



Webtribe Limited t/a Jambopay v Equity Bank (Kenya) Limited & another (Environment and Land Case Civil Suit E005 of 2021) [2023] KEELC 59 (KLR) (18 January 2023) (Judgment)

Neutral citation: [2023] KEELC 59 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E005 OF 2021
JO MBOYA, J
JANUARY 18, 2023**

BETWEEN

WEBTRIBE LIMITED T/A JAMBOPAY PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED 1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

JUDGMENT

Introduction And Background.

1. Vide Originating Summons dated the 9th February 2022, the Plaintiff herein has approached the Honorable Court seeking the following Reliefs;
 - i. That this matter be certified urgent and heard Ex-parte in the first instance.
 - ii. That the Honorable Court be pleased to grant a Permanent Injunction restraining the Defendants, Equity Bank Limited and Purple Royal Auctioneers, selling, disposing of, alienating; transferring; causing to be transferred; altering, registering or in any other way whatsoever interfering with its quiet possession, use and enjoyment of the suit property pending the hearing and determination of this application and suit.
 - iii. That costs of this Application/ Suit be provided for.
2. The instant originating summons is anchored and premised on various grounds, which have been enumerated at the foot thereof. For clarity, a total of nine grounds have been alluded to thereunder.
3. On the other hand, the Originating summons is premised and predicated on the supporting affidavit sworn by one Danson Muchemi, which is sworn on the 9th February 2022. It is imperative to state that



the supporting affidavit has merely repeated and reiterated the grounds enumerated at the foot of the originating summons.

4. Upon being served with the originating summons herein, the 1st Defendant duly entered appearance on the 2nd March 2022 and thereafter filed a Replying affidavit sworn on the 24th June 2022.
5. Other than the foregoing, the first Defendant similarly sought for and obtained leave of the court to file a Supplementary Replying affidavit. In this regard, a supplementary Replying Affidavit sworn on the 4th October 2022 was duly filed and lodged with the court.
6. Be that as it may, it is imperative to state and observe that despite the contents of both the elaborate Replying affidavit sworn on the 24th June 2022 and the Supplementary affidavit, sworn on the 4th October 2022, the Plaintiff herein did not file any Further/supplementary affidavit, whatsoever.
7. Needless to state, that the foregoing pleadings and documents, constitute and comprise the totality of pleadings filed by and on behalf of the Parties.
8. Furthermore, the Parties herein agreed to have the originating summons canvassed and disposed of on the basis of affidavit evidence and written submissions. In this regard, the court proceeded to and thereafter issued directions pertaining to and concerning the filing and exchange of written submissions.
9. For completeness, it is imperative to state that the Plaintiff proceeded to and filed written submissions dated the 13th October 2022, whilst the 1st Defendant filed written submissions dated the 2nd December 2022.
10. Suffice it to point out that the two sets of written submissions, (the details whereof have been alluded to in the preceding paragraph), forms part of the record of the court and shall be taken into account in crafting the Judgment herein.

Submissions by the Parties:

a. Plaintiff's Submissions:

11. The counsel for the Plaintiff herein filed written submission dated the 13th October 2022 and in respect of which, same has raised and highlighted three issues for consideration.
12. First and foremost, learned counsel for the Plaintiff has submitted that the Defendants herein and in particular, the 1st Defendant failed and neglected to issue and serve the requisite statutory notice pursuant to the provisions of Section 90(2) of the *Land Act*, 2012.
13. In this respect, counsel for the Plaintiff has contended that without issuance and due service of the primary notice envisaged under the provisions of Section 90(2) of the *Land Act*, 2012 (2016) the impugned exercise of statutory power of sale, shall be irregular, illegal and thus unlawful.
14. Secondly, counsel for the Plaintiff has submitted that other than the mandatory statutory notice envisaged vide the provisions of Section 90(2) of the *Land Act*, 2012, it was also incumbent upon the 1st Defendant to issue and serve a secondary notice as stipulated vide Section 96(2) of the *Land Act*, 2012.
15. Additionally, counsel for the Plaintiff has contended that the statutory notice under Section 96(2) of the *Land Act*, 2012 is separate and distinct from the notification of sale under the provisions of Rule 15 of the *Auctioneers Rules*, 1997.



