



Meru Green Horticulture EPZ Ltd v Equity Bank (Kenya) Limited (Civil Case E005 of 2023) [2024] KEHC 1776 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E005 OF 2023
MW MUIGAI, J
FEBRUARY 22, 2024**

BETWEEN

MERU GREEN HORTICULTURE EPZ LTD PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED DEFENDANT

RULING

1. This matter originated from the Environment & Land Court Machakos vide Ruling delivered by Hon LJ A. Nyukuri of 24/7/2023 to have the matter transferred to the High Court Machakos.
2. On 27/7/2023, this Court requested to peruse the Court file and maintained status quo upto 31/7/2023 and the Court did not reach the matter. The matter was mentioned in the last Term on 19/9/2023 where Parties/Counsel filed written submissions with regard to 2 Applications filed by the Plaintiff/Applicant.

Notice Of Motion Of 24/4/2023

3. Vide Notice of Motion under Certificate of Urgency dated and filed on 24th April,2023 brought under Sections 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act* 2010 and Order 40 Rule 1 and 2 of the Civil Procedure Rules 2010 and Sections 90, 96 and 97 of *Land Act* 2012.
4. The Applicant sought inter alia the following orders that:
 1. This Court to issue an order of injunction restraining the Defendant through the Directors, employees, servants, agent and/or anyone deriving benefits and/or instructions from them from advertising, seeking alienating and in any other way interfering with the quiet enjoyment of properties known as Titles Nos. L.R NO. 18474/196 (L.R NO. 167993) Meru Greens Horticulture Epz Ltd Mavoko Machakos County pending inter partes hearing and determination of this Application and suit.



2. This Court to issue an order directed at the Defendant through their Directors, employees', agents and/or servants to allow them re-structure the said loan repayment in view of the external financing by a 3rd party.
 3. This Court to issue an order that the Defendant failed to follow the provisions of Sections 90 (2) 96 (2) and 97 (3) of the Land Act.
 4. This Court to issue an order declaring the purported sale void.
 5. This Court to issue an order directed at the Defendant to have their name removed from CRB.
 6. This Court to issue injunction orders and also for a declaratory order declaring the entire process of sale pursuant to Section 90, 96 and 97 of the Land Act as non-compliant and void.
5. The grounds upon which the Application is premised are on the body of the said application.

Supporting Affidavit

6. The Application herein was supported by an affidavit dated and filed on 24th April, 2023 sworn by Muthomi Gerald, wherein he deposed that the Defendant through Garam Auctioneers have issued 45 days advertised for sale the Plaintiff properties being Titles L.R NO. 18474/196 (L.R NO. 167993) Meru Greens Horticulture Epz Ltd Mavoko Machakos County.
7. Depositing that the said sale is in exercise of the Defendant Power of Sale and is/was slated for 3rd May, 2023 at 12 noon. Opining further that the Defendant failed to issue Notice in accordance to Section 90 (2) of the Land Act, the sale being actuated by malice since the Plaintiff has a financier who is ready and willing to finance the business to enable the Plaintiff repay the loan.
8. He deposed that in June 2022 the Plaintiff had agreed with the Defendant to have a consultant by the name of Peter Nyaga who still works with the Plaintiff and paid by the Defendant. Depositing that the terms of reference was for the Consultant to report on the business viability and provide turnaround Plan.
9. This was well done and the reports were presented where the expert advised the lender to inject \$ 433,000, and the business would have been able to start repaying the Defendant from the month of February, 2023. He opined that the Defendant trashed the Consultant's report and went ahead to instruct Auctioneers to attach the assets the premises of this suit.
10. He lamented that the sale valuation as set out in the notification of sale by the Defendant is/was far below the value of property which contravenes the provisions of Section 97 (3) of the Land Act.
11. The deponent relied/relies on the documents in the lists of documents as evidence in support.
12. He deposed that they and Directors have been listed in the CRB which completely incapacitates them from making any alternative means of financing and that the co-directors were never served nor did they sign the 45 days Notice in line with Section 96 (13) of the Land Act.

