Kariuki v Family Bank Limited & another (Civil Suit E020 of 2024)
[2025] KEHC 689 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 689 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E020 OF 2024

E OMINDE, J

JANUARY 31, 2025

BETWEEN

STEPHEN KARANJA KARIUKI ..... PLAINTIFF

AND

FAMILY BANK LIMITED ..... 1ST DEFENDANT

ONESMUS MACHARIA T/A WATTS AUCTIONS ..... 2ND DEFENDANT

RULING

1. The Applicant approached this court vide a Notice of Motion Application dated 20/08/2024 seeking the following orders;

    i. Spent

    ii. Spent

    iii. That an interlocutory order do issue restraining the defendants whether by themselves, their servants and/or agents from selling, transferring or in whatever manner alienating the land parcel known as ELDORET MUNICIPALITY/BLOCK 14/1130 pending the hearing and determination of the suit

    iv. That the costs of this application be provided for.

2. The Application is premised on the grounds on the face of it and the averments in the applicants supporting affidavit.

Applicants' Supporting Affidavit

3. The applicant swore a supporting affidavit where he deposed that he is the proprietor of Eldoret Municipality/Block 14/1130. Further, that the Principal debtor, Dominion Automobiles was granted

a credit facility by the 1st defendant in the sum of Ks. 30,000,000/- by dint of a charge and a further charge registered on 18/02/2020 and 01/11/2021 respectively. He stated that the facility has been repaid to the tune of Ks. 12,000,000/- but the respondents intend to exercise their statutory power of sale over the charged property.

4. The deponent averred that the intended exercise of the statutory power of sale is unlawful and irregular for reasons that the chargee is in breach of section 84(1) of the *Land Act*, section 56(2) of the *Land Registration Act* and section 90 of the *Land Act* as the requisite notices under these sections were not served upon him. Further, that the chargee has failed to issue and serve a valid notice under section 90(2)(d) of the *Land Act* and that the chargee intends to sell a charged property without compliance with section 96(2) of the *Land Act*. Additionally, the deponent stated that there was no valid notification of sale and redemption notice as required by the Auctioneers Rules 1997 and that there was no proper valuation as to the forced sale value of the property as required by section 97(2) of the *Land Act*.

5. The deponent averred that he moves the court pursuant to the provisions of section 194 of the *Land Act* as the principal debtor depends on servicing the charge from the income derived from motor vehicle spare parts business which has been affected by the hard-economic times in the country. Further, that the collateral is the plaintiffs' home and a sale would render him and his family homeless. Considering the circumstances, he prayed the court suspend or postpone the sale for a period of one year.

6. The deponent urged that he has a prima facie case with a probability of success and further, that he will suffer irreparable harm which will not be compensated by damages. Additionally, that the court should tilt towards maintaining the status quo and assuming the power risk. He urged the court to allow the application.

1st Respondents' Replying Affidavit

7. The 1st Respondent opposed the application vide a replying affidavit dated 28/08/2024 which was sworn by Wambani Deya, the manager – Legal Services, for the defendant. He deposed that the application is a delay tactic by the applicant which undermines the 1st defendants' efforts to enforce a loan agreement. Further, that the Plaintiff is guilty of non-disclosure of relevant facts aimed at misleading the court to grant adverse orders against the 1st defendant.

8. The 1st respondent laid out the particulars of the facility advanced by the 1st defendant to the applicant. He stated that the 1st respondent agreed to advance a loan facility to Stephen Karanja T/A Dominion Automobiles for Kshs 30,000,000/- vide a letter of offer dated 22/10/2021. He annexed a copy of the letter and highlighted the provisions of clause 2 and 8 which provided that the facility would be paid in instalments of Kshs. 1,011,039/- and further, that the facility would be secured by the title deed supported by an existing charge of Kshs. 15,000,000/- over Eldoret Municipality Block/12/1130 in the name of Stephen Karanja Kariuki registered in favour of the 1st respondent. Additionally, it was also supported by a further charge of Kshs. 15,000,000/- over the same property.

