



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, G.B. M. KARIUKI & ODEK, JJ.A)**

**CIVIL APPLICATION NO. 279 of 2015 (UR 237/2015)**

**BETWEEN**

**ANITA CHELAGAT O'DONOVAN.....1<sup>st</sup> APPLICANT**

**ESTATE OF TERENCE PETER O'DONOVAN.....2<sup>nd</sup> APPLICANT**

**ESTATE OF JOYCE JEROTICH O'DONOVAN.....3<sup>rd</sup> APPLICANT**

**AND**

**FREDRICK KWAME KUMAH.....1<sup>st</sup> RESPONDENT**

**ZIPPORAH WAIRIMU WANJOHI.....2<sup>nd</sup> RESPONDENT**

**NATIONAL BANK OF KENYA LIMITED.....3<sup>rd</sup> RESPONDENT**

***(An application for injunction pending the hearing and determination of an appeal against the Ruling of the High Court of Kenya at Nairobi (C. Kariuki J.) dated 21<sup>st</sup> October 2015***

**in**

**HCCC No. 131 of 2015)**

**\*\*\*\*\***

**RULING OF THE COURT**

1. Before us is a Notice of Motion dated 12<sup>th</sup> November 2015 lodged pursuant to **Rules 5(2) (b)** of the Rules of this Court seeking three injunctive orders namely:

*“a) An Order restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally whether by themselves, their agents, employees or otherwise from evicting and or attempting to evict the applicants from the property comprised in LR Nairobi Block 90/143 Loresho South or from entering, attempting entry thereto or purporting to levy distress thereto and or interfering with or damaging any structures thereon or interfering in any way with the applicants quiet enjoyment thereof.*

b. An order restraining the 3<sup>rd</sup> respondent whether by themselves, agents, employees or otherwise from selling, advertising for sale by way of private treaty or public auction the properties comprised in LR Nairobi Block 209/11315 and LR Nairobi Block 209/11316 or interfering in any way whatsoever with the applicants quiet enjoyment thereof.

c. That pending the hearing and determining of the intended appeal against the Ruling of Hon. Justice Charles Kariuki delivered on 21<sup>st</sup> October 2015 in Nairobi HCCC No. 131 of 2015, there by stay of proceedings in the said Nairobi High Court Civil Case.”

2. The background facts relevant to this application are that at all material times in the suit, the late **Peter O'Donovan** and the late **Joyce Jerotich O'Donovan** were registered proprietors of **Nairobi LR No. 90/143** (hereinafter referred to as the Loresho South Property). Upon their demise, the property vested in their respective estates were represented by the 2<sup>nd</sup> and 3<sup>rd</sup> applicants. The applicants borrowed money from the 3<sup>rd</sup> respondent and provided three properties as security namely **LR Nairobi Block 209/11315** and **LR Nairobi Block 209/11316** and **Nairobi LR No. 90/143**.

3. Nairobi LR No. 90/143 is hereinafter referred to as the Loresho property and all the three properties are together hereinafter referred to as the suit property. As stated, the applicants charged the Loresho property as security for the loan. The applicants' defaulted in repaying the secured amount.

Pursuant to the exercise of its chargee's statutory power of sale, the 3<sup>rd</sup> respondent Bank, **National Bank of Kenya Limited**, sold and transferred the Loresho property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents (**Fredrick Kwame Kumah** and **Zipporah Wairimu Wanjohi**) who asserted that they are innocent *bona fide* purchasers for value of the Loresho property.

4. In the Complaint dated 18<sup>th</sup> March 2015 filed before the High Court against the three respondents, the applicants contended that they were unaware of the sale and disposition of the suit property by the 3<sup>rd</sup> respondent to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have attempted forcibly and illegally to take possession of the Loresho property and to evict the applicants therefrom and that there is no lawful authority on the part of the 3<sup>rd</sup> respondent to dispose of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In their complaint, the applicants seek a permanent injunction to restrain the 3<sup>rd</sup> respondent from selling or advertising for sale the suit properties and an order to restrain the respondents jointly and severally from evicting the applicants from the Loresho property.

