



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC.NO.49 OF 2016

JIDRAPH MUIGAI NJUGUNASuing as the Personal Representative of the
Estate of the late **SIMON NJUGUNA WAITETE**.....**PLAINTIFF/APPLICANT**

-VERSUS-

EQUITY BANK (K) LIMITED.....**1st DEFENDANT/RESPONDENT**

WINFRED NZILANI MAELE.....**2nd DEFENDANT/RESPONDENT**

R U L I N G

The matter for determination is the *Notice of Motion* application dated **25th January 2016**, brought by the Plaintiff/Applicant herein **Jidraph Muigai Njuguna**, suing as the Personal Representative of the Estate of the late **Simon Njuguna Waitete**, seeking for orders against the Defendant/Respondent, **Equity Bank of Kenya Limited**. The orders sought are:-

1) Spent

2) Spent.

3) A temporary injunction do issue pending the final determination of the suit restraining the Respondent, itself and through its directors, officers, employees, servants, workmen, disclosed and undisclosed agents or any other persons from selling, charging, mortgaging, sub-dividing or dealing in whatsoever manner or interfering with the property known as Title Number Kabete/Nyathuna/3280.

4) The costs of this application be borne by the Respondent in any event.

The application is based on the grounds stated on the face of the application and on the **Supporting Affidavit** of **Jidraph Muigai Njuguna**. Among the grounds in support of the application are:

i. The Respondent illegally and fraudulently obtained a charge over the property known as Title Number Kabete/ Nyathuna/3280, which is the matrimonial property of the Late Simon Wainaina Waitete and Mary Njeri Njuguna, as security for a loan issued by a stranger known as Winfred Nzilani Maele without spousal consent issued by Mary Njeri Njuguna, in breach of the

mandatory provisions of Section 79(3) of the Land Act, No.6 of 2012.

ii. The absence of spousal consent for the charge vitiates any capacity that the Late Simon Njuguna Waitete may have had to charge the aforesaid property, rendering the purported charge in favour of the Defendant null and void, ab initio and legal validity at all.

iii. The Applicant (and the Estate of the Late Simon Njuguna Waitete) will suffer irreparable damage which cannot be compensated by an award of damages if the order of injunction is not granted because:

iv. Being ancestral land, that is where the deceased family members are buried, hence the emotional attachment to the land cannot be quantified and compensated by an award of damages.

The Plaintiff/Applicant's case is that he is the *administrator* of the *Estate of the late Simon Njuguna Waitete*, who was the *registered owner* of *Lr.No.Kabete/Nyathuna/3280*, the subject of this suit as is evident from *JMN 2*. That the said *Simon Njuguna Waitete* was a father to the Plaintiff/Applicant and six other siblings and his *wife* was *Mary Njeri Njuguna*. He also stated that his father died on **6th October 2014**, as is evident from the *Certificate of Death, JMN 3*. It was his case that soon after the death of his father, one *Fredrick Mule* who introduced himself as *Debt Recovery Officer* of *Equity Bank* contacted their family and informed them that **their father had an outstanding debt** with the *Bank*. That the said *Fredrick Mule* gave them the particulars of the account in which they were to make loan repayment and acting in good faith, the *family made payments* to the said Account. However, when the family sought for the particulars of the said loan, the said *Fredrick Mule* failed to do so. He also stated that the family continued to pay the alleged loan upto the tune of *Kshs.600,000/=* through *cash deposits* until **October 2015**. It was his case that they stopped making the payments when they realized the Bank and its officials were not being clear on how the loan was taken. He also stated that after stopping the payments, the Bank sent an auctioneer *T/A Antique Auctions Agencies* with a *Notification of Sale* of their land. It was then that they realized the loan was granted to *Winfred Nzilani Maele* who was a complete stranger to the family. He further stated that on **13th January 2016**, the said auctioneers (*Antique*) advertised their property for sale by Public Auction which was scheduled for **27th January 2016** as is evident from *JMN 6*. It was his contention that the Bank through its officials acted dishonestly and misled them by giving them false statements and information on the loan allegedly taken by their late father. He urged the Court to restrain the Bank from illegally selling their ancestral home as they risked losing the same and would therefore suffer irreparable damage. It was his further contention that the Bank acted in bad faith against his family. Further that the Bank has recourse against its debtor, *Winfred Nzilani Maele*, who has been working in cahoots with the Bank officials to evade repayment of the loan. He urged the Court to allow his application.

