



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVILCASE NO. 552 OF 2012

ABEL MORANGA OGWACHO..... 1ST PLAINTIFF

BELCOM AGENCIES LIMITED..... 2ND PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LTD..... DEFENDANT

RULING

1. By a banking facility letter dated 18th May 2011, the defendant offered to the 2nd plaintiff banking facilities on terms and conditions that were contained in the said letter. The banking facilities that were offered by the defendant to the 2nd plaintiff were as follows:

Type of facility	Facility limit
Limit No. 1 – over draft facility	Kshs.40,000,000.00
Limit No. 2 existing term loan facility	Kshs.7,529,770.00
Limit No. 3 – existing term loan facility	Kshs.72,419,080.00
Limit No. 4 – existing term loan facility	Kshs.18,722,410.00
Limit No. 5 – new term loan facility	Kshs.63,000,000.00
Limit No. 6 – new bond and guarantees facility	Kshs.10,000,000.00
Total facility limits	Kshs.211,671,260.00

According to the said banking facility letter dated 18th May, 211 (hereinafter referred to only as “**banking facility letter No. 1**”) the purposes for the various financial facilities which were made available to the 2nd plaintiff were given as follows. The existing overdraft facility (Limit No. 1) was to finance working capital requirements of the 2nd defendant. The existing term loan facility (Limit No. 2) was to finance the purchase of trucks for the 2nd defendant’s business use. The existing term loan facility (Limit No. 3) was

to finance construction of a six (6) storey commercial property for investment purposes by the 2nd plaintiff. The existing term loan facility (limit No. 4) was to finance petrol station construction. The new term loan facility (limit No. 5) was to finance completion works to the then ongoing commercial development of a six (6) storey property for the 2nd plaintiff's own use and investment purposes and, the new bond and guarantees facility (Limit No. 6) was to guarantee Kenol-Kobil and other reputable suppliers of petroleum products to the 2nd plaintiff in its ordinary cause of business.

2. The said banking facilities were to be secured by; an existing legal charge over **LR Nos. Kisii Municipality/Block III/370 and 371** registered in the name of the 1st plaintiff securing a maximum principal amount of Kshs.136,500,000.00, a further charge that was to be created over **LR Nos. Kisii Municipality/Block III/370 and 371** registered in the name of the 1st plaintiff to secure a maximum principal amount of Kshs.17,000,000.00, an existing legal charge over **LR No. Kisii Municipality/Block II/233** in the name of the 2nd defendant securing a maximum principal sum of kshs.14,000,000.00, existing directors' personal guarantees in the sum of Kshs.156,000,000.00, a new refreshed director's personal guarantees which was to be created in the sum of kshs.212,000,000.00, an existing legal charge over LR No. Kisii Municipality/Block I/103 in the name of the 1st plaintiff securing a maximum principal sum of Kshs.5,500,000.00, existing all assets debenture in the sum of Kshs.156,000,000.00 over the assets of the 2nd defendant, anew increased all assets debenture to be created in the sum of Kshs.56,000,000.00 over the assets of the 2nd defendant, a legal charge to be created over **LR No. Kisii Municipality/Block III/591** in the name of the 1st plaintiff to secure a maximum principal sum of Kshs.39,000,000.00.
3. The 2nd plaintiff accepted the terms and conditions that were contained in the said banking facility letter No. 1 on 20th May 2011. Pursuant to the terms and conditions of the said banking facility letter No. 1, the 1st plaintiff executed a charge dated 7th July 2011 over **LR No. Kisii Municipality/Block III/591** (hereinafter referred to as "**the suit property**") in favour of the defendant to secure an aggregate amount not exceeding the sum of Kshs.34,450,000.00. According to the terms of the said charge which was registered on 11th July, 2011, the same was executed by the 1st plaintiff in consideration of the sum of Ksh. 34,450,000.00 which the defendant had paid to the 2nd plaintiff on or before the execution of the said charge.
4. On 28th November 2012, the plaintiffs brought this suit against the defendant seeking:-
 - a. **A declaration that the charge instrument registered over LR No. Kisii Municipality/Block III/591 ("the suit property") on 7th July 2011 was fraudulent, illegal and invalid for want of consideration.**
 - b. **An order compelling the defendant to cancel, discharge and/or remove the charge registered over the suit property and to release the title document of the suit property to the 1st plaintiff unconditionally.**
 - c. **A permanent injunction restraining the defendant either by herself, agents, servants or anyone acting on the defendant's instructions from selling by public auction or by private treaty disposing of, transferring, alienating, clogging, encumbering and/or in any other manner dealing with the suit property.**
 - d. **Cost of this suit.**
 - e. **Any such further and/or any other relief as the honourable court may deem fit and expedient to grant.**