Replying Affidavit

13. The Application was opposed by a Replying Affidavit dated and filed on 5th May, 2023, sworn by Kariuki King'ori the Defendant manager/ Legal services, wherein he deposed that by letter dated 17th September, 2019 the Defendant offered and the Plaintiff accepted various banking facilities amounting to KES 375,000,000. That of the banking facilities advanced to the plaintiff, 4 were new facilities, 1



was an existing facility that was reviewed and 1 was a facility that was renewed and enhanced. (reference was made to a copy of the letter of offer at page 1 to 19 of the exhibit annexed to this affidavit).

14. Depositing that it was an express term that the facility of 17th September, 2019 would be secured by these securities: corporate guarantee by Mount Kenya Gardens Limited supported by existing legal charge of KES 70,500,000 to Meru Greens Horticulture limited over Title Number Mbeti/Gachuriri/441, 444 and 554 registered and stamped in favour of the Defendant, corporate guarantee by Mount Kenya Gardens Limited supported by existing legal charge of KES 9,300,000 over Title No. Abothuguchi/Kariene/2941 and 2942 registered and stamped in favour of the Defendant, corporate guarantee of Meru Greens Horticulture Limited for KES 82,422,382 executed in favour of the Defendant and Directors personal guarantee and indemnity of KES 82,422,382 executed in favour of the Defendant.
15. Depositing further that it was also expressly agreed that the facility would be secured by the following additional securities: All assets debenture charge of KES 375,000,000 over the Plaintiff's current and future assets to be stamped and registered in favour of the Defendant, Legal Charge over L.R No. 18474/196 to cover KES 375,000,000 to be stamped and registered in favour of the Defendant. This was done and a charge registered in favour of the Defendant on 18th December, 2019 (copy of the Charge at pages 20 to 43 of the exhibit), corporate guarantee of Meru Greens Horticulture Limited to cover KES 375,000,000, corporate guarantee from Meru Greens Horticulture Limited to cover KES 375,000,000 and Directors Personal guarantees and indemnity of KES 375,000,000.
16. That by a letter dated 20th December, 2019, the Plaintiff and Defendant agreed to vary the facility to modify the rate of interest that the Defendant would charge. (copy of the said letter at pages 44 to 47 of the exhibit).
17. Further, it was deposed that by a letter dated 18th May, 2020, the Plaintiff and Defendant agreed to vary the terms of the facility owing to the difficult economic conditions caused by Covid-19 Pandemic. The Defendant granted the Plaintiff a Moratorium freezing repayment obligations on the principal and/or interest for a period of between six and twelve months. (copy of the variation letter at pages 48 to 89 of the exhibit).
18. He opined that in July 2021 the moratorium granted to the plaintiff had lapsed and the Plaintiff was in default and the Defendant moved to realize the charge offered over L.R No. 18474/196. That by a letter dated 2nd July, 2021, the Defendant issued the Plaintiff with a statutory notice under Section 90 of the Land Act demanding payment of KES 22,064,588.05 and EUR 23,010 secured by charge over L.R No. 18474/196 registered in the name of Meru Greens Horticulture EPZ Limited. (Copy of the said at pages 90 to 91 of the exhibit). That the said letter contained all the information required under Section 90 (2) of the Land Act.
19. It was deposed that the letter dated 2nd July, 2021 was sent to the Defendant by registered mail. (copy of the certificate of posting confirming postage at pages 92 to 93 of the exhibit) and it is not correct that the Plaintiff was not served with a notice under Section 90 of the Land Act.
20. Depositing that the Plaintiff did not make payment within the time set out in the notice under Section 90 of the Land Act and by a letter dated 28th October, 2022 the Defendant issued the 40-day notice to sell required under Section 96 of the Land Act relating to L.R No. 18474/196. That the total outstanding amount due as at that date was KES 217,461,476 and EUR 2,338,431. (copy of this letter at pages 94 to 95 of the exhibit).
21. That when the notice lapsed, the Defendant did not take steps to advertise L.R No. 18474/196 for sale until December 2022 to give the Plaintiff an opportunity to settle the outstanding sums and that