The application is *opposed* and several deponents filed *Replying Affidavits* in opposition to the said *Notice of Motion*.

On **10th May 2016**, *Winfred Nzilani Maele* applied to be *enjoined* as a **2nd Defendant/Respondent** and by consent of the parties entered on **11th May 2016**, the said *Winfred Nzilani Maele* was enjoined as a **2nd Defendant/Respondent** and pleadings were amended accordingly.

The **1st Defendant/Respondent** opposed the application through the affidavits of *Stanley M. Kiima, Kevin Mwendwa* and *Winfred Nzilani Maele*, all filed on **10th May 2016**.

In his *Replying Affidavit*, *Stanley M. Kiima* averred that the Plaintiff/Applicant's application is *misconceived, mischievous* and *an abuse of the court process*. He also averred that the Plaintiff/Applicant's allegations are riddled with blatant untruths and deliberate non-disclosure of material facts intended to mislead the Court and cloud issues. It was his averment that in **November 2013**, he prepared the first legal Charge over property known as *LR.No.Kabete/Nyathuna/3280* in the name of *Simon Njuguna Waitete* to be registered in favour of the Defendant/Respondent for *loan facility*

extended to Winfred Nzilani Maele as is evident from annexure **SK 1**.

He also averred that the said legal Charge was executed by the guarantor and the borrower and the spousal consent was witnessed before **Mr. R. M. Musili Advocate** before the same was lodged for registration. He also averred that he has been informed by **Mr. R. M. Musili Advocate** that **Mary Njeri Njuguna**, the chargor's/guarantor's spouse lawfully executed the spousal consent in his presence and he personally witnessed the execution of the said spousal consent. Further that he has also been informed that the said legal charge was similarly executed by the Chargor/Guarantor and the borrower before the same advocate, and the same was returned to him to lodge for registration. Therefore he stated that it was untruth for the Plaintiff/Applicant to allege that the spousal consent was a forged one. It was his further allegation that the suit property was charged in favour of the Defendant/Respondent after all conditions were met including securing a lawful witnessed spousal consent from the guarantor's spouse contrary to Plaintiff/Applicant's untruthful averments. Therefore the suit property is legally available for attachment and sale by the Defendant/Respondent since the same is lawfully held by the Defendant/Respondent as a lawful security for a secured debt, which overrides any other interest contrary to Plaintiff/Applicant's untruthful averments. It was his contention that all the required lawful procedures were followed in registering the legal Charge over the suit property.

In his **Replying Affidavit**, **Kevin Mwendwa** stated that he is the **Credit Manager**, at the Defendant/Respondent's Bank and it was his contention that the Plaintiff/Applicant's averments were riddled with blatant untruths and deliberate non-disclosure of material facts intended to mislead the Court and cloud the issues. He contended that in **November 2013**, **Winfred Nzilani Maele** approached the Defendant/Respondent for loan facility and the Defendant/Respondent agreed to extend the same to the borrower as long as the borrower provided security for the said loan facility. He stated that the borrower **Winfred Nzilani Maele** was granted loan facility of **Kshs.2,400,000/=** which loan was **guaranteed by Simon Njuguna Waitete** and **secured with the suit property**. He alleged that the loan facility was secured by a Personal Guarantee by the said **Simon Njuguna Waitete** and supported by the first legal charge over property known as **Kabete/Nyathuna/3280**, in the name of **Simon Njuguna Waitete** to be registered in favour of the Defendant/Respondent. He contended that **Simon Njuguna Waitete** agreed to serve as guarantor and provided the property **Kabete/Nyathuna/3280** as the charged security for the loan facility as he was the actual beneficiary of its proceeds. He also averred that after the loan facility was extended to **Winfred Nzilani Maele**, she settled the attendant fees and later withdrew first **Kshs.2,000,000/=** which she gave to **Simon Njuguna Waitete** as per the signed loan agreement. It was his contention that though the loan was **payable** in **60 equal monthly instalments** of **Kshs.63,586/= per month**, the account is **now in arrears** and the outstanding debt is **Kshs.2,690,210/=** as at **1st February 2016**, and the Plaintiff is well aware of that fact.