In their plaint dated 26th November 2012, the plaintiffs have averred that on or about June 2011, the 1st plaintiff who is a director of the 2nd plaintiff approached the defendant with a request for an additional loan facility in the sum of Kshs.34, 450,000.00 to be granted to the 2nd plaintiff for the purposes of construction of and/or completion of construction works on premises known as **LR Nos. Kisii Municipality/Block III/370 and 371** (hereinafter referred to only as "**Plot No. 370 and 371**"). The 1st plaintiff's said request was accepted by the defendant who proceeded to issue

the 1st plaintiff with an offer for additional facility in the said sum of Kshs.34,450,000.00. The said additional loan facility was to be secured by a charge over the 1st plaintiff's property known as **LR No. Kisii Municipality/Block III/591** ("the suit property"). Upon the 1st plaintiff accepting the defendant's offer of the said additional loan facility in the sum of Kshs.34,450,000.00, the 1st plaintiff proceeded to execute a charge over the suit property to secure the said sum of Kshs.34,450,000.00 that was to be advanced by the defendant to the 2nd plaintiff.

5. The plaintiffs have contended that upon the creation and registration of the said charge over the suit property in favour of the defendant, the defendant refused and/or declined to grant the said additional loan facility in the sum of Kshs.34,450,000.00 to the 2nd plaintiff without giving or assigning any reasonable cause for doing so, the plaintiffs having fulfilled all the conditions under which the said additional loan facility was to be advanced. The plaintiffs have contended that the defendant procured, secured and obtained a charge over the suit property fraudulently and by false pretense and as such the defendant is guilty of breach of contract. The plaintiffs have set out in the plaint the particulars of fraud and breach of contract by the defendant. It is on account of the foregoing that the plaintiffs have sought the reliefs that I have set out herein above at the beginning of this ruling.
6. Together with the plaint, the plaintiffs filed an application by way of Notice of Motion dated 26th November 2012, brought under Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules 2010, section 1A, B, 3A and 63 (e) of the Civil Procedure Act and sections 96 and 103 of the Land Act, 2012 seeking; temporary injunction to restrain the defendant either by herself, agents, servants or anyone claiming under the defendant from advertising for sale through private treaty or public auction, charging, encumbering the title of and/or in any other manner, whatsoever dealing with the suit property pending the hearing and determination of this suit. This is the application which is the subject of this ruling.
7. The plaintiffs' application was brought on the grounds set out on the body of the application and on the supporting affidavit and further affidavit sworn by the 1st plaintiff on 26th November 2012 and 13th August 2013 respectively. In his supporting affidavit sworn on 26th November 2012, the 1st plaintiff reiterated the contents of the plaint that I have already highlighted hereinabove. In addition, the 1st plaintiff has stated that the defendant has started the process of realizing the security that was created over the suit property in that the defendant has instructed its advocates who have already issued the plaintiffs with a statutory notice expressing an intention to realize the said security. The 1st plaintiff has stated further that the defendant intends to proceed with the realization of the said security created over the suit property despite the fact that the defendant had failed and/or refused to perform or fulfill its part of the bargain. The 1st plaintiff has stated further that the intended sale or realization of the charge over the suit property is fraudulent and the same is bound to deny or deprive the 1st plaintiff of the suit property without any consideration. The 1st plaintiff has contended further that the plaintiffs have established a prima facie case against the defendant with overwhelming chances of success. The 1st plaintiff has contended further that if the intended sale of the suit property proceeds the plaintiffs stand to suffer an irreparable loss as the suit property will be beyond the reach of the 1st plaintiff.
8. It is on account of the foregoing that the plaintiffs have sought an order of temporary injunction to issue against the defendant. The 1st plaintiff has stated further that the 2nd plaintiff is ready, able and willing to give an undertaking as to damages as a condition for granting the injunction sought. The 1st plaintiff has annexed to his supporting affidavit, a copy of the register for the suit property certified by the land registrar on 8th November 2012, a copy of the banking facility letter No. 1 dated 18th May 2011, a copy of statutory notice dated 10th July 2012 addressed to the 1st plaintiff by the firm of Hamilton Harrison & Matthews Advocates acting on behalf of the defendant.
9. The plaintiffs' application was opposed by the defendant. The defendant filed grounds of opposition dated 10th January 2013 and a replying affidavit sworn by one, Francis Njenga on 11th January 2013 in opposition to the application. The said affidavit sworn by Francis Njenga shall hereinafter be referred only as "**the defendant's replying affidavit**". In its replying affidavit, the

