REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL DIVISON & ADMIRALTY DIVISION

CIVIL SUIT NO 527 OF 2013

PALMY COMPANY LIMITED …….…..……..……...PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

Application for injunction

[1] The Plaintiff/Applicant approached the court through a Motion dated 29th November, 2013 and sought for five (5) orders. Reliefs in Prayers No 1 and 2 of the said Motion are, however, spent and what is remaining for determination are prayers No 3, 4 and 5 that:

1. **The property L.R. No. 209/11043 to be valued by an independent Valuer to ascertain its value;**
2. **A temporary injunction to issue restraining the Defendant whether by itself, its agents, servants and/or employees from selling or offering for sale, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property known as L.R. No.209/11043 – Nairobi pending inter-parties; and**
3. **Costs of the application.**

[2] The application is supported by the affidavit of MARTIN MANYARA, a director in the Applicant Company, and other grounds which are contained in the application and the written submissions by the Applicant.

Preliminary issues

[3] Before I could get into the substance of the case presented by each party, there are issues which are not in doubt. The first one is; the Applicant is the registered owner of L.R. Number 209/11043 – Nairobi (hereinafter called 'the premises') comprising of a total of 23 Apartments of 2 Bedrooms each. The other one is; two out of the 23 Apartments; being No 2A and 2B on **L.R. NO 209/11043** have been sold to Montage Company Limited with the express consent of the Defendant. Indeed, a Consent Judgment was recorded on 22nd of February, 2014 in **NBI HCCC NO 531 OF 2013** between **MONTAGE COMPANY LIMITED** and **CONSOLIDATED BANK OF KENYA LIMITED,** where the Defendant in this case, was to effectively transfer

those two Apartments to Montage Company Limited. Therefore, for all purposes Apartments No 2A and 2B on **L.R. NO. 209/11043** is not part of the suit property herein. That aspect is settled although I will, at the appropriate juncture, revert to it later in my decision.

Applicant's gravamen

[4] The Applicant's gravamen is that; 1) The Defendant has undervalued the property herein contrary to the obligation in section 97 of the Land Act which places a duty of care on the chargee to value the property before exercising the power of sale and obtain the best price reasonably obtainable at the time of sale; 2) The Notification of Sale as given is manifestly unlawful and contrary to the provisions of the Land Act; and 3) the sum shown to be due as well as interest charged is disputed.

Alleged breach of duty to value property

[4] According to the Applicant, the suit Premises was grossly undervalued at Kshs.65 million with a forced value of Kshs.52 million. It objected to that value because even at completion the joint valuation put the value of the suit premises at Kshs.138 million. The Applicant obtained an open market valuation for the 21 Apartments at Kshs.168 million. Effectively, since the notification referred to all the 23 apartments, it means that each apartment was being valued at Kshs.2.26 million! Yet the 2 Apartments sold to Montage Company Limited were each valued at Kshs.5 million in the year 2013 (Annexure MM/7) way before completion of the construction of the units. The proposed sale price is thus below the market price. Certainly, thus, after completion, the value can only go up. The Plaintiff, therefore, avers that the whole process that culminated to the attempted sale is fraught with failure to comply with mandatory statutory requirements as set forth in the Act and in so far as those are or have not been corrected, the Applicant has established a prima facie case with high probability of succeeding. If the Defendant is not stopped from selling in utter disregard of the Act, then the Plaintiff shall be greatly prejudiced and imminently shall suffer irreparable damages. On that basis, the Applicant is of the view that the application should be allowed. In any event, the balances of convenience herein favour the Plaintiff. The Defendant ought not to be allowed to benefit from obvious and direct breach of the Act. Section 97 of the Land Act which the Applicant is relying on provides as follows:

<u>Duty of Chargee exercising power of sale</u>

97 . (1) A Chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of court, owes a duty of care to the Chargor, any Chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) A Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a Valuer.

(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market-

a. ***There shall be a rebuttable presumption that the Chargee is in breach of the duty imposed by subsection (1); and***

b. ***The Chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the Chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the Chargee has complied with the duty imposed by subsection (1).***

Dispute on sum owed and interest charged

[5] Although the Applicant admits it is in arrears, it, however, disputes the sum shown by the Defendant to be due of Kshs. 42,575,039.65. according to the Applicant, there have been numerous grave accounting errors in calculating the sum due which were revealed by the Interest Advisory Centre that the Applicant commissioned to carry out independent calculations on the sum owed; the re-calculation showed a difference of Kshs. 1.037, 573.02 which the Defendant did not take into account in calculating the sum due.

