



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 15 OF 2016**

**‘FAST TRACK’**

**AMOS KIPKORIR BUTTIT.....1<sup>ST</sup>  
PLAINTIFF**

**MICHAEL KIMELI ROTICH T/A TROCADERO PETROLEUM PRODUCTS.....2<sup>ND</sup>  
PLAINTIFF**

**JOSEPHINE JEPKOSGEI KIMELI T/A TROCADERO PETROLEUM PRODUCTS....3<sup>RD</sup>  
PLAINTIFF**

**VS.**

**BANK OF AFRICA KENYA LTD.....  
.....DEFENDANT**

**RULING**

By the application dated 27<sup>th</sup> January 2016, the Plaintiffs/Applicants are seeking the substantive order that the defendant be restrained whether by itself, its servants and/or agents from advertising, selling whether by private treaty or public auction, transferring or conveying or in whatever way interfering with the plaintiffs’ and donors proprietary interests in the land parcels known as SERGON/KOIWOPTAOI BLOCK 3(SMAMTREK) 269 and UASIN GISHU/KIMUMU/1510 pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the suit. The application is premised on the following 3 grounds that; the plaintiff has a *prima facie* case with a probability of success; that damages shall not be adequate remedy; that if in doubt the balance of convenience tilts in favour of maintaining the status quo. The instant application is supported by the Affidavit sworn on 27<sup>th</sup> January 2016 by Michael Kimeli Rotich and Supplementary Affidavit sworn by the said Michael Kimeli Rotich on 6<sup>th</sup> April 2016.

On the other hand, the instant application is opposed by the Defendant/Respondent vide the Replying Affidavit sworn on 16<sup>th</sup> Day of March 2016 by Samuel Irungu the Recoveries Officer, of the Respondent.

The plaintiffs have elaborately stated their case in their both supporting affidavit sworn on 27<sup>th</sup> January 2016 and Supplementary Affidavit sworn on 6<sup>th</sup> April 2016. The Plaintiffs’/Applicants’ case is that they are the joint owners and proprietors of the suit properties. The Plaintiffs took credit financing facility from the Defendant/Respondent totalling to Kshs.4,500,000/= of which they charged the suit properties. It is contended that the defendant/respondent illegally and unlawfully varied the interest terms and as such the Defendant/Applicant is now demanding illegal and unjustified figure of Kshs.10,880,609.20. It is

contended that the Defendant/Respondent merged 3 credit facilities under 1 contract namely an overdraft, a term loan and guarantees which are separate and distinct financial facilities with different applicable terms. It is deposed that the defendant/respondent charged over limit interest while the contract of the parties by clause 6.8 was vague and inaccurate as to whether the 10% was to be applied monthly or per annum.

The plaintiffs/Applicant have deposed that the defendant/respondent despite receiving payments of Kshs.10,997,670.12 from the borrower for the total credit advanced of Kshs.6,900,000 was still demanding Kshs.10,818,766.29 and that the defendant/respondent varied the interest rate to 29% p.a without notice and agreement of the parties. It is deposed further that the defendant is seeking to sale the plaintiffs' property by private treaty without having regard to the market value contrary to section 98(1)(d) of the Land Act and that the defendant is seeking to sale the plaintiff's property by public auction without setting and reserve price and complying with the requirement of the Auctioneers Act, 1996 contrary to section 98(1)(d) and (2) of the Land Act 2012.

It is deposed that the defendant has flouted section 44A of the Banking Act Cap 488 and that no valid redemption notices and notifications of sale have been issued as required by the Auctioneers Act, 1996, Auctioneers Rules 1997 and Land Act, 2012. The plaintiffs have deposed further in their Supplementary Affidavit that the Honourable Court has the requisite jurisdiction to hear the application and the case as the matters herein relate to charges the exercise of the chargee's statutory power of sale, redemption rights, interest variation amongst others which are matters contained in the Land Act 2012 and which section 150 of the Land Act, 2012 vests exclusive jurisdiction only upon the Environment and Land Court.

