



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 123 OF 2019**

*(As consolidated with Machakos ELC No. 133 of 2019)*

PAUL GATETE WANGAI.....1<sup>ST</sup> PLAINTIFF/APPLICANT  
MICHAEL KANYI WAMBUGU.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
ANNE STELLA ONYANGO.....3<sup>RD</sup> PLAINTIFF/APPLICANT  
JANE WANJIRA NJOGU.....4<sup>TH</sup> PLAINTIFF/APPLICANT  
SAMUEL MWANGI NDUATI.....5<sup>TH</sup> PLAINTIFF/APPLICANT  
RUTH KWALI.....6<sup>TH</sup> PLAINTIFF/APPLICANT  
DANIEL STEPHEN OUMA.....7<sup>TH</sup> PLAINTIFF/APPLICANT  
LUCY KATILO WAMWANDU.....8<sup>TH</sup> PLAINTIFF/APPLICANT  
DOROTHY ACHIENG OMOLO.....9<sup>TH</sup> PLAINTIFF/APPLICANT  
CHARLES WAHOME MURIUKI.....10<sup>TH</sup> PLAINTIFF/APPLICANT  
JOHN WAWERU KARANJA.....11<sup>TH</sup> PLAINTIFF/APPLICANT  
SULWE AGENCIES LIMITED.....12<sup>TH</sup> PLAINTIFF/APPLICANT  
DAMUMA INVESTMENTS LTD.....13<sup>TH</sup> PLAINTIFF/APPLICANT  
WILLIAM KIMANI &  
GRACE TITO LEKASI.....14<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

CAPITAL REALTY LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT  
HOUSING FINANCE CO. LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

1. The Plaintiffs/Applicants approached this court by way of a Notice of Motion dated 14<sup>th</sup> November, 2019 filed under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 90(3), 91(c) and 104(2) (a) and (c) of the Land Act (No. 17 of 2012) and all other enabling provisions of law. The following orders were sought:

*a) Pending the hearing and determination of this suit, this Honourable Court be pleased to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants*

**whether by themselves, their servants, employees, assigns and/or agents from disposing, selling, transferring, taking possession of or in any way dealing with the Maisonette Numbers B16, A19, C14, A8, A24, B10, C13, B1, B22, B14, B25, C9 and C23 situate on the property known as Land Reference Number 12715/617 (Original Number 12715/11742); and**

**b) Costs of the Application be provided for.**

**The Plaintiffs' case:**

2. The Plaintiffs' Application is supported by the Affidavit of the 5<sup>th</sup> Plaintiff, who deponed the Affidavit with the authority of the 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs and the 6<sup>th</sup> to 13<sup>th</sup> Plaintiffs. The 5<sup>th</sup> Plaintiff deponed that between July 2013 and October 2017, the Plaintiffs entered into Sale Agreements with the 1<sup>st</sup> Defendant for the purchase of 13 Maisonettes situated on land known as Land Reference Number 12715/617 (Original Number 12715/11742) (hereinafter 'the Maisonettes').

3. It was deponed by the 5<sup>th</sup> Plaintiff that the 1<sup>st</sup> Defendant, through their advocates, Gachanja and Company Advocates, advised the Plaintiffs to deposit their payments towards the purchase price into the Vendor's CFC Stanbic Bank Account No. 0100001516293 or the Advocates' CFC Stanbic Bank Account No. 0100000657818.

4. According to the 5<sup>th</sup> Plaintiff, the 1<sup>st</sup> to 8<sup>th</sup> Plaintiffs and the 10<sup>th</sup> Plaintiff to 13<sup>th</sup> Plaintiffs deposited the purchase price in the 1<sup>st</sup> Defendant's bank account while the 9<sup>th</sup> Plaintiff deposited the purchase price in the account of the 1<sup>st</sup> Defendant; that the Plaintiffs settled the stamp duty, registration fees and legal fees and that the total sum paid to date by the Plaintiffs for the purchase of the Maisonettes and the registration of Leases in their favour is Kshs. 147,975,680.

5. It was deponed by the 5<sup>th</sup> Plaintiff that between April 2014 and April 2015, the 1<sup>st</sup> Defendant handed vacant possession of the Maisonettes to the Plaintiffs; that the 1<sup>st</sup> to 11<sup>th</sup> Plaintiffs moved into the Maisonettes with their families and have resided in the said Maisonettes for the last 4 years and that the 12<sup>th</sup> and 13<sup>th</sup> Plaintiffs are companies owned by married couples who have also moved into the Maisonettes.

6. The deponent pointed out that the Maisonettes are the Plaintiffs' matrimonial homes; that the Plaintiffs invested in the properties by sinking boreholes, building a bio-digester plant and renovating their Maisonettes and that the Plaintiffs' children attend school in the neighbouring area.

7. It was deponed by the 5<sup>th</sup> Plaintiff that to date, none of the Plaintiffs have had Leases registered in their favour for the Maisonettes they purchased from the 1<sup>st</sup> Defendant and that on 14<sup>th</sup> October 2019, the Plaintiffs were served with a statutory notice dated 7<sup>th</sup> October 2019 indicating that the 2<sup>nd</sup> Defendant will exercise its statutory power of sale over the Plaintiffs' Maisonettes after the expiry of 40 days.

8. According to the 5<sup>th</sup> Plaintiff, the Plaintiffs have been residing in the Maisonettes with their families as *bona fide* purchasers for value; that the Plaintiffs had met their purchase obligations with the 1<sup>st</sup> Defendant under their respective sale agreements and that the Plaintiffs stand to suffer great prejudice and financial loss if the Maisonettes are disposed of by the 2<sup>nd</sup> Defendant under its statutory power of sale.