9. The deponent stated that a further charge dated 01/11/2021 was executed over the suit property and therefore, the existing charge and the further charge secured the total of Kshs. 30,000,000/-. However, the borrower became reluctant to pay and as at 01/06/2023 the loan account had fallen into arrears to the tune of Kshs. 1,055,310/- prompting the respondent to issue a demand letter dated 01/06/2023 demanding rectification of this default. There was no response from the borrower and the default persisted. As at 15/07/2023 the borrower was in arrears of Kshs. 3,950,170/- with no indication of intention to repay the sum advanced. The defendant issued another demand letter dated 15/07/2023 requiring the plaintiff to regularise the account. As at 13/02/2024 the borrower had fallen in arrears to the tune of Kshs. 1,269,177.39 which amount was subject to accrual of interest on a daily basis until

payment in full. Additionally, the total outstanding balance was now at Kshs. 19,944,888.02/-. The defendant then issued a 90-day statutory notice dated 13/02/2024 through registered post (WD-5a and WD-5b were annexed as the Notice and Certificate of Postage respectively)

10. The borrowers' default persisted and the arrears amounted to Kshs. 3,292,983.97/- as at 16/05/2024 whereas the total outstanding balance for the loan was Kshs. 20,909,593.09/-. The defendant then issued a 40-day statutory notice dated 16/05/2024 through registered post and the borrower remained in default. (WD-6a and WD-6b were annexed as copies of the Notice and the Certificate of Postage respectively)

11. The deponent averred that in compliance with section 97(2) of the *Land Act*, the 1st Respondent engaged Cambrian Valuers Limited to carry out a valuation of the property and a report dated May 2024 was prepared. He annexed a copy of the report as WD-7 and urged that the allegations that there was no valuation is false and misleading.

12. As at 01/07/2024 the borrower owed the defendant Kshs. 19,921,616.48/- and therefore the 1st defendant instructed the 2nd defendant to proceed with the repossession of the suit property. The 2nd defendant issued a 45-day Redemption Notice dated 02/07/2024 through registered post in accordance with rule 15(d) of the Auctioneers Rules, 1997. (He annexed as WD-8, WD-9a) b)and c) the letter of instruction to the Auctioneer, A copy of the 45 days Redemption Notice and the Certificate of Postage).

13. Subsequently, the 2nd defendant published an advertisement in the Daily Nation Newspaper of 19/08/2024 inviting members of the public to take part in the public auction of the suit property scheduled for 06/09/2024. However, the auction did not proceed due to the injunctive orders issued by the court on 21/08/2024.

14. The deponent stated that the borrower has failed and neglected to pay back the money owed to the bank and further, that as at 23/08/2024 he owes the defendant Kshs. 22,040,271.07/-. He maintained that the 1st Respondent's statutory power of sale was exercised according to the law and the 1st defendant would be greatly prejudiced if the application is allowed as prayed. He urged that the application should be dismissed with costs but if the court grants the orders sought, the same should be conditional on repayment of the loan amount, failure to which the said interlocutory orders ought to stand vacated.

Hearing of the Application

15. The parties were directed to prosecute the application vide written submissions. The applicant filed submissions dated 13/10/2024 through the firm of Messrs Wambua Kigamwa and Company Advocates whereas the Respondents filed submissions dated 28/10/2024 through the firm of G.M Gamma Advocates LLP.

Applicants submissions

16. Learned counsel for the Applicants began his submissions by pointing out that the tenets that guide the consideration of the grant of the reliefs sought were settled in Giella vs Cassman Brown & Company Limited (1973) EA 358 to wit; the applicant must have a prima facie case, the applicant must demonstrate irreparable harm if the injunction is not granted and if in doubt, the court shall decide the application on a balance of convenience. Further, that there existed a loan facility advanced to the applicants with the property known as Eldoret Municipality block 14/1130. Counsel cited the celebrated case of Mrao Limited v First America Bank of Kenya Limited & 2 Others on the definition of a prima facie case.

17. It is the Applicants' case that the chargee is in breach of section 84(1) of the *Land Act* as it failed to serve the notice on reduction and increase of interest. Counsel pointed out that in the Replying affidavit, the interest rate in the letter of offer at page 10 is 13% p.a and in the letter dated at page 28, dated 1st June 2023 is 16% p.a and a late payment fee of 6% p.a. Further, that in the letter dated the 15th July, 2023 the interest rate is 16% p.a and a late payment fee of 6% p.a.