- on 10th January,2023 the Defendant was approached by Gerald Muthomi, a director of the Plaintiff, together with Peter Nyaga, a consultant engaged by the Plaintiff, for a meeting.
22. It is not correct that the Defendant agreed to pay Peter Nyaga as alleged, based on the Defendant's policies, any agreement with a consultant has to be in writing setting out the terms of the consultant's engagement.
 23. Further that at the meeting of 10th January,2023, Mr. Muthomi presented a proposal on how the Plaintiff's business would be turned around and how it would be able to start making loan repayments. His proposal was heavily reliant on funds the Plaintiff expected to receive from any entity known as Scipion. No evidence was provided that Scipion had committed or disbursed funds to the Plaintiff. Further that the Plaintiff also requested a moratorium and freeze repayments for at least 6 months, the Plaintiff's proposals were not acceptable to the Defendant. (copy of the minutes of the meeting of 10th January,2023 are at pages 98 and 99 of the exhibit).
 24. That the Defendant appointed Garam Investments Auctioneers to carry out the sale for L.R No. 18474/196. The Auctioneer prepared and served the Plaintiff with 45-day redemption notice dated 24th February,2023 together with a notification of sale. Opining that the auctioneer served the notices physically on the Plaintiff's director, Gerald Muthomi, who acknowledged receipt by appending his signature and the plaintiff was notified that the charged property would be sold by public auction on 2nd May,2023. (copies of the acknowledged redemption notice and notification of sale are at pages 100 to 102 of the exhibit).
 25. It was deponed that on 2nd March,2023, the Plaintiff's consultant, Peter Nyaga, wrote to the Defendant acknowledging that the Plaintiff was in receipt of the notices but sought accommodation to enable it repay the debt. (copy of the email is at page 103 of the exhibit).
 26. That the Defendant appointed a valuer who proceeded to undertake an inspection of L.R No. 18474/196 on 9th March,2023. The property has a market value of KES 327,450,000 and a forced sale value of KES 253,000,000. (copy of the valuation report at pages 104 to 165 of the exhibit).
 27. Further that the Defendant agreed to meet the Plaintiff on 28th March,2023 where the Plaintiff was given yet another opportunity to present an acceptable payment proposal. The Plaintiff did not state with certainty how and by when the Defendant would receive payment of the outstanding sums. (A copy of the minutes of this meeting are at pages 166 to 167 of the exhibit).
 28. It was deposed that Gerald Muthomi requested for another meeting with the Defendant to introduce an investor who was prepared to inject capital into the Plaintiff's business. That the Defendant agreed and a meeting was held on 12th April,2023. Opining that at this meeting, the Plaintiff was again unable to state with certainty how and by when the Defendant would receive payment of the outstanding sums and the Defendant informed the Plaintiff that the auction would proceed as planned. (a copy of this meeting is at pages 168 to 172 of the exhibit).
 29. It was deposed further that due to the Plaintiff's failure to repay the debt, L.R No. 18474/196 was advertised for sale by public auction on 2nd May,2023. Stating that the Defendant has no knowledge of any sabotage of the Plaintiff's business as alleged or of the alleged financiers approached to pay off the debt by the Plaintiff referred to at paragraph 11 of the affidavit of Gerald Muthomi.
 30. The Defendant has complied with all provisions of the law before exercising its statutory power of sale, hence it should be allowed to realize its security.



Notice Of Motion Dated 10Th August,2023

31. There is yet another Notice of Motion Application dated 10th August,2023 brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules.
32. The Applicant seeks the following orders that:
 1. This Court do issue interim orders in terms of prayer No. 2 of the Motion dated 24th April,2023 pending the directions by the court.
 2. The costs of this application be provided for.
33. The grounds upon which this application was premised are in the body of the said application.