16. Nevertheless, counsel for the Plaintiff has added that the 1st Defendant failed and neglected to issue and serve the requisite secondary notice.
17. Thirdly, learned counsel has submitted that on the basis of failure to issue and serve the requisite statutory notices, the intended sale and disposal of the suit property pursuant to exercise of statutory power of sale, was therefore irregular, illegal and unlawful.
18. In the premises and based on the foregoing, Learned counsel for the Plaintiff has therefore contended that reasonable basis has been established and laid out to warrant the grant/issuance of the orders of permanent injunction as sought.
19. To buttress the submissions, which have been enumerated hereinbefore, counsel for the Plaintiff has cited and quoted the decisions in various cases, inter-alia, *Albert Mario Cordeiro & another v Vishram Shamji* (2015) eKLR, *Alice Owino Okello v Trust Bank Ltd & another* LLR No 625 (CCK) and *Mrao Ltd v First American Bank Ltd & 2 Others* (2003)eKLR.

b. 1st Defendant's Submissions

20. The 1st Defendant's submissions are dated the 2nd December 2022 and same has highlighted and amplified five issues for consideration and determination.
21. The first issue for consideration relates to whether the honourable court can grant orders in terms of prayer 2 of the Originating summons. For clarity, counsel has pointed out that prayer 2 of the Originating summons, which is the only substantive prayer at the foot of the originating summons touches on and concerns the issuance of an order of Permanent injunction pending the hearing and determination of the application and the suit.
22. To this end, counsel has pointed out that such an order can only issue up to and including the determination of the suit and not otherwise, given and taking into account the wordings thereof/ the manner in which same has been crafted.
23. Be that as it may, counsel has further submitted that a permanent injunction is a perpetual order which is issued to protect the rights of a Party post/ subsequent to the hearing and determination of the suit. For clarity, an order of Permanent injunction outlives the determination of the suit and not otherwise.
24. The second issue which has been raised and amplified by counsel for the 1st Defendant related to whether the 1st Defendant duly complied with the relevant and applicable provisions of the *Land Act, 2012*, in her efforts/endeavor to exercise her statutory powers of sale.
25. In this respect, counsel for the 1st Defendant has contended that prior to and before instructing the 2nd Defendant to sell and dispose of the suit property vide public auction, same had issued and served the Plaintiff with various statutory notices.
26. For completeness, counsel for the 1st Defendant invited the attention of the court to the first notice dated the 13th December 2018, which was a demand notice addressed to the Plaintiff and which brought to the attention of the Plaintiff, as well as her Directors, the default pertaining to non-payment of the sum of Kes 2, 621, 616.97/= only.
27. Similarly, counsel for the 1st defendant also referred to a second notice dated the 7th November 2019, being the statutory notice issued pursuant to and in line with the provisions of Section 90(2) of The *Land Act, 2012*.