He further alleged that shortly after the **death** of **Simon Njuguna Waitete** on **6th October 2014**, his sons **Jidraph Muigai** (the Plaintiff/Applicant) and **Joseph Njenga Njuguna**, met with the said **Winfred Nzilani Maele** in the presence of **Fredrick Mule** an **officer** in the **Debt Recovery Unit** of the Defendant and the Plaintiff and his brothers were clearly briefed on the particulars of the loan agreement and the two undertook to pay on behalf of the family. Therefore the Plaintiff/Applicant is not a stranger to the said **Winfred Nzilani Maele** or the loan facility secured with the suit property. It is even evident that the Plaintiff/Applicant and his family members have been making payments towards the loan facility until when they defaulted. He also averred that he had been informed by **Stanley M. Kiime** of **Mutunga & Co. Advocates** that the spousal consent was secured from the guarantor's spouse which was duly signed and witnesses as required by law. Further that the **guarantor** and the **borrower executed the legal Charge** in the presence of the said **Mr. R. M. Musili Advocate** of **M/S Musili Mbiti Associates**. It was his further contention that he was also informed by **Mr. R. M. Musili Advocates** that the said **borrower, Winfred Nzilani Maele**, the **Chargor/Guarantor, Simon Njuguna Waitete** and **his spouse Mary Njeri Njuguna**, appeared before him and identified themselves with their **National Identity Cards** and the said **Mary Njeri Njuguna** executed the spousal consent in his presence and he personally witnessed the execution of the same. Therefore the allegations made against the employees of the Bank are blatantly untruths intended to mislead the Court and cloud issues. It was his further contention that the Plaintiff/Applicant and his family were well aware of the loan facility even before the guarantor passed away, a spousal consent having been lawfully executed by one **Mary Njeri Njuguna** who was personally served with all

the lawful required *Notices* and *Notifications* before proceeding with the advertisement of the sale of the suit property.

Further that the Defendant/Respondent followed all the required lawful procedures and issued all the lawful required *Notices* and *Notifications* before proceedings with the advertisement and sale of the suit property. He alleged that *the Bank Statutory Power of Sale* has rightfully accrued in the circumstances and ought to be allowed to exercise that right. He urged the Court to dismiss the Plaintiff/Applicant's application.