Allegation that Notification unlawful

[6] The other bone of contention by the Applicant is that the Notification of Sale of the suit premises as given is manifestly unlawful and contrary to the provision of the Land Act especially section 90 and 96. The Defendant has failed in its statutory obligations to the Plaintiff as is stipulated in the said sections 96 of the Land Act which provide as follows:-

Chargee's power of sale

96. (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.

(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on

(a)…;

(b)…;

(c)…;

(e) any Lessee and Sub-lessee of the charged land or of any building on the charged land;

(f) any person who is a co-owner with the Chargor;

(g)…;

(h)…;

(i) any other person known to have a right to enter on the use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and

(j…

[7] The Notice required by section 96 of the Act was not given to the Lessees and to Montage Company Limited who have recognized interests in the land – the failure to notify them thus go into the core of the validity of the issuance and service of the Notification of Sale. According to the Applicant, the Applicant has fulfilled all the principles set out in case of **GIELLA v CASSMAN BROWN & COMPANY LIMITED (1973) EA 358** that:-

i. The Applicant must show a prima facie case with a probability of success.;

ii. An injunction will not normally be granted unless the Applicant might otherwise

suffer irreparable injury;

III. When the court is in doubt, it will decide the application on a balance of convenience.

Defendant opposed the application

[8] The Defendant/Respondent opposed the application, filed a Replying Affidavit in opposition to the application sworn by PATRICK GACHUHI on 10th December, 2013 and written submissions on 21st March, 2014. According to the Defendant, by a letter of offer dated 11th January, 2011, which was duly accepted by the Plaintiff, the Defendant's Bank advanced to the Plaintiff a facility in the sum of **Kshs. 27,000,000/-** to enable it construct residential flats for rental on **L.R. No.209/11043** Villa Franca, Nairobi, (hereinafter referred to as the suit premises) – see annexure **PG-1 at page 1** of the Affidavit. The Applicant took out an additional facility to complete the construction of the said residential flats and by a letter of offer dated **9th February 2012**, duly accepted by the Plaintiff, the Defendant Bank advanced to the Plaintiff a facility in the sum of **Kshs. 8,000,000.00**- see annexure PG-2.

[9] Subsequently, First Legal Charge dated **21st January, 2011** was registered on **3rd February 2011** for the sum of **Kshs. 27,000,000/-** over the suit property in the name of the plaintiff- annexure **PG-3** at page 7. Further Legal Charge dated 29th February, 2012 was registered on 5th March 2012 over the suit property for the sum of Kshs.8,000,000/- see annexure PG -4.

[10] The Applicant failed and/or neglected to service the loan facility in accordance with the terms set out in the Charge and was served with a statutory notice dated **19th September 2012** to recover the outstanding sum of **Kshs. 40,268,002.40** as at 19th September, 2012, see annexure **PG-5.** The Applicant acknowledged receipt of the Statutory Notice by a letter dated 17th December, 2012 from its then advocates M/S A.S. Kuloba & Wangila Advocates and made proposal for payment of the outstanding sum, see annexure PG-6. By a letter dated **23rd September, 2013** the Defendant duly instructed the auctioneers, M/s Dalali Traders to advertise the suit premise for sale, see annexure **PG-7.** On **25th September, 2013**, the Applicant was served with a Redemption Notice requiring it to redeem the charged property **within Forty Five (45) Days** and a Notification of Sale informing the Plaintiff that the property would be sold on 5th December, 2013 unless the sum of **Kshs. 42,575,039.65** being the outstanding loan amount was settled, see annexure **PG-9.**

[11] The Defendant went on. By a valuation report dated **27th November, 2013**, by Kenstate Valuers, the Open Market Value of the suit property was found to be **Kshs.80,000,000/-** and the Forced Sale Value Kshs.68,000,000/-, see annexure **PG-10.** The Applicant wrote letters to the bank admitting liability and requesting more time to settle the arrears.