The defendant vide an elaborate Replying Affidavit sworn on 16<sup>th</sup> March 2016 is opposed to the instant application on grounds that the demand of Kshs.10,880,609.20 is not premature as alleged by the plaintiffs and that the same was made three years. It is deposed that the statutory notices herein were in strict compliance with section 90(2) of the Land Act. The defendant has deposed further that it followed the due process of law and issued relevant notices in compliance with the Land and Auctioneers Act. It is deposed that the plaintiffs are still indebted to the defendant to the tune of Kshs.12,565,755 as at 25<sup>th</sup> January 2016.

It is deposed further that this Honourable Court lacks jurisdiction to entertain this suit as the dispute between the plaintiffs and the defendant does not relate to the environment, use, or the occupation of and title to the suit property. It is deposed that based on the holding in the case of Kisimani Holdings Limited & Another vs. Fidelity Bank Limited (2013)eKLR, this matter should be transferred forthwith to the Eldoret High Court and that it is only fair and just that the plaintiff's application be dismissed with costs and the defendant be allowed to realize its security.

The plaintiffs/applicant vide Wambua Kigamwa & Co. Advocates filed their written submissions dated 6<sup>th</sup> day of April 2016 whereby they have submitted that the tenets for determining interlocutory injunction were settled in the case of Giella vs. Cassman Brown & Company Ltd. (1972) E.A 358 and which are as follows; that the applicant must show a prima facie case with a probability of success; that the denial of injunction to the applicant will result in irreparable injury that cannot be compensated by an award of damages and that if in doubt the court must decide the case on a balance of probability. It is submitted that the plaintiffs have established a prima facie case against the defendant. Counsel based his submissions on the following issues;

On charging of unlawful interests and clogging redemption, it is submitted that defendant is charging unlawful interests and has clogged redemption herein. Counsel submitted that the defendant varied interest rates against the plaintiffs without proper notice as envisaged by the law. In support of the foregoing argument, counsel relied on the provisions of section 84(1) of the Land Act. To this end counsel cited the following cases; Samuel Kiprono Sawe T/A Kericho Technical Institute vs. Industrial and Commercial Development Corporation, H. C at Kericho, Civil Case No. 42 of 2013, where it is submitted that the learned judge Sergon J granted Interlocutory injunction on the basis that the defendant had varied the interest rates from 16% to 19% without notice. In Muiruri vs. Bank of Baroda Ltd (2011)

KLR 183, where the Court of Appeal granted the injunction and noted that the appellant was challenging what appeared to be unjustified interest rates. The Court of Appeal further observed that the balance of convenience favours the grant of an injunction to maintain the status quo so as to give the appellant an opportunity to prove his/her case.

It is submitted that the defendant has clogged the right of redemption of the plaintiffs under section 89 of the Land Act, No. 6 of 2012 by combining the three facilities under one contract and that the said merger is improper. To this end counsel relied on the holding in the case of Kisamani Holdings Ltd & Another vs. Fidelity Bank Ltd, H.C at Nairobi Civil Case No. 744 of 2012 where the learned judge Havelock J. declared statutory notices being invalid and consequently granted an injunction.

It is submitted further that the 3 facilities attract different rates of interests and are operated on different and varied tenets that cannot permit a merger. To this end counsel relied on the case of National Bank of Commerce Ltd vs. Nabro & Another (2008) 1 E.A 432, where the principles of Banking Law (Oxford) (1977) 154-155 were cited by the court. In that case the court noted the different accrual of interests on an overdraft and a term loan. The court noted that while an overdraft facility attracts a compound interest, interests on a term loan only accrue on outstanding balance of the principal sum.

It is submitted further that the plaintiffs have completed paying debt herein as per the expert report of the Accountant annexed and marked 'G'. To this end counsel cited the holding in Givan Okallo Ingari & Another vs. Housing Finance Company (K) Ltd, [2007] eKLR H.C at Nairobi Civil Case No. 79 of 2007, where the learned judge Warsame J. granted the injunction and noted that it is pertinent to give a chance to the parties to contest their dispute at a full hearing, where evidence will assist the court to reach a proper verdict as to the rival positions.