Supporting Affidavit

34. The application was supported by an affidavit dated 10th August,2023, sworn by Mr. Seth Ojienda, Counsel for the Plaintiff herein, wherein, he deposed that the plaintiff's Notice of Motion dated 24th April,2023 should be heard during the High Court current vacation.
35. Deposing that the matter was filed at ELC Machakos but was subsequently transferred to the Civil Division, further that the matter was mentioned on the 27th July,2023 before Muigai J who directed the same to be mentioned on 31st July,2023 for directions, the said matter could not be reached and the Plaintiff is apprehensive that the Defendant will proceed to sell the property known as Title Nos. L.R NO. 18474/196 (L.R NO. 167993) Meru Greens Horticulture Epz Ltd Mavoko Machakos County.
36. That the matter had subsisting interim orders by the ELC Court which were discharged upon transfer, hence the Plaintiff sought for interim orders in terms of prayer No. 2 of the motion dated 24th April,2023 pending the directions by the court.

Defendant's Grounds Of Opposition

37. The Defendant in its Grounds of Opposition dated and filed in court on 18th August,2023, opposed the Plaintiff's Notice of Motion dated 10th August,2023 on the following grounds:
 1. The Plaintiff is guilty of delaying the matter having been in Court on 31st July,2023 which was the last day of the Court Term. No explanation has been offered for the lapse of ten (10) days before the application was made.
 2. The application is an abuse of court process as the Plaintiff has an Application dated 24th April,2023 by which it seeks injunction orders which is pending determination. This is a fresh application by which the Plaintiff seeks the same orders as in its earlier application.
 3. The Plaintiff has in the Notice of Motion dated 10th August,2023 failed to disclose material information including that; It has filed three different suits arising from the same lending being Embu ELC No. E014 Of 2023 And Meru E006 of 2023.

The Defendant has responded to the Application of 24th April,2023 by replying affidavit of Kariuki King'ori dated 5th May,2023, grounds of opposition and digest of authorities all dated 5th May,2023.
 4. In both the Applications dated 24th April,2023 and dated 10th August,2023, the Plaintiff has failed to disclose the material facts that:



- a. The Plaintiff was served with all the statutory notices under Sections 90 and 96 of the Land Act and with a 45-day redemption notice and notification of sale prior to the public auction and the Defendant engaged in negotiations with the Plaintiff before and after issuance of the notices.

Replying Affidavit In Response To The Plaintiff's Application Dated 10th August, 2023

38. The Defendant vide its replying Affidavit dated 11th August, 2023 sworn by Kariuki King'ori the Defendant's Manager, herein, wherein he deposed that the Plaintiff filed this suit in the Environment and Land Court (ELC) and the matter was originally ELC No. E009 of 2023.
39. The Defendant objected to the Jurisdiction of the ELC to deal with the matter as the dispute did not relate to the environment or the use and occupation of and title to land. The court upheld the objection by its ruling of 24th July, 2023 and transferred the suit to the High Court.
40. Deposing that it is an abuse of court process for the Plaintiff to file multiple suits and applications for injunctions arising from the same transaction as this is a clear act of forum shopping, further that the Plaintiff does not deny that it owes debt to the Defendant which has been outstanding since 2nd July, 2021 and has not made any payment since then.
41. The matter was canvassed by way of written submissions.