[12] The Defendant submitted that there is no dispute that the Defendant granted a loan to the Applicant for a total of **Kshs. 35,000,000/-** which the Plaintiff defaulted in payment. The Applicant defaulted in **May, 2012** and was duly served with a statutory notice dated **19th September, 2012** in accordance with **Section 90** of the Land Act, 2012 which the Applicant acknowledged service through its then advocates, **M/S A.S Kuloba & Wangila Advocates**. The Defendant Bank is, therefore, validly exercising its Statutory Power of sale under Section 96(1) of the Land Act, 2012 which states as follows:-

1. **Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under section 90(1), a charge may exercise the power to sell the charged land.**

Section 96(2) of the Act goes on to qualify that:

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.

[13] On expiry of the Statutory Notice, the Applicant was served with a further notice for Forty (40) Days and thereafter served with a Redemption Notice on 25th September 2013 requiring it to redeem the charged property within Forty Five (45) Days and a Notification of Sale informing the Plaintiff that the property would be sold on 5th December, 2013 unless the sum of Kshs. 42,575,039.65 being the outstanding loan amount was settled. A Valuation report dated 27th November, 2013 was prepared by Kenstate Valuers in compliance with Section 97 of the Act.

[14] The Defendant Bank respectfully submits that the exercise of the Statutory Power of Sale is, therefore, lawful and valid as the Applicant has defaulted in repayment of the Loan facility. Accordingly, the Applicant has not satisfied the principles of the granting of interlocutory injunctions set out in the *locus classicus* case of **GIELLA v CASSMAN BROWN & CO. LTD. 1973 EA 338.**

Not yet established Prima Facie Case

[15] The Defendant stated that, according to the case of **MRAO LIMITED v FIRST AMERICAN BANK LIMITED & 2 OTHERS, [2003] KLR 125**, the Court of Appeal delineated what prima facie case is as follows:-

> **"So what is a prima facie case? I would say that in civil cases it is a case in 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."**
>
> **"…But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.**

[16] The Defendant further averred that the Applicant's application primarily disputes the exercise of the Defendant's Statutory Power of Sale on the basis that the amount due under the Mortgage is disputed. The Defendant submitted that it is trite law that a court ought not to 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 a mortgage. See **SHAH VS DEVJI [1965] EA 91**. The Defendant reserved the right to vary the interest rate in its sole and absolute discretion under **Clause 3** of the Charge **dated 21st January, 2012** and registered on **3rd February, 2011** and also in Clause 3 of the Further Charge dated 29th February, 2012 and registered on **5th March, 2012.** The interest rate applied in the Plaintiff's account was, therefore, contractually valid and it is the Defendant's respectful submission that the IRAC report produced as MM/18 has no basis in law or fact as it seeks to re-write the contractual agreement between the parties. The Court of Appeal held in the case of **FINA BANK LTD. v RONAK LTD**, **[2001] 1 EA 54** that dispute on accounts was no basis for grant of an injunction. More specifically, it considered disputes on interest charged where it held at page 68:-

> **"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 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."**

[17] The Defendant observed that the Applicant has admitted at page 1 of its Submissions that it has defaulted in the repayment of the Loan Facility to the Defendant which in itself evident that the Applicant

has failed to establish a prima facie case and its Application ought to be dismissed with costs.

On Irreparable injury

[18] The Defendant relied on the case of **ANDREW M. WANJOHI v EQUITY BUILDING SOCIETY 7 ANOTHER [2006] eKLR,** where 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."**

The court held that damages are an adequate remedy as once a property is given as security, it becomes a commodity and it subject to sale. Accordingly, in the unlikely event that the court finds in favour of the Plaintiff, the value of the charged property is ascertainable and any loss suffered by the Plaintiff's upon the sale of the same, is remediable by an award of damages. This is guaranteed by Section 99 (4) of the Land Act, 2012 which reads:

> **"A person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."**

The Defendant submitted that any loss occasioned to the Plaintiff as a result of the Defendant Bank's exercise of its Statutory Power of Sale can be adequately compensated by an award of damages.

[19] The Defendant contended that the Valuation Report dated 26th November, 2013 from Prudential Valuers produced is exaggerated to assist the Plaintiff. The court would take judicial notice of the fact that 0.19 of an acre at Villa Franca Estate in Nairobi, cannot be valued at Kshs. 168,000,000/-.