28. Other than the foregoing, counsel for the 1st Defendant also made reference to the notice dated the 5th March 2020, being the 40 days' Notice issued pursuant to and in line with the provisions of Section 90(2) of the *Land Act*, 2012.
29. For coherence, it was the submissions of counsel for the 1st Defendant, that the 1st Defendant duly issued and served all the requisite notices upon the Plaintiff herein and her directors, in accordance with the provisions of Sections 90(1, 2) and 96(2) of the *Land Act*, 2012.
30. In a nutshell, counsel for the 1st Defendant submitted that the 1st Defendant therefore duly complied with and adhered to the requisite provisions of the law prior to and before commencing the exercise of the statutory powers of sale.
31. Thirdly, counsel for the 1st Defendant submitted that the Plaintiff herein has raised and canvassed the issue of breach and violation of Section 84(3) of the *Land Act*, 2012. However, it has been pointed out that the issue of Section 84(3) of the *Land Act*, 2012 had neither been raised nor pleaded in the originating summons.
32. Based on the foregoing, counsel for the 1st Defendant has therefore contended and submitted that the issue of breach of Section 84(3) of the *Land Act*, 2012, cannot now be canvassed vide the submissions, in the manner ventilated by the Plaintiff.
33. To this end, counsel for the 1st Defendant has therefore invited the court to find and hold that the Plaintiff is bound by her pleadings and thus cannot be allowed to travel beyond the boundaries of the pleadings filed before the Honourable court.
34. The fourth issue raised by the counsel for the 1st Defendant relates to whether the Plaintiff herein is entitled to the orders of Permanent injunction, either in the manner sought or at all.
35. As pertains to whether the Plaintiff is entitled to an order of Permanent injunction, counsel for the 1st Defendant has submitted that the Plaintiff herein duly approached the 1st Defendant for financial accommodation, which approach was acceded to by the 1st Defendant, culminating into the issuance of a Letter of offer.
36. Further, counsel submitted that the Plaintiff duly executed the letter of offer and thereafter the 1st Defendant prepared and perfected a Charge over and in respect of the suit property. For clarity, it was pointed out that the charge was registered on the 22nd September 2016.
37. Other than the foregoing, counsel for the 1st Defendant submitted that upon the disbursement of the banking facility to and in favor of the Plaintiff, same was obliged to repay the monies at the foot of the banking facility vide instalment in the manner stipulated and contained in the charge instrument.
38. Be that as it may, counsel added that the Plaintiff failed to make repayments either in accordance with the terms of the charge Instrument or at all. In this regard, it was pointed out that the banking facility in favor of the Plaintiff remains due and outstanding in the sum of Kes 139, 156, 723.47/= only, as at the time of filing the submissions.
39. In view of the foregoing, counsel for the 1st Defendant has submitted that there is an admitted outstanding loan in the sum of Kes 139, 156, 723.47/= only and hence no order of Permanent injunction can issue, either in the manner sought or at all.
40. In any event, counsel has further added that the issuance of an order of Permanent injunction would be tantamount to blocking and permanently barring the 1st Defendant from recovering the said amount, contrary to and in contravention of the established position of the law.



41. Finally, counsel for the 1st Defendant has also submitted that by charging the suit property to and in favor of the 1st Defendant, the Plaintiff herein acknowledged that the suit property became a commodity for sale and therefore available for sale and disposal, subject to compliance with the requisite provisions of the law.
42. In a nutshell, counsel for the 1st Defendant has submitted that the Plaintiff herein is not entitled to the orders of Permanent injunction, either as sought or at all.
43. To vindicate the foregoing submissions, counsel for the 1st Defendant has invited the court to take cognizance of the decision in various cases, inter-alia, *Joseph Kiarie Mbugua v Garam Ltd & Another* (2006)eKLR, *Euro Bank Ltd (In Liquidation) v Twicter Investment Ltd & 2 Others* (2020)eKLR, *Bandari Investments & Company Ltd v Martin Chiponda & 139 Others* (2022)eKLR, *Kenya Power & Lighting Ltd v Sheriff Molana Habib* (2018)eKLR and *Kenleb Corns Ltd v New Gatitu Service Station Ltd & Another* (1990)eKLR.

Issues for Determination

44. Having reviewed the Originating summons together with the supporting affidavit thereof as well as the Replying and Supplementary Replying affidavit, filed on behalf of the Parties herein and upon consideration of the submissions filed by the Parties, the following issues are pertinent and thus worthy of determination;
 - i. Whether the Honourable court can grant the orders of Permanent Injunction pending the hearing and determination of this application and suit and in any event whether such an order is Legally tenable.
 - ii. Whether the 1st Defendant duly complied with the relevant and applicable provisions of the *Land Act*, 2012 (2016) and if so, whether the Intended exercise of statutory power of sale is lawful and legitimate.
 - iii. What Reliefs ought to be granted.

Analysis and Determination

Issue Number 1

Whether the Honourable Court can grant the Orders of Permanent Injunction pending the hearing and Determination of this application and suit and in any event, whether such an order is Legally tenable.

45. The Plaintiff herein filed and lodged before the honourable court originating summons dated the 9th February 2022. For clarity, the Plaintiff itemized and highlighted the nature of reliefs that same was seeking vide the impugned originating summons.
46. Given the importance of prayer 2 sought v ide the Originating summons, it is important to reproduce same. In this regard, prayer 2, which is the only substantive prayer sought vide the originating summons is reproduced as hereunder;
 - ii. That the Honorable Court be pleased to grant a permanent injunction restraining the Defendants, Equity Bank Limited and PURple Royal Auctioneers, selling, disposing of, alienating; transferring; causing to be transferred; altering, registering or in any other way



whatsoever interfering with its quiet possession, use and enjoyment of the suit property pending the hearing and determination of this application and Suit.