18. He stated that it is clear that the contractual rate of interest was varied upwards by the chargee without notice to the plaintiff as required by law and additionally, the late payment fee of 6 % pa. was not provided for in the loan contract. Counsel urged that the deposition at paragraph 37 of the replying affidavit that interest was not varied at page 6 therein is therefore false. It is also a confirmation of non-compliance with section 84 (1) of the *Land Act*. Counsel cited the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited (2014) eKLR and Bhalvinder Pal Singh S/O. Surji Singh & Another v Equity Bank (2015) eKLR in support of this submission.

19. Learned counsel for the applicant submitted that the chargee has failed to demonstrate that it issued and served a 3 months' demand notice to the plaintiff as required by section as required by section 56 (2) of the *Land Registration Act*. The said notice is a separate notice from that provided for in section 90 of the *Land Act*. Counsel pointed out that the demand letters at pages 28 and 30 of the replying affidavit give a period of 14 days from service instead of the stipulated 3 months in the law and in covenant 1 of the charge instrument. He cited section 56 (2) of the *Land Registration Act* and relied on the findings in Aquinas Wasike & 2 Others v Sidian Bank Limited (Formerly K-Rep Bank) & Another (2016) eKLR in support of this submission.

20. Counsel urged that the chargee failed to issue and serve valid a notice under section 90 of the *Land Act* in respect of each of the charge facilities. That it did not comply with section 56 (2) of the *Land Registration Act* and could therefore not move to issue notices under section 90 of the *Land Act*. Further, the charges were 2 and therefore the chargee was bound to issue separate notices under section 90 of the *Land Act*. Cap. 280. He pointed out that the notice which appears at page 32 of the replying affidavit also failed to comply with the stipulation of 90 days from service. It required the chargor to within 90 days of the notice dated the 13th February, 2024 to regularize the default as opposed to from the date of service. The notice also gave 90 days instead of 3 months as stipulated in the law. Counsel invited the court to be guided by the authority in Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 (unreported) in support of this submission.

21. It is the applicants' case that the chargee, having failed to comply with the issuance of the demand notice under section 56 (2) of the *Land Registration Act*, and notice under section 90 of the *Land Act*, the process of exercise of the remedy of sale was already invalid. But the chargee persisted in breach of the law by issuing the 40 days' notice prematurely. The certificate of postage at page 35 of the replying affidavit shows that the letter dated the 13th February, 2024 was posted on 16th February, 2024.

22. The same would be deemed to have been delivered or served after 7 working days from the date of postage which would exclude the Saturday and Sunday. The letter of the 13th February, 2024 would be deemed as served on 26th February, 2024. The 3 months were to run until 26th May, 2024. Counsel posited that it is clear that the chargee prepared the 40 days' notice on 16th May, 2024 and posted it 17th May, 2024 which actions were well before the 3 months had lapsed. He maintained that the 40 days' notice was thus issued prematurely and in breach of the law. He cited the case of David Ngugi Ngaari v Kenya Commercial Bank Limited (2015) eKLR in support of this submission. Counsel urged that the chargee intends to sell the charged property and complete a contract of sale of the land parcel without compliance with section 96 (2) of the *Land Act*. He stated that the instructions to the auctioneer were

also prematurely issued and invited the court to be guided by the case of Palmy Company Limited v Consolidated Bank of Kenya (2014) eKLR.

23. Counsel submitted that the 2nd defendant was the only one who could positively depone to the fact of service of the said notices as these were matters within his personal knowledge. Further, that the 2nd defendant was served and has filed no response hence the complaint by the plaintiff remains unchallenged on these matters. He urged that an examination of the notices for purposes of confirmation that there was non-compliance can be undertaken. He stated that the 2nd defendant is bound to comply with rule 15 of the Auctioneers Rules. 1997 and further, that the notices herein were dispatched by registered post in the first instance without recourse to personal service as required by the law.

24. He challenged the compliance of the 2nd defendant by stating that the auctioneer has not provided a certificate of service as required by law. He urged that the Notices were dispatched on 03/07/2024 and were to be deemed to have been delivered within 7 working days after the date of postage which would be 12/07/2024. The 45 days would run until 27/08/2024. The auctioneer advertised the property for sale in the newspaper on the 19/08/2024 which was before the lapse of the 45 days. He maintained that the 2nd defendant was in breach of the law.

25. On the valuation of the property, counsel urged that the obligation to value the property has not been complied with, faulting the valuation report provided as improper. The said report provides that it is valid only if it has the official seal of the company. In this case the seal is non evident as having been affixed.