On Balance of Convenience

[20] The Defendant submitted that the Applicant has been in Default since May, 2012 and is in arrears of **Kshs. 42,575,039.65** as at September 2013. The Defendant is prejudiced by the fact the fact that it cannot recover the sums due and owing to it from the Applicant. The Court of Appeal unanimously held in the case of **FRANCIS J.K. ICHATHA v HOUSING FINANCE COMPANY OF KENYA, CIVIL APPLICATION NO. 108 OF 2005** 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."**

Likewise, the court in the **Andrew Wanjohi case (supra)** held:

> **" 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 charger 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."

[21] From the foregoing, the Defendant respectfully submitted that the balance of convenience tilts in its favour as the Plaintiff admits it defaulted on repayment of the loan and has made no effort to make any payments for the last two years. Further, the Plaintiff has not disclosed any intention to make any payments despite enjoying an interim injunction. Therefore, the Applicant has not established any prima facie case with a probability of success and the application should be dismissed with costs. In any event, no irreparable damage has been demonstrated and the balance of convenience tilts in favour of the Defendant Bank.

COURT'S RENDITION

Issues

[22] Looking at the pleadings and the submissions of parties, I think, the overall determination the court must make is; whether the proposed sale of the suit premises should or should not be stopped by way of an injunction. In doing so, the court will be guided by the test for granting a temporary injunction as laid down in the case of GIELLA v CASSMAN BROWN, and as it has developed over time. But for the court to reach there, I see two issues: One; Whether the Chargee properly exercised its power of sale of the charged properly; and two; whether the chargee discharged the duty under section 97 of the Land Act to ensure a forced valuation is undertaken by a Valuer.

[23] I have already settled an important matter about the two apartments sold to Montage Company being No 2A and 2B on **L.R. NO. 209/11043** which I find and hold is not part of the suit premises. That aspect will, however, be reverted to later in my decision.

Disputes on the sum owing and interest charged

[23] This is yet another issue which I should determine in limine: on disputes on the sum owing and the varied interest rates applied to the loan. I need not say more; these two issues are well settled and I am content to adopt a work of Rudd, J in **BHARMAL KANJI SHAH AND ANOTHER v SHAH DEPAR DEVJI (supra)** that:

…the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage…

And also a work of the Court of Appeal in the case of **FINA BANK LTD. v RONAK LTD**, **[2001] 1 EA 54** that dispute on accounts was no basis for grant of an injunction, and more specifically, the following passage at page 68 is on point in relation to disputes on interest charged 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 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."

Just in passing, let me state that, although the Applicant alluded to section 44A of the Banking Act in the letter by **M/S A.S Kuloba & Wangila Advocates**, there was nothing much that was canvassed or material placed before the court on the section, and I think that issue does not warrant any decision by the court. I say no more.

[24] Back to the substantive arguments. I wish to cite a more subtly put passage in Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725 that:

> **''725 When mortgagee may be restrained from exercising power of sale**
>
> **The mortgagee will not be restrained from exercising his 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. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive''.**

Therefore, unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a chargee who is exercising the statutory power of sale of the charged property. The re-calculation by Interest Rates Advisory Centre may also not add much in an application for injunction unless it has the potentiality of supporting a claim that the sum due is manifestly and unjustifiably excessive and that can be discerned from the plain sight of the terms of the charge. The re-calculation may as well be tantamount to re-writing the contract for parties which is not permitted in law. Let me now examine the other grounds being proposed by the Applicant.

Duty to Value Property

[25] Having said that, did the chargee discharge the duty under section 97 of the Land Act to ensure a forced valuation is undertaken by a Valuer? The purpose of the valuation under section 97(2) of the Land Act is twofold; One; to obtain the best price reasonably obtainable at the time of sale, thus protecting the right of the chargor to property. Doubtless, best or reasonable price which is comparable to interests in land of the same character and quality is part of the right to property itself; and two; to prevent unscrupulous chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality. The duty under section 97(2 of the Land Act is, therefore, a serious legal requirement which will entitle the chargor to apply to court under section 97(3) (b) of the Land Act to have any sale based on such breach to be declared void, and the court on the required proof, should declare such sale to be void. That is the onerous nature of the duty. But the question is; did the Defendant as the chargee satisfy the requirement of section 97(2) of the Land Act?