M/S Winfred Nzilani Maele also swore her *Replying Affidavit* on *28th March 2016*, and also averred that the Plaintiff/Applicant's averment are riddled with *blatant untruths* and *deliberate non-disclosure of material facts* intended to mislead the Court and cloud issues. She averred that the Plaintiff/Applicant and his family were well aware of the loan facility even before the guarantor, *Simon Njuguna Waitete* passed away contrary to the Plaintiff/Applicant's untruthful averments. She averred that she had entered into an arrangement with *Simon Njuguna Waitete*, wherein she *pledged her account to be used* by the said *Simon Njuguna Waitete* to *borrow a loan* from the Defendant/Respondent. The said *Simon Njuguna Waitete* was to use his property *Kabete/Nyathuna/3280* as security. She was therefore named in the Charge as borrower and *Simon Njuguna Waitete* was named as the guarantor providing security for the loan. The said loan was therefore secured by a Personal Guarantee by the said *Simon Njuguna Waitete*, who was the full and sole beneficiary of the loan proceeds and was supported by the first legal Charge over property known as *Kabete/Nyathuna/3280*, in the name of *Simon Njuguna Waitete*. The loan facility was for *Kshs.2,400,000/=* which was successful and she *withdrew Kshs.2,000,000/=* and *released it to* the said *Simon Njuguna Waitete* who acknowledged receipt as evident by annexure *WNM 2*. It was her allegations that the said *Simon Njuguna Waitete* used the loan facility to buy a *mini-bus* registration no. *KAS 185V*, plying *Hillock route* which the Plaintiff/Applicant and his family continue to use to date. Further that the Plaintiff/Applicant and his mother *Mary Njeri Njuguna*, did have meetings with the deponent and representatives of the *Bank* after *Simon Njuguna Waitete* passed on and agreed to continue making payments towards the loan. That she even surrendered the account used to process the loan to the Plaintiff/Applicant and his family which they continued to use making deposits through *Simon Njuguna Waitete's sons, Joseph and Samuel*. She also averred that she appeared with *Simon Njuguna Waitete* and his spouse *Mary Njeri Njuguna* before a lawyer *R. M. Musili Advocate*, and they identified themselves using their ID cards and they executed the legal Charge and *Mary Njeri Njuguna* executed the spousal consent before the said Advocate. Therefore it was her contention that the Plaintiff/Applicant's averments are untrue and meant to mislead the Court so that the Plaintiff/applicant and his family can defraud the Bank of the loan proceeds which they continue to enjoy through the investments they financed with the loan proceeds. She urged the Court to dismiss the instant application.

On behalf of 2nd Defendant, *Chrispus Nyumu Maithya*, an Advocate, averred that he acted for the late *Simon Njuguna Waitete* and *Winfred Nzilani Maele*, who appeared before him on *11th December 2013*, and he prepared an agreement which they duly signed in his presence. The said agreement was marked *CN 1*. Further that he prepared a second agreement on behalf of the two, wherein *Simon Njuguna Waitete acknowledged receipt* of *Kshs.2,000,000/=* from *Winfred Nzilani Maele* and the said *Simon Njuguna Waitete*, undertook to offset the said loan taken on his behalf by *Winfred Nzilani* as is evident on *CN 2*. He averred that the said *Simon Njuguna Waitete* signed the aforesaid agreement voluntarily in his presence having fully understood what he was doing.

Further, the 2nd Defendant/Respondent *Winfred Nzilani Maele*, swore her own *Replying Affidavit* dated *22nd June 2016*, and she reiterated the contents of her *earlier Replying Affidavit* sworn on *28th March 2016*. She averred that in *November 2013*, *Simon Njuguna Waitete* could not borrow funds from the Defendant/Respondent due to his advanced age and lack of an Operating Bank Account with the Defendant. He therefore requested her and she agreed to pledge her Bank Account to be used to borrow a sum of *Kshs.2,400,000/=* from the Defendant/Respondent. That the said *Simon Njuguna Waitete* wanted to utilize the money to buy a matatu. The deponent therefore borrowed the money and the said *Simon Njuguna Waitete* gave a personal guarantee and indemnity supported by legal charge of *Kshs.2,400,000/=* over his property *Kabete/Nyathuna/3280*, as evident from *WN 1 & WN 2*. That the

spouse of **Simon Njuguna Waitete, Mary Njeri Njuguna** signed the spousal consent in the presence of their Advocate. Thereafter the **loan proceeds** less the costs were **credited** in her account on **16th December 2013**. She thereafter **withdrew** the said money on **18th & 19th December 2013** and handed it to the said **Simon Njuguna Waitete** as is evident from anexture **WN4**. It was her contention that upon the demise of the said **Simon Njuguna Waitete**, she telephoned the Plaintiff/Applicant and met him together with the family members and informed them about the loan. They undertook to continue with the loan obligations of the deceased and that the family has been making payments in her account to clear the loan facility. She is therefore surprised to learn that the Plaintiff/Applicant is alleging that she is a stranger to him and his family. She averred that **Mary Njeri Njuguna** signed the spousal consent before **Mbiti Musili Advocate** in her presence. She urged the Court to dismiss the Plaintiff/Applicant's application.

In further support of the application **Mary Njeri Njuguna** swore a further **Supporting Affidavit** on **22nd June 2016**, and averred that she does not know **Stanley Kiima** and **R. Musili Advocates** and she never appeared before them and signed the spousal consent. It was her contention that the signature on the said document was not her signature. It was her contention that she was a stranger to everything averred by the two advocates as she never signed the spousal consent. She also denied knowing **Winfred Nzilani Maele** and reiterated that she has never met her to discuss any loan she took using the title of her matrimonial property. She also denied that she agreed with the said **Winfred Nzilani Maele** and the Bank to continue repaying the loan related to her matrimonial home. She urged the Court to allow her application.

On his part, **Jidraph Muigai Njuguna**, swore a further **Supporting Affidavit** and **denied** all the averments made by **Kevin Mwendwa, Winfred Maele Nziani** and **Stanley M. Kiima** and he alleged that they are all acting in collusion with respect to the fraudulent activities complained in this suit. He urged the Court to allow his application.

The application was canvassed by way of **Written Submissions** which this Court has carefully read and considered. The Court has also carefully considered the pleadings herein and the annexures thereto, the cited authorities and the relevant provisions of law and the Court renders itself as follows:

The Plaintiff/Applicant herein has sought for injunctive orders which is an equitable relief granted at the discretion of the Court. However, the said discretion must be exercised judicially. See the case of **Giella..Vs..Cassman Brown & Company Ltd 1973 E.A 358** where the court held that:

“The granting of an Interim Injunction is an exercise of Judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Since the Plaintiff/Applicant is seeking for injunctive relief, the Court will be guided by the laid down principles set out in the case of **Giella..Vs...Cassman Brown (Supra)**. There principles are:-

- a) The Applicant must establish that he has a prima facie case with probability of success.**
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c) When the Court is in doubt, to decide the case on a balance of convenience.**

These principles have been repeated in other judicial pronouncements. In the case of **Kibutiri...Vs... Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might 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. See also E.A Industries ..Vs..Trufoods (1972) EA 420.

Further as the Court determines whether to grant or not to grant the injunctive orders sought, it Court will also take into account that at this stage, it is not expected to determine the disputed issued definitively based on affidavits evidence. The Court is only supposed to determine whether the Applicant is deserving of the orders sought based on the usual criteria set in the *Giella ..Vs... Cassman Brown (supra)*. See the case of *Agip (K) Ltd..Vs..Maheshchandra Himatlal Vora & 2 Others, Civil AppealNo.213 Of 1999 (2000) 2 EA 285* where the Court held that:-

“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

See also the case of *Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank (Nairobi), Milimani HCC No.1234 of 2002*, where the Court held that:-

“In an interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed preposition of law”

The Court will now consider the available evidence and determine whether the Plaintiff/Applicant is deserving of the orders sought. There is no doubt that there exist a legal charge over property known as ***Kabete/Nyathuna/3280***, which parcel of land is registered in the name of ***Simon Njuguna Waitete (now deceased)***. The said legal charge was created to secure a personal loan of ***Kshs.2,400,000/=*** granted to ***Winfred Nzilani Maele*** by the 1st Defendant. It is also evident from the available documents that the said loan facility was secured by the Personal Guarantee of the said ***Simon Njuguna Waitete***.

There is also no doubt that the said ***Simon Njuguna Waitete*** *passed on* as is evident from the ***Death Certificate annexure JMN-3*** which shows that the said ***Simon Njuguna Waitete*** died on ***6th October 2014***. That was before the loan facility had been fully paid.

There is also no doubt that the said loan facility was in arrears of outstanding debt of ***Kshs.2,690,217/=*** as at ***1st February 2016***, and the 1st Defendant/Respondent has attempted to exercise its Statutory Power of Sale to recover the outstanding debt. It is also evident that the 1st Defendant/

Respondent had ***advertised the sale*** of the suit property by ***Public Auction*** vide an ***advertisement*** in the ***Daily Nation***, by ***Antique Auctions*** for ***27th January 2016***.

However, the Court did issue temporary orders of injunction stopping the said Public Auction until the application is determined. The Plaintiff/Applicant has alleged that the ***legal charge secured*** by the suit property is ***illegal, null and void*** because there was no spousal consent given by the spouse of ***Simon Njuguna Waitete***. The Plaintiff/Applicant alleged the said spousal consent attached to the ***legal charge*** is a ***forgery*** and that the Court should declare the said consent as a forgery. Further that the loan facility was utilized by the borrower ***Winfred Nzilani Maele***, and not the late ***Simon Njuguna Waitete***. Therefore, the loan should be paid by the borrower but not the ***estate*** of the late ***Simon Njuguna Waitete***.

The disputed issues herein is whether ***Mary Njeri Njuguna***, the wife of the late ***Simon Njuguna Waitete***, signed the spousal consent and whether the borrowed money was utilized by ***Simon Njuguna Waitete*** or ***Winfred Nzilani Maele***.

The Plaintiff/Applicant had a duty to establish that he has a ***prima-facie*** case with probability of success. ***Prima-facie*** was described in the case of *Mrao ..Vs.. First American Bank of Kenya Ltd & Others (2003) KLR* to mean;

“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”.

From the above description of *prima-facie* case, it is evident that it means more than an arguable case, that the evidence must show an infringement of a right and the probability of success of the Applicant's case at that. Further in the case of **Habib Bank Attorney General Zurich ...Vs...Eugene Marion Yakub, Civil Application No.43 of 1982 (1982) CAK**, the Court held that:-

“Probability of success means the Court is only to gauge the strength of the Plaintiff's case and not do adjudge the main suit at that stage since proof is only required at the hearing stage”.

With the above positions held by various Courts on what entails a *prima-facie* case with probability of success at that, the Court will now sieve through the available evidence to determine whether the Plaintiff/Applicant is deserving of the orders sought.

The Plaintiff/Applicant has alleged that the suit property herein is a matrimonial property which should be protected as the 1st Defendant/ Respondent did not obtain a genuine spousal consent from **Mary Njeri Njuguna**. However, it is evident that the property in issue was used as a security by the **late Simon Njuguna Waitete** for a loan facility of **Kshs.2,400,000/=**. The security used was **LR.No.Kabete/Nyathuna/3280**. On whether the suit property is a matrimonial property or not, the Court will take into account the often held positions by Courts, that once a property is offered as a security, it becomes a commodity for sale. See the case of **Maltex Commercial Supplies Ltd & Another...Vs...Euro Bank Ltd (in liquidation) HCCC No.82 of 2006**, where the Court held that:-

“Any property whether it is a matrimonial or spiritual house which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

See also the case of **Joseph Gitahi Gachau & Another...Vs...Pioneer Holdings (A) Ltd & 2 Others (2009) eKLR**, where the Court held that:-

“Where a property even residential, is charged to secure loan, it is converted into a commodity for sale and where there is failure to pay the charge debt or loan, no sentimental value or attachment to the mortgaged property however great would operate against the exercise of the statutory power of sale by the Mortgagee”.

Considering the available documents on the face value, it is evident that **Simon Njuguna Waitete**, acted as a Personal Guarantor for **Winfred Nzilani Maele**, who took a loan facility from the 1st Defendant/Respondent Bank for **Kshs.2,400,000/=** and pledged his title **Kabete/Nyathuna/3280** as security. Therefore, once the said property was pledged as security, it became a commodity for sale.