defendant has accused the plaintiffs of concealing truth and material facts to this court. The defendant has contended that the plaintiffs are not deserving of an equitable remedy. The defendant has stated that under banking facility letter No. 1, there were only two new facilities that were made available to the 2nd defendant, namely;

- a. Limit No. 5; new term loan facility for Kshs. 63,000,000.00
- b. Limit No.6; new bond and guarantees facility for Kshs. 10,000,000.00.

The defendant has contended that the total limit of the banking facilities that were made available to the 2nd plaintiff under banking facility letter No. 1 was Kshs.211,671,260.00 which amount was secured by several securities among them LR No. Kisii Municipality/Block III/591 (“the suit property”) registered in the name of the 1st plaintiff which was charged in favour of the defendant to secure a maximum principal sum of Ksh.34,450,000.00.

- 10.The defendant has contended that facility limit No. 5 for Kshs.63,000.000.00 as I have stated above, was for construction purposes and the same was to be advanced and/or disbursed in instalments as per the interim certificate which was to be issued by the project architecture to the contractor from time to time. The defendant has contended that in accordance with the terms of the said banking facility letter No. 1, the defendant at the request of the 2nd plaintiff disbursed a sum of Kshs.22,318,400.00 directly to the 2nd plaintiff’s contractor on 27th September 2011. The defendant has contended further that it was a condition of the banking facility letter No. 1 that the said funds that were disbursed to the 2nd plaintiff’s contractor as stated above were payable to the defendant within 30 days from the date of disbursement in equal monthly instalments of Kshs.1,055,333.00 each. The defendant has contended that in breach of the terms and conditions of the banking facility letter No. 1, the 2nd plaintiff failed to repay the said sum of Kshs.22,318,400.00 as had been agreed in that the 2nd plaintiff never paid even a single instalment to the defendant. In view of this development, the defendant Was unable to disburse further funds to the 2nd plaintiff under facility limit No. 5 aforesaid. The defendant thereafter proceeded to consolidate the 2nd plaintiff’s loan account No. 1030005075159 through which the 2nd plaintiff’s contractor was paid and debited the debit balance that was standing thereon to the 2nd plaintiff’s loan account No. 0112805472800 on 14th June 2012. The defendant has contended that the 2nd plaintiff’s borrowings under banking facility letter No. 1 were jointly secured by all the securities that were provided by the plaintiffs and that none of the said securities can be separated from the other and discharged singly, unless and until the 2nd plaintiff’s liabilities owing and due to the defendant are liquidated in full.
- 11.The defendant has contended that following the said default on the part of the 2nd plaintiff to fulfill its obligations under banking facility letter No. 1, the defendants served the plaintiffs with several demand notices. The defendant has contended that on account of continued default on the part of the 2nd plaintiff in its repayment obligations to the defendant, the defendant at the 2nd plaintiff’s request agreed to reschedule the banking facilities that had been availed by the defendant to the 2nd plaintiff to enable the 2nd plaintiff to revive its petroleum business so that it may be able to repay the outstanding liabilities to the defendant. This arrangement gave rise to a new banking facility letter dated 8th November 2011 (hereinafter referred to as “**banking facility letter No. 2**”). The defendant has contended that under banking facility letter No. 2, the defendant offered to the 2nd plaintiff the following facilities:-