26. Counsel submitted that the plaintiff has been servicing the loan and based on the loan statement supplied by the 1st defendant. That it has received credit amounts from him in the sum of sh. 17,328,899.74. This is a substantial payment considering the loan amount is sh. 30,000,000. This also confirms the plaintiff's assertion in the matter that he has paid over sh. 12,000,000. Counsel highlighted that the depositions in paragraphs *38*, *39*, *40* and even 41 of the replying affidavit cease to be correct upon checking the repayments made by the plaintiff based on the statement provided to the court by the 1st defendant. Further, he submitted that the 1st defendant has not challenged the said relief as sought by the plaintiff in the plaint by way of a defence and also in the replying affidavit.

27. Counsel reiterated that the plaintiff has a prima facie case to move the court under pursuant to the provisions of section 104 of the *Land Act*. 2012 and postpone the sale based on various reasons. He then reproduced the reasons advanced in paragraph 6 of the affidavit in support of the application. Counsel referred the court to the decision in Showcase Properties Limited v Kenya Commercial Bank Ltd. (2014) eKLR in support of this submission.

28. On the issue of irreparable harm and inadequacy of damages, counsel urged that the plaintiff will suffer irreparable harm and damage which will not be adequately compensated by an award of damages as the defendants are in breach of the law in seeking to exercise the statutory power of sale. Further, that the plaintiff ought not to be condemned to take damages in lieu of his crystallized right to an injunction. Counsel cited the case of Joseph Siro Mosiomo v Housing Finance Company of Kenya. Nairobi HCCC 26 of 2007 in support of this submission. Further, he submitted that the conduct of the defendants demonstrates a clear act of highhandedness and cited the case of Waithaka v Industrial and Commercial Development Corporation. (2001) KLR 374 in support of the submission.

29. Counsel concluded by submitting that if the court is in doubt it can maintain the status-quo, relying on the decision of Films Rover International v Cannon Films Sales Limited, (1986) 3 ALL ER 772 in support of this submission. He prayed that the court allows the application with costs.

Respondents' submissions

30. Learned counsel for the Respondent submitted that our courts have embraced the dicta in the locus classicus case of Giella vs Cassman Brown Co. Ltd [1973] EA 358 on the conditions that a person seeking the equitable remedy of injunction is required to satisfy. On the first limb, counsel referred to the findings of O'kubasu JA in Mrao -vs- First American Bank of Kenya Ltd & 20 others [2003] KLR. 123 on what amounts to a prima facie case. Further, that in the said case the court went on to state that

> "a person seeking an injunctive remedy is required to present material evidence demonstrating that their right has been infringed upon and that their case has a probability of success."

31. Counsel urged that it is not disputed that the 1st Defendant advanced a loan facility to Stephen Karanja Kariuki T/A Dominion Auto Mobiles which was secured by a legal charge over the suit property. Further, that it is also not disputed that the loan facility was to be repaid in forty-eight equal monthly instalments of Kshs. 1,011,039/- failure to which the 1st Defendant would be at liberty to exercise its statutory power of sale. He pointed out that the plaintiff does not deny that the loan account is in default insofar as repayment of the loan instalment arrears is concerned.

32. Counsel submitted that as a result of the continued default by the Plaintiff the 1st Defendant issued two demand letters; one dated 1st June 2023 and the other dated 15th July 2023. Therefore, the argument by the Plaintiff that the 1st Defendant did not comply with section 56 (2) of the *Land Registration Act* therefore falls flat. Citing Section 56 (2) of the *Land Registration Act*, counsel submitted that this provision of the law speaks to where there has been no demand for repayment and elucidates that payment ought to be made three months after service of a demand. From the annexures marked as WD-3 and WD-4 it is evident that there was a demand of payment and the Plaintiff has not asserted that he made any payment 3 months after the demands had been served upon him.

33. Counsel urged that the default not having been denied, the respondent was entitled to exercise his statutory power of sale. In doing so, the 1st Defendant proceeded to issue the following statutory notices upon the Plaintiff/Borrower;

    a. 90 days' notice pursuant to Section 90 (1) and (2) of the *Land Act*, 2012.

    b. 40 days' notice pursuant to Section 96(2) of the *Land Act*, 2012.

    c. 45 days' redemption notice pursuant to Rule 15(d) of the Auctioneers' Rules, 1997.

    d. 14 days' notification of sale pursuant to Rule 25(e) of the Auctioneers' Rules, 1997.