9. It was deponed by the 5<sup>th</sup> Plaintiff that the 2<sup>nd</sup> Defendant has alternative remedies under Section 90(3) of the Land Act and that the 2<sup>nd</sup> Defendant can sue the 1<sup>st</sup> Defendant for money due and owing to it; and that an order for injunction do issue.

**The 1<sup>st</sup> Defendant's case:**

10. The 1<sup>st</sup> Defendant's Director deponed that in the normal course of its business, the 1<sup>st</sup> Defendant purchased and became the registered proprietor of all that parcel of land known as L.R. No. 12715/11742 (previously 12715/617) situated off the Nairobi-Mombasa Road and within the Syokimau area, Machakos County.

11. It was deponed that the 1<sup>st</sup> Defendant subsequently designed 76 Town Houses for development on the suit property together with the usual conveniences connected thereto including a perimeter wall, electric fencing, guard house, a social hall, cabro paved driveways, borehole, water tower with storage water tanks, sewer treatment plants, landscaped gardens and pathways.

12. The 1<sup>st</sup> Defendant's Director deponed that the 1<sup>st</sup> Defendant approached the 2<sup>nd</sup> Defendant and tendered a proposal applying for a loan facility of Kshs. 300,000,000 to assist the 1<sup>st</sup> Defendant with the necessary finance to develop and implement the proposed Project; that the 2<sup>nd</sup> Defendant approved the loan facility and that by a Letter of Offer dated 10<sup>th</sup> June 2010, the 2<sup>nd</sup> Defendant agreed to advance the 1<sup>st</sup> Defendant the sum of Kshs. 310,000,000.

13. It was deponed that subsequently, by a letter of offer dated 23<sup>rd</sup> May, 2013, the 2<sup>nd</sup> Defendant agreed to advance to the 1<sup>st</sup> Defendant the sum of Kshs. 40,000,000 bringing the total amount of the loan to the sum of Kshs. 350,000,000; that the Project was expected to be funded from pre-sales of the Town Houses thereon, which pre-sales were projected to raise approximately 175 Million and that the loan was to be secured by a Legal Charge over the Property.

14. The 1<sup>st</sup> Defendant's Director deponed that in accordance with the above terms and agreement, the 1<sup>st</sup> Defendant injected the required equity into the Project and proceeded to charge the property in favour of the 2<sup>nd</sup> Defendant; that the 1<sup>st</sup> Defendant proceeded to appoint a Building Contractor and Sub-Contractors to construct the Building Works envisaged in the Building Contract for a total consideration of Kshs. 378,000,000 and that the 1<sup>st</sup> Defendant continued to service the loan and interest payments due to the 2<sup>nd</sup> Defendant by utilizing funds

generated from the aforesaid pre-sales of the Town Houses, including the Town Houses sold to the Plaintiffs.

15. The 1<sup>st</sup> Defendant's Director deponed that the 1<sup>st</sup> Defendant was expected and indeed was required by the 2<sup>nd</sup> Defendant to sell the Town Houses being developed or to be developed on the Property; that the 1<sup>st</sup> Defendant was expected and indeed required to appraise and avail the 2<sup>nd</sup> Defendant with Reports regarding the progress of sales of the Town Houses within the Project and that the sole source for the repayment of the loan together with the accruing interest and other costs thereon was from the funds generated or to be generated from the sale of the Town Houses.

16. According to the 1<sup>st</sup> Defendant' Director, the 1<sup>st</sup> Defendant proceeded to sell the Town Houses to the Plaintiffs and other third parties on the terms and conditions stipulated in the various Agreements for Sale; that to date, the 1<sup>st</sup> Defendant has sold a total of 66 out of the 76 Town Houses developed on the property and that the proceeds of sale were applied towards the repayment of the loan and other costs directly incurred in the Project which were not covered or envisaged to be covered by the loan.

17. It was deponed that the Building Contractor exercised its right of lien over the Project and refused to release the Town Houses to the 1<sup>st</sup> Defendant based on non-payment of the evaluated contract sum; that the above circumstances necessitated the 1<sup>st</sup> Defendant to negotiate with the contractor to retain possession and eventually acquire beneficial interest in eight Town Houses in lieu of the payment due and that upon execution of the aforesaid Accord and Satisfaction Agreement, the Building Contractor handed over the remaining 68 Town Houses and retained possession of 8 Town Houses.

18. According to the 1<sup>st</sup> Defendant, the process of sales of the Town Houses did not commence in May 2015 as alleged but commenced at the beginning of the Project in 2009; that the Status Report shows that Agreements for Sale had been entered into in respect of about 53 Town Houses by the time the Project was completed in 2015 and that Clause 3.0 of the Escrow Agreement requires the 1<sup>st</sup> Defendant to open an Escrow Account with the 2<sup>nd</sup> Defendant and to deposit receivables being the proceeds received from the sale of the Town Houses.

19. However, it was deponed, Clause 3.2 (ii) (c) of the Escrow Agreement provides that the Escrow Account shall be utilized "in payment to the Lender of any amounts which it has certified in writing with a copy to the Borrower as being due and payable by the Borrower under the Loan and that Clause 10 of the Letter of Offer stipulates that "all payments to be made by the Applicant" towards payment of the Loan or interest thereon shall be made to the 2<sup>nd</sup> Defendant.

20. It was deponed by the 1<sup>st</sup> Defendant's Director that under Clause 1(a) of the Charge Instrument, the 1<sup>st</sup> Defendant was required "to pay to the 2<sup>nd</sup> Defendant the Loan or any part thereof and that whereas the Escrow Agreement provided for payments to be held in the Escrow Account, the Letter of Offer and the Charge Instrument required the 1<sup>st</sup> Defendant to re-pay the loan which was achievable by payment directly into the Loan account

21. The 1<sup>st</sup> Defendant's Director deponed that the Escrow Agreement, the Escrow Agent and the Lender are one and the same party and that the 2<sup>nd</sup> Defendant and/or the Escrow Agent reserved the right to apply funds received from the 2<sup>nd</sup> Defendant into the Escrow Account, irrespective of the account in which the funds were received.

22. It was deponed that upon receipt of sale proceeds, the 1<sup>st</sup> Defendant made payments directly to the 1<sup>st</sup> Defendant's loan account held with the 2<sup>nd</sup> Defendant; that any amounts received in the 1<sup>st</sup> Defendant's loan account or the escrow account were soon thereafter uplifted by the 2<sup>nd</sup> Defendant and credited into the loan account and that as per the bank statements availed by the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant has to date paid the 2<sup>nd</sup> Defendant the sum of Kshs. 446,909,116 towards the loan.

23. The 1<sup>st</sup> Defendant's Director deponed that out of the aforesaid amount of Kshs. 446,909,116, the sum of Kshs. 143,000,000/= was raised and paid from the sale proceeds of the Town Houses to the Plaintiffs and that from the outset, the 2<sup>nd</sup> Defendant received payments in the 1<sup>st</sup> Defendant's loan account, current account, savings account, escrow account and directly into the loan account.

24. It was deponed that payments in respect of some of the purchases financed by the 2<sup>nd</sup> Defendant itself were processed and paid directly into the loan account by the 2<sup>nd</sup> Defendant thus contradicting the 2<sup>nd</sup> Defendant's assertion that it was a requirement in respect of the sale of all the 76 Units for the funds to be deposited into the Escrow Account.

25. Examples of these, it was deponed, are:

Date	Purchaser	House No.	Amount
14/4/2014	Grace Murichu	A18	8,955,000/=
30/06/2015	Joseph Ndiku	B18	9,450,000/=
30/06/2015	Jonathan Manoharan	B24	9,765,000/=

Date	Purchaser	House No.	Amount
30/6/2015	Beatrice Waila	B17	8,955,000/=
30/06/2015	Leonida Omutora	B12	4,920,000/=
30/06/2015	Stanley Sang	B21	4,490,000/=
30/06/2015	Jonathan Manoharan	B24	9,765,000/=

26. In regard to the Escrow Account, it was deponed that the 2<sup>nd</sup> Defendant has failed to assign some of the payments received therein to the sale of specific Town Houses rendering it unclear which payments the 2<sup>nd</sup> Defendant recognizes in respect of the sale of the Town Houses and that the approach of the 2<sup>nd</sup> Defendant has not been consistent in that in a number of cases, the 2<sup>nd</sup> Defendant has executed Partial Discharges where the sale proceeds were not received in the Escrow Account.

27. The 1<sup>st</sup> Defendant's Director deponed that the 1<sup>st</sup> Defendant completed the Project and the Town Houses that are the subject matter of these proceedings in accordance with the terms of the respective Agreements for Sale.

28. According to the 1<sup>st</sup> Defendant's Director, in respect of the Plaintiffs (*purchasers*) who had completed and paid the full purchase price for their respective Town Houses, the 1<sup>st</sup> Defendant handed over possession of those Town Houses.

29. It was deponed that the houses were handed over to the Plaintiffs on the basis that a suitable undertaking had been issued securing the balance of the purchase price; that the 1<sup>st</sup> Defendant has previously requested and continues to request the 2<sup>nd</sup> Defendant to execute partial discharges in respect of the Town Houses purchased by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> Plaintiffs being all the Town Houses fully paid for by the Plaintiffs, with the exception of the 8<sup>th</sup> Plaintiff and that despite repeated requests, the 2<sup>nd</sup> Defendant has to date refused, neglected and/or declined to execute the requisite Partial Discharges.

30. The 1<sup>st</sup> Defendant's Director deponed that by a Notice dated 8<sup>th</sup> November 2017, the 2<sup>nd</sup> Defendant issued the 1<sup>st</sup> Defendant with a demand stating that unless they received the full sum of Kshs. 455,311,599.45, they would proceed and appoint a Receiver Manager over the Project.

31. It is the 1<sup>st</sup> Defendant's case that upon receipt of the aforesaid Notice, the 1<sup>st</sup> Defendant sought to negotiate the matter with the 2<sup>nd</sup> Defendant and that arising out of the said negotiations, the 2<sup>nd</sup> Defendant agreed to withhold the appointment of the Receiver Manager subject to the 1<sup>st</sup> Defendant handing over the entire legal conveyancing process in respect of the Project to a firm of Advocates appointed by the 2<sup>nd</sup> Defendant.

32. The 1<sup>st</sup> Defendant's Director deponed that pursuant to the above, the 2<sup>nd</sup> Defendant's nominated the firm of Kimani Michuki Advocates to take over the legal and conveyancing process in respect of the Project and that the 1<sup>st</sup> Defendant had no alternative under the threat and coercion of the 2<sup>nd</sup> Defendant but to concede to the handover of the Project to the 2<sup>nd</sup> Defendant and/or its Advocates.

33. In any event, it was deponed, the 2<sup>nd</sup> Defendant had failed, refused and/or neglected to release partial discharges in respect of the Town Houses purchased by the Plaintiffs and others which in effect meant that the required processes necessary to confer Title to the Plaintiffs and other purchasers of Town Houses within the Project had stalled.

34. It was deponed that in preparation of the handover of the Project, the 1<sup>st</sup> Defendant prepared and forwarded to the 2<sup>nd</sup> Defendant a Status Report dated June, 2018 providing the 2<sup>nd</sup> Defendant with all pertinent information regarding the Project including details of the purchases entered into between the Plaintiffs and the 1<sup>st</sup> Defendant and also accounting for the proceeds of sale received by the 1<sup>st</sup> Defendant.

35. The 1<sup>st</sup> Defendant's Director deponed that since the date of the release of the Status Report and the Project Documents, the 2<sup>nd</sup> Defendant has not reverted to the 1<sup>st</sup> Defendant and/or raised any queries with regard to the information contained therein including but not limited to the status of the transactions and payments received from the Plaintiffs.

36. According to the 1<sup>st</sup> Defendant's Director, the expectation of the 1<sup>st</sup> Defendant was that: the 2<sup>nd</sup> Defendant would issue partial discharges in respect of the Town Houses purchased and fully paid for by the Plaintiffs as disclosed in the Status Report referred to hereinabove; that the 2<sup>nd</sup> Defendant and/or its Advocates would proceed with the registration of the Leases in favour of the Plaintiffs and that the 2<sup>nd</sup> Defendant and/or its Advocates would oversee the sale of any unsold units and similarly proceed and process the legal documentation necessary to confer Title to the Purchasers upon payment of the purchase price of such Town Houses having been secured or paid.

37. It was deponed that in a complete surprise turn of events, and in the absence of any prior notice or response to the Status Report and after a period of over one (1) year, the 2<sup>nd</sup> Defendant issued a Statutory Notice dated 24<sup>th</sup> June, 2019 in which it threatened to proceed and exercise its statutory power of sale by selling the Plaintiffs' Town Houses by Public Auction unless the amount demanded of Kshs. 350,361,219.25 was paid within a period of 90 days and that by a letter dated 20<sup>th</sup> August, 2019, the 1<sup>st</sup> Defendant *inter alia* queried the validity of the Statutory Notice on the basis that it failed to disclose or make clear which Town Houses were the subject matter of the

purported exercise of the 2<sup>nd</sup> Defendant's statutory power of sale.

38. Subsequently, it was deponed, the 2<sup>nd</sup> Defendant issued a Notification of Sale dated 7<sup>th</sup> October, 2019 threatening to exercise its statutory power of sale and proceed with the sale by way of public auction of 35 Town Houses specified in the Notice, which include the Town Houses purchased by the Plaintiffs;

39. According to the 1<sup>st</sup> Defendant, the 90 day Statutory Notice is invalid for want of the mandatory requirements specifying and/or identifying the Property being threatened with the exercise of the 2<sup>nd</sup> Defendant's statutory power of sale and that the Notification of Sale is also likely to be deemed invalid on the basis that the same was not preceded by a valid Statutory Notice.

40. It is the 1<sup>st</sup> Defendant's case that the Notification issued by the 2<sup>nd</sup> Defendant puts the 1<sup>st</sup> Defendant in a collision course with the Plaintiffs in that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Plaintiffs' have fully paid the agreed purchase price for their respective Town Houses whereas the 8<sup>th</sup> Plaintiff has paid a substantial amount towards the purchase price thereof.

41. It was deponed that the fully paid up Town Houses and partially paid up Town Houses have been included in the list of the properties threatened by the said forced sale by public auction and that the 1<sup>st</sup> Defendant sold the Town Houses to the Plaintiffs with the express and/or implied knowledge, consent and/or approval of the 2<sup>nd</sup> Defendant.

42. The 1<sup>st</sup> Defendant's Director deponed that the proceeds of sale in respect of the Town Houses purchased by the Plaintiffs were utilized to offset the loan with the 2<sup>nd</sup> Defendant and in particular, the Principal amount due, the accruing interest on the Principal, the accruing interest on the Arrears and other bank charges levied by the 2<sup>nd</sup> Defendant from time to time against the loan account.

43. It was deponed that that the Plaintiffs entered into the Sale Agreements detailed in paragraph 3 of the Supporting Affidavit; that with the exception of the 8<sup>th</sup> Plaintiff, the Plaintiffs have fully paid the purchase price for the respective Town Houses which amounts to a total sum of Kshs. 143,000,000 as stated hereinabove into the account or accounts directed by the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant should grant to the Plaintiffs vacant possession in respect of the Town Houses purchased.

44. The 1<sup>st</sup> Defendant's Director finally deponed that Leases were prepared by the 1<sup>st</sup> Defendant's Advocates in favour of the Plaintiffs who had fully paid for their respective Town Houses; that the 1<sup>st</sup> Defendant has previously executed and is willing to execute any Leases in favour of the Plaintiffs who have completed their transactions and that despite several requests, the 2<sup>nd</sup> Defendant declined, refused and/or neglected to issue the said partial discharges thereby stalling and frustrating the process of registration.

45. It was deponed that the foregoing issues are weighty and ought to be heard and determined at the main trial where the parties to the suit shall be in a position to table their full evidence regarding the issues raised in the suit.

#### **The 2<sup>nd</sup> Defendant's case:**

46. The Application was strenuously opposed by the 2<sup>nd</sup> Defendant's Legal Officer who deponed that on 21<sup>st</sup> June, 2011, the 1<sup>st</sup> Defendant applied for a loan facility of Kshs 310,000,000 to construct 76 maisonettes on the suit property, which loan was secured by a revolving charge on the suit property.

47. It was deponed that on 27<sup>th</sup> August, 2013 a further loan of Kshs 40,000,000 was advanced to the 1<sup>st</sup> Defendant, which was secured by a further charge over the suit property; that the 1<sup>st</sup> Defendant further executed a fixed and floating and a supplementary fixed and floating debenture on all its assets on 21<sup>st</sup> July, 2011 and 15<sup>th</sup> August, 2013 and that on 27<sup>th</sup> August, 2013, the 1<sup>st</sup> Defendant's Directors gave a personal guarantee as well as a corporate guarantee by Holiday Resort Co. Ltd.

48. The deponent averred that the loan was advanced to the 1<sup>st</sup> Defendant in tranches; that the Plaintiffs were cash buyers and that in terms of the escrow agreements dated 28<sup>th</sup> July, 2011 and 27<sup>th</sup> August, 2013, all monies in respect of the sale of the 76 Maisonettes was to be deposited in the 1<sup>st</sup> Defendant's escrow account with the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant is yet to receive the purchase price.

49. The 2<sup>nd</sup> Defendant's Legal Officer deponed that it did not recognize the sale of the subject Maisonettes for it neither received the original agreements for sale and the full purchase price; that on 24<sup>th</sup> June, 2019, the 2<sup>nd</sup> Defendant wrote to the 1<sup>st</sup> Defendant seeking for a handover of the agreements and proof of payment; that no response was forthcoming from the 1<sup>st</sup> Defendant and that the 2<sup>nd</sup> Defendant wrote to the individual purchasers on 10<sup>th</sup> September, 2019 and asked them to provide proof of purchase documents.

50. It was deponed by the 2<sup>nd</sup> Defendant's Legal Officer that because no response was forthcoming from either the Plaintiffs or the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant resorted to exercising its statutory power of sale in accordance with Sections 96(2), 90(3) and 96(1) of the Land Act.

51. It was deponed that the purchasers did not do due diligence so as to be aware that the suit property was charged to the 2<sup>nd</sup> Defendant; that the injunction sought would be prejudicial to the 2<sup>nd</sup> Defendant and that the Application did not meet the threshold for the grant of an injunction.

52. Vide a Further Affidavit deponed by the 2<sup>nd</sup> Defendant's Company Secretary, it was reiterated that the sale proceeds in relation to the suit

property were not received in the 1<sup>st</sup> Defendant's escrow account; that the alleged sale between the Plaintiffs and the 1<sup>st</sup> Defendant was invalid because the 1<sup>st</sup> Defendant/Chargor failed to get the consent of the 2<sup>nd</sup> Defendant/Chargee prior to selling the suit property and that the statutory notice that was issued by the 2<sup>nd</sup> Defendant was proper and valid for it met the conditions of Section 96(2) of the Land Act.

#### **Submissions:**

53. The Application was canvassed vide written submissions. Counsel for the Plaintiffs cited the case of *Giella vs. Cassman Brown* [1973] EA 358 where the court held that:

*“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 normally be granted unless the Applicants 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 (E.A. Industries v. Trufoods, [1972] E.A. 420).”*

54. In submitting that the Plaintiffs have a prima facie case with a high probability of success, reliance was placed on the case of *Mrao versus First American Bank of Kenya Limited & 2 Others* [2003] KLR 125 which defined a prima facie case 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.”*

55. It was counsel's argument that the Plaintiffs have presented the sale agreements they made with the 1<sup>st</sup> Defendant, together with proof of payments they made to the 1<sup>st</sup> Defendant for the purchase prices of the Maisonettes, the legal fees and stamp duty and that they have resided in the suit properties for the last four years.

56. It was submitted that the 2<sup>nd</sup> Defendant was not oblivious to the sale of the Maisonettes to the Plaintiffs and that the Plaintiffs have a genuine and arguable case which calls for an explanation from the Defendants.

57. On the issue of irreparable harm, reliance was placed on the definition of the term in the case of *Micah Terer & another v Letshego Kenya Limited* [2017] eKLR, where irreparable harm was defined as an injury that cannot be adequately compensated for in damages.

58. According to counsel, the 13 Maisonettes were purchased using the life savings of the Plaintiffs; that the Plaintiffs moved into the Maisonettes four years ago with their families and that the Maisonettes are not only their matrimonial homes, but also family homes. Counsel submitted that the harm which the Plaintiffs are likely to suffer goes beyond damages. Cited by counsel was the case of *Boniface Kivindyo Mutisya v Alfred Kavila Kivindyo & 2 Others* [2017] eKLR where the Court held that there was a danger of an Applicant suffering irreparable harm in the case of matrimonial property.

59. On the element of balance of convenience, counsel cited the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was held that the balance of convenience would favour a Plaintiff if the inconvenience they are to suffer if an injunction is not granted is greater than the inconvenience the Defendants would suffer if an injunction is granted.

60. According to counsel, the likelihood of the Plaintiffs losing their matrimonial/family homes which they purchased with their life savings, the improvements they made to the said homes and the common areas of Land Reference Number 12715/11742 are issues which should be resolved after a full trial.

61. The 1<sup>st</sup> Defendant counsel submitted that the 2<sup>nd</sup> Defendant issued a 90-days Statutory Notice dated 24<sup>th</sup> June 2019 in respect of the Charge and the Further Charge claiming arrears of the sum of Kshs 350,361,219/25; that the Statutory Notice was in respect of the entire Property namely, L.R. No. 12715/11742 and that the 2<sup>nd</sup> Defendant also issued a 40-day Notifications of Sale both dated 7<sup>th</sup> October 2019 in respect of 35 Maisonettes including those purchased by the Plaintiffs and claiming the sum of Kshs. 316,962,724/76.

62. According to counsel for the 1<sup>st</sup> Defendant, the Plaintiffs' Application raises several triable issues being that the Plaintiffs have legal or equitable rights capable of protection under the Law. The court was invited to consider the definition of “rights” or “interests” in land under the provisions of the Section 2 of the Land Act.

63. It was the argument of counsel that Agreements for sale were entered into between the Plaintiffs and the 1<sup>st</sup> Defendant for the sale of specific Maisonettes to the Plaintiffs and for consideration and that a disposition within the meaning of the Land Act gave the Plaintiffs rights or interests as purchasers which they seek to protect.

64. Learned counsel was of the view that the competing interests between the Plaintiffs (*as Purchasers*), the 1<sup>st</sup> Defendant (*as Vendor*) and the 2<sup>nd</sup> Defendant (*as Chargee*) were the issues in controversy in this suit that require the full hearing and determination of the court.

65. According to counsel, the 2<sup>nd</sup> Defendant received requests to discharge the Maisonettes sold from the Charge; that the 1<sup>st</sup> Defendant released copies of the Agreements for Sale to the 2<sup>nd</sup> Defendant; that the 2<sup>nd</sup> Defendant demanded and took over the Project and that the Plaintiffs were not parties to the loan agreements.

66. It was the submission of counsel that the 1<sup>st</sup> Defendant had the 2<sup>nd</sup> Defendant's actual authority to sell the Maisonettes and that the 1<sup>st</sup> Defendant was required to sell the Maisonettes under the terms of the Letter of Offer for the loan facility.

67. Counsel associated himself with the submission of the Plaintiffs that the loss of their matrimonial homes would occasion the Plaintiffs irreparable harm and injury. Counsel submitted that the balance of convenience rests with the Plaintiffs, hence an injunction ought to be granted.

68. On record are submissions by counsel for Sarah Ayimba Tabu, the Plaintiff in ELC 136 of 2019 in respect of the Application dated 14<sup>th</sup> November, 2019. It was submitted that the Plaintiffs presented in court the sale agreements they made with the 1<sup>st</sup> Defendant, proof of payment that they made to the 1<sup>st</sup> Defendant for the purchase price and that the 2<sup>nd</sup> Defendant acknowledged the existence of the Plaintiffs.

69. Counsel placed reliance on the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR* and submitted that the balance of convenience would favour the Plaintiffs who stand to lose their family homes standing on the suit land. The court was urged to allow the Application as prayed.

70. In response, counsel for the 2<sup>nd</sup> Defendant's advocate submitted that the Plaintiffs had not demonstrated a *prima facie* case and hence the element of irreparable injury and balance of convenience did not deserve consideration by the court.

71. It was submitted that the Plaintiffs had not demonstrated that if the 2<sup>nd</sup> Defendant exercised its power of sale, then they might suffer irreparable injury. Reliance was placed on the case of *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited [2001] eKLR* where the court held as follows:

*"Is the applicant's probable injury capable of being adequately compensated in damages? I have no doubt that it is. The applicant has known all along that the securities he offered for his charge debt would be realized if default was made in the repayment. As I have said severally, once property is offered as security it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. So although Mr Wandaba's eloquence nearly induced in me tears of sympathy for the applicant, I am on a rational consideration of the matter impelled to conclude that the applicant's loss is perfectly compensable by an award of damages and that the bank is capable of meeting any such award. The Application fails on this ground too."*

72. The 2<sup>nd</sup> Defendants advocate submitted that it was a condition of the securities that the written consent of the Chargee must be obtained before any disposition of charged land is undertaken by the Chargor. Counsel placed reliance on Clause 5(g & h) of the Charge, Clause 9 of the Further Charge and Section 87 of the Land Act and Section 59 of the Land Registration Act which provide as follows:

Clause 5 g & h

*"The Chargor hereby covenants and agrees with the Chargee that during the continuance of this charge the Chargor shall at all times:*

*g) not lease, agree to lease...or part with possession of the Mortgaged Property or any part thereof or any estate or interest in the Mortgaged Property...without the prior written consent of the Chargee...*

*h) not sell or agree to sell...the Mortgaged Property or any part thereof without the prior written consent of the Chargee...*

Clause 9.1 of the Further Charge

*The Chargor shall not sell, transfer, lease, agree to lease, accept surrenders of leases, charge or part with the possession of any part of the Charged Property or any estate or interest thereof without the prior written consent of the Chargee.*

Section 87 of the Land Act

*"If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar."*

Section 59 of the Land Registration Act

*If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.*

73. Additionally, it was submitted, the 2<sup>nd</sup> Defendant's policy and practice, as is with all seasoned mortgage financiers, is that it will only give its consent by endorsing on the Agreement for Sale once both the original Agreement for Sale and purchase price of the Maisonette are forwarded to it; that in the present case, the purchase price was to be deposited in the Escrow Account and that the purchase prices were not deposited in the Escrow Account as per Clause 2.3 of the Escrow Agreement.

74. Consequently, it was submitted by the 2<sup>nd</sup> Defendant's advocate, there was no valid sale of the Maisonettes to the Plaintiffs; that the Plaintiffs do not have a legal and registrable right and/or interest in the suit property superior to that of the Chargee and that their only recourse in the present case lies in indemnity against Capital Realty Ltd and not the suit property. Counsel relied on the case of *Innercity Properties Limited vs Housing Finance & 3 others- HCCC No. E030 of 2020* where the High Court (Majanja, J.) held as follows:

*“The Interested Parties’ case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank’s consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour...”*

75. Counsel submitted that the Notice issued to the 1<sup>st</sup> Defendant- the Chargor on 24<sup>th</sup> June 2019 did indeed specify the amount due- KSh. 350,361,219.25 and the period for repayment- 3 months as prescribed by law and that the same was served via registered post.

76. Counsel submitted that the 2<sup>nd</sup> Defendant's Statutory Power of Sale has arisen validly and within the bounds of sections 90 and 96 of the Land Act; that the 2<sup>nd</sup> Defendant's right over the charged property supersedes any other purported interest in the property and that the Plaintiffs have not established a legal claim against the bank and have thus failed to show a clear and unmistakable right to be protected from the exercise of the Chargee's statutory power of Sale.

77. It was submitted by the 2<sup>nd</sup> Defendant's advocate that if a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration and that in any case, courts have time and again put defaulters who are Applicants in various cases on notice that the securities offered for a charged debt will always be realized if there is a default in repayment.

78. It was submitted that the Courts have also stated that an Applicant must demonstrate irreparable injury that cannot be compensated by an award of damages; that there is a specific quantum stated by the Plaintiffs as loss(es) to be suffered if an injunction is not granted and that the 2<sup>nd</sup> Defendant is capable of meeting any such award, on the off chance that the Court is convinced that it was in fact not entitled to exercise its Statutory Power of Sale.

79. It was submitted that it has now been judicially settled that an Applicant seeking an interlocutory injunction has to satisfy all the three conditions, sequentially, before the same is granted; that the Plaintiffs have failed to establish both *prima facie* case and demonstrate irreparable injury if a temporary injunction is not granted and that as such the Court need not consider whether the balance of convenience is in their favour.

#### **Analysis and findings:**

80. The Plaintiffs in the two consolidated suits are seeking for injunctive orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from disposing, selling, transferring, taking possession of or in any way dealing with the Maisonettes situate on the property known as Land Reference Number 12715/617 (*Original Number 12715/11742*) (*the suit property*) pending the hearing and determination of this suit.

81. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*see Giella vs. Cassman Brown & Co Ltd (1973) EA 358 and Fellowes and Son v. Fisher [1976] 1 QB 122*).

82. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

*“...In civil cases, it is a case in 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.”*

83. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court of Appeal restated the law as follows:

*“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*(a) establish his case only at a prima facie level,*

*(b) demonstrate irreparable injury if a temporary injunction is not granted, and*

*(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate*

*remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."*

84. In *Dr. Simon Waiharo Chege vs. Paramount Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 360 of 2001*, Ringera J (as he was) then held as follows:

*"The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the Courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as appertains to the subject matter of the suit does not meet the approval of the eye of equity."*

85. The undisputed facts of this case are that the 1<sup>st</sup> Defendant purchased and became the registered proprietor of all that parcel of land known as L.R. No. 12715/11742 (previously 12715/617) situated off the Nairobi-Mombasa Road and within the Syokimau area, Machakos County.

86. The 1<sup>st</sup> Defendant subsequently designed 76 Town Houses (*Maisonnettes*) for development on the suit property together with the usual conveniences connected thereto including a perimeter wall, electric fencing, guard house, a social hall, cabro paved driveways, borehole, water tower with storage water tanks, sewer treatment plants, landscaped gardens and pathways.

87. Having designed the said houses, the 1<sup>st</sup> Defendant approached the 2<sup>nd</sup> Defendant and applied for a loan facility of Kshs. 300,000,000 to assist the 1<sup>st</sup> Defendant with the necessary finance to develop the suit premises. The 2<sup>nd</sup> Defendant approved the loan facility and by a Letter of Offer dated 10<sup>th</sup> June 2010 agreed to advance the 1<sup>st</sup> Defendant the sum of Kshs. 310,000,000.

88. Subsequently, by another Letter of Offer dated 23<sup>rd</sup> May, 2013, the 2<sup>nd</sup> Defendant agreed to advance to the 1<sup>st</sup> Defendant the sum of Kshs. 40,000,000, bringing the total amount of the loan to the sum of Kshs. 350,000,000. The said loan was secured by a revolving Charge & Further Charge over the suit property.

89. The construction of the project was completed and handed over to the 1<sup>st</sup> Defendant by the contractor in May, 2015 and the selling of the *Maisonnettes* to third parties, including the Plaintiffs commenced.

90. As a condition precedent to the granting of the loan facility, the parties also executed Escrow Agreements dated 28<sup>th</sup> July, 2011 and 27<sup>th</sup> August, 2013 under which the 1<sup>st</sup> Defendant created an Escrow Account with the 2<sup>nd</sup> Defendant and (*as per Clause 2.3 of the Escrow Agreement*) into which all proceeds of the sale of the *Maisonnettes* were to be deposited. The said clause provided as follows:

Clause 2.3 (b)

*"The Borrower shall cause to be paid directly into the Escrow Account all the receivables, for the avoidance of doubt the Receivables shall include all proceeds of sale for any and every unit sold or agreed to be sold from the Project including all prepayments payable by purchasers of Units of the Project either as deposits, instalments or any other amounts under a Sale Agreement."*

91. The 2<sup>nd</sup> Defendant's case is that the 1<sup>st</sup> Defendant defaulted on loan and interest repayments severally thus necessitating the issuance of Demand and Statutory Notices by the 2<sup>nd</sup> Defendant on 31<sup>st</sup> March 2015, 8<sup>th</sup> November 2017, 24<sup>th</sup> June 2019 and 7<sup>th</sup> October 2019 and that as at 23<sup>rd</sup> January 2020, 1<sup>st</sup> Defendant's loan arrears totalled to Kshs. 301,324,569.80.

92. According to the 1<sup>st</sup> Defendant's Director, the 1<sup>st</sup> Defendant proceeded to sell the Town Houses to the Plaintiffs and other third parties on the terms and conditions stipulated in the various Agreements for Sale; that to date, the 1<sup>st</sup> Defendant has sold a total of 66 out of the 76 Town Houses developed on the Property and that the proceeds of sale were applied towards the repayment of the Loan and other costs directly incurred in the Project which were not covered or envisaged to be covered by the Loan.

93. The 1<sup>st</sup> Defendant's Director has not explained in his Affidavits why the 1<sup>st</sup> Defendant did not deposit all the proceeds of the sale of the 66 units in the Escrow Account as agreed between the parties. Indeed, a perusal of the Escrow Account annexed on the 1<sup>st</sup> Defendant's Affidavit does not tally with the sales of the *Maisonnettes* as indicated in the 1<sup>st</sup> Defendant's status report.

94. Furthermore, there is no evidence to show that the 2<sup>nd</sup> Defendant, being the chargee, was made aware of the sales that the 1<sup>st</sup> Defendant was making in strict compliance with the provisions of the Charge, the Further Charge and the law. Clause 5 (g & h) of the Charge provides as follows:

*“The Chargor hereby covenants and agrees with the Chargee that during the continuance of this charge the Chargor shall at all times:*

*g) not lease, agree to lease...or part with possession of the Mortgaged Property or any part thereof or any estate or interest in the Mortgaged Property...without the prior written consent of the Chargee...”*

*h) not sell or agree to sell...the Mortgaged Property or any part thereof without the prior written consent of the Chargee...*

Clause 9.1 of the Further Charge:

*The Chargor shall not sell, transfer, lease, agree to lease, accept surrenders of leases, charge or part with the possession of any part of the Charged Property or any estate or interest thereof without the prior written consent of the Chargee.*

Section 87 of the Land Act:

*“If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.”*

Section 59 of the Land Registration Act

*If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.*

95. It is therefore obvious from the above provisions of the law and the Charge documents that the Agreements which the Plaintiffs entered into with the 1<sup>st</sup> Defendant would only be enforceable as against the 2<sup>nd</sup> Defendant, whose interests on the suit property supersedes the Plaintiffs' interest, after the 2<sup>nd</sup> Defendant has given its consent, with evidence of the payment of the purchase price which was to be deposited in the Escrow Account.

96. Although the Plaintiffs have a beneficial interest in the suit property having purchased the same, the said interest is subordinate to the Bank's interest as Chargee. A charge is an overriding interest within the meaning of section 28(g) of the Land Registration Act, which means that the rights and interest of a chargee in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property.

97. It is trite that the bank being the holder of the charge would have first priority over the suit property as long as the land remains charged. In *HCCC No. E035 of 2020: Monica Waruguru Kamau & Anor vs. Inncity Properties Ltd.*, Tuiyott, J. in dismissing the claim for an injunction quoted with approval the case of *Inncity Properties Limited vs. Housing Finance & 3 others- HCCC No. E030 of 2020* where Majanja, J. held as follows:

*“The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour...”*

98. Just like in the above case, the Plaintiffs have not exhibited any evidence to show that the 2<sup>nd</sup> Defendant gave its consent before the Maisonettes standing on the suit property were sold to them.

99. As per Clauses 8 and 9 of the Charge and Clauses 7.1 and 7.2 of the Further Charge, in the event of default or breach of the charge, the 2<sup>nd</sup> Defendant is entitled at its option to sue for the repayment of the secured obligations and enforce the payment thereof and/or exercise the statutory powers, rights and privileges conferred on the chargee by law, including the right to sell the charged property.

100. The Plaintiffs must have been aware that the suit property was charged, and that for any sale to be valid, the Chargee was required to give its consent. All the Plaintiffs were required to do was to conduct an official search on the suit property, and insist on the consent of the Chargee before committing their money. They seem to have missed this crucial step, which is a basic requirement in this kind of transactions.

101. According to section 90 of the Land Act, a Chargee is entitled to issue a three months' Notice in writing to a defaulting Chargor, if the default persists for one month. The said Notice is required to adequately inform the recipient of the nature and extent of the default.

102. If the default consists of non-payment of any money due under the Charge, it must specify the amount that must be paid to rectify the default and the period within which it should be paid, not being less than three months. If the Chargor does not comply with the Notice within the stipulated time, the Chargee is at liberty to exercise various remedies, including selling the charged land.

103. In the present case, the Notice that was issued to the 1<sup>st</sup> Defendant on 24<sup>th</sup> June 2019 did specify the amount due and the period for repayment as prescribed by law. The 40 days Notification of sale was also validly issued.

104. In the present case, after the lapse of the prescribed three months, Capital Realty Ltd. had made little effort to regularize its mortgage account. Instead of regularizing its account, it rushed to the High Court in Machakos and sought for an injunction in *Machakos HCCC No. 6 of 2020; Capital Reality Limited Vs. Housing Finance & Another*.

105. While dismissing the 1<sup>st</sup> Defendant's prayer for injunction in the above suit, Odunga J held as follows:

*“Having considered the issues raised by the Plaintiff, I am unable to find that the Plaintiff has established a prima facie case for the purposes of the grant of an injunction pending the hearing and determination of the suit.”*

106. I am of the same view. Considering that neither the Plaintiffs nor the 1<sup>st</sup> Defendant have repaid the amount due and owing to the 2<sup>nd</sup> Defendant, or deposited all the proceeds of the sale in the Escrow Account as agreed, it is my finding that the Plaintiffs have not established a prima facie case with chances of success.

107. As was held in the case of *Elijah Kipng'eno (supra)*, the Plaintiffs and the 1<sup>st</sup> Defendant knew all along that the charging of the suit property would lead to the realization of the same if the amount due to the 2<sup>nd</sup> Defendant was not repaid. Once a property is offered as a security, it by that very fact becomes a commodity for sale. And there is no commodity for sale whose loss cannot be compensated adequately in damages. That being the case, and for the reasons I have given above, I dismiss the Plaintiffs' Application dated 14<sup>th</sup> November, 2019 with costs.

108. This being a test suit, this Ruling will apply *mutatis mutandis* to all the other pending Applications seeking for injunctive orders in this court between third parties on one hand and the two Defendants herein on the other hand, in respect to the Maisonettes built on L.R. No. 12715/617 (*original number 12715/11742*).

**DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 23<sup>RD</sup> DAY OF OCTOBER, 2020.**

**O. A. ANGOTE**

**JUDGE**