Submissions

Plaintiff's Submissions

42. The Plaintiff vide its submissions dated 8th September, 2023 and filed in court on 12th September, 2023, wherein Counsel for the Plaintiffs submitted and reiterated facts as deposed in the filed Affidavits. The issues raised are; issue whether this Honorable Court should issue an order restraining the Defendant through the Directors, employees, servants, agent and/or anyone deriving benefits and/or instructions from them from advertising, seeking alienating and in any other way interfering with the quiet enjoyment of properties known as Titles Nos. L.r No. 18474/196 (L.r No. 167993) Meru Greens Horticulture Epz Ltd Mavoko Machakos County from compliance with Sections 90, 96 and 97 of the Lands Act that is deemed to be non-compliant and void.
43. Reliance was made on the cases of *Giella Vs Cassman Brown* (1973) EA 358, *Mrao Ltd Vs First American Bank of Kenya LTD* (2003) eklr and *Dr. Simon Waiharo Chege Vs Paramount Bank of Kenya Ltd Nairobi (Milimani) HCC No. 360 of 2001*, to cement its position on what court consider in granting interlocutory injunction.
44. It was the contention of plaintiff that the 90 days redemption Notice was never served upon them and that the Defendant contends that they served Notice upon registered posts to the Plaintiff through registered post of P.O BOX 1730-60200, the Plaintiff contended they never received such Notice. Further it is the case for the Plaintiff that there is also evidence that there was email correspondence and physical meeting between parties had advertised the 45 days by the auctioneers was served.
45. It was the contention by the Plaintiff that the 90 days redemption notice was presumed service and that the 45 days Auctioneer Rules were served upon 1 Director of the Plaintiff. Opining that evidence of service of 90 days redemption Notice has become a contempt issue. The said Post Office Box 1230-60200 do not belong to the Plaintiff.
46. To buttress its point on issuance of statutory notices, Counsel for the Plaintiff placed reliance on the cases of *Esso Kenya Limited vs Mark Makwata Okiya Civil Appeal No. 69 of 1991*, *Bank of Africa*



Kenya Limited Vs John Ndungu Gachara [2022] eKLR, Moses Kibiego Yator Vs Eco Bank Kenya Limited NKU E&L No. 426 of 2013 [2014] eKLR and Beatrice Atieno Onyango Vs Housing Finance Company Limited & 3 Others [2020] eKLR & Nyangilo Ochieng & Anor vs Fanuel Ochieng & 2 Others [1995-1998] 2EA 260 among other cases.

47. In respect to the valuation, counsel submitted that 2 valuation reports had given varied forward valuation from the properties in issue. Contending that the variation of the forced value is over and incapable of being reconciled. According to counsel, the variation will require evidence to be reviewed by both valuers so as to ascertain and to ensure that the Plaintiff obtains the best price. To support this argument credence was placed Section 97 (3) of the *Land Act* and in the cases of *Zum Zum Investment Limited Vs Habib Bank Limited* [2014] eKLR and *Simon Pasua Kaanto & Another Vs Family Bank Limited* [2018] eKLR.

Defendants Submissions

48. The Defendant in its submissions dated and filed in court on 15th September 2023, wherein Counsel for the Defendant submitted on the limbs sequentially.
49. On abuse of Court process, Counsel submitted that the Plaintiff filed multiple suits arising from the same transaction contrary to Section 6 CPA.
50. The Defendant raised the issue of that the Plaintiff filed 3 suits over the same transaction in various Courts, Embu & Meru and there has been non-disclosure of material facts to the Court and failed to bring the whole case to Court. The Defendant asserted that the borrowing by the Plaintiff from the Defendant to support its business was 1 transaction. Reliance was Supreme Court in Kenya *Commercial Bank Ltd vs Muiiri Coffee Estate Ltd & Anor* eKLR & C.A. In *Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others* {1995} *Total Kenya Ltd vs PS Ministry of Energy & 14 Others* [2006] eKLR.
51. The Defendant deposed that entire suit is an abuse of court process filed with sole intention of delaying the Defendant from exercising its statutory power of sale so that the Plaintiff can allegedly secure funding from another Financier as evidenced from a letter dated 6th April, 2023 addressed to the Plaintiff by Scipion Capital where Scipion Capital notes that the Defendant is proceeding to sell Assets belonging to the Plaintiff by public Auction on 2nd May, 2023.
52. The 3rd Party, Scipion Capital guaranteed that it would provide additional funding, if the borrower is able to find a method to stop the sale and again a further stay of proceedings. Reference was made to the letter at pages 18 and 19 of the bundle of documents filed by the Plaintiff. To cement its point on the abuse of court process, Counsel quoted the case of *Muchanga Investments Ltd Vs Safaris Unlimited (Africa) Ltd & 2 Others* [2019] eKLR.
53. On the issue test for grant of an interlocutory injunction, counsel contended that to succeed in an application for an interlocutory injunction, the plaintiff is required to prove that it has a prima facie case that if the injunction is not granted the plaintiff will suffer loss that cannot be compensated by an award of damages. To buttress this limb, reliance was made on the cases of *Nguruman Limited Vs Jan Bonde Nielson and 2 Others* [2014] eKLR and *Mrao Ltd Vs First American Bank of Kenya LTD* (2003) eKLR.
54. As to the statutory notices, Counsel averred that by a letter dated 2nd July, 2021 the Defendant issued the plaintiff with a statutory under Section 90 of the *Land Act* demanding payment of KES 22,064,588.05 and Euro 23,010 Secured by a charge over L.R No. 18474/196 (copy of the latter at pages 90-91 of the exhibit). Contending that the said letter contained all the information that is required under Section