Type of facility	Facility limit
Limit No. 1 – over draft facility	Kshs. 40,000,000.00
Limit No. 2 existing term loan facility	Kshs. 7,529,770.00

Limit No. 3 – existing term loan facility	Kshs. 72,419,080.00
Limit No. 4 – existing term loan facility	Kshs. 18,722,410.00
Limit No. 5 – existing term loan facility	Kshs. 28,000,000.00
Limit No. 6 – new term loan facility	Kshs. 35,000,000.00
Total facility limits	Kshs.201,671,260.00

The defendant has contended that under the banking facility letter No. 2, the previous new term loan facility for kshs. 63,000,000.00 Which fell under limit No. 5 was rescheduled as follows:

- a. Limit No. 5 existing term loans for kshs. 28,000,000.00.
- b. Limit No. 6 new short term loan for kshs. 35,000,000.00.

The defendant has contended that limit No. 5 in the banking facility letter No. 2 in the sum of kshs.28,000,000.00 was to finance completion works to the ongoing commercial development of a six storey property and limit No. 6 in the sum of kshs.35,000,000.00 was part of the undrawn portion of limit No. 5 in the previous banking facility letter No. 1 and was converted into a short term loan at the request of the 2nd plaintiff to assist him in buying petroleum products for its business. The defendant has contended that limit No. 6 in banking facility letter No. 2 in the sum of kshs.35,000,000.00 was a revolving short term loan and that any funds drawn down thereunder were to repaid within 7 days from the date of disbursements. The defendant has contended that under limit No. 6 the 2nd plaintiff made two cash withdrawals in the sum of kshs. 928,000.00, and Kshs.805,500.00 respectively and also had a total sum of kshs.13,000,000.00 transferred to the 2nd plaintiff's supplier of petroleum products making a total sum of kshs.14,733,000.00 drawn down from that particular account.

12.The defendant has contended further that the 1st plaintiff herein executed a personal guarantee in the sum of kshs. 212,000,000.00 dated 20th May 2011 to secure the repayment of the 2nd plaintiff's outstanding liabilities to the defendant. The defendant has contended further that the 2nd plaintiff is truly indebted to the defendant in the sum of kshs. 237,971,107.25 as at 31st December 2012 and as such the suit property which is in the name of the 1st plaintiff cannot be discharged unless the said debt is paid in full. The defendant has contended further that upon being served with the statutory notice and the various demand letters, the 2nd plaintiff wrote to the defendant admitting the debt and promising to make a reasonable proposal for the repayment of the entire outstanding balance. The defendant has also contended that the plaintiffs did not at any time raise the alleged issue of the non-disbursement of funds to the 2nd plaintiff under limit No. 5 in banking facilities letter No. 1. The defendant has contended that the alleged non-disbursement of funds is a ploy by the plaintiffs to circumvent their financial obligations to the defendant. The defendant has contended that the plaintiffs have not met the conditions for granting a temporary injunction.

13.The defendant has annexed to its replying affidavit; a copy of the banking facility letter No. 1 dated 18th May 2011, copy of a charge over the suit property dated 7th July 2011, copy of the 2nd plaintiff's undated letter addressed to the defendant and received on 19th September 2011, a copy of interim certificate dated 13th September 2011 in the sum of kshs. 34,336,000.00 issued by Kefa K. Orok architect, a copy of statement of account for agreement number 10300050754159 for the period 1st September 2011 to 30th June 2012, a copy of statement of account for account number

