



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 97 OF 2014
RAINBOW ACRES LIMITEDPLAINTIFF
Versus
NIC BANK LIMITED.....DEFENDANT

RULING

Temporary injunction

[1] I have before me the Plaintiff's application dated 10th March 2014 seeking the following orders;

- a. **An interlocutory injunction restraining the Defendants from selling or transferring suit Number C1 and C2 erected on Land Reference Number 209/388/4 and 209/388/3/1, pending determination of the suit.**

Un-contractual interest

[2] The application is grounded on the affidavit of of Caesar Ngige Wanjao, grounds set out in the application and others which were canvassed in the submissions by the Applicant. There are two, albeit inextricable, major grounds for the application, namely:-

a) That the Respondent, unlawfully, without notice and contrary to the charge instrument, transferred the loan facility herein to the Applicant's current account and converted it into an overdraft. The transfer and conversion of the loan in the manner done by the Respondent totally changed the bargain, the terms, the relationship and the contract between the parties. The overdraft is a different type of facility and bears very different terms from the mortgage agreed between the parties. Invariably, the rate of interest charged under an overdraft was different from and not the one contemplated in the mortgage instrument. As a result, henceforth, the Respondent continued to charge interest at a rate as high as 36%, and further charged penalty interest, which was not included in the mortgage instrument. The conversion of the loan to an overdraft was draconian with far reaching effect on the possibility of redemption of the charged properties.

b) Consequently, the Respondent charged interest beyond the contracted rate, thus, the interest so charged was illegal and unconscionable.

[3] The Applicant averred that, the loan granted by the Respondent was secured by Mortgage instrument dated 29th October 2008 and marked HM1, which is a charge over suit Number C1 and C2 erected on Land Reference Number 209/388/4 and 209/388/3/1. Under the charge, the Respondent granted the Applicant a loan facility of Kenya Shillings Eight Million at interest of 2% per annum above the lenders base rate which at the time stood at 14% per annum. This instrument governed the relationship between the parties, and it did not provide for penalty interest, or default interest which the Defendant purported to charge the Applicant. The Applicant submitted that, although the letter of offer contained a provision that an excess rate of 12% would be charged above the Base Rate Applicable and will apply on any amount in arrears on the loan, the clause was, however, not incorporated in the Mortgage Instrument as one of the express terms. The mortgage instrument supersedes all other agreements between the parties which have not been expressly provided for in the instrument. See **Givan Okallo Ingari & Another vs. Housing Finance Co** (supra). Since the mortgage instrument did not provide for default or excess interest, the same could not be levied. The Respondent has no basis in law or otherwise to demand for further sums. Therefore, fact that the Respondent applied default, or penalty interest charges on the Applicant's account contrary to the Mortgage is prima facie uncontractual and illegal. They cited the case of **Givan Okallo Ingari & Another vs. Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232**, which justice Odunga rightfully relied on in the case of **Francis Joseph Kamau Ichatha vs. Housing Finance Company Of Kenya Limited [2014] eKLR**, where it was observed that;

“...There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties’ agreement. I have gone through the charge document and there is no provision that allowed the defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the plaintiffs. In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal. There is nothing as prevailing customs or trade usages, which can allow the defendant to commit acts of fundamental breach to the contractual document... The charges debited in the plaintiff’s account were done without any legal basis and in my humble view made the account irredeemable.....”

Amalgamation of accounts

[4] The Applicant made further submissions about the amalgamation of accounts done by the Respondent on the 16th day of May 2011; it was arbitrary and purportedly to have been pursuant to general terms and conditions which are applicable on current accounts which are overdrawn without formal arrangement. It should be noted that the loan, as rightly pointed out by the Respondent, was payable in 60 months which had not elapsed as at the time of the amalgamation. The mortgage instrument only mentions of amalgamation of accounts when the loan falls in arrears. The kind of amalgamation envisioned in the mortgage instrument was like a st-off, for it was to when the loan account is in arrears and the borrower has another account that has a credit balance. See what the mortgage instrument provided under part (g) and (f);

“...The lender shall be at liberty without thereby affecting their rights hereunder at any time:-

- i. To combine consolidate split determine or vary any credit to or accounts of the Mortgagor or the mode of repayment thereof.....**

Under part f;

The lender may at any time and without notice to the mortgagor combine or consolidate all or any of the Mortgagor accounts with and liabilities to the lender and

set off or transfer any sums standing to the credit or any one or more of such accounts in or towards satisfaction of the mortgagor liabilities to the lender.....