5. In opposing the application for injunctive orders, the 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that they purchased the Loresho property from the 3<sup>rd</sup> respondent; that they entered into a sale agreement on 26<sup>th</sup> May 2014 and obtained all the necessary approvals and consents and settled all the requisite statutory and other payments; that they purchased the Loresho property at market value and paid Kshs.36 million and the property is now registered in their names; that having purchased the Loresho property and being the duly registered proprietors, the 1<sup>st</sup> and 2<sup>nd</sup> respondent contend that they are entitled to entry therein and possession thereof and that being registered proprietors, they are entitled to vacant and undisturbed possession of the property and the law allows them to use reasonable force in the enforcement of their rights over the Loresho property. The 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that they have no knowledge or interest in any dispute between the applicants and 3<sup>rd</sup> respondent over Nairobi LR No. 209/11315 and LR No. 209/11316.

6. The 3<sup>rd</sup> respondent Bank in its defence to the suit by the applicants averred that it exercised its statutory power of sale in relation to the Loresho property and procedurally and legally sold the same to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the 3<sup>rd</sup> respondent in exercise of its statutory power of sale duly served the Estate of the 2<sup>nd</sup> applicant with statutory notices dated 24<sup>th</sup> October 2013; that upon service of the statutory notices, the applicants did nothing to redeem the Loresho property and the 3<sup>rd</sup> respondent through **Legacy Auctioneering Services** served the applicants with the 45 days statutory redeeming notices; that a notification of sale was served upon the applicants and subsequently the 3<sup>rd</sup> respondent

sold the Loresho property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the proceeds of sale were aptly applied and reflected in the statement of account given to the applicants; that even after the realization of proceeds of sale from the Loresho property, the applicants are still indebted to the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent contend that the issues and procedural legality surrounding the 3<sup>rd</sup> respondent's right to exercise its statutory power of sale was canvassed, dealt with and determined in **Nairobi High Court Civil Case No. 333 of 2008**; that the Nairobi High Court Civil Case No. 333 of 2008 upheld the right of the 3<sup>rd</sup> respondent to exercise its statutory power of sale which included realization of the suit property and that in Case No. 333 of 2008, the validity of the statutory notices issued to the applicants was upheld.

7. The pertinent grounds in support of the instant application for injunctive orders as stated on the face of the application and in the supporting affidavit deposed by the 1<sup>st</sup> applicant are *inter alia* that the 3<sup>rd</sup> respondent's purported exercise of its statutory power of sale over Nairobi LR No. 90/143 Loresho South is detrimental to the applicants; that the 3<sup>rd</sup> respondent has failed to account for the basis of such action; that the 3<sup>rd</sup> respondent as chargee owes a duty to the applicants as chargors of the suit properties; that the amount due and owing to the 3<sup>rd</sup> respondent is in dispute because the amount demanded as at 24<sup>th</sup> October 2013 was Kshs.20,033,085/55 and ten months later the 3<sup>rd</sup> respondent demanded a sum of Kshs.128,710,537/= which is an unexplainable quantum leap of Kshs. 08,000,000/= over and above the sum initially demanded; that the applicants are reasonably apprehensive that the respondents shall evict them and or forcibly obtain entry and possession to the Loresho property and that the Loresho property is the residence of the applicants since 1979 and it would be prejudicial to evict them therefrom. In support of the present application, the applicants attached a draft memorandum of appeal; it was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents as purchasers shall not be prejudiced if injunctive orders are granted because they have an indemnity in their favour issued by the 3<sup>rd</sup> respondent.

8. In opposing the present application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their replying affidavit depose that they are *bona fide* purchasers for value of the Loresho property and if there was any irregularity in the sale of the property by the 3<sup>rd</sup> respondent, the applicants remedy lies in damages against the 3<sup>rd</sup> respondent as the person exercising the statutory power of sale; that being registered proprietors of the Loresho property, they are entitled to vacant and quiet possession thereof; the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that they are reasonably apprehensive that the applicants shall not be able to compensate them for losses suffered if the applicants remain in possession of the Loresho property; that the applicants are intent on prolonging the dispute in court by filing numerous interlocutory applications and that whereas the applicants are seeking discretionary orders, it would be in the interest of justice for this Court to exercise its discretion in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and decline to grant the injunctive orders sought.