47. From the wording of the said prayer, it is evident and apparent that what the plaintiff is seeking is an order to last pending the hearing and (sic) determination of the suit and not otherwise.
48. In the premises, the question that does arise is what shall then happen immediately upon the determination of the instant suit and delivery of the Judgment.
49. Clearly, the kind of order that has been sought by the Plaintiff herein, is one that will terminate and (sic) stand extinguished, upon delivery of Judgment. In this regard, it is my humble view that the order that has been sought for would be an order in futility and vanity.
50. Be that as it may, it is also imperative to state and underscore that where the Orders sought shall be in vain, then the Honourable Court is not obligated to grant such an Order. For the avoidance of Doubt, Courts of Law do not act in vanity or futility.
51. Secondly and for good measure, an order of Permanent injunction, which is similarly referred as a perpetual injunction only issues after the hearing and determination of a suit and thus same determines the rights of the Parties before the court.
52. For clarity, it is important to note that an order of Permanent injunction thus constitutes a decree of the court and same binds the Parties to the suit ex-post the delivery of the Judgment by the court.
53. Put differently, an order of Permanent injunction would by its nature be one that takes effect upon the delivery and rendition of the Judgment of the court and thus same outlives the delivery of the Judgment and not otherwise.
54. Given the foregoing, it is my considered view that an order of Permanent injunction, which is distinct from a Temporary injunction, cannot be tied to the pendency/determination of the suit or application, in the manner stipulated in the current Originating summons.
55. To amplify the foregoing observations, it is appropriate to take cognizance of the holding of the court in the case of *Kenya Power & Lighting Company Ltd v Sherif Molana Habib* (2018)eKLR, where the court stated and observed as hereunder;

“A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the Parties.”
56. Simply put, the order of Permanent injunction sought vide the Originating summons would have outlived its usefulness, purpose and tenor, if at all, immediately the court pronounces the instant Judgment. In this regard, such an order cannot issue.
57. Thirdly, it is also common knowledge that Parties are bound by their pleadings and hence same cannot be allowed to travel beyond the borders set and circumscribed by the pleadings filed. In this regard, the guiding pleading is the Impugned Originating Summons.



58. To this end, it is appropriate to recall, restate and reiterate the holding of the Court of Appeal in the case of *Independent Electoral & Boundaries Commission & Another v Stephen Mutinda Mule & another* [2013] eKLR where the Court Of Appeal observed as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

59. Furthermore, the importance of the doctrine of departure and essentially the aspect that Parties are bound by their pleadings, was re-visited by the Court of Appeal in the case of *Dakianga Distributors Ltd v Kenya Seed Company Ltd* (2015)eKLR, where the Court of Appeal stated and observed as hereunder;

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in *Malawi Railways Limited v Nyasulu* [1998] MWSC 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties



as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not Hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

In *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v Adam Vassiliadis* [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 that:

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

This Court in *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others* (supra) cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC* SC 91/2002 where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

Mr Kimamo Kuria, for the respondent, faulted the learned judge for giving credit of sums alleged in evidence as having been paid by the appellant to the respondent Mr Bosire Gichana, for the appellant, while supporting that part of the judgment believed that the learned judge was entitled to give such credit and that it was not necessary to amend the defence.

We are of the respectful opinion that the learned judge, after holding correctly that parties were bound by their pleadings erred in holding that the appellant was entitled to credit on sums which were not pleaded in the defence at all. The appellant was bound by its pleading in the defence where it claimed that it had issued three cheques in replacement of dishonoured cheques which its witness admitted, and the trial court so found, that they were cheques issued in respect of other independent transactions.

60. Duly inspired by the holding, details in the preceding paragraph, I come to the conclusion that the Plaintiff herein cannot now be allowed to change tact and purport vide written submissions dated the 13th October 2022 to be seeking for a different set of orders of permanent injunction.



61. Suffice it to point out that the Plaintiff herein is bound by the terms of the pleadings filed before the court and hence same cannot seek to vary or depart from the terms of the pleadings, without having sought for and procured leave to amend.
62. Before moving away from this particular point, it is important and imperative to take cognizance of and essentially, to reiterate the provisions of Order 2 Rule 6 of the Civil Procedure Rules 2010.
63. For ease of reference, the said provisions are reproduced as hereunder;
 6. Departure [Order 2, rule 6.]
 - (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.
 - (2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.
64. In view of the foregoing consideration, I come to the conclusion that the substantive reliefs which has been sought at the foot of the originating summons dated the 9th February 2022, is legally untenable and cannot therefore be granted.
65. Further, it is my humble view that the issuance/grant of the impugned substantive order (sic) (Permanent Injunction pending the determination of the suit), shall amount to acting in vain and in futility, insofar as same shall be rendered otiose, immediately upon the rendition of the judgment.

Issue Number 2

Whether the 1st Defendant duly Complied with the Relevant and Applicable Provisions of the Land Act, 2012 (2016) and if so, whether the Intended Exercise of Statutory Power of Sale is Lawful and Legitimate.

66. The Plaintiff herein had contended and averred that the 1st Defendant neither issued nor served the requisite statutory notices. In this regard, the Plaintiff complained that the 1st Defendant had commenced the exercise of her statutory powers of sale in flagrant disregard of the provisions of Section 90(1), (2) and 96(2) of the Land Act, 2012.
67. Essentially, the gravamen of the Plaintiff's case touched on and concerns non- issuance of the requisite statutory notices by and on behalf of the 1st Defendant.
68. In answer to the complaints and averments by the Plaintiff, the 1st Defendant filed an elaborate Replying affidavit sworn on the 24th June 2022 through her Credit manager, Kenyatta Avenue Branch.
69. On behalf of the 1st Defendant, it was contended that the Plaintiff herein was duly issued and served with all the requisite statutory notices, as envisaged under the Land Act 2012.
70. First and foremost, the deponent of the Replying affidavit alluded to and invited the court to take cognizance of the Demand Notice dated the 13th December 2018, which was duly served upon both the Plaintiff and her directors vide certificate of posting, a copy of which was duly exhibited and attached to the replying affidavit.
71. Secondly, the deponent of the Replying affidavit also alluded to the Statutory notice dated the 7th November 2019 and which was issued pursuant to and in line with the provisions of Section 90(2) of the Land Act, 2012.



72. Similarly, the deponent of the Replying affidavit attached and availed to the court a copy of the certificate of postage, showing the named address which had hitherto been availed and supplied by the Plaintiff.
73. Thirdly, the deponent of the Replying affidavit also invited the attention of the court to the notice dated the 5th March 2020, issued pursuant to and by virtue of Section 96(2) of the *Land Act* 2012.
74. For completeness of record, the deponent of the replying affidavit has also availed and annexed a copy of the certificate of postage denoting that indeed the impugned statutory notice was indeed dispatched to the Plaintiff last known postal address.
75. Needless to add, that the postal address shown and reflected at the foot of the certificate of postage, which has been annexed by the deponent of the Replying affidavit, correspond with the postal address alluded to and relied upon by the Plaintiff in the affidavit in support of the originating summons.
76. In this regard, there is no gainsaying that indeed the impugned statutory notices were duly dispatched and sent to the Plaintiff's last known address, which address has in any event not been contested or disputed.
77. Be that as it may, it is important to point out that upon being served with both the Replying affidavit and the Supplementary Replying affidavit, whose contents are very elaborate, the Plaintiff herein neither filed any further/supplementary affidavit nor responded to the pertinent issues contained at the foot of the two named affidavits.
78. To my mind, having failed to file any further/supplementary affidavit, the Plaintiff is taken or deemed to have admitted the positive averments contained in the elaborate affidavits, which were filed by and on behalf of the 1st Defendant.
79. Suffice it to point out that if the Plaintiff had wanted to challenge and impeach the various positive depositions contained in the named affidavits, same was obligated to file a further/supplementary affidavit. Only then, would it be deemed that those averments under oath are denied.
80. To this end and without belaboring the point, I beg to adopt and reiterate the holding in the case of *Mohammed & Another v Haidara* [1972] EA 166 at page 167 paragraph F-H, Spry V P considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:
- “The respondent made no attempt to reply to these allegations and they therefore remain un rebutted...Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”
81. Premised on the foregoing, it is my finding and holding that the Plaintiff herein and her Directors were variously and duly served with the requisite statutory notices by and on behalf of the 1st Defendant.
82. Moving on, I also find and hold that having been duly served with the requisite statutory notices, the Plaintiff herein cannot now feign ignorance and contend that same was never served with requisite notices.
83. In any event, taking into account the elaborate contents of the replying affidavit, which were never contested, it is my finding and holding that the denials by the Plaintiff, as pertains to service of the requisite notices is informed by Dishonesty and a gross attempt to defraud the Cause of Justice.