- 90 (2) of the Land Act. However, the Plaintiff did not make payment within the three months' time limit that had been set under the said notice.
55. It was submitted that the Plaintiff having failed to make payments within the time lines, by a letter dated 28th October,2022, the Defendant issued the 40-day notice to sell as required under Section 96 of the Land Act relating to L.R No. 18474/196. Opining that this notices were served upon the plaintiff and its guarantor through their registered mail address. (the latter and certificate of posting are at pages 94 and to 97 of the exhibit annexed to the replying affidavit).
 56. Submitting that the postal address for the Plaintiff as set out in the charge dated 17th December,2019 is P.O. Box 607-00242, Kitengela (reference was made to page 21 of the exhibit to replying affidavit), contending that the statutory notices that were sent to the Plaintiff were sent to P.O BOX 607-00242, Kitengela (reference made to pages 94 to 95 and 100 to 102 of the exhibit to the replying affidavit).
 57. As to the valuation of the charged property, counsel opined that an argument that the charged property has been undervalued is not sufficient cause to grant an interlocutory injunction. To support this averment reliance was made on the cases of Zum Zum Investment Limited Vs Habib Bank Limited [2014] eKLR and olkasasi Limited Vs Equity Bank Limited [2015] eKLR, and submitted that the Plaintiff's complaint lacked merit and the Plaintiff failed to demonstrate that it has a prima facie case with the probability of success.
 58. As to irreparable loss, counsel submitted that it is not in dispute that the Plaintiff charged L.R No. 1874/196 to secure the facility advanced to the Plaintiff. The property became commodity of sale that can be sold to recover the debt. Reliance was on the case of John Kingori Kioni Vs Sidian Bank & Another [2020] eKLR and Isaac O. Litali Vs Ambrose Lusumbai & Beautrice Subali & AFC and Andrew Muriuki Wanjohi Vs Equity Building Society Limited & others [2006] eKLR.
 59. Submitting that the Defendant is a stable bank and there is no suggestion that it would be unable to compensate the Plaintiff in the event that plaintiff is successful in the trial. Hence the Defendant should not have stopped from exercising its power of sale to recover the outstanding debt.
 60. As to balance of convenience, it was submitted that outstanding from the Plaintiff to the Defendant is KES 217,461,476 Euro 2,338,431 as of 28th October,2022 which sum continues to attract interest and the longer the debt remains outstanding the harder it will be for the Defendant to recover the monies advanced to the Plaintiff and the Defendant will be at high risk of suffering irreparable loss. Reliance was made on the case of Andrew Muriuki Wanjohi Vs Equity Building Society Limited & others [2006] eKLR contending that the balance of convenience their tilts in favour of the Defendant by allowing the Defendant to proceed to exercise its statutory power of sale.
 61. It was the Defendant's case that the Plaintiff sought in their application to compel the defendant to restructure loan repayment in view of external financing. Opining that the court cannot interfere or re-write contractual relationships between parties. That the Plaintiff is bound by the terms of the agreement entered into with the defendant and the court cannot interfere unless fraud, coercion or undue influence is proven. Reliance was made on the case of National Bank of Kenya Ltd Vs Pipe Plastic Samkolit (K) Ltd [2001] eKLR. Further that the Plaintiff in the Application also seeks final orders at prayers 3 to 7 which if granted would have the effect of determining the suit with finality. Counsel relied on the case of Kenya Deposit Insurance Corporation Vs Richardson & David Limited & Another [2017] eKLR, where the court held that final orders cannot be granted at the interlocutory stage.
 62. Defendant urged the court to dismiss the Plaintiff's Application dated 24th April,2023.