The above amalgamation in the sense of the mortgagee instrument does not include amalgamating a current account with a loan account and treating the loan as an overdraft. It was purportedly on the general terms and conditions, but disregarded the mortgage instrument that defines the relationship between the Applicant and the Respondent. These acts were calculated at unjustly benefiting the Respondent by clogging the Applicants equity of redemption. The amalgamation herein smells mischief which the court should investigate. See the words of Justice F. Azangalala in **Ezekiel Osugo Agwenyi versus Housing Finance Company of Kenya [2006] eKLR** when he held that...

“...The Plaintiffs complaints do not merely relate to the issue of damages or a dispute on amount due. It would be inequitable to ask the Plaintiff to pay sums that are not payable especially as the Plaintiff maintains that if the Defendant had managed his loan account prudently the account would be in credit. Having come to that conclusion it is not necessary to consider whether ministerial approval was required before effecting variation of interest...”

[5] The Applicant lamented further, that, the Respondent had failed to provide them with statement of accounts and a copy of the mortgage instrument despite persistent requests. It only provided the statement much later after they had issued several demands and threats to sell the suit properties. Immediately the Respondent provided the statement of accounts, the Applicants sought the services of Interest Rates Advisory Centre (IRAC) to calculate and ascertain the correct balance due to the Respondent under the mortgage facility. IRAC analyzed the account and the payments made by the applicant and even factored the 12% excess rate and or penalty charge on arrear returned, but returned a report that the sum owing was Kshs. 879, 202.42. The report by IRAC is annexed to the Affidavit by Caesar Ngige Wanjao and marked as CNW 8. The Applicant paid Kshs. 880,000 to the Respondent hoping the charged properties would be discharged. The Respondent accepted the above sum paid but later on demanded a further balance of Kshs. 2,523,611.85.

[6] On about the 9th day of November 2011 the Respondent through Garam investments limited issued the Applicants with a notification of sale in complete disregard of the fact that the Applicant had dutifully been servicing the loan. The Applicant asserted that paragraph 10 of the Respondents replying affidavit sworn by one Henry Maina on the 30th day of April 2014, avers that on the 9th of November 2011, a notice of sale was sent to the applicant but was subsequently withdrawn as it was erroneously issued. But, in spite of that acknowledgement, the Respondent went ahead and debited the Applicants account with the auctioneer’s charges. The Respondent’s Advocate fees were similarly debited to the Applicants account. The fees to the advocates amounted to Kshs. 82, 128.00 and was debited was after the auctioneers charges were levied. Again on the 16th day of April 2012 the Respondent issued the Applicant with a demand letter claiming Kshs 9,570,140.00 similarly in complete disregard that the Applicant had duly been servicing the loan.

[6] On the basis of these matters, the Applicant is convinced is entitled to relief and protection of its equity of redemption by issuing orders to restrain the Respondent from selling the charged properties charged properties. The Applicant surmised that, **in view of the foregoing, there exists a right which the Respondent blatantly disregarded and or breached. Thus, the Applicant has demonstrated a prima facie case entitling the court to grant the orders sought.** The Applicant cited the case of **Oramat Ole Sentu v Emmanuel Lekishon Kayo [2014] eKLR**, where Justice S OKongo’o while relying on the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, observed that:

In the same case, the court defined a prima facie case in a civil application as “a case which on the material presented to the court, a tribunal property directing itself will

conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

[7] The Applicants stated that they have their registered office on the suit premises, and derive their livelihood from the said offices. They have become associated with location of the suit premises, thus should the premises be disposed of, the Applicant stands to suffer irreparable. Furthermore, the Applicant had proposed to deposit the amount alleged to be due either in court or in an interest earning account in the joint names of the Applicant and Respondents Advocates name, until proper taking of accounts. The Respondent accepted the proposal only to beat a hasty retreat, without proffering any reasons. Such deposit of the claimed sums in court will not prejudice the Respondents' rights in any way. They therefore, opined that the balance of convenience tilted towards granting the prayer sought by the Applicants.

The respondent fired back

[8] The Respondent opposed the application and filed a Replying Affidavit sworn by Henry Maina on 30th April 2014. According to the Respondent, it was an express term of the Loan facility that the interest would be charged at the rate of 2% p.a. above the Base Lending Rate, and an excess rate of 12% p.a. above the Base Lending Rate on any amount in arrears. It was agreed that the loan would be repaid over a period of 60 months. In furtherance of the said Loan facility the Applicant executed a Mortgage Instrument dated 29th October 2008 over Suite No. C1 and C2 situate on L.R. No. 209/388/4 and 209/388/3/1 securing to the Defendant a sum of Kshs. 8,000,000/- together with interest thereon and other charges arising therefrom. The Applicant defaulted in re-payment of the Facility as a result of which the Respondent issued the Statutory Notice dated 19th May 2011 to the Applicant. The Applicant persisted in default and failed to redeem the Loan wherein the Respondent instructed Garam Investment Auctioneers to issue notification of sale dated 9th November 2011.