[24] From the record, the Defendant ensured that a Forced Valuation was undertake through a valuation report dated **27th November, 2013**, by Kenstate Valuers, which placed the Open Market Value of the suit premises at **Kshs.80,000,000/-** and the Forced Sale Value at Kshs.68,000,000/-. The report is annexure PG-10 of the Replying affidavit. The Applicant says that valuation was grossly undervalued for the suit premises was valued at Kshs. 138,000,000 as at 23rd May, 2013 when the Certificate of Completion was issued, and the current value is Kshs. 168,000,000 as per the valuation report by Prudential Valuers Ltd done on 29th November, 2013. What I find to be strange is that the Valuation Report by the Valuer appointed by the Defendant and that by the Valuer appointed by the Applicant was done on 27th November, 2013 and 26th November, 2013, respectively. Barely a day apart, but the figures given by each are way apart. There is one more thing that I note; the joint valuation done on 5th June, 2012 by Centenary Valuers did not place a value of Kshs. 138,000,000 on the suit premises as it has been claimed by the Applicant in its submissions. Indeed, that valuation returned the following important valuation and projections:

a. **Open Market (as is then) Kshs. 68,000,000**
b. **Mortgage Value (as is then) Kshs. 61,000,000**
c. **Forced Sale (as is then) Kshs. 54,000,000**
d. **Projected Value of property upon completion Kshs. 100,000,000**

[25] There is, therefore, not truth in the submission by the Applicant that the joint valuation pegged the value of the suit premises at Kshs. 138,000,000 at completion. The Defendant says that the valuation report by the Applicant is an overly exaggeration whilst the Applicant says the one by the Defendant is a gross under-valuation of the suit premises. The onus of establishing on *prima facie* basis, that the Applicant's right has been infringed by the Defendant by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant. Other than the report by Prudential Valuers, there is nothing on record to support the claims by the Applicant or to discredit the valuation by Kenstate Valuers. The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Defendant as to entitle the court to call for an explanation or rebuttal from the Defendant. That approach is necessary to prevent defaulters from filing valuation reports with value way beyond the open market value just to obtain an injunction. Needless to state that having an arguable point, as is the case hare, is not sufficient to establish a prima facie case for the grant of an injunction especially in cases of exercise of the power of sale by a chargee who has shown that the Applicant has defaulted and continue to be in default. It be known that, as long as it is lawfully exercised, the Statutory Power of Sale is not a favour that the chargor extends to the chargee or an infringement on the right of or a foreclosure of the chargor's equity of redemption; it is a statutory remedy which is inextricably tied to the right of the chargee to recover its money-which is property guaranteed under Article 40 of the Constitution. The standard I have applied was set out in the case of **MRAO LIMITED v FIRST AMERICAN BANK LIMITED & 2 OTHERS, [2003] KLR 125**, when the Court of Appeal in stated:-

> **"So what is a prima facie case? I would say that in civil cases it is a case in 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."**
>
> **"…But as I earlier endeavoured to show, and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.**

[26] For purposes of this ruling, and from the material on record, the Defendant ensured that a Forced Valuation is undertaken by a Valuer in accordance with the law. There is nothing from the record so far that suggests the valuation herein was a negation of the duty **to obtain the best price reasonably obtainable at the time of sale.**

Notification of Sale

[27] From the record, the Applicant defaulted in May, 2012 and was duly served with a Statutory Notice dated 19th September, 2012 in accordance with Section 90 of the Land Act, 2012 which the Applicant acknowledged service of in the letter by its then advocates, M/S A.S Kuloba & Wangila Advocates. Despite the excuses which the Applicant gave for the default plus the disputes it raised on the sum owing, the Applicant does not deny it has been and still is in default of payment of the loan herein. The Notice under section 90 of the Land Act issued on 19th September, 2012 is proper in law as it was issued pursuant to the terms of the charge, i.e. after the chargor was in default of payment of several repayment instalments on their due dates thus making the entire sum owing and payable. See clauses 2.2, 2.3, 7.1, 7.2 and 8 of the charge. Therefore, the only rectification of the default that the Applicant ought to have carried out was to pay the entire sum owing. Section 90(1) of the Land Act is instructive in that respect. Further, the Notice gave the Applicant three months to pay the amount demanded of Kshs. 40,268,002.40 lest the Bank should follow-through on its legal remedies under the charge and the law. The Notice also sufficiently informed the Applicant **to apply to court for injunctive or temporary reliefs against the Bank's exercise of the power of sale or any other remedy it may opt to exercise to rectify the default**. The Applicant did not pay up; but it made a rejoinder through **M/S A.S Kuloba & Wangila Advocates** in a letter dated 17th December, 2012, barely 2 days before the said Notice was to expire. The Notice expired nonetheless, and in law, after the STATUTORY NOTICE under