On validity of statutory notices, Counsel for plaintiffs has submitted that the notices herein are invalid. It is submitted that the defendant issued two notices with cumulative sums of Kshs.22,837,722.18 and yet the charge instruments by the defendant contain charge debts of Kshs.3,000,000.00 each thus the total charge debt is Kshs.6,000,000.00 and as such the sum demanded is over three times which renders the statutory notices to be invalid for breach of section **44A of the Banking Act cap 488**. It is submitted further that the notices are in breach of the induplum tenet. To this end counsel relied on the case of John Gatu Nderitu vs. Kenya Commercial Bank Ltd [2011] eKLR, H.C at Nyeri Civil Case No. 55 of 2001, where the learned judge Sergon J. held that it was the bank that is enjoined to provide documentary evidence to the court to effect that it had complied with section 44 of the Banking Act and that a failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate.

Counsel also relied further on the case of Margaret Njeri Muiruri (Being the Administrator of the Estate of the Late Joseph Muiruri Gachoka (Deceased) Vs. Bank of Baroda (Kenya) Ltd C.A at Nairobi Civil Appeal No. 282 of 2004, where the court termed increase of the rate of interests as whimsical decision by the respondent, and not supported by any relevant factors.

It is submitted further that the notices herein are faulty and that the said default has not been indicated pursuant to the provisions of section 90(2) of the Land Act, 2012. To this end counsel cited the holding in David Gitome Kuhiguka vs. Equity Bank Limited, H.C at Nairobi Civil Case No. 94 of 2013, where the learned judge Havelock J. faulted the defendants' notices for failure to detail the amount that must be paid to rectify the default as required by section 90(2)(b) of the Land Act, 2012.

On notification of sale and redemption notices, it is submitted that the notices herein do not contain any reserve prices for the property as required under the provisions of section 98(1)(e) of the Land Act, 2012.

The Plaintiff's counsel has also submitted on the second principle of adequacy of damages. It is submitted that no amount of monetary compensation can adequately remedy the breach of an Act of Parliament. It is submitted further that at the time the suit is concluded, the prices of property shall have gone up and an award of damages shall not adequately compensate the plaintiffs. Counsel has argued that the courts have addressed the foregoing point and concluded in favour of a ward of interlocutory injunction as opposed to

damages. To this end counsel relied on the following case law; Jimmy Wafula Simiyu vs. Fidelity Commercial Bank Ltd [2013]eKLR, High Cour at Nairobi (Nairobi Law Courts) Civil Case 658 of 2012, where the learned judge Mabeya J. noted that damages are and cannot be substituted for loss, which is occasioned by a clear breach of the law.

**Samuel Kiprono Sang T/a Kericho Technical Institute vs. Industrial and Commercial Development Corporation [2014]eKLR, High Court Of Kenya at Kericho Civil Case No.42 Of 2013**, where the learned judge Sergon J. observed that as much as the anticipated loss may be ascertained in monetary terms the issues that were raised in the foregoing case were serious questions of law which may take way the plaintiff's statutory equity of redemption and that, that statutory right and protection cannot in essence be qualified in monetary terms.

On the third principle, the balance of convenience, it is submitted that the same tilts towards maintaining the *status quo* as the plaintiff are in occupation of the suit land. To this end counsel relied on the case of Dr. Joseph Kipruto Arap Ng'ok & Another vs. EABS Bank Ltd, [2009]eKLR, H.C at Nairobi Civil Case No. 296 of 2008, where the learned judge Khaminwa J. stated that the plaintiff had demonstrated a prima facie case with a good chance of success and that if their property was sold they would suffer irreparable loss not compensated in damages and the balance of convenience tilts in their favour as they are in possession.

On jurisdiction, it is submitted that the claim herein falls within the jurisdiction of the Environment and Land Court by dint of section 150 of the Land Act, 2012 which grants the court exclusive jurisdiction in regard to matters contained in the Act such as the issues herein.

The Defendant/Respondent through Wamae & Allen advocates filed their written submissions dated 20<sup>th</sup> day of April, 2016. The Defendant's/Respondent's submissions are based on various issues;

On whether the Plaintiffs have set out a case entitled them to injunction orders, it is submitted that the plaintiffs consented to be bound by the terms of contract herein. It is submitted that the defendant was justified in varying the interest terms herein. To this end counsel relied on the case of Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Limited [2013]eKLR, H.C at Nairobi (Milimani Commercial Court), Civil Case No. 74 of 2011, where the learned judge Mabeya J. noted that the parties were bound by the contract and that the parties executed the same willingly whereby the terms of the contracted required the defendant to change the rate the rate of interest at its discretion from time to time.