However, the Plaintiff/Applicant has alleged that the said legal charge is illegal, null and void as **Mary Njeri Njuguna** did not sign the spousal consent as provided by Section 79(3) the Land Act. However, I have seen the affidavits sworn by the 1st and 2nd Defendants/Respondents deponents. It was alleged that indeed **Mary Njeri Njuguna** presented herself before **R. M. Musili Advocates** and signed the spousal consent. The Plaintiff/Applicant and the said **Mary Njeri Njuguna** have disputed the signature on the spousal consent. However, the issue of whether the signature on the spousal consent is for **Mary Njeri Njuguna** or not, cannot be resolved through affidavit evidence. The determination of such an issue would require calling of witnesses in a full hearing and testing the same through cross-examination.

Further, it is evident that the Plaintiff/Applicant and his family paid a sum of about **Kshs.600,000/=** towards settlement of the loan facility. The Plaintiff/Applicant has alleged that the Bank officials and **Winfred Nzilani Maele**, 2nd Defendant had dubbed him and his family into paying the said debt. However, the Defendants/Respondents have alleged that the Plaintiff/Applicant and his family paid the said monies because they were aware of the loan facility undertaken by the late **Simon Njuguna Waitete** and that he even bought a Matatu Mini-bus which is being operated by the family todate. These are also issues in dispute which cannot be resolved at this interlocutory stage. The said disputed issues can only be resolved by calling of evidence.

The Court therefore finds that it cannot ascertain the Plaintiff's/Applicant's claim that the Guarantor's spouse, **Mary Njeri Njuguna**, did not sign the spousal consent. However, what is certain is that the loan facility that the late **Simon Njuguna Waitete** guaranteed, is in arrears and the Bank/1st Defendant had a right to exercise its Statutory Power of Sale as provided in the Charge document and as provided by the law.

The Plaintiff/Applicant has alleged that he did not receive the **Statutory Notices** as provided by **Section 90(1)** of the **Land Act**. However, the Plaintiff/Applicant did admit that they stopped paying the loan once the Bank failed to supply them with the necessary information about the loan. The Court finds the Plaintiff's/Applicant's averments not truthful and will dismiss the same.

The Plaintiff/Applicant has sought for injunctive order which is an equitable remedy and this Court has to exercise that equitable jurisdiction judicially. That has to be done by giving all the parties full hearing. See the case of **Kenya Commercial Bank Ltd..Vs.. Kipsang Sawe Sisei, Civil Appeal No.53 of 2002**, where the Court held that:-

“An order of injunction is an equitable remedy and the Court can only exercise its equitable jurisdiction judicially if all the parties have been fully heard and if all the material facts are before the Court”.

Equally in this matter, the Court finds that the issues in dispute can only be resolved if all the parties are heard and all material facts are before the Court. Therefore, this Court comes to a conclusion that the Plaintiff/Applicant has not established a *prima-facie* case with probability of success.

On the second limb, the Court finds that though the Plaintiff/Applicant has alleged that the suit property herein is a matrimonial home and if the 1st Defendant/Respondent is allowed to exercise its Statutory Power of Sale, the Plaintiff/Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that once the same was offered as security, it became a commodity for sale.

Further, the suit property herein can be valued and is quantifiable.

Therefore, the Plaintiff/Applicant can be adequately compensated with damages in the event the main suit is decided in favour of the Defendant. See the case

Wairimu Mureithi..Vs..City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, the Court held that:-

“However strong the Plaintiff's case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

On the third limb, the Court is not in doubt and therefore will not decide on a balance of convenience.

Having now carefully considered the Plaintiff's/Applicant's **Notice of Motion** dated **25th January 2016**, the Court finds it not merited and consequently this Court dismisses the said application entirely with costs to the Defendants/Respondents. Further the Court discharges the interim orders of injunction in force.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this 11th day of August 2017.

L. GACHERU

JUDGE

11/8/2017

In the presence of

Mr. Odour holding brief for Mr. Mugo for the Plaintiff/Applicant

No appearance for 1st Defendant/Respondent though served with Notices

No appearance for 2nd Defendant/Respondent though served with Notices.

Kajuju - Court Clerk

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of Mr. Odour holding brief for Mr. Mugo for the Plaintiff/Applicant and absence of the Defendants' advocate though served with Ruling Notices.

L. GACHERU

JUDGE

11/8/2017