section 90 has lapsed, and the chargor continues to be in default, the chargee may exercise the power to sell the charged land**.** See Section 96(1) of the Land Act, 2012 which states as follows:-

1. **Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under section 90(1), a charge may exercise the power to sell the charged land.**

[28] Once the chargee has decided to exercise its statutory power of sale, Section 96(2) of the Land Act puts yet another caveat that:

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.**

[29] As far as I am aware, this requirement of a notice to sell under section 96(2) of the Land Act, and that the chargee shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell, are still points of judicial debate. Some courts have dealt with that requirement for instance in **MALINDI ELC COURT LAND CASE NO. 1'B' OF 2014 JOSIAH KAMANJA NJENGA v HOUSING FINANCE CORPORATION OF KENYA & ANOTHER,** Angote J. stated that:

31. **Having analysed the chronology of events, I take the view that the auctioneer's fees is only payable once the bank gives to the auctioneer lawful instructions. Section 96(2) of the Land Act stipulates that the Bank cannot exercise its power to sell the charged property until at least 40 days have lapsed. The Plaintiff was served with the 40 days' notice on 18th October 2013, which was the fourth day after the posting of the letter dated 10th October, 2013. The letter, according to the documents annexed on the Replying Affidavit, was received by the post master general on 14th October, 2013.**
32. **It is only after 27th November, 2013, which was the 40th day after 18th October, 2013, when the Plaintiff is supposed to have been served with the letter, that the 1st Defendant would have instructed the 2nd Defendant to proceed to issue to the Plaintiff with a notification of sale pursuant to the provisions of Rule 15 of the Auctioneers Rules, 1997 and not earlier than that.**
33. **Consequently, the letter of instructions dated 14th November, 2013 by the 1st Defendant addressed to the 2nd Defendant instructing it to sell the suit property was prematurely issued and is contra-statute. The said instructions and the subsequent notification of sale by the 2nd Defendant are therefore, *prima facie*, a nullity and cannot be the basis for the auction which had been scheduled for 26th January, 2014 or the loading of the auctioneer's fees on the Plaintiff's loan account.**

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

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

…I have not seen any notice to sell the charged land which was issued to the Applicant under section 96(2) of the Land Act. What I see in the documents annexed to the replying affidavit are the Statutory Notice by the chargee's advocates, letter of instruction by the Defendant to the auctioneers, Redemption

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

> [31] The Notice issued on 25th September, 2013 together with a Notification of sale of the same date by the auctioneer was on the instructions by the Defendant Bank. Both were served and received by the Martin K. Manyara on 25th September, 2013, the Director of the Applicant Company. I think, the Notice to sell the suit premises required under section 96(2) of the Land Act should be seen within the land reforms and the constitutional desire to protect the chargor's right to property by allowing reasonable opportunities to redeem the charged property. That is why, unlike before, the doctrine of equity of redemption has been provided for under section 89 of the Land Act as an express statutory provision. Therefore, section 96(2) of the Land Act should be seen in that light and thus, places a separate obligation on the chargee to issue a notice to sell which is quite apart from the obligations placed on the auctioneer under the Auctioneers Act to issue a redemption notice before selling an immovable property on instructions of a chargee or court order. A fusion of the notice under section 96(2) of the Land Act and that under rule 15(d) of the Auctioneers Rules, will not only obfuscate a clear distinction between the two, but will also bear the innuendo of a clog on the equity of redemption of the chargor. The two procedures come into operation at different times and offer different legal opportunity and expectation to the chargor to redeem the charged property and should never be abridged or fused. Section 96(2) of the Land Act uses specific words…**Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form…**which I think, like Angote J., does not envisage the taking of any actual process of selling the charged land under the Auctioneers Act before a notice issued in that behalf is issued under the said section and at least 40 days have elapsed from the service of the said Notice. Redemption notice under the Auctioneers Act is actual step, albeit the very initial, of sale of the charged property and may be attended to by other consequences which are not intended in section 96(2) of the Land Act. Accordingly, I do not think the notice issued by the auctioneer is a substitute for or sufficient Notice to sell the charged property as envisioned under section 97(2) of the Land Act. Banks should use the prescribed notice under section 96(2) of the Land Act and in the absence of any prescribed form thereto, they should adopt a format which complies with the requirement of section 96(2) of the Land Act. Non-adherence with that section is a matter which would vitiate the Notification for sale or any sale based on the flawed process. But let me determine the remaining issue before I make the final orders.

