the charge even if the rate stated in the charge may have been arrived at in the manner described by the Respondent. Nonetheless, the Respondent has used the figures as per the charge. There were other commissions, fees and charges, legal and other costs and expenses in relation to the charge which were to be loaded on the debt on same terms in the charge. From the charge, all these sums were to be and indeed were secured by a Charge over L.R No 5/153 Nairobi. The Applicants executed a Charge dated 28th September 2006 over Maisonette No. 2 on Land Reference Number 5/153 Nairobi. In view of the forgoing, it is not correct for the Applicants to state that illegal default interest was charged on the loan.

[34] The suit property is sectional property. I have perused copies of the first charge and further charge presented to the court and the following is apparent discernible: The Applicants as Lessees and chargors signed both the first and further charge. The Lessor or Manager of the suit property JIPE CLOSE LIMITED gave its consent to the charge and duly sealed and signed the charges. The relevant certificates under section 69(1) of TPA were properly executed as by law provided. Therefore, the charges were properly executed and in accordance with the law. The argument by the Applicants that the charges were not valid fails. And also as Kwach JA observed in the case of **Mrao** it is also the case here that; at no time in the course of argument did the Applicants indicate to the Court when the alleged invalidity first came to the knowledge of the appellants and what action they took. Indeed, the Applicants took further amounts on the same security. See the case of **Coast Brick & Tiles Limited & Others v Premchand Raichand Limited [1966] EA 154**] on the effect of registration of securities on land that:

> ***"By s 32 upon registration the land specified becomes liable as security. In view of these provisions I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus. The second reason for my opinion that the***

onus is heavy is based upon the particular facts of this case. The mortgage was duly registered on February 27, 1956, and the plaint in the action is dated September 21, 1960; no hint of any alleged invalidity was given during those four and a half years. ..A case so presented cannot inspire confidence."

[35] I also note that, following new interest rates issued by the Central Bank of Kenya, the Respondent varied the interest rate in accordance with clause 2(b) of the Further Charge and served upon the Applicant necessary notices for the variation of interest. The Respondent issued explanatory notices such as the one dated 4th May 2012, 30th May 2012 and 18th November 2014 as required under clause 2(b) thereof. Accordingly I find that the variation of interest was provided for and was done in accordance with the law and the charge. Central Bank issued changes in interest rates in accordance with the law as authorized by the Central Bank and the Banking Act.

[36] It appears from the record that in or around April 2011, the Applicants started defaulting on repayment of the Mortgage loan. And there have been various correspondences between the parties on the default. The Respondent sent out various communications to the Respondent on the accumulating arrears and the Applicants in various communications admitted to being in default. For instance, see the letter dated 30th November, 2011 where the 1st Applicants admitted to and apologized for the poor performance of the loans and promised to regularize the loan accounts. The letter made promises to pay the debt herein and gave the efforts he is making in order to repay the loan. The proposals seemed concrete for the 1st Applicant stated that:- a) he was in the process of selling two of his properties, namely Nairobi Block 79/71 and Kajiado/Kaputiei North/ 3667. He also stated that he was also in the process of selling his house in Buruburu and was only waiting for commitments on the sale of the house. He, however, promised that, as these other processes are going on, he will continue to reduce the outstanding arrears within the next 5 to 6 days. He requested to be allowed to regularize his account within the suggested period of time. A copy of the letter has been produced at page 87 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014.

[37] The Applicants wrote other letters, i.e.; Letter dated 25th April 2012 where the 1st Applicant acknowledges that the mortgage accounts are in arrears and stated that he had sold his Buruburu house and what he was waiting for is charging of the property to CFC Bank so that the purchase price could be released to him. He has not disclosed whether he sold the Buruburu house and for how much. This information is useful especially when a person has come for relief from equity. We can only speculate on these issues. When he wrote the letter dated 19th July 2012 he only referred to payments he made on 12th October 2012 and admitted that *"..I have not been able to put in any amounts for the last 8 or so months..."* He also set out to explain his termination from KAA and the slump in the property market without disclosing the fate of the proceeds of the sale of Buruburu house. He nonetheless made further promises that he will continue to service the loan and was expecting money out of some IT consultancy he was about to sign with a real estate institution, and after selling other assets. We are not also told whether the other two properties in Nairobi and Kajiado were sold as he promised in his letter dated 30th November 2011. From the statements filed by the Applicants in court, he made payments of Kshs. 200,000 on 4th July 2012, Kshs. 150,000 on 31st August 2012 and EFT of Kshs. 1,315,578 on 1st December, 2012. He has not made any other payment. The outstanding loan as at 1st December 2012 as per the statements produced stood at Kshs. 12,732,150.60 and it continued to attract further interest. Other charges for insurance policies taken out on the loan were also debited into the debt. On *prima facie* basis and looking at the charge, there is nothing in the plain sight of the law which is un-contractual on these charges. There is not a report by professionals in calculations of interest which has been annexed to show that the charges are un-contractual or contrary to the law. We have only generalized statements made by the Applicants without concrete legal foundations. Copies of the said letters have been produced at pages 88 to 90 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014.