0112805472800 in the name of the 2nd plaintiff for 14th June 2012, copies of several demand letters addressed to the plaintiffs by the defendant's advocates Hamilton Harrison and Matthews, a copy of banking facility letter No. 2 dated 8th November 2011, a copy of a letter dated 1st December 2011 by the 2nd plaintiff addressed to the defendant authorizing the defendant to release a sum of kshs. 8, 075,000.00 to Sun Traders and Lodges, copy of an invoice dated 1st December 2011 in the sum of kshs. 8,075,000.00 issued by Sun Traders and Lodges, copy of statement of account for account No. 0102005472800 in the name of the 2nd plaintiff for the period 5th December 2011 to 31st December 2011, a copy of undated letter by the 2nd plaintiff to the defendant received on 7th November 2011 authorizing the defendant to release a sum of kshs. 14,875,000.00 to Sun Traders and Lodges, a copy of invoice dated 4th November 2011 in the sum of kshs. 14, 875,000.00 addressed to Belcom Agencies Ltd, a copy of a statement of account for account number 0102005472801 in the name of the 2nd plaintiff for the period 9th November 2011 to 15th November 2011, copy of guarantee dated 20th May 2011 by the 1st plaintiff to the defendant for a maximum amount of kshs. 212,000,000.00, a copy of a guarantee dated 20th May 2011 by Petiro Ogwacho in favour of the defendant for a maximum amount of kshs. 212,000,000.00, copy of statement of account for account number 0102005472800 in the name of the 2nd plaintiff for the period 29th September 2012 to 14th June 2012 and lastly, a copy of a letter which is undated by the 2nd plaintiff addressed to the defendant and received on 15th November 2012 requesting for copies of statements on mortgage loan account No. 0112805472800 and expressing willingness to make a tangible proposal to settle the entire outstanding balance once the figures are ascertained.

14. In response to the defendant's affidavit in reply, the 1st plaintiff filed a further supporting affidavit on 19th August 2013 in which he reiterated that the defendant made no disbursements on limit No. 5 under the banking facility letter No. 1. The 1st plaintiff maintained that the suit property was charged to the defendant to secure an additional loan facility in the sum of kshs. 34, 450,000.00 which the defendant was to make available to the 2nd plaintiff. The 1st plaintiff maintained that the defendant only made disbursements in respect of limits Nos. 1-4 and not otherwise under banking facility letter No. 1 and under banking facility letter No. 2 the 1st plaintiff contended that the defendant only made disbursements of a portion of limit No. 6.
15. The 1st plaintiff contended further that the loan facilities to the 2nd plaintiff were rescheduled due to the defendant's failure to disburse the agreed sums to the 2nd plaintiff. The 1st plaintiff contended that even with the revision of the total facility limit from kshs. 211,671,260.00 to kshs. 201,671,260.00 the defendant still refused and/or failed to disburse the agreed sum of kshs. 34,450,000.00 that was secured by a charge over the suit property. The 1st plaintiff admitted that indeed the defendant disbursed the sum of kshs. 22,318,400.00 to the project architect one, Kefa Osoro on 27th September 2011. The 1st plaintiff contended however that, that disbursement was under limit No. 3 of banking facility letter No. 1 dated 18th May 2011 and not under limit No. 5 of the said banking facility letter claimed by the defendant.
16. The 1st plaintiff contended further that the disbursement of kshs. 22,950,000.00 that was made by the defendant to the 2nd plaintiff's suppliers of petroleum products was made under limit No. 6 of the banking facility letter No. 2 and that the same was not secured by a charge over the suit property which charge was to secure disbursements which were supposed to be used towards the construction of the six level storey building. The 1st plaintiff reiterated that the holding and/or retention of the title documents in respect of the suit property by the defendant amounts to obtaining or securing a charge over that property by misrepresentation and/or false pretence. The 1st plaintiff contended that this is an appropriate case to grant the orders sought in the plaintiffs' application dated 26th November 2012.
17. On 15th January 2013 the parties agreed to argue the plaintiffs' application by way of written submissions. Both parties have filed their respective submissions and the same are on record. I have considered the plaintiffs' application and the two affidavits filed in support thereof. I have also considered the defendant's affidavit in reply and grounds of opposition filed in opposition to the plaintiff's application. Finally, I have considered the parties' respective written submissions

and the case law cited therein. What is before me is an application for a temporary injunction pending the hearing and determination of the suit herein. As was held in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** that was cited by the defendant’s advocate and the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that was cited by the plaintiffs, for an order of a temporary injunction to issue, the applicant must first demonstrate that he has a prima facie case against the respondent with a probability of success, secondly, that he will suffer irreparable injury which cannot be adequately compensated for by an award of damages unless the injunction is granted and lastly, if the court is in doubt as to the foregoing it will decide the application on a balance of convenience.