9. In opposing the application, the 3<sup>rd</sup> respondent filed a replying affidavit deposed by **Mr. Paul Chelanga**. He deposes that the applicants are guilty of material non-disclosure in that they have failed to disclose to this Court that the issues surrounding the 3<sup>rd</sup> respondents exercise of its statutory power of sale had been resolved and determined in Civil Case No. 333 of 2008; that the 3<sup>rd</sup> respondent procedurally exercised its statutory power of sale and sold the Loresho property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; that the applicants are still indebted to the 3<sup>rd</sup> respondents; that since 1994, the applicants have used the court process in a vicious circle to delay and frustrate the 3<sup>rd</sup> respondent from realizing its security over the charged properties; that the present application is frivolous, vexatious and an abuse of the court process; that the applicants have refused to vacate the Loresho property and have perfected the art of seeking court orders to defeat the ends of justice and that the applicants do not have a *prima facie* case with probability of success.

10. At the hearing of this application, learned counsel Mr. Kithinji Marete appeared for the 1<sup>st</sup> and 3<sup>rd</sup> applicants while learned counsel Mr. Katwa Kigen appeared for the 2<sup>nd</sup> applicant. Learned counsel Mr. Kennedy Ogeto appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents while learned counsel Mr. Duncan Okatch appeared for the 3<sup>rd</sup> respondent. All counsel filed written submissions and list of authorities in the matter.

11. The applicants submitted that the intended appeal was arguable and would be rendered nugatory if the injunctive orders sought were not granted. Learned counsel Mr. Marete submitted that the intended appeal had been filed as **Civil Appeal No. 300 of 2015**; that the draft memorandum of appeal filed disclosed multiple arguable grounds of appeal; that the trial court did not adjudicate on all matters that had been placed before it; that the trial court arrived at erroneous findings of fact and erred in failing to find that **Sections 90 (1) and 96 (1) of the Lands Act** were not complied with; that at all material times, the 3<sup>rd</sup> respondent Bank never informed the trial court that it had already sold the Loresho property by private treaty; that a chargee cannot enter into a sale agreement before expiry of the 45 days statutory redemption notice period; that in the present case, the 3<sup>rd</sup> respondent violated the 45 days statutory redeeming period by entering into a sale agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents prior to expiry of the period and that further, the 3<sup>rd</sup> respondent entered into the sale agreement when there was a *status quo* order with the legal consequence that the sale agreement between the respondents is null and void as it was entered into when the 3<sup>rd</sup> respondent had no legal capacity to do so.

12. Learned counsel Mr. Kigen for the 2<sup>nd</sup> applicant urged that the applicants have been forced to live in perpetual apprehension that they can be evicted from the Loresho property; that if evicted, the substratum of the intended appeal will have been destroyed; counsel urged this Court to restrain the respondents from evicting the applicants in order to preserve the substratum of the appeal; it was submitted that the intended appeal was arguable to the extent that the 3<sup>rd</sup> respondent Bank did not properly exercised its statutory power of sale and it clogged the applicant's equity of redemption; that the 3<sup>rd</sup> respondent issued a statutory notice that it would sell the Loresho property by public auction on 19<sup>th</sup> June 2014 yet it had already sold the property by private treaty to the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 26<sup>th</sup> May 2014; that this fact *prima facie* demonstrates that the statutory notice and the statutory power of sale was not exercised properly; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' were not bona fide innocent purchasers for value because the purported sale of the Loresho property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was by private treaty and there is no evidence as to how the two respondents came to learn about the intended sale of the Loresho property; that the sale by private treaty was a collusion between the respondents; that the private treaty sale of 26<sup>th</sup> May 2014 sold the Loresho property well before expiry of the 45 day statutory redeeming period that had been given to the applicants; that no proper statutory notices were served to the applicants pursuant to **Sections 90 and 96 of the Lands Act**; that the 3<sup>rd</sup> respondent Bank clogged the applicants equity of redemption by increasing and escalating the amount due from Kshs.20,033,085/55 to Kshs.128,710,537/= and that the amount and percentage of increment beats logic and was not done in good faith and was applied solely to clog the equity of redemption. Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall not be prejudiced if injunctive orders are granted because the purchase agreement between the respondents grant has an indemnity clause by the 3<sup>rd</sup> respondent Bank and that in this regard, any prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> respondents is mitigated by the indemnity. Counsel cited the following cases in support of its submissions: **Chris N. Bichage -v- Richard Nyagaka Tongi & 2 Others (2013) eKLR**; **Antoine Ndiaye -v- African Virtual University (2015) eKLR**; **Kenya Kazi Security Services Limited -v- Kenya National Private Security Workers Union (2013) eKLR** and **Ishmael Kagunyi Thande -v- Housing Finance Company of Kenya Limited Civil Application No. NAI 157 of 2006.**