84. Nevertheless, it is also stated that upon being issued and served with the various statutory notices by the 1st Defendant, the Plaintiff herein approached the 1st Defendant and sought further indulgence and accommodation by the 1st Defendant.
85. On the other hand, the deponent of the Replying affidavit has further averred that upon the approach by the Plaintiff, the 1st Defendant indeed revised the payment plan to enable the Plaintiff to repay the loan instalments. However, it was added that despite the indulgence extended to the Plaintiff, same was unable to comply.
86. Surely, if the Plaintiff herein did not receive the impugned statutory notices (which I have found were duly issued and served) then why did the Plaintiff approach the 1st Defendant for further indulgence and accommodation in the manner adverted to vide paragraphs 21 and 22 of the Replying affidavit.
87. In my humble view, the Plaintiff herein was playing lottery with the due process of the court, yet same had benefited from the disbursement of the monies at the foot of the Banking facility at the instance of the 1st Defendant.
88. Suffice it to point out, that by approaching the 1st Defendant and seeking further indulgence, long after the issuance and service of the various notices, the Plaintiff herein signaled that same had indeed been duly served with the requisite notices.
89. Besides, having not raised any Issues pertaining to the validity or otherwise of the said Notices, (when same approached the First Defendant for indulgence) it is also safe to find and hold that the Plaintiff, had no contest on the validity thereof.
90. In respect of the foregoing observation, it is imperative to adopt and reiterate the holding of the Court of appeal in the case of *Euro Bank Ltd (in liquidation) v Twicter Investments Ltd & 2 Others*(2020)eKLR paragraph 40, where the court stated and observed as hereunder;

40. From the record it is clear that after receiving the notice giving (whether it was for the 14 days or 90 days), the advocates on record for the mortgagor engaged counsel for the Bank with proposals on how to liquidate the loan. They did not complain at all that the notice they had been given was invalid. They actually acted on it. following the discussions, the auctioneers were advised to hold any advertisement for the sale of the suit property. That was in November 1998. The property was not re-advertised until April 2001. The question we should be asking, in our view is whether in these circumstances, it was necessary to re-issue another statutory notice. The answer to this is in the negative as the default in payment had continued for more than 3 months following the notice in view of Section 69A(1) (a). This was the position held by this Court in *Nancy Kaboya Amadiva v Expert Credit Limited & another* [2015] eKLR where it was held:-

“There are also instances where a notice need not issue, where interest for more than 2 months is due and remains unpaid. This was held by this Court in *Trust Bank Limited v Kiran Ramji Kotendia* Civil Appeal No 61 of 2000 eKLR and followed in *James Ombere Okoth v East African Building Society and others* Civil Appeal No 202 of 1996 (unreported). There is no evidence on record of payment having ever been made by the appellant to the respondent towards repayment of the money borrowed for more than two months. For this reason



alone, no notice was issuable to the appellant as explained above and it does not behove us to consider the issue any further.”(Emphasis added)

From the above analysis, it is clear that our finding is that the notice served on the 1st respondent was valid as there was compliance with section 69A(1) (a) of the *ITPA* .

91. Premised on the foregoing finding and holding, there is no gainsaying that the exercise of the statutory powers of sale or Right of Foreclosure by and on behalf of the 1st Defendant was therefore lawful and legal.

Issue Number 3

What Reliefs Ought to be Granted.

92. The Plaintiff has variously admitted and acknowledged that the loan facility which was granted by the 1st Defendant remains owing, due and in arrears.

93. For ease of reference, the Plaintiff has made the following averments before the court;

“The Plaintiff has been all through diligent enough in servicing the loan arrears and in fact, has since given the Defendant proposals for the payment of the said outstanding arrears, but in total disregard of which, the 1st Defendant went ahead to issue irregular notices and threatening to sale the suit property”(see paragraph 5 of the Supporting affidavit).

94. Other than the foregoing deposition, the Plaintiff has further averred/ submitted as hereunder;

“It is the Plaintiff submissions that on the balance of convenience, that if the court is in doubt that the Plaintiff has established a prima facie case with probabilities of success and damages would not be adequate compensation for the loss suffered, that the balance of convenience should tilt in favor of preserving the suit property as the Plaintiff works towards servicing the said loan to its conclusion”.

95. From the Plaintiff’s own lips, it is admitted and acknowledged that the debt in favor of the 1st Defendant remains due and owing.

96. However, to be able to appreciate the gravity and magnitude of the matter, it is imperative to reproduce the contents of paragraph 26 of the 1st Defendant’s Replying affidavit sworn on the 24th June 2022.

97. For convenience, same is reproduced as hereunder;

26. That the Plaintiff in obtaining the aforesaid ex-parte orders issued on 22nd February 2022 failed in their duty of candour to the Honourable Court to disclose all material facts as follows :

- i. The Plaintiff misrepresented that it has been diligent in serving the loan arrears and based on the averments above, this is not true and the Plaintiff has been in default.
- ii. The Plaintiff misrepresented that the outstanding amount was Ksh 800,000/= while in fact the outstanding amount as of 29th January 2021 was Ksh 139,156,723.47/= being the balance of the principal sum together with interest accrued all of which



immediately became due upon the Plaintiff being in default of payment of the due instalment.

- iii. In addition as at the said date, there were arrears of Kshs 40,309,094/=
- iv. The Plaintiff failed to make reference to his previous default and that despite indulgence by the 1st Defendant it had indeed not honoured its obligations.
- v. The Plaintiff failed to disclose to the Court that upon defaulting in payment of the instalment then the 1st Defendant was at liberty to call in the entire loan and the entire liability was due.
- vi. The Plaintiff alleged failure to have been served with the necessary notices and demands in compliance with the law while the same had been served on it
- vii. The Plaintiff failed to produce all documents in respect of the nature of its relationship with the 1st Defendant concealing its obligations as set out in the documents and failure to honour its obligations
- viii. The Plaintiff failed to disclose that the 1st Defendant had a right to act as it did in redeeming the property charged.

98. From the foregoing reproduction, it is apparent that the amount in arrears is substantial, nay colossal.

99. Premised on the foregoing, the question that does arise is whether a court of law and of Equity can surely intervene in favor of the Plaintiff, yet same is admittedly in breach of a binding contract.

100. In my humble view, the grant of any positive orders in respect of the subject matter and more particularly, in favor of the Plaintiff, shall be tantamount to occasioning grave injustice and outright absurdity. In this regard, the prayer for an Order of Permanent Injunction shall be contrary to Values enshrined vide Article 10 (2) of the Constitution, 2010.

101. Consequently, even if the Plaintiff herein had properly pleaded the claim for Permanent injunction, this Court would still have found it difficult to grant same. In any event, the grant of such a Prayer, to enable and afford the Plaintiff time to re-pay the Loan Facility, would be tantamount to re-writing the terms of the Charge Instrument, which is not legally acceptable.

Final Disposition:

102. Having analyzed and evaluated the issues for determination which were highlighted and amplified in the body of the Judgment, it must have become apparent that the Plaintiff's case was not only misconceived but equally devoid of merits.

103. In the circumstances, it is my finding and holding that the Plaintiff's suit is not meritorious and hence same warrants dismissal. In a nutshell, the Plaintiff's suit vide originating summons dated the 9th February 2022 be and is hereby dismissed with costs to the 1st Defendant.

104. For the avoidance of doubt, the Temporary orders of Injunction which were issued on the 21st February 2022, be and are hereby discharged and vacated.

105. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Ayugi h/b for Mr. Seth Ojienda for the Plaintiff.

Mr. Njuguna h/b for Ms. Oduor for the 1st Defendant.

N/A for the 2nd Defendant.