18. In the said Court of Appeal case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others** (Supra) the court stated that: **“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.”** What I need to determine in the application before me is whether the plaintiffs have demonstrated that they have a prima facie case against the defendant and that unless the injunction sought is granted, they will suffer irreparable injury which cannot be adequately compensated for by an award of damages. In considering whether or not the plaintiff has established a prima facie case, I need to consider whether the plaintiffs have shown or proved that there exists a right which has apparently been infringed by the defendant. The plaintiffs’ case as I have set out hereinabove at the beginning of this ruling is that; the plaintiffs had approached the defendant for additional loan facility in the sum of kshs. 34,450,000.00, the defendant acceded to the plaintiffs request for that facility, the defendant thereafter made an offer to the plaintiffs for the said facility which offer was accepted by the 2nd plaintiff. The said facility of kshs. 34,450,000.00 was to be secured by a charge over the suit property which charge was prepared and executed by the 1st plaintiff after which it was duly registered. The plaintiffs’ contention is that even after the registration of the said charge, the defendant has refused to disburse the said loan facility in the sum of kshs. 34,450,000.00 to the 2nd plaintiff. The plaintiffs’ case therefore is that the charge registered against the title of the suit property has been so registered without consideration and that the defendant has procured the same through acts of fraud and misrepresentation. It is on account of the foregoing that the plaintiffs have sought a declaration that the creation of a charge over the suit property was fraudulent, illegal and invalid for want of consideration and an order for the cancellation of the said charge and the release of the title of the suit property to the 1st plaintiff unconditionally. The onus was upon the plaintiffs to place before the court material to prove; the plaintiffs application to the defendant for the said loan of kshs. 34,450,000.00, the acceptance of the plaintiffs’ application by the defendant, the offer of the said facility by the defendant to the plaintiffs and the plaintiffs’ acceptance of the terms of the said offer.

19. I must say that the plaintiff’s have not placed any material before this court in proof of the foregoing. There is no evidence before me that the 2nd plaintiff applied to the defendant for an additional loan facility in the sum of kshs. 34,450,000.00, that, the defendant accepted that application, that, the defendant made an offer to advance an additional loan facility in the sum of kshs. 34,450,000.00 to the 2nd plaintiff and that, the 2nd plaintiff accepted the said offer. What I have before me is a banking facility letter dated 18th May 2011 (banking facility letter No. 1) by the defendant to the 2nd plaintiff under which, the defendant offered the 2nd plaintiff banking facilities of various types on terms and conditions that were set out in the said letter. Under this banking facility letter, the defendant offered to the 2nd plaintiff an overdraft facility, three existing term loan facilities, new term loan facility and a new term bond and guarantee facility. These facilities were for various purposes and the total limit of the facilities was kshs. 211,671,260.00. According to the said facility letter, banking facilities that were offered to the 2nd plaintiff were to be secured by several securities, some of which were already in existence and some of which were to be created. Among the securities that was to be created to secure the said banking facilities was a legal charge for kshs. 34,450,000.00 over the suit property. The charge over the suit property was created and registered on 7th July 2011. There is no indication in the banking facility letter No. 1 that the charge that was to be created over the suit property was to secure additional loan