34. Counsel pointed out that the Plaintiff has called to question the 90 days' notice particularly at paragraph 6(d) of his supporting affidavit sworn on 28th August 2024 where he states the 1st Defendant failed to inform the Plaintiff of the consequences of failing to rectify the Default. He urged that paragraph *6*(d) reveals one thing- the Plaintiff actually received the Notice. The Plaintiff, however, has averred, perjuriously, in his supplementary affidavit sworn on 13th October 2024, that the 1st Defendant failed to indicate the remedy of the chargee will be 3 months after service of the notice. It is clear the 1st Defendant has indicated in annexure WD-5a the consequences of non-rectification and when the rectification ought to be done.

35. Counsel urged that noting that the Plaintiff has not disputed receipt of the 90 day notice, which was posted in the same manner as the 40 day notice and the 45 day Redemption Notice, it is demonstrable that the Plaintiff received the other notices. Moreover, the 1st Defendant has produced the postage

receipts for the 40 days' Notice and the requisite 45-day redemption notice or notification of sale. Counsel cited the case of *Mugo v Equity Bank Limited (Civil Appeal E62 of 2023*) [2023] KEHC 24167 (KLR) (27 October 2023) in support of this submission.

36. Counsel questioned the allegation by the plaintiff that he has been diligently repaying the loan, urging that this allegation cannot stand in the face of the documentation submitted by the 1st Respondent. Additionally, that in an effort to hoodwink this court and gloss over the cracks, the Plaintiff has filed a "further supporting affidavit" without leave of court where he has attached payment evidence for payments made in the month of October 2024. These are payments made after the filing of this application and after proceedings in this court. Additionally, the payments fall way short of the instalment the Plaintiff needed to pay in accordance with the contract.

37. Counsel submitted that the Plaintiff has not demonstrated any threat against any right and further, that he desires that this court do issue the orders sought based on assumptions. In fact, it is the 1st Defendant's rights under the loan facility and legal charge that are at threat by the Plaintiff. Counsel cited the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR in support of this submission.

38. On the issue of the variation on interest, counsel referred the court to the findings in Argos Furnishers Ltd v Ecobank Kenya Limited & Another (2014) eKLR where it was stated;

> " The subject on whether disputes on the sum owing and interest charged on a mortgage sum could be a basis for the issuance of an injunction is replete with ample judicial precedents as well as respected literary works. I am content to adopt a work of Rudd, J in Bharmalal Kanji Shah & Another v Shah Depar Devji (supra) 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.

39. Counsel reiterated that the plaintiff has not established a prima facie case deserving of the orders sought and placed reliance in the case of Mrao (supra). On the second limb, he cited the holding in Cause E298 of2023 eKLR and High Court Civil Suit E024 of2023 eKLR and urged that the applicant has not demonstrated that he will suffer irreparable harm. His claims of potential damage are not substantiated by concrete facts, or not severe enough to meet the legal standard for irreparable harm.

40. On the final limb, counsel urged that the balance of convenience tilts in favour of the 1st Defendant. That when evaluating whether to grant an injunction, the court assesses which party would be more adversely affected by the injunction being granted or denied. This involves comparing the potential harm each party would experience and determining which outcome is more equitable and practical. Further, that granting the injunction would have a direct and detrimental impact on the 1st Defendant's ability to recover outstanding debts for several reasons to wit; Restriction on recovery actions, financial impact on the 1st Defendant, Irreversibility of financial losses and prejudice to the 1st Defendant

41. Counsel urged that the applicant has failed to meet the required threshold for the orders sought and therefore the application should be dismissed with costs

Analysis & Determination

42. Upon consideration of the pleadings, attendant responses and submissions by both parties, the sole issue that arises for determination is;

    i. Whether the orders for a temporary injunction should issue

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43. The application is expressed to be brought under Order 40 Rule 1 of the Civil Procedure Rules. Order 40 Rule 1 provides as follows;

Where in any suit it is proved by affidavit or otherwise

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree;

or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

44. The principles guiding courts in determining whether an interlocutory injunction should be granted were laid out in the locus classicus case of Giella vs. Cassman Brown & Co. Ltd [1973] EA at Page. 358 whose holding is as follows: -

> " The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.
>
> First, an applicant must show a prima facie case with a probability of success.
>
> Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.
>
> Thirdly, if the court is in doubt, it will decide an application on the balance of convenience".

45. These principles were reiterated and expounded upon by the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR (Nguruman case) where the learned justices of appeal had this to say:

> " These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established That all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case That alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied That the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at That stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between..."

46. It follows therefore that for an applicant to successfully obtain orders for a temporary injunction, the following conditions must be satisfied;

    a. That there exists a prima facie case with a probability of success

    b. That the applicant will suffer irreparable loss that cannot be compensated by way of damages

    c. That the balance of convenience lies in granting the injunction.

Whether the Applicant has a prima facie case

47. In determining what amounts to a prima facie case, I am guided by the holding of the Court of Appeal in the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125(Mrao case), where the court held as follows:

> " In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude That there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

48. The court went on to state that a court will not venture into the merits of the case when considering whether a prima facie case has been established.

49. The crux of the applicants' application is that he was not served with the requisite statutory notices and as such, the statutory power of sale is irregular. There is no dispute as to the existence of the loan facility, all that is disputed is the exercise of statutory power of sale. In order to determine whether there exists a prima facie case, the court must establish whether the statutory power of sale was exercised in accordance with the law.

Whether the statutory power of sale was exercised as per the law

50. Statutory power of sale is governed by sections 90 and 96 of the *Land Act* and Rule 15 of the Auctioneers Rules 1995. Section 90 of the said *Land Act* Cap 280 (Laws of Kenya) provides that:

> " If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
>
> The notice required by subsection (1) shall adequately inform the recipient of the following matters—
>
> the nature and extent of the default by the chargor;
>
> if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
>
> if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default

and the time, not being less than two months, by the end of which the default must have been rectified;

the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies."

51. Section 96 of the *Land Act* stipulates that:

> " 1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.
>
> Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."

52. The 1st respondent, in its replying affidavit dated 28th August 2024, laid out the timeline within which it issued the notices to the applicant as follows; The respondent issued a demand letter dated 1st June 2023 requiring the applicant to remedy the default of Kshs. 1,055,310/-. It then followed up with another demand letter dated 15th July 2023 demanding repayment of the arrears which was at Kshs. 3,950,170/-. The Applicant did not respond to either.

53. The 1st respondent then issued a notice under section 90(1) of the *Land Act* and section 56(2) of the *Land Registration Act*. The notice, annexed to the replying affidavit as WD-5 was dated 13th February 2024 and was indicated to have been sent by registered post to the applicants' address being P.O. Box 1910-30100 – Eldoret. I have perused the charge agreements and I have noted that indeed, that is the listed address for the applicant.

54. The provisions of section 96 provides that the notices shall be issued upon one month of default. The applicants' first default was on 1st June 2023 and the second one was on 15th July 2023. The notice was issued on 13th February 2024 and therefore, it is clear that it was issued after more than one month of default as is required by law.

55. The respondent then issued a 40-day notice dated 16th May 2024 under section 96(2) of the *Land Act*. It is required that the notice to sell be served on the chargor within no less than 90 days after service of the notice under section 90 of the *Land Act*. This notice was annexed and marked as annexure WD-6 to the respondents' replying affidavit. The notice under section 90 having been issued on 13th February 2024, the notice under section 96(2) also was evidently issued within the correct timelines as per the act.

56. The applicant contended that there was no service of the statutory notices on him by the 1st defendant. The respondent annexed and marked the certificates of postage of the 90-day statutory notice as WD-5b and the copy of the 40-day statutory notice as WD-6b. I note from the submissions that the applicant has no0t challenged the certificates of posting and/or the address to which the communication the subject matter of these certificates were sent to in any substantive way or at all.

57. The Court of Appeal addressed the issue of service of notices in the case of Delphis Bank Limited v Praful Natwarlal Shavdia & 2 others [2005] eKLR where, in reference to the provisions of the Registered *Land Act*, the Court held thus;

It is evident that the appellant chose sub-section 153(c) of the Act as a mode to effect service upon the 2nd respondent. Under the section all that it needed do was to send the Notice by registered post to the 2nd respondent at his last known postal address in Kenya, that is P.O. Box No. 81930, Mombasa, and this it did.

58. In Nyagilo Ochieng & Another Vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260 the Court of Appeal while dealing with section 74(1) of the repealed Registered *Land Act* held that:

> It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the Registered *Land Act* (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the Chargor's receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered *Land Act*. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved

59. Despite the fact that these authorities are with respect to the repealed Registered *Land Act*, the legal principle which the court expounded upon, which is that proof that notices were sent to the registered address provided by the applicant is sufficient evidence to confirm that there was service of the notices remains inviolable. I have also perused the said notices and I am satisfied that they are in compliance with the provisions of section 90 and 96 of the *Land Act* as they clearly inform the applicant of the nature of the notice, nature and extent of default, the arrears due as at the respective dates, the outstanding balances, the modes of rectification, the consequences of non-rectification and the rights of the chargor under the *Land Act*.

60. Whereas the applicant had stated that his property was not valued as is required under the law, I note from the annexures availed by the Is Respondent that they indeed conducted a valuation of the suit property as per the provisions of section 97(2) of the *Land Act* and carried out a valuation of the suit property. A report dated May 2024 was produced by the respondent. The same was marked and annexed as annexure WD-7 to the respondents' replying affidavit. It is therefore my considered view that the valuation report was carried out in compliance with section 97(2) of the *Land Act*.

61. While taking into account the submissions of the applicant on the notices annexed by the 1st Respondent in the applicants bid to demonstrate to Court that the notices were irregular and illegal for reasons that they did not conform with the relevant provisions of the law under which they were

purportedly issued, the explanations he proffered with respect to each notice, and unfortunately to the detriment of the applicant, demonstrated clearly that despite his denying that no notices were served upon him, it is evident that all the required notices were indeed served, the same were duly received, the applicant in fact is in possession of them and hence his ability, as has been demonstrated through his submissions, to comment on every minute detail of each notice.

62. The upshot of the foregoing therefore is that I am well satisfied on this limb that the 1st respondent did sufficiently comply with the provisions of the law on the issuance of all the relevant Notices in their bid to exercise their Statutory Power of Sale.

63. However, going forward, I note further that the applicant disputed the compliance with rule 15(d) of the Auctioneers Rules which provides as follows;

> " 15. Upon receipt of a Court warrant of letter of instruction he auctioneers shall in the case of immovable property.
>
> d. Give in writing to the owner of the property a notice of not less that forty –five days within which the owner may redeem the property by payment of the amount set forth in the Court warrant or letter of instruction."

64. The 1st respondent annexed as WD-8 a copy of the letter of instruction to the 2nd respondent and additionally, the redemption notice, notification of sale and certificates of postage as annexures WD-9a, WD-9b and WD-9c respectively. As the respondent is the one who was seeking to exercise statutory power of sale, and it is the one that issued the instructions to the auctioneer, I find that the allegation that it cannot produce these documents as evidence to be moot.

65. The letter of instruction was issued on 1st July 2024 after the issuance of the notice under section 96(2) which was issued on 16th May 2024. Given that there is a certificate of postage provided, the respondent has satisfied this court that the redemption notice was issued in accordance with statutory provisions. From my analysis, I am satisfied that the 1st respondent complied with the statutory provisions in exercising its statutory power of sale which had crystalized against the plaintiff/applicant.

66. Additionally, the applicant took issue with the alleged variation of interest rates and the actual amount owed. Courts have long held that a dispute as to the amount owed is not sufficient ground for an injunction to be allowed. It was stated in the case of Nairobi HCCC No. 527 of 2013 Palmy Company Limited vs. Consolidated Bank of Kenya Limited [2014] eKLR, That;

> " Unless there are other cogent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction against a chargee who is exercising the statutory power of sale of the charged property..."

67. It is therefore my considered view that the applicant has failed to prove that there exists a prima facie case and guided by the findings in Nguruman Limited (supra) where the court stated that:

> " If prima facie case is not established, then irreparable injury and balance of convenience need no consideration....."
>
> it is my finding that the applicant having failed to prove the existence of a prima facie case, I need not delve into irreparable damage and balance of convenience. I therefore find that the application

lacks merit and the same is accordingly dismissed in its entirety with costs to the respondent. The interim orders issued on 31st October 2024 are now hereby vacated.

READ DATED AND SIGNED AT ELDORET ON 31ST JANUARY 2024.**

E. OMINDE

JUDGE