[9] The Respondent stated further that, the Applicant made a payment proposal and it was mutually agreed that the statutory notice would stand withdrawn. Nevertheless the Applicant subsequently failed to honour its own proposal. The Respondent submitted that the application is fatally defective, bad in law and incompetent for several reasons. The first one, the interest chargeable on the loan was contractual and expressly provided in the Banking facility. The interest rate charged would vary depending on the fluctuation in the Base Lending Rate. This does not amount to a variation in the interest rate as the same was a contractual expectation. In any event the facility also allowed the Respondent to vary the interest rate at its sole discretion from time to time. See the case of **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR** where the court argued that dispute on accounts was no basis for grant of an injunction and the learned judge relied on the case of **Fina Bank Ltd. V Ronak Ltd, [2001] 1 EA 54** where it was stated that;

“As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates in its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis.”

The attempt by the Applicant to question those rates of interest is an attempt to ask the court to rewrite the contract between the parties which is improper and illegal as the sacred role of the court is merely to construe and legitimize what parties have agreed between themselves. They cited the case of **Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR** where the learned judge relied on the case of **National Bank Of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd And Another (2002) EA 503** and stated;

“This, in our view, is a serious misdirection on the part of the Learned Judge. A

court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause”.

[10] The Respondent responded to the Applicant’s allegation that the rate of interest charged was contrary to the provisions of the Banking Act; they did not indicate any specific provision of the Banking Act that has been violated. They failed to discharge their burden of proof as required by **Section 108 of the Evidence Act**.

[11] The second reason why the application is incompetent is that IRAC failed to take into account that the Base Lending Rate applicable is not static and is determined by the prevailing monetary policy. The said report relied upon by the plaintiff is a mere opinion and has no force of law. It is neither binding nor persuasive on the Defendant or on the Honourable court. The Statement of Account provided the accurate record of all the payments made by the Plaintiff, the outstanding amount and all the interest accrued on the outstanding amount. They also submitted that when the Statutory Notice was issued, the Applicant admitted being indebted to the Defendant and made a proposal payment and it was mutually agreed between the parties that the notice would stand withdrawn. A fresh Statutory Notice dated 16th April 2012 was issued to the Applicant and the same is marked **“HM4”** in the Respondent’s Replying Affidavit. The Plaintiff is thus stopped from denying the correctness of the Statement of Account by virtue of **Section 120 of the Evidence Act** which is to the effect that;

“Where one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth from that thing.”

The principle of General Estoppel was emphasized in the case **Ayman Hijjawi v Anwar Hussein [2014] eKLR** where the learned judge argued that;

“The Defendant cannot now be heard to say that he does not owe the Plaintiff money. The Defendant is estopped from reneging on his promises which the Plaintiff reasonably relied on”.

The court was further guided by the celebrated case of **Combe v Combe (1951) 2 KB 215** where **Denning L. J** stated;

"The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word”.

[12] Therefore, the Respondent submitted that the statutory notice was properly, lawfully and validly issued; it should not be restrained from exercising its Statutory Power of Sale. **Section 96 of the Land Act** provides that;

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

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

They relied on the case of **Habib Bank A.G Zurich vs Pop - In (K) Ltd CA Civil Appeal No.147 of 1989** which was quoted in **Thika General Workshop Limited & Another V Kenya Commercial Bank Ltd & another [2009] eKLR** where it was argued that;

“As I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale. If any authorities were needed for this elementary proposition one need not look beyond Bharmal Kanji Shah & Anor v Shah Debar Devji [1965] EA 91; J. L. Lavuna & Others V Civil Servants Housing Co. Ltd & Another (Civil Application No. Nai 14/95) (unreported); and Halsbury’s Laws of England, volume 32, 4th Edition, paragraph 725. I summarized the position in my ruling in Lavuna case in these terms:

“Notwithstanding the stand taken by Mr.Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charge executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

Similarly in the case of **Muhani & Another Vs National Bank of Kenya Ltd, Civil case No. 2280/1988** which was quoted in **Esther Njeri Komu v Consolidated Bank Ltd & another [2013] eKLR** the court stated;

“An injunction will not issue to restrain a mortgagee from exercising his Statutory Power of Sale merely because the amount is in dispute”

And in **Esther Njoki Komu (supra)** also quoted **Halsbury’s Laws of England Vol. 32 , 4th Edition Page 752**, it was stated that

“It is trite law that court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in Court, that is, the amount which the mortgagee claims to be due to it unless on the terms of the mortgage , the claim is excessive “.