[38] I also see the exhibits to the Supporting Affidavit of Anthony Muthumbi Wachira dated 22nd May 2014 which show that as at 14th January 2014, the Applicants were in arrears of Kshs. 1,902,273.45 for account number ML 600-0006367. Also at page 97 of the exhibit to the Replying Affidavit of Patrick

Wainaina dated 9th June 2014 is the statement for account No ML 600-0006057 showing arrears of Kshs. 5,372,039.85 as at 20th March 2014. In the absence of any professional report that the loan has been paid in full, there cannot be any prima facie conclusion that the Applicant has fully repaid the entire loan. Paragraphs 5 and 7 of the Supporting Affidavit of Antony Muthumbi Wachira that the Applicants have fully serviced the loan accounts cannot be correct. All correspondences from the Applicant admitted indebtedness.

Statutory Notices

[39] This is another major point of contention. But before I deal with it, let me dispel one misstatement by the Applicants about the demand issued on 19th March 2014. The Applicants have submitted that the demand and exercise of statutory power of sale was based on a non-existent charge. I have found that the charges herein were properly executed and are charges in law. The charged property is designated in the schedule as; *ALL THAT Maisonette known as Number 2 and particularly described and delineated on the plan…registered as the Registry of Documents at Nairobi in Volume D1 Folio 178/1349 File DXXXI situate on the piece of land in the City of Nairobi…being Land Reference Number 5/153 (originally 5/45)* …''The demand as well as the notifications by the Respondent and the auctioneers, respectively, is appropriate and refer to the mortgaged property which is the suit property herein. Therefore, the Applicants' averments in paragraph 12 cannot be correct.

[40] According to the Applicants, the statutory notices herein were not issued in accordance with the law. They gave three major reasons; one, that the notices were pre-mature as section 44 of the Banking Act was never complied with as no notice was issued to state when the loan became none performing. Two, they had fully repaid the loan. And three, there was an insurance cover which the Respondent did not utilize to realize the loan after his dismissal from employment. I will start with the last reason.

Insurance policy

[41] There is no doubt that the Applicants took out a life assurance cover under the Group Mortgage Protection Assurance Scheme and a copy of the Proposal forms, confirmation of acceptance terms, letters forwarding declaration forms and the standard policy cover have been produced at pages 190 to 210 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014. From the policy, it was to provide cover for the payment of the principal sum advanced in the event of death or total or permanent disability due to accident of the debtor during the currency of the insurance. The policy did not cover termination from employment as claimed by the Applicants. I agree with the Respondent that such risk is only covered by an insurance policy taken out for that purpose. In law, insurance cover extends only to risks covered. The policy herein did not cover termination of employment. The Applicant did not take out an Insurance Policy covering unemployment which is done ordinarily by filing the Unemployment Rider Proposal Form. I have seen a copy of the form. But even if such policy was taken it would only have covered an amount equivalent to six (6) monthly mortgage repayments from the date of unemployment. Accordingly, in the absence of a policy to that effect, the Applicants' unemployment does not affect the chargee's statutory power of sale. But I may state in passing that, it is prudent practice for Banks to advise their clients and make a standard condition in their lending agreements requiring the mortgagor to take out and maintain all necessary and appropriate insurance covers which will guarantee a reasonable recompense in the event the insured risk attaches. In cases where the chargors are individuals and are in employment which perhaps may be the major source of repayment funds, an insurance cover on termination of employment would be necessary and most appropriate. There is no insurance policy in place covering the Applicants unemployment and so the arguments on that basis fail.

Tenor of notices

[42] On the other hand, the Respondent posits that, it issued various statutory notices as follows:

1. ***Three months statutory notices dated 17th October 2011 and 27th January 2012.***

2. ***Forty days statutory notice dated 19th March 2014***

3. ***45 days redemption notice dated 24th March 2014***

4. ***Notification of Sale dated 24th March 2014 and***

5. ***Auctioneer's Certificate of Service dated 25th March 2014***

I have seen copies of the notices, certificates of posting and auctioneers certificate of service; they are annexed at pages 116 to 131 as exhibits to the Replying Affidavit of Patrick Wainaina dated 9th June 2014. The statutory notices were sent to the last known postal address of the Applicants being P. O. Box 32243-00600 as per Cause 11 and 9(bb) of the Charge and further charge. I agree with the Respondent that there has been no notice of change of postal address by the Applicant. The Notices were served in accordance with the law. The Applicant has not denied receipt of the notices except they alleged that they were not in accordance with the law. I note specifically that the Bank gave the Applicants the 40 days' notice under section 90(3) of the Land Act which has always been confused with the notice of redemption under the Auctioneers Act and Rules. That is fantastic. The notices are for the amount of time required under the law and they called for payment of the entire sum which had become due and payable under the charge. The remedial action expected in such circumstances is payment of the entire sum.

[43] The Respondent has also extended magnanimous indulgence to the Applicants on a number of occasions. It issued the 3 months statutory notice twice on 17th October 2011 and 27th January 2012. See pages 116 and 119 of the exhibit to the Replying Affidavit of Patrick Wainaina dated 9th June 2014 for copies of the said notices. It postponed the auction scheduled for 27th November 2012. These indulgencies were aimed at giving the Applicants a chance to regularize their accounts, but in vain. The indulgences were at the behest of the Applicant and it would be wrong for the Applicant to try and hold the passage of time against the Bank on the *in duplum* rule. The Applicants are perpetual defaulters who made promises they never intended to keep. Even the repayments they made were most intermittent in nature, and every time a balance fell in arrears would attract interest in accordance with the charge, and invariably, the loan kept on swelling. The Applicants did not expect the loan to remain constant when they knew very well they had an agreement in the form of a charge with the Respondent where interest would be charged as well as default interest. In the circumstances of this case, and despite the situation of unemployment of the 1st Applicant, there is nothing which prevents the Respondent from selling the suit properties. When I apply the test on what prima facie case is as formulated in the case of **Mrao Limited vs. First American Bank Limited & 2 Others, [2003] KLR 125**, I find that, on the material presented to the court, and properly directing myself, there exists no right which has apparently been infringed by the Respondent as to call for an explanation or rebuttal from them. The Applicants needed to put forth a case which is more than an arguable case. It is not sufficient to raise issues which are not supported by evidence. They must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That standard, which is higher than an arguable case has not been attained. The Applicants made statements at very high level of generalization without concrete proof, and I have demonstrated this above. They have not, therefore, established that they have a prima facie case with high probability of success at the trial.

Irreparable damages

[44] The Applicants did not establish any prima facie case as required. It would, certainly be a herculean task to show that they will suffer irreparable damage which cannot be compensated in damages if the suit property is sold. They seem to lay a lot of emphasis that the suit property is unique and is their matrimonial home. They argued that if it is sold, they will be rendered homeless together with their families. I have heard these arguments many times before. And courts have in decisions without number stated that a property once given as security for a loan becomes a commodity for sale. I need not re-invent the wheel on the subject except I am content to cite the case of **Julius Mainye Anyega vs. Eco Bank Limited [2014] eKLR** where the court expressed itself as follows:

Property is matrimonial home

[33] The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation) that;

"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured".

See also the case of Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows:

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities… loss of the properties by sale is clearly contemplated by the parties even before the security is formalized".

And a work of the court in Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR in the rendition below:

On matrimonial home

It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee's statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better.

[35] The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee's statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home. Now let me consider the substantive issues herein.

[46] I reiterate that a mortgagee will only be restrained from exercising its statutory power of sale of a mortgaged property where the Mortgagor has paid the sum claimed in court or the amount being claimed is apparently excessive from the face of the charge; here illegal charges and interest should be established, or where the mortgagee has violated the law in the exercise of the statutory power of sale, for instance, where no or no proper notices were issued as required under the law. None of these things are present in this case. In the overall, the conduct of the Applicants does not meet the approval of equity and may be summed up as Rigera J (as he then was) did in the case of **Thathy vs. Middle East Bank (K) Ltd & Ano. HCCC No. 302/02** that:

> ***''How about the conduct of the Applicants? ...the history of the parties is characterized by several demands for payment of mortgage debt, and several unfulfilled promises by the Applicants to pay the said debt. The Respondent has extended a lot of indulgence to the Applicants but the Applicants has not made good his promises…And the Applicants is absolutely silent about repayment … the Applicants' conduct disentitles him to the favour of equity. He cannot get an injunction to restrain the Bank from realizing its security when he is heavily indebted, his promises of repayment have come to nought and he does not evince any intention to repay soon or at all….a sale of the security now appears to me in the best interest of both parties.''***

[48] However, I am inclined to take a path which is fair and appears to the court to carry the lower risk of injustice. I will order sale of the suit property, but only after satisfaction of the following:

> ***a) The Respondent shall, within 30 days of today provide the Applicants with statements of account on the debt, and for purposes of this ruling, the amount owing as at the date of last payments and as of today.***
>
> ***b) The Respondent shall within 30 days of today cause a current forced valuation on the property to be undertaken as required under section 97 of the Land Act.***
>
> ***c) On satisfaction of condition (a) and (b) above, the auctioneer shall accordingly advertise the suit property for sale as per the Auctioneers Act and rules made thereunder.***
>
> ***d) A temporary injunction is, therefore, issued for 30 days or for as long as the Respondent has not fulfilled conditions (a) and (b) above.***

[49] Subject to paragraph 48 above, the application dated 22nd May 2014 is dismissed with costs to the Respondent. It is so ordered.

Dated, signed and delivered in court at Nairobi this 9th day of March 2015

F. GIKONYO

JUDGE