Counsel also cited the holding in Sammy Japheth Kavuku vs. Equity Bank Limited & Another [2014]eKLR, H.C at Mombasa Civil Case No. 84 of 2013, where the learned judge Kasango J. on citing various case law reiterated that parties to the contract are guided by the same and that if the lender reserves to himself the right to charge such interests as he shall determine and to vary the same without reference to the borrower, so it shall be. Counsel further referred the honourable court to the holding in the case of Desai & Others vs. Fina Bank Ltd [2004] 2 EA 46 at pg 51, where it was held that the function of the Court is to enforce what is agreed between the parties and not what the court ought to have been fairly agreed between the parties.

It is submitted that the plaintiffs have been unable to meet the requisite grounds for interlocutory injunction as set out in the case of Giela vs. Cassman Brown & Company Limited (1972) E.A 358.

It is submitted that no prima facie case has been demonstrated. Counsel relied on the holding in the Court of Appeal in the case of Mrao Limited vs. First American Bank Limited & 2 Others [2008]KLR 125 as quoted in Palmy Company Limited Vs. Consoldated Bank of Kenya Ltd (2014)Eklr, H.C at Nairobi Civil Suit No.527 of 2013, where the learned judge Gikonyo J. reiterated that a prima facie case in a civil case is a case in which on the material presented to the court or a tribunal properly directed 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.

It is submitted further that the Plaintiffs have not denied being indebted to the Defendant's Bank. Counsel

quoted the passage in the Hasbury's Laws of England, Vol. 32 (4<sup>th</sup> Edition) paragraph 725 where it is stated that 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.

Counsel also referred the honourable court to the holding in the case of Barmal Kanji Shah and Another vs. Shah Depar Devji [1965] EA 91 as quoted in Rainbow Company Limited vs. NIC Bank Ltd (2014)eKLR, where the court stated 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.

On irreparable damages, counsel referred the honourable to the holding in the case of Andrew M. Wanjohi vs. Equity Bank Society & Another (2006) eKLR quoted in Kisimani Holdings Limited & Another vs. Fidelity Bank Ltd (2013) eKLR H.C at Nairobi Civil Case No. 744 2012, where the court held that damages are an adequate remedy as once a property is given as security, it becomes a commodity and is subject to sale. Counsel submitted further that by dint of the provisions of section 99(4) of the Land Act, 2012, the plaintiffs shall have a remedy in damages.

On balance of convenience, it is submitted that the plaintiff has been in default to the Defendant and has not offered any repayment proposal. It is submitted that the defendant is prejudiced by the fact that it cannot recover the sums due and owing to it from the Applicants unless it exercises its statutory power of sale to recover the sum due. To this end counsel relied on the holding in Andrew M. Wanjohi vs. Equity Building Society, supra where the learned judge Ochieng J. noted that if the 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 had never made any repayment for more than three years. The learned judge held further that the stoppage of the intended sale by the chargor would result in the continued growth of debt and thus exposing them potentially substantially irrecoverable losses.

It is submitted that the notices herein conform to the provisions of Section 90(2) of the Land Act. Counsel cited the holding in Andrew M. Wanjohi vs. Equity Building Society & Another, supra, where the learned judge Ochieng J. noted 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 interests thereon.

Counsel has submitted that defendant has a right to exercise Statutory Power of Sale and that the notices issued were valid. Counsel cited the holding in the case of Fina Bank Ltd vs. Ronak Ltd (2001) 1 EA 54 (CAK) where the Court held that the right to charge interest at a variable rates its absolute and sole discretion and that the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified.

On jurisdiction, the Defendant's counsel has submitted that this court lack's jurisdiction over this matter and the same ought to be transferred to the High Court for determination.