[13] The Respondent laid emphasis on the fact that the Applicant had admitted being indebted to the Respondent and made a proposal for payment as illustrated elsewhere herein but has later denied being indebted to the Respondent. A copy of the proposal payment is annexed and marked **“HM3”** in the Replying affidavit sworn by Henry Maina. On the basis of the foregoing, the Respondent is convinced that the Applicant herein has not demonstrated a prima facie case with high probability of success. See **Giella vs Cassman Brown (1973) EA 358** as quoted in **Mbuthia D K James V United Insurance Company Ltd & Another [2014] eKLR** that conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally

granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

In **Mrao vs First American Bank Of Kenya Limited & 2 Others (2003) KLR 125**, as quoted in **Mbuthia D K James V United Insurance Company Ltd & Another [2014] EKLR** a prima facie case was described as follows:

“...a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

[14] The Respondent also submitted that the Applicant having failed to prove a prima facie case with a high chance of success the Court need not venture into the other grounds. See **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as quoted in **Mbuthia D K James vs United Insurance Company Ltd & Another [2014] eKLR** the Court held that:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

But in any event, the award of damages would be adequate to the Applicant for any loss or damage suffered, if at all. Once the suit properties were given as security, ipso facto it becomes a commodity and it is subject to sale. See the case of **Andrew M. Wanjohi V Equity Building Society 7 Another [2006] eKLR** which was relied on in **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR (supra)** the court held that;

“By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.”

Further in **Andrew Wanjohi case (supra)** which was also quoted in **Kisimani Holdings Limited & another v Fidelity Bank Limited [2013] eKLR** it was stated that;

“In my considered view if the 1st and 2nd defendants were restrained from selling off until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the suit property, as the borrower has never made any repayments for more than three years. That fact, coupled with the status of the 1st and 2nd defendants, persuades me that the balance of convenience is in favour of the said defendants. If the property was sold, the plaintiff can find other accommodation. And if it were finally held that the property should not have been sold, the 1st and 2nd defendants would be able to compensate the plaintiff. In contrast, the stoppage of the intended sale by the chargor would result in the continued growth of debt and thus exposing them potentially substantial irrecoverable losses. I therefore find that provided the charge complies with all other legal requirements, he should be permitted to realise the security.”

In addition to the foregoing Section 99 (4) of the Land Act, 2012 explicitly provides that;

“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”.

[15] Thus, the Respondent concluded that the Applicant has defaulted in servicing the loan facility since 2011 which then entitled the Respondent to issue the Statutory Notice dated 19th May 2011 to the Applicant and a fresh notice on 16th April 2012. The amount owing to the Respondent by the Applicant as at 31st March 2014 was Kshs. 2,084.086.90/- and which amount continues to accrue interest. An injunction is not merited. In the case of **Francis J.K. Ichatha vs Housing Finance Company Of Kenya, Civil Application No. 108 Of 2005** which was quoted in **Palmy Company Limited case (supra)** the court argued that;

“A plaintiff should not be granted an injunction if he does not have clean hands, and no Court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayments to the Defendant/Respondent a debt which he expressly undertook to pay.”

Ultimately, the Respondent sees the balance of convenience tilting in favour of the Respondent. The application should be dismissed with costs to the Respondent.

THE DETERMINATION

The threshold

[16] As we apply the thresholds of law set out in the case of **Giella vs Cassman Brown**, we are reminded of the dictates of the principles of justice enshrined in Article 159 of the Constitution of Kenya, 2010, as well as the overriding objective of the court. These principles offer a new yardstick; that courts should take a much wider approach when interpreting the threshold provided in law for grant of legal redress. The principles for the grant of injunctive relief have also attained greater levels of refinement to cover areas not foreseen before, except only tethered to the Constitution and the circumstances of the case. Traditionally, on the basis of the well accepted principles set out in **Giella Vs Cassman Brown** the court has had to consider the following questions before granting injunctive relief. Is there a prima facie case? Does the applicant stand to suffer irreparable harm? On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test as I have outlined above in order to do justice to all the parties. See the case of **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J (as he then was)**.

[17] I will apply the above test. Has the Applicant established a prima facie case? The Applicant claims that the mortgage instrument dated 29th October 2008 and marked HM1, which is a charge over suit Number C1 and C2 erected on Land Reference Number 209/388/4 and 209/388/3/1 governed the relationship between the parties. Under the charge, the loan facility of Kenya Shillings Eight Million was to be repaid with interest at 2% per annum above the lenders base rate which at the time stood at 14% per annum. This fact has been admitted by the parties and is expressly provided for in the mortgage instrument. Similarly, the mortgage did not provide for penalty interest, or default interest which the Defendant charged the Applicant. After hearing the Respondent, I understand them to say that they charged 12% excess rate above the base rate on any amount in arrears as provided for in the letter of offer. I have perused the letter of offer and it provides that an excess rate of 12% would be charged above the Base Rate Applicable and will apply on any amount in arrears on the loan. The Respondent argued that this clause bind the parties and is applicable. The law on the place of letter of offer and other documents which precede the charge, the way I understand it is that, these documents are useful in forming the foundation of the charge and ascertaining the intention of the parties in the transaction. However, when they are pitted against a charge, the charge is superior and they must bow to the express terms of the charge. They will, therefore, apply in so far as they are not inconsistent with the charge. I note that the provision on excess charge and penalty charge at 12% above the base rate on any sum in arrears was not expressly incorporated into the charge herein. The charge provided specific amount of interest as 2% above the base rate. A rate of 12% above base rate is quite

significant and substantial portion of money. Therefore, in the circumstances, the claim that the charge of excess interest and penalty interest is un-contractual is not a bare statement. This is an issue, looking at the charge, which will require intrinsic investigation by the court through trial.

See Givan Okallo Ingari & Another vs. Housing Finance Co (supra). Thus, as was stated in the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, based on the law, the facts of this case and the material presented before this court, properly directing my mind, I can conclude that there exists a right which the Respondent may have infringed and for which they may be required by the court to offer an explanation or rebuttal. For purposes of injunctive relief, on that basis alone, a prima facie case with a high probability of success has been established.

[18] Further reinforcement of the position I have taken is found in the arguments by the Applicant on amalgamation of the loan with other accounts of the Applicant. Whereas the Respondent had the right to amalgamate accounts, the kind of amalgamation had on the 16th day of May 2011 raises legal issues which touch on the legality of the entire process, and which will require full inquiry by the court to unravel. The Respondent stated that it relied on the general terms and conditions which are applicable to current accounts which are overdrawn without formal arrangement. It should be noted that the loan, and this is confirmed by the Respondent, was payable in 60 months which had not elapsed as at the time of the amalgamation. The mortgage instrument allows amalgamation but of accounts when the loan falls in arrears. The relevant provision on the matter in the mortgage is part (g) and (f) that;

Under part (g):

“...The lender shall be at liberty without thereby affecting their rights hereunder at any time:-

- ii. **To combine consolidate split determine or vary any credit to or accounts of the Mortgagor or the mode of repayment thereof.....**

Under part (f);

The lender may at any time and without notice to the mortgagor combine or consolidate all or any of the Mortgagor accounts with and liabilities to the lender and set off or transfer any sums standing to the credit or any one or more of such accounts in or towards satisfaction of the mortgagor liabilities to the lender.....

The arguments that the above amalgamation does not allow conversion of the loan into an overdraft make a lot of legal sense. And whether the terms of the overdraft created in the manner herein are consistent with the mortgage is yet another plausible argument which hinges on the rights of parties under the mortgage. These issues are prima facie indicative of a serious legal issue which needs determination. Accordingly, the validity of statutory notices that were issued upon the debt herein is put to question and becomes a real issue in controversy in the trial. And the danger of clogging equity of redemption becomes real too. Therefore, an injunction in these circumstances is merited.

[19] After I have found that there is prima facie case with a high probability of success, I do not think an award of damages would be adequate or an alternative remedy to an injunction especially where, on the material before the court, there is a right which has been shown to have been infringed. And of course, the balance of convenience will tilt in favor of granting the injunction. Accordingly, I grant an interlocutory injunction restraining the Defendants from selling or transferring suit Number C1 and C2 erected on Land Reference Number 209/388/4 and 209/388/3/1, pending determination of the suit. Except, the confession and undertaking by the Applicant that he is willing to deposit the sum claimed into an interest earning account in the joint names of the parties' advocates is important in the realm of injunctions; it serves as a guarantee as

to damages to as well recouping of the debt by the Respondent should the court ultimately find the injunction was not merited. It, therefore, serves a useful mitigating factor. Consequently, as a condition for the injunction granted, I order that the sum claimed herein shall be deposited within 45 days, in a joint earning account in the names of the advocates for the parties and the Deputy Registrar, at KCB, Milimani High Court Branch, Nairobi. The upshot is that I allow the application dated 10th March 2014 subject to the foregoing condition. It is so ordered.

Dated, signed and delivered in court at Nairobi this 4th day of March, 2015

F. GIKONYO

JUDGE