[32] The other aspect that also carries merit is the inclusion of all the 23 apartments in the advertisement herein as constituting the suit premises. That anomaly is substantial as it described the property to be sold to be the entire property on L.R. NO 209/11043 (I.R. NO. 70243) which also included Apartments No 2A and 2B. The advertisement under the Auctioneers Act and Rules serves a useful purpose of informing the prospective bidders of the exact nature of the property they expect to bid for and eventually purchase. Rule 16(d) of the Auctioneers Rules, 1997 requires advertisement for the sale of immovable property to give an accurate description of the property. Therefore, the advertisement as placed in the dailies is

incorrect and misleading. All the foregoing, does not, however, vitiate the Statutory Notice issued to the Applicant for default herein.

FINDINGS

[33] In conclusion, the Applicant; has not paid the amount claimed into court, that is, the amount which the Defendant as the chargor claims to be due to it; and has not shown any intention to repay its just debt; which does not charm any love from equity (see **NBI HCCC NO 17 OF 2014 SUNRISE HOME LIMITED v NBK & ANOTHER [2014] eKLR**); and has not shown prima facie evidence that the Defendant breached the duty of care under section 97(2) of the Land Act. But on account of the requirement of irreparable damage, I am convinced the breach of law suffices as an irreparable damage which is not compensable by an award of damages. And, although the Applicant is a defaulter who has not showed any or even a little remorse, the breach of law would entitle the court to offer relief based on the law and interest of justice.

[34] The Statutory Notice issued on 19th September, 2013 was properly issued and is not vitiated by the failure by the Defendant to issue a proper notice to sell the charged premises under section 96(2) of the Land Act. However, in the absence of a proper notice under section 96(2) of the Land Act, the instructions to the auctioneer herein were not proper and all the subsequent processes issued upon those instructions are accordingly vitiated in law, and in particular, the Notification of Sale and the ensuing advertisements of the suit premises.

ORDERS

[34] Given the circumstances of this case, I will base my decision on the interest of justice and the failure by the chargor and the auctioneer to comply with the requirements of section 96(2) of the Land Act, and the Auctioneers Act, respectively. Accordingly, the court makes the following orders:

a) The Defendant is restrained from selling or advertising for sale any or both of Apartments No 2A and 2B on L.R. NO 209/11043 (I.R. NO. 70243). The said apartments are not part of the suit premises and should effectively be excluded in any subsequent notice to sell or advertisement for sale or sale of the suit premises; that should be achieved by adherence to the law and providing accurate description of the suit premises;

b) The Notification of sale issued on 25th September, 2013 by the Defendant is in contravention of the law for it was based on no instructions in the strict sense of the law. The Defendant and the auctioneer herein are, therefore, restrained from proceeding on the said Notification of Sale to sell the suit premises. However, as the Statutory Notice is not impugned, the Defendant may issue a proper Notice to sell the charged property under section 96(2) of the Land Act, and may proceed thereafter to realize the security as provided in law and the charge.

c) The other prayers in the application dated 29th November, 2013 are denied including a prayer for valuation of property L.R. No. 209/11043 by an independent Valuer.

d) In the circumstances of this case, it will not be prudent to award costs to any party, and therefore, each party shall bear its own costs on the application.

Dated, signed and delivered in open court at Nairobi this 6th day of June, 2014

F. GIKONYO

JUDGE