facility in the sum of kshs. 34,450,000.00 that was to be advanced by the defendant to the 2nd plaintiff. According to the plaintiffs this charge was to secure a term loan that was to be advanced under limit No. 5 of the banking facility letter No. 1 and which loan was to be used to finance the completion works to the ongoing commercial development of a six storey property for the 2nd plaintiff's own use and investments. According to the terms of the banking facility letter No. 1, the facility that was to be made available to the 2nd plaintiff under limit No. 5 was in fact kshs.63,000,000.00 and not kshs.34,450,000.00 as claimed by the plaintiffs. In my understanding of the terms of the said charge over the suit property, the sum of kshs.34,450,000.00 was the principal maximum amount secured under that charge. The fact that the charge secured a maximum principal amount of kshs.34,450,000.00 did not mean that the defendant was going to advance to the 2nd plaintiff the said sum of kshs.34,450,000.00. I am in agreement with the submission by the defendant's advocate that the charge over the suit property was just one of the securities that was to secure the total facility limit of kshs.211,671,260.00 that was made available by the defendant to the 2nd plaintiff. I am also in agreement with the submission by the defendant's advocate that 2nd plaintiff's borrowings from the defendant were jointly secured by all the securities that are listed in banking facility letter No. 1 and that none of the said securities can be separated and/or discharged until the 2nd plaintiff's indebtedness or liability to the defendant is discharged in full.

20. Having reached the conclusion that the charge over the suit property was just one of the several securities that secured the 2nd plaintiff's total borrowing from the defendant, the next question to answer is whether the 2nd plaintiff is indebted to the defendant to justify the sale of among others the suit property in realization of the defendant's charge over the said property and whether the defendant has followed the requisite procedures in attempting to realize the said security. It is not disputed that the 2nd plaintiff is indebted to the defendant. As at the time when the 2nd plaintiff was offered banking facilities under banking facility letter No. 1, the 2nd plaintiff was already indebted to the defendant. Under the banking facility letter No. 1 and banking facility letter No. 2, new banking facilities were made available to the 2nd plaintiff and the 2nd plaintiff has admitted monies being disbursed to the 2nd plaintiff under those facilities. The 2nd plaintiff has not claimed neither has it contended that it has paid the loan that was existing as at the time that new loan facilities were made available to it under the banking facility letter No. 1 and the banking facility letter No. 2 or the disbursements that were made to it under the new facilities that were made available to it under the two banking facility letters. There is no dispute therefore that the 2nd plaintiff is still indebted to the defendant which debt was secured by the various facilities set out in the two banking facility letters which include a charge over the suit property.
21. It is not in dispute that the defendant has served the plaintiffs with several letters of demand calling for the payment of the outstanding amount and that no payment has been forthcoming from the plaintiffs. There is also no dispute that the 1st plaintiff has been served with a statutory notice calling upon the 1st plaintiff to redeem the suit property failure to which the same will be sold in realization of the defendant's security over the same. Due to the foregoing, I am not persuaded that the plaintiffs have a prima facie case against the defendant with a probability of success. What of the second condition for granting a temporary injunction? The plaintiffs have not contended either in their affidavits in support of the present application or in their written submission that the defendant would not be able to compensate the 1st plaintiff in the event that the suit property is sold and it turns out at the trial that the charge over the same was procured by fraud or misrepresentation. There is no evidence therefore that unless the orders sought herein are granted the plaintiffs are likely to suffer irreparable injury which cannot otherwise be compensated in damages.
22. I am fully in agreement with the decision of Nyamu J. in the case of **Maithya –vs- Housing Finance Company of Kenya & Another**, East Africa Law Reports [2003] 1E. A 133 that was cited by the defendant where he held that: **“The securities are valued before lending and loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. Damages would therefore be an adequate remedy. The balance of convenience tilts in favour of the lender since it is in a position to repay should the borrower succeed at trial whereas the borrower's security continue to be eaten away by the mounting redemption**

money and may prove insufficient.” The plaintiffs have failed to show that they would suffer irreparable loss which cannot be compensated for in damages unless the orders sought herein are granted. Having held that the plaintiffs have failed to demonstrate that they have a prima facie case against the defendant with a probability of success and that they would suffer irreparable injury unless the orders sought are granted, I am not obliged to consider the balance of convenience. The upshot of the foregoing is that the plaintiffs’ application dated 26th November 2012 is not for granting. The same is hereby dismissed with costs to the defendant.

Delivered, dated and signed at Kisii this 6th day of June, 2014.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Oguttu for the Plaintiffs

N/A for the defendant

Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE