REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 284 OF 2016

ESTHER KEMUMA MOGAKA ……. 1ST PLAINTIFF

OURU POWER LIMITED …….2ND PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED …… DEFENDANT

R U L I N G

1. This ruling is in respect of two applications. One filed by the plaintiffs dated 16th September 2016. By the application the plaintiffs seek the following substantive order:

> **"That the Honourable Court be pleased to grant an order of temporary injunction restraining the defendant either by herself, nominated agents, servants and/or anyone claiming and/or acting under the said defendant, from exercising the statutory power of sale over and in respect of LR No. Kisii Municipality/Block III/334, hereinafter referred to as ("the suit property") and in particular advertising for sale, selling vide public auction and/or private treaty currently scheduled on the 14ty day of October 2016 or any other date, disposing of, transferring, leasing, alienating, clogging and/or in any other manner interfering with the 1st plaintiff's title, rights and/or interests therein, whatsoever and/or howsoever, pending the hearing and determination of the suit."**

The application is premised on the grounds set out on the face of the application and the affidavit sworn in support by Esther Kemuma Mogaka, and the further affidavit sworn on 16th September 2016 and 19th October 2016 respectively. The court on 5th October 2016 granted an interim order of injunction ex parte in favour of the plaintiff pending the hearing and determination of the plaintiff's application.

2. The defendant vide a Notice of Motion dated 15th October 2016 filed in court on 17th October 2016 brought under Order 12 Rule 7 and Order 40 Rule 4 (2) and 7 among other legal provisions sought inter alia an order:-

> **"That the honourable court be pleased to set aside the interim order of injunction issued on the 5th October 2016 as against the defendant and discharge the injunctive order restraining the defendant from exercising its statutory power of sale over the charged property Kisii Municipality/Block III/334 pending the hearing and determination of this suit."**

3. The application was premised on the grounds set out on the body of the application and on the annexed supporting affidavit sworn by one Lwanga Mwangi, a Debt Recovery officer of the defendant on 15th

October 2016. The same Lwanga Mwangi of the defendant's bank also on the same day (15th October 2016) swore a replying affidavit in opposition to the plaintiff's application dated 16th September 2016. The defendant's affidavit in support of its application and the replying affidavit in opposition to the plaintiff's application are save for a few paragraphs in the defendant's affidavit in support of its application, explaining the reason for the defendant's non attendance in court on 5th October 2016 when the interim order of injunction was granted similar in content. The affidavits set out in considerable detail the relationship between the plaintiffs and the defendant is so far as the defendant extended banking facilities to the 2nd plaintiff as the borrower against the security by way of charge over land parcel **Kisii Municipality/Block III/334** registered in the 1st plaintiff's name.

4. I have reviewed the application by the plaintiffs and the application by the defendant and it is apparent and clear to me that a determination of the application by the plaintiff will invariably result in the determination of the defendant's application. The application by the plaintiff as set out above seeks an order of injunction to restrain the realization by way of sale by way of public auction or private treaty of the security held by the defendant over land parcel **Kisii Municipality/Block III/334** pending the hearing and determination of the suit. The court having granted an ex parte interim order of injunction restraining the defendant from exercising its power of sale in regard to the security it holds pending the hearing of the plaintiff's application, it follows that the defendant's application seeking the setting aside and discharge of that order will dissipate following the determination of the plaintiff's application. In the premises therefore, I will set out to consider and determine the application by the plaintiff dated 16th September 2016 whose determination will equally dispose off the defendant's application dated 15th October 2016.

5. The application by the plaintiffs is predicated on the various grounds set out on the face of the application. Inter alia, the plaintiffs aver that they were afforded banking facilities by the defendant which facilities were secured by way of charge over **LR No. Kisii Municipality/Block III/334** amongst other securities. That the plaintiffs were granted banking facilities in the aggregate sum of kshs. 115,000,000/= as per the banking facility letter dated 7th October 2015 on the terms set out in the said letter **("EKM2")** which provided for a maximum interest rate of 21% p.a. The plaintiffs however aver that the defendant contrary to the reserved maximum rate of interest, charged interest rates that were way beyond the mutually agreed maximum rate of interest with the result that the loan amount escalated and that the defendant as at 8th February 2016 made a demand for payment of kshs. 123,303,528/52. The plaintiffs claim that this amount was not due and owing and yet the defendant proceeded to issue and serve a statutory notice of its intention to exercise its power of sale.

6. The plaintiffs claim the defendant proceeded to issue and serve a notification sale and to schedule a date of sale on 14th October 2016 without complying with Section 96 (2) of the Land Act No. 6 of 2012 and further without obtaining a statutory valuation as required under Section 97 (2) of the Land Act No. 6 of 2012 and in the premises contends that the intended exercise of the power of sale in regard to the security held is premature, irregular and illegal and is a clog on the plaintiffs equity of redemption.

7. The defendant through the replying affidavit sworn in opposition to the plaintiffs application under paragraph 5 set out the various banking facilities the defendant extended to the 2nd plaintiff from 12th September 2008 when an initial facility of kshs. 30,000,000/= was granted to the 2nd plaintiff. The facility was renewed year on year at enhanced rates and the renewal vide a letter of offer dated 15th September 2014 was for a credit facility of kshs. 115,000,000/=. This is the facility which was further renewed vide the letter of offer dated 7th October 2015. The various letters of offer were collectively annexed as **("LMI")**. The defendant states inter alia the parties agreed the following terms and conditions would apply to the facility:-

a. The overdraft facility is repayable on demand (Clause 3 of offer letter dated 7th October 2015).

b. The letter of credit draw down under the aforesaid limit would be repaid within a maximum period of ninety (90) days. (Clause 3 offer letter of 7th October 2015).

c. Interest on the overdraft facility would be charged on the daily outstanding balance but debited to the account monthly in arrears at the interest rate of 11.13%p.a above the Kenya Bank's Reference Rate (KRRR) subject to a floor rate of 21% p.a. whichever is higher, on a reducing balance. The bank reserved the right to vary the interest rate and or the basis of computation thereof, upon notice, at its sole discretion. (Clause 4 offer letter of 7th October 2015).

d. That if the borrower shall not pay any sum payable on its due date the charger and/or borrower would pay additional interest of 10% p.a. (Clause 8 (vi) offer letter of 7th October 2015.

The plaintiffs accepted the aforesaid terms and conditions on 12th October 2015 by duly signing the memorandum of acceptance appended to the letter of offer dated 7th October 2015.

8. The defendant further stated the facilities extended to the 2nd plaintiff as the borrower were secured by various securities including:-

i. A first legal charge dated 13th April 2010 over LR No. Kisii Municipality/Block II/334 registered in the name of Esther Kemuma Mogaka ("LM3").

ii. A further legal charge dated 12th April 2011 over LR No. Kisii Municipality/Block III/334 ("LM5").

iii. A second further legal charge dated 27th October 2014 over LR No. Kisii Municipality/Block III/334 ("LM6").

The banking facilities were also secured by joint and several guarantees by Zablon Nyamari Mogambi Mogaka and Esther Kemuma Mogaka collectively annexed and marked **"LM7"**.

9. The defendant averred that the plaintiffs defaulted in the servicing of the overdraft facility by failing to make payments punctually when they fell due resulting in the account being overdrawn to the sum of kshs. 123,303,528.52 as at 8th February 2016. As the plaintiffs did not regularize the account the defendant sent a demand letter through its advocates on 17th February 2016 **("LM8")** demanding payment within 14 days. The defendant further issued a statutory notice to the plaintiffs dated 23rd February 2016 under the provisions of Section 90 of the Land Act 2012 signifying their intention to exercise its power of sale conferred under the charge if the debt was not paid within three (3) months of the notice **("LM9")**. The defendant further gave a notification of sale under Section 96(2) of the Land Act, 2012 vide letter dated 25th May 2016 **("LM10")**. On 28th July 2016 the defendant's advocates instructed the Auctioneers to proceed to realize the security by public auction **("LM12")**.

10. The defendant contends that they have adhered to the provisions of the law in seeking to realize the security held contrary to the averments by the plaintiff that the defendants have not followed due process to realize the security.

11. The further supporting affidavit sworn by the 1st plaintiff in response to the defendant's replying affidavit is rather argumentative. For instance it is averred the statutory notice dated 23rd February 2016 was not received until 4th March 2016 and thus the service of the notification of sale under Section 96 (2) of the Land Act, 2012 dated 25th May 2016 was premature since a period of 3 months had not elapsed since receipt of the initial statutory notice dated 23rd February 2016. The 1st plaintiff disputed that any revaluation of the property was done before the process of realization was commenced stating that the auctioneer relied on a valuation that had been done in 2013 before the facility was granted arguing that this was not in conformity with Section 97 of the Land Act, 2012. The plaintiffs thus contend they have demonstrated a prima facie case with a probability of success to warrant the court to grant them an

interlocutory order of injunction as sought in the Notice of Motion.

12. The application(s) was argued by way of written submissions. The plaintiffs/applicants submissions dated 28th November 2016 were filed on 29th November 2016 while the defendants submissions dated 6th December 2016 were filed on 8th December 2016. The submissions by the parties have substantially reiterated the facts as set out in the parties respective affidavits. The parties have further submitted on questions of the applicable law and have referred the court to various authorities to support their respective positions. The plaintiffs application being one seeking the grant of a temporary injunction, the issue to determine is whether the plaintiffs have satisfied conditions and the criteria applicable in granting an interlocutory injunction as laid down in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358** where the court stated the broad principles thus:-

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

13. The Court of Appeal in the case of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others [2014] eKLR** provided some insights on the application of the three conditions articulated in the **Giella –vs-Cassman Brown** case **(Supra)**. The court held thus:-

> **"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 –vs- 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."**

14. In the instant matter the fulcrum of the plaintiffs' application is that the plaintiffs' dispute having been served with the requisite statutory notices as required under Sections 90, 93 and 96 of the Land Act, 2012. The plaintiffs further argue that if any notices were served they were irregular and therefore invalid, for non compliance with the provisions of the law. In particular the plaintiffs contend that no appropriate notice was served on then under Section 96 (2) of the Land Act, 2012 which was a pre requisite before the defendant could initiate the process of realization of the security in respect of land parcel **Kisii Municipality/Block III/334**. The plaintiffs have further contended that the defendant did not comply with Section 97 of the Land Act, 2012 which requires that a chargee obtains a current valuation of the charged property before the property can be sold pursuant to the chargee's exercise of power of sale.

15. For its part the defendant contends that the plaintiffs were served with all the requisite notices as required under the Land Act, 2012. The defendant submitted that the plaintiffs were served with the undernoted documents as pleaded in the replying affidavit of Lwanga Mwangi dated 15th October 2016.

i. Demand letter dated 17th February 2016 requiring the plaintiffs to regularize the account which was overdrawn to the extent of kshs.123,303,528.52 as of 8th February 2016 ("LM8").

ii. Statutory notice under Section 90 (3) of the Land Act 2012 dated 23rd February 2016 through registered post ("LM9").

iii. 40 days notification of sale pursuant to Section 96 (2) of the Land Act, 2012 dated 25th May 2016 through registered post ("LM10").

iv. A 45 days redemption notice dated 9th August, 2016 issued by M/s Garam Investments (LM12").

16. The defendant submits there is clear demonstration that the defendant served all the appropriate notices required under the Land Act, 2012 and that the plaintiffs' allegations of non service are without any basis. I have perused the notices sent by the defendant to the plaintiffs and it is clear that the demand letter dated 17th February 2016, the statutory notice dated 23rd February 2016 and the notification of sale dated 25th May 2016 were all posted to the plaintiffs address given under the instrument of charge dated 13th April 2010 and the subsequent further charge and second further charge as **"Post Office Box Number 3769-40200, Kisii"**. The notices show on the face of it that they were sent under certificate of posting and are embossed with prepaid stamps denoting the same were paid for. Under Clause 24 (o) of the instrument of charge dated 13th April 2010 any notice or demand for payment was deemed to have been received or served 5 days following the date of posting provided the notice or demand was properly addressed. The clause provided as follows:-

24(o) Any notice or demand for payment by the chargee hereunder shall without prejudice to any other effective mode of serving the same be deemed to have been properly served on the chargor and/or the borrower if left at the charged property or at the principal place of business of chargor and/or the borrower or if sent by post to the chargor and/or the borrower at its postal address referred to above. Any such notice or demand dispatched by post shall be deemed to have been served on the addressee five (5) days following the date of posting notwithstanding that it may be undelivered or returned undelivered and in proving such service it shall be sufficient to prove that the notice or demand was properly addressed and put into the post.

The further charge and the second further charge expressly and impliedly incorporated the above terms in regard to service of any demands and notices under Clause 5 of these subsequent instruments. I am in the circumstances persuaded that the plaintiffs were infact served with the statutory notice under Section 90 of the Land Act, 2012 and the notification of sale under Section 96 (2) of the Land Act, 2012.

17. I agree with the defendant's counsel that the decision that this court made in the case of **Kisii HC ELC No. 217 of 2014 Musa Angira Angira –vs- Industrial & Commercial Development Corporation (unreported)** is distinguishable. In that case there was no service of a notice of sale under Section 96 (2) of the Land Act, 2012 unlike in the instant case where the notification of sale vide the letter of 25th May 2016 was clearly a notice under Section 96 (2) of the Land Act, 2012. This letter was appropriately addressed to the 1st and 2nd plaintiffs as shown on the face of it. The Post Master has acknowledged receipt by embossing the prepaid postage stamps on the face of the copy of the notices.

18. The plaintiffs do not deny indebtness to the defendant but appear to dispute the quantum. The plaintiffs allude to the fact that the defendant has charged interest beyond the agreed maximum of 21% p.a. as per the Banking facility letter dated 7th October 2015 **"EKM2"** although the same letter under

Clause 8 (vi) provided that in case of any excess over the approved limit an additional penal interest of 10% p.a. would be charged. The defendant has annexed as **"LM14"** the running current account of the borrower, the 2nd plaintiff from January 2012 to 30th September 2016 which shows a closing debit balance of kshs. 149,535,098.74. The abstract statement shows that as at 1st February 2016 the debit balance was kshs. 123,303,528.52 and this is the amount that the defendant made a demand of in the demand letter of 17th February 2016. The plaintiffs allege that the amount of money claimed by the defendant is as consequence of fraud and unlawful and fraudulent mismanagement of the plaintiffs overdraft account by the defendant and deny that the amount claimed is due and/or owing.

19. The undisputed fact is that the plaintiffs were extended banking facilities in the aggregate sum of kshs. 115,000,000/= as per the letter of offer of 7th October 2015. The second further charge **"LM6"** dated 27th October 2014 registered on 14th November 2014 had extended security over of the existing overdraft facility from kshs. 80,000,000/= to kshs. 115,000,000/= and the letter of offer therefore was formalizing the extension of the banking facilities. The plaintiffs have not demonstrated that they repaid the banking facilities extended to them. The abstracted statement of account exhibited by the defendant shows the borrower's current account with the defendant was outstanding in the sum of kshs.123,303,528.52 as at 17th February 2016 when the demand for payment was made by the defendant to the borrower and the chargor. Under Clause 24 (d) of the charge dated 13th April 2010 it was provided that a certificate of indebtness in regard to the secured debt furnished by an officer of the chargee shall be binding and conclusive upon the chargor and the borrower barring any manifest error. Clause 24 (d) provided as follows:-

> **"a certificate of an officer of the chargee as to the secured obligations for the time being shall save in the case of manifest error be binding and conclusive upon the chargor and the borrower."**

20. On the material placed before me I am persuaded the defendant had granted to the plaintiffs banking facilities that were secured inter alia by the charge, further charge and second further charge registered over LR **No. Kisii Municipality/Block III/334**. The defendant having made demand for payment and having served the requisite 3 months statutory notice and given the appropriate notification of sale as required under the Land Act, 2012, its power of sale conferred under the charge and the statute has accrued and the defendant is entitled to exercise its power of sale to recover the outstanding debt owing to it by the plaintiffs.

21. The fact that there may be a dispute as to the amount due and owing cannot be a bar to the chargee in the exercise of the power of sale. See the cases of **Mrao Limited –vs- First American Bank (K) Ltd & 2 Others [2003] KLR 125** and **Jane Wanja Miriti –vs- Fina Bank Ltd & Another [2012] eKLR**. **Kwach, J. A (as he then was)** in the **Mrao Ltd case** (Supra) while outlining the instances where a mortgagee would be restrained from exercising his power of sale quoted Halsbury's Laws of England, Vol 32 (4th Edition) paragraph 725 as follows:-

> **"725. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began 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 in court, that is, the amount the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

22. In the present case it is abundantly clear that the plaintiffs were granted banking facilities which were secured by inter alia a charge over the suit property. The defendant avers the plaintiffs defaulted in payment of the overdraft resulting in the defendant making demand for payment and issuing the appropriate statutory notices as required under the charge and the Land Act, 2012. The plaintiffs have not shown that the overdraft facility is not due or had been paid. The plaintiffs averments that the appropriate statutory notices have not been duly served are not justified. I have found and held that the statutory notices were properly issued and served on the plaintiffs. The defendant's right to exercise its power of

sale has accrued and there is no basis to restrain the exercise of the same.

23. The court in the case of **HCCC No. 3125 of 1995 John P. O Mutere & Another –vs- Kenya Commercial Bank Ltd** held that:-

> **"Once a power of sale has arisen a mortgage has the right to exercise it. The court has no power to prevent the exercise of that power if it is being properly exercised. It is a power parliament has granted a mortgagee and courts cannot and ought not to interfere if it is being exercised."**

I agree with the observation. It is to be remembered that the mortgagor/ chargor and the mortgagee/chargee freely enter into the contract and the intention is that both parties will be bound by the terms of the contract as spelt out in the mortgage or charge and thus when either of the parties is enforcing the terms of the contract, the courts ought not to be used as impediments to the enforcement of the contract. The courts ought to intervene only where it is shown the party seeking enforcement has flouted the terms of the contract and/or is acting maliciously to the prejudice of the other party. A party who approaches the court for an order of injunction must demonstrate he has clean hands. An order of injunction being an equitable remedy a party seeking the same must come to equity with clean hands.

24. The court in the case of **Daniel Kamau Mugambi –vs- Housing Finance of Kenya Ltd [2006] eKLR**, Ochieng, J. cited with approval the case of **Francis J. K. Ichatha –vs- Housing Finance Co. of Kenya Ltd, Court of Appeal C. A No. 108 of 2005 (unreported)** where the court observed thus:-

> **"A plaintiff should not be granted an injunction if he does not have clear hands, and no court of equity will aid a man to derive advantage from h is 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 repayment to the defendant/respondent a debt of which he expressly undertook to pay."**

25. In the instant matter, I have stated that the plaintiffs have not demonstrated they have paid the facility granted to them by the defendant and have merely stated that the defendant has fraudulently mismanaged the account by charging irregular and excessive interest. Not to mention that no particulars of any alleged fraudulent acts attributed to the defendant have been furnished. I am not satisfied the plaintiffs have approached the court with clean hands.

26. Taking into account the totality of all the evidence and material placed before the court by the parties, I am not persuaded the plaintiffs have demonstrated a prima facie case with a probability of success. I have found and held that the defendant in seeking to exercise its power of sale conferred under the charge has complied with the legal provisions as to the service of the requisite notices under the Land Act, 2012. Although the plaintiffs have submitted that the defendant had not complied with Section 97(3) of the Land Act, 2012 as pertains to obtaining a revaluation of the property for purposes of ascertaining the forced sale in the event of sale, my view is that such non compliance would not be ground to restrain the exercise of power of sale that has accrued. The plaintiffs would be entitled to other remedies provided under Section 97 of the Land Act, 2012, if it is shown the property was sold at an undervalue. At any rate since no sale has taken place yet in the present matter the chargee would in any consequent sale be well advised to take note of the provisions of Section 97 and to ensure compliance. The defendant, however, has shown a valuation was infact obtained on 13th August 2016 and therefore there was compliance with the legal provision even if the sale had proceeded as scheduled.

27. In the instant case, my view is also that damages would be an adequate remedy and that an order of injunction would not be an available remedy for the plaintiffs. The plaintiffs freely and voluntarily charged the property the subject of the suit and were clearly aware that in the event of default in servicing the debt the property was liable to be sold in exercise of the power of sale by the defendant. Hence it was foreseeable that the property could be sold if there was default. By charging the property, the plaintiffs constituted the suit property a commodity in the market which the defendant could sell to recover its loan.

28. Ochieng, J. put the matter succinctly in the case of **Andrew Muriuki Wanjohi –vs- Equity Building Society Ltd [2006] eKLR** when he stated thus:-

> **"Whenever the applicant offered the suit property as security, he was conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had the property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable even if the borrower did not pay it.**
>
> **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 interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable on the basis of the real market value of the said property."**

I am in full agreement with my brother Judge's sentiments and I concur that damages would be adequate compensation where exercise of power of sale by a chargee is eventually found to have been unjustified.

29. The upshot is that, I find and hold the plaintiff's notice of motion dated 16th September 2016 to be devoid of any merit and I order the same to be dismissed with costs to the defendant. This determination disposes of the defendant's application dated 15th October 2016. The interim order of injunction granted by the court on 5th October 2016 is discharged and vacated.

30. Orders accordingly.

Ruling dated, signed and **delivered** at **Kisii** this **31st day** of **March, 2017**.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyachiro for Oguttu for the 1st and 2nd plaintiffs

N/A for the defendant

Milcent Court assistant

J. M. MUTUNGI

JUDGE