13. Learned Counsel Mr. Ogeto for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that essentially the dispute in this matter is between the applicants and the 3<sup>rd</sup> respondent; that in relation to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the intended appeal is not arguable and shall not be rendered nugatory if the prayers sought are not granted; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are innocent purchasers for value and are protected under **Section 99 (2) and (3) of the Lands Act**; and that the applicants have never made an allegation of fraud or misrepresentation against the 1<sup>st</sup> and 2<sup>nd</sup> respondents with the consequence that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's title to the Loresho property is indefeasible. Counsel submitted that there was no material before the trial judge indicating that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were party to any wrongdoing; it was submitted that whereas the applicants contend that there was a status quo order at the time the sale by private treaty was concluded, this fact was not known to the 1<sup>st</sup> and 2<sup>nd</sup> respondents; counsel emphasized that **Section 99 (4) of the Lands Act** protects purchasers of charged property unless there is fraud and or misrepresentation. On arguability of the intended appeal, it was urged that whereas the intended appeal

may be arguable as against the 3<sup>rd</sup> respondent, it was not arguable against the 1<sup>st</sup> and 2<sup>nd</sup> respondents whose title is indefeasible and who are protected as innocent purchasers for value. On nugatory aspects, counsel submitted that the intended appeal cannot be rendered nugatory as the applicants can still be restored to the Loresho property if the appeal succeeds.

14. It was emphasized that the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their replying affidavit have undertaken not to let, waste, alienate, charge or alter the nature and character of the Loresho property; that the only thing the 1<sup>st</sup> and 2<sup>nd</sup> respondents would wish to have is vacant possession of the Loresho property which they purchased with the intention to live and reside therein and that if given vacant possession, the respondents are ready to give an undertaking as to damages or any compensation to the applicants.

15. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urged this Court to find that all the judicial authorities cited by the applicants were distinguishable and inapplicable to the facts of the present case. Counsel cited various authorities and emphasized the decision in **Kenline Agencies Limited -v- Housing Finance Company of Kenya Limited & Another (2007) eKLR** where it was held that if an applicant is dispossessed of a suit property, and the appeal ultimately succeeds, the appeal will not be rendered nugatory as the effect of success of the appeal would be, among other things, to restore the applicant into the premises pending the hearing of the suit.

16. Learned counsel Mr. Okatch for the 3<sup>rd</sup> respondent urged us to dismiss the instant application; that the intended appeal is an afterthought taking into account that the issues relating to the procedure followed in the exercise of the 3<sup>rd</sup> respondent's statutory power of sale have been canvassed and determined in Civil Case No. 333 of 2008; that the applicants had a chance to deal with procedural issues before the High Court and that the question of accounts and amount due are answered in the statement lodged with the Registrar of this Court and served upon the applicants. Counsel submitted that it is an established principle of law that a chargor cannot seek injunctive orders based on the issue of accounts; it was submitted that the 3<sup>rd</sup> respondent acted pursuant to **Section 98** of the **Lands Act** and a chargee cannot be compelled to realize security by way of public auction; that a chargee is at liberty to realize security by way of private treaty so long as property is sold at market value; that the sale to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was at Kshs.36 million which was the market value; that the applicants were invited to submit their own independent valuation report on the market value of the Loresho property and they failed to do so; that the applicants never took any steps to redeem the suit property; that since 1994, the applicants have neither paid a cent to redeem the suit property nor monies to clear their indebtedness to the 3<sup>rd</sup> respondent and that if at all there was any error or mistake in the exercise of the 3<sup>rd</sup> respondents statutory power of sale, the applicants remedy is in damages and not to challenge the title of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the Loresho property.

17. In reply to the respondent's submissions, the applicants reiterated that the 3<sup>rd</sup> respondent's statutory power of sale had never accrued; that proper exercise of statutory power of sale is dependent on statutory notice and proper procedure which was not followed in this case; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not innocent purchasers for value as they engaged in questionable conduct; that the questionable conduct is how the 1<sup>st</sup> and 2<sup>nd</sup> respondents found the 3<sup>rd</sup> respondent to conclude a sale by private treaty; that there is an act of deceit and dishonesty on the part of the 3<sup>rd</sup> respondent to issue a statutory notice that the sale is by public auction and then conduct sale by private treaty; that it is dishonest to serve a notice that the public auction shall be held on 19<sup>th</sup> June 2014 yet a sale private treaty had been concluded on 26<sup>th</sup> May 2014.

18. We have considered the grounds in support of the instant application, the written and oral submissions as well as the bundle of authorities. This being an application under **Rule 5 (2) (b)** of the rules of this Court, this Court must be satisfied in the twin guiding principles that the intended appeal is arguable; it is not frivolous and that unless a stay or injunction is granted, the appeal or the intended appeal, if successful, would be rendered nugatory – see **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838**; **J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. [1982 – 88] 1 KAR 1088** and **Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application**

**No. 98 of 2002 (unreported).**

19. In the instant case, a notice of appeal has been filed and a draft memorandum of appeal is attached to the supporting affidavit. Whereas the applicants contend that the intended appeal is arguable, the respondents assert that it is not arguable. This Court has on numerous occasions stated that in an application for stay, it suffices that a single arguable point is identified. In the instant application, one of the arguable issues is whether the 3<sup>rd</sup> respondent properly exercised its statutory power of sale and whether this matter was concluded in Civil Appeal No. 333 of 2008. The other arguable issue is whether the sale by private treaty and the sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents was valid given the allegation that the sale agreement was entered into before expiry of the statutory 45 days redemption period; a contended issue is whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents were *bona fide* innocent purchasers of the Loresho property. In our view, there are various triable issues that have been disclosed that need to be canvassed in the intended appeal.

20. On nugatory aspects, the applicants who are in possession of the suit property contend that the appeal shall be rendered nugatory if they are evicted from the Loresho property. Conversely, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend the appeal shall not be rendered nugatory because if the appeal succeeds, the applicants can be restored to the property. The 3<sup>rd</sup> respondent contends that the intended appeal shall not be rendered nugatory as the remedy for the applicants lie in damages in the event it is established that the 3<sup>rd</sup> respondent did not properly exercise its statutory power of sale.

21. We have considered the competing contentions by the parties in light of the applicants' submission that the 3<sup>rd</sup> respondent clogged its equity of redemption and that no prejudice shall be suffered if injunctive orders are granted.

22. One of the grounds urged by the applicants is that the 3<sup>rd</sup> respondent clogged their equity of redemption by escalating and increasing the amount due from Kshs.20,033,085/55 to a sum of Kshs.128,710,537/=. In **Joseph N.K. Arap Ngok & another -v- EABS Bank Limited (2015) eKLR**, it was stated that the approach of this Court is normally not to grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute on the amount due under the mortgage. (See also **Priscillah Krobought -v- Kenya Commercial Finance Co. Ltd. CA No. 227 of 1995**). Guided by the foregoing practice of this Court, we are of the considered view that the ground that the 3<sup>rd</sup> respondent clogged the equity of redemption is not a tenable ground to issue injunctive orders.

23. In ***Rule 5 (2) (b)*** application, the centrality of loss to the parties on both sides of the appeal is a relevant factor to be considered and this Court must strive to preserve the status quo because any loss may render the appeal nugatory. In **Aguthi Enterprises Limited -v- Hussein Ibrahim Nuni, (2015) eKLR**, this Court noted that "it was confirmed to us that the applicant is still in possession of the suit property and the respondent has already applied for eviction orders; ...but we are satisfied that the intended appeal, if successful would be rendered nugatory if a stay order is not granted as there is a likelihood that the applicant may be evicted." In the instant case, whereas the applicants are in possession of the Loresho property, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the registered proprietors thereof. Guided by the *dicta* of this Court quoted above, we are satisfied that the intended appeal is arguable and shall be rendered nugatory if the applicants are evicted from the Loresho property when the legal propriety of the sale agreement between the respondents is in issue.

24. Given that grant of a stay order is discretionary; an issue for our consideration is whether the applicants should be granted unconditional injunctive orders as prayed for in the Notice of Motion dated 12<sup>th</sup> November 2015. In considering this issue, we note that the applicants did not place any material challenging the 3<sup>rd</sup> respondent's exercise of its statutory power of sale in relation to LR Nairobi Block 209/11315 and LR Nairobi Block 209/11316. In the submissions before this Court, the applicants have emphasized and largely made submission with regard to the Loresho property. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that have no interest in LR Nairobi Block 209/11315 and LR Nairobi Block

25. In granting stay orders, this Court must balance the interest of the parties and the likely prejudice or loss to be occasioned upon either party. The applicants urged us to find that there shall be no prejudice to the 1<sup>st</sup> and 2<sup>nd</sup> respondents if the injunctive orders sought are granted. It is the applicants' submission that because the 3<sup>rd</sup> respondent has agreed to indemnify the 1<sup>st</sup> and 2<sup>nd</sup> respondents, no prejudice shall be occasioned. On the face of it, the submission by the applicants appears sound and tenable; however, on closer scrutiny, the applicants seek to ride on an indemnity given by the 3<sup>rd</sup> respondent; there is no demonstration how the applicants continued possession and occupation of the Loresho property does not prejudice the respondents. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are the registered proprietors of the Loresho property; the applicants remain indebted to the 3<sup>rd</sup> respondent; the applicants since 1994 continue to be in default of their loan repayment but want to continue occupying the Loresho property for free without servicing the outstanding loan and by keeping the 1<sup>st</sup> and 2<sup>nd</sup> respondents out of possession of the property. Such a situation cannot be countenanced by this Court. We do not agree that the 1<sup>st</sup> and 2<sup>nd</sup> respondents shall be not prejudiced if unconditional injunctive orders are granted.

26. In order to mitigate the loss or prejudice suffered by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, we hereby grant a conditional injunction in the following terms:

*I. Pending the hearing and determination of the intended appeal being Civil Appeal No. 300 of 2015, an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly and severally whether by themselves, their agents, employees or otherwise howsoever, from evicting and or attempting to evict the applicants from the property comprised in LR Nairobi Block 90/143 Loresho South or from entering, attempting entry thereinto, purporting to levy distress thereon and or interfering with or damaging any structures thereon or interfering in any way whatsoever with the appellant's quiet enjoyment thereof be and is hereby granted on the following conditions:*

*a. The applicants shall deposit the sum of Kshs.1.500,000/= (1.5 million) in a joint interest earning account as deposit and security for rent in relation to their continued occupation and possession LR Nairobi Block 90/143 Loresho South.*

*b. The deposit of Kshs.1.500,000/= shall be made within 90 days of the date of this ruling and in default the injunction hereby granted shall automatically lapse and be discharged.*

*c. The account shall be opened in the joint names of counsel for the applicants and counsels for all the three respondents in a Bank ( other than the 3<sup>rd</sup> respondent bank) to be agreed by all counsel. If counsel shall fail to agree on the Bank the said sum of Kshs.1.5 million shall be deposited with the Registrar of this Court within 90 days of the date of this ruling.*

*II. For avoidance of doubt, and subject to the proceedings before the High Court and any order that may be made by the High Court, prayer (b) and 3 of the Notice of Motion dated 12<sup>th</sup> November 2015 are hereby declined and no order for stay of High Court proceedings in Civil Suit No. 131 of 2015 (Anita Chelegat O'Donovan & 2 others -v- Fredrick Kwame Kumah & 2 others) is granted.*

27. Save as expressly ordered here above, the notice of motion dated 12<sup>th</sup> November 2015 has partial merit and is partially allowed. Costs in the appeal.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2016***

**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**G.B.M. KARIUKI**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**