In the Determination of the application the court considers the The main salient issues for determination as follows:-

**a. Whether the honourable court has jurisdiction to here this matter.**

**b. Whether the injunction herein should be granted**

### **Jurisdiction of the Court.**

Both parties have not supported their arguments with provisions of the law or the case law on whether this court has jurisdiction over this matter. The plaintiffs' counsel submitted that that the claim herein falls within the jurisdiction of the court as envisaged by section 150 of the Land Act 2012 which guarantees this court exclusive jurisdiction in regard to matters contained in the Act such as the exercise of the chargee's statutory power of sale, redemption rights, interest rates variations among others.

The said section 150 of the Land Act 2012, stipulates as follows;

### **150. Jurisdiction of the Environment and Land Court**

**The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.**

While section 13 of the Environment and Land Court Act states as follows;

### **13. Jurisdiction of the Court**

**(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

**(b) relating to compulsory acquisition of land;**

**(c) relating to land administration and management;**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**

**(e) any other dispute relating to environment and land.**

**(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**

**(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.**

**(5) Deleted by Act No. 12 of 2012, Sch.**

**(6) Deleted by Act No. 12 of 2012, Sch.**

**(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—**

**(a) interim or permanent preservation orders including injunctions;**

**(b) prerogative orders;**

**(c) award of damages;**

**(d) compensation;**

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

In the case of Kisimani *Holdings Limited & another v Fidelity Bank Limited [2013] eKLR*, supra the learned judge Havelock J. rendered himself as follows;

24. However, before I leave this matter, I need to comment upon the Defendant Bank's submission that this Court lacks jurisdiction pursuant to *Article 165 (5) (b)* of the *Constitution*. As I understood the Defendant Bank's position in the matter, it is saying that as the Environmental and Land Court has now been set up under its own Act in 2011, it is the only Court that shall hear and determine all disputes relating to land. It makes its point even more definite by reference to the issue of practice directions by the Chief Justice on 20th September 2012 through Gazette Notice No. 13573. Those directions were to the effect that all new cases which shall be filed relating to land should now be put before the nearest Environment and Land Court for hearing and determination. The Plaintiff herein was filed on 30th November 2012 and thus, according to the Defending Bank, it should have been filed in the Environment and Land Court as it relates to the suit property L. R. No. 13544/99, Nairobi. I have considered this point and asked myself as to whether this case really relates to a matter of land or is it based on some other cause of action. In my opinion, the Plaintiff as drawn, as well as the Defence herein, relate to banking transactions as between the 2nd Plaintiff and the Defendant Bank with the 1st Plaintiff as guarantor therefore. The Plaintiff raises other issues other than whether the Defendant Bank's statutory power of sale has arisen as regards the suit property such as interest rates applicable to the banking transaction, the extent of the 1st Plaintiff's liability to the Defendant Bank as guarantor, as well as to the amount necessary to be found by the Plaintiffs to redeem the suit property. All these matters related to the tripartite contract as between the parties evidenced by the offer and acceptance of the Defendant Bank's facility letter of offer dated 13th January 2011. In my view, the charging of the 1st Plaintiff's property as security is a secondary issue to the main cause of action being the banking transaction to which I have referred. As a result, I do not consider that the suit before Court is a dispute relating to land. *Article 165 (5) (b)* of the *Constitution* to which the Defendant Bank refers in its submissions reads that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in *Article 162 (2)* of the *Constitution*. *Article 162 (2)* reads as follows:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

a) employment and Labour relations; and

b) the environment and the use and occupation of, and title to, land.”

With all due respect to the learned counsel for the Defendant Bank, I do not consider that the suit before this Court involved a dispute as regards to the environment, the use, or the occupation of and title to the suit property. As I see it, the suit property being offered by way of security to the Defendant Bank for the loan facilities availed to the 2<sup>nd</sup> Plaintiff, the same became a commodity which the chargee, the Defendant Bank, could sell off in order to recover monies lent to the 2nd Plaintiff. To this end, I adopt the finding of Ochieng J. in the Andrew Wanjohi case (supra) when he stated:

“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.”

In the foregoing case, the learned judge Havelock J. had the view that the matters relating to recovery of the loan with regard to charges/mortgages are purely commercial issues and do not relate to the environment, the use, or the occupation of and title to the suit property and as such can competently be handled by the High Court as opposed to the Environment and Land Court.

In the case of *Esther Nyanganyi Onyango v Housing Finance Company of Kenya & another [2016] eKLR, H.C at Mombasa Civil Suit No. 04 OF 2014* the learned judge Otieno J. opined at para 20 as follows;

**20. For the foregoing reasons, I refuse to construe the statute, section 13 (2) d of the Environment and Land Court Act with the strictness Mr. Kongere has sought from the court. I hold that commercial transactions even if grounded on land must remain commercial transaction unless they vest or create rights that can result in and touch on Environment, the use and occupation or title to land. In the instant case, the question is whether or not the bank should recover its debt in terms of the collateral and not otherwise. I therefore find no merit in the preliminary objection and dismiss the same with costs.**

In the foregoing case, the learned Judge dismissed a Preliminary Objection that questioned the jurisdiction of the High Court over the issues relating to statutory power of sale under the Land Act. In view of the above holding, the learned judge Otieno J. appears to read from the same script as Justice Havelock (*See Kisimani Holdings Ltd Case*) with regard to commercial transactions and noted that even if founded on the land are squarely commercial and hence to be dealt by the High Court.

In the case of *Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] eKLR, In the Environment and Land Court at Nairobi, ELC Suit No. 317 of 2014* the learned judge Nyamweya J. opined as follows;

**The dispute herein involves property situated on a parcel of land, and the specific prayers sought by the Plaintiff in the Plaint filed herein dated 18<sup>th</sup> March, 2014 are a declaration that the Plaintiff is the owner of the said property, that that the continued occupation of the property by the Defendant is illegal, orders of eviction, and a permanent injunction restraining the Defendant from dealing with the suit property. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. In addition, the Land Registration Act which provides for certain matrimonial property rights and co-ownership of the matrimonial home as between spouses specifically provides under section 101 thereof that this Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.**

In the foregoing case, the learned judge Nyamweya J. appears to suggest that any matters relating to occupation and or touches title on land are reserved for Environment and Land Court.

As much as there are divergent and or conflicting decisions regarding the Environment and Land Court over commercial issues relating to land, I do hold that the provisions of section 13 (2) para (d) of the Environment and Land Act, are very clear. The said provisions state as follows;

**(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—**

**(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and...**

It follows therefore as much as the issues involved may be commercial and or contractual, as much as they relate to land, then the Environment and Land Court has jurisdiction over the same, in my view. The honourable court therefore has jurisdiction over this matter. I do hold that the disputes herein, that is regarding the charge over the land herein, falls under “**...instruments granting any enforceable interests in land...**” and therefore this Court is rightfully in seizure of the jurisdiction of this matter.

***Both counsels have ably submitted on the principles for granting or denying an injunction as set out in the locus classicus case of Giela vs. Cassman Brown Case.*** The first two principles; existence of prima facie case and loss of irreparable damages have attracted very competent and rival submissions from the two sides of the divide. It is quite clear that from the authorities relied on by both counsels, it very persuasive that an injunction may be granted where it is demonstrated the correct procedure was not adhered to on exercising statutory powers of sale. It is also persuasive that a dispute on amount due regarding a mortgagee cannot guarantee an injunction. It is also important to note that an irregular exercise of the power of sale has a remedy in damages. This is in accordance with section 99(4) of the Land Act, 2012. I have considered the evidence on record and am convinced that it has not been demonstrated by the defendant that the statutory notice envisaged under section 90 of the Land Act no 6 of 2012 was served as there is no affidavit of service or evidence of postage and therefore there is establishment of a prima facie case that there was procedural impropriety. The same applies to the demand notice, and the 40 days' notice under section 96(2) of the Land Act no 6 of 2012. On the issue of irreparable injury that cannot be adequately compensated with damages this court finds that the defendant cannot be allowed to benefit from procedural impropriety in the circumstances of this case. It follows therefore that the balance of convenience tilts in favour of the Plaintiffs who are in occupation of the suit premises. It is therefore fair and in the interest of justice that *status quo* should be maintained pending the hearing and determination of the instant suit. The application is allowed

**DATED AND DELIVERED AT ELDORET THIS 28<sup>TH</sup> DAY OF JULY, 2017.**

**A. OMBWAYO**

**JUDGE**