Determination/analysis

63. The Court considered the pleadings filed by parties through Counsel and written submissions. The issues that emerge for determination are; Whether or not;
1. This Court to issue an order of injunction restraining the sale of the suit property L.R No. 1874/196 pending hearing and determination of the application / suit
 2. This Court to issue an order directed at the Defendant to allow the Plaintiff/Applicant re-structure the said loan repayment in view of the external financing by a 3rd party.
 3. This Court to issue an order that the Defendant failed to follow the provisions of Sections 90 (2) 96 (2) and 97 (3) of the Land Act & to issue an order declaring the purported sale void.

Temporary/interlocutory Injunction

64. In *Giella –vs- Cassman Brown and Co. Ltd* [1973] [EA 358] the court set out the principles for grant of temporary injunctions as follows: -
- i) The Plaintiff must establish that he has a prima facie case with high chances of success;
 - ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
 - iii) If the court is in doubt, it will decide on a balance of convenience.
64. In *Mrao Limited –vs- First American Bank of Kenya Limited* [2003] KLR 125, the Court stated 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. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”
65. In *Mureithi vs City Council of Nairobi* [1976-1985] EA 331 Madan JJA referred to *L Diplock in American Cyanamid Co vs Ethicon Ltd* [1975] 1All ER 504 Court stated as follows;
- “The object of Interlocutory injunction is to protect the Plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial....”
66. The authorities prescribe that an Applicant has the burden of proof to establish a prima facie case, irreparable damage that cannot be compensated by damages and if not the case for the Court consider the grant of injunction on a balance of probabilities. Order 40 (1) & (2) CPR provides for grant of Interlocutory/Temporary Injunction for 1year maximum if merited in the specific circumstances.

Has the Plaintiff proved a prima facie case

67. The Plaintiff’s claim against the Defendant is that the Defendant through Garam Auctioneers issued 45 days’ notice in exercise of the statutory power of sale on Plaintiff’s property LR No 18474/196 (LR



- 167993) and advertised the suit property for sale without compliance of statutory provisions and legal process.
68. The Plaintiff/Applicant asserted that Defendant failed to serve Statutory Notice under Section 90 (2) & 96 (2) of Land Act. The Plaintiff Co -directors were never served and 2nd Director did not sign the 45 days' notice in line with Section 96 (13) Land Act. The Plaintiff stated that the Notices allegedly posted by registered post to P.O. Box 1730-60200 that was/is not their address. The P.O. Box 1230-60200 does not belong to the Plaintiff. The service of statutory notices is contested.
69. That the sale was actuated by malice as the Defendant refused to accommodate the Plaintiff who had a 3rd Party, Scipion Trading Capital to inject funds and revamp the business to enable the Plaintiff to repay the Loan. The Defendant refused the Plaintiff's offer that United Bank of Africa & Access Bank & Africa Haet Ltd to provide working capital to restore the business and the subject of the loan/ credit facilities resolved once funds were availed. The Plaintiff disclosed that injunction was granted in Machakos ELC E009 of 2023 for 3 related properties Title Nos Mbeti/Gachuriri/441/442/444 & 554 Embu & Abothuguchi/Kariene/2941 & 2942 which are intertwined with the present suit property.
70. The Plaintiff stated that the sale valuation as set out in the Notification sale by the defendant is far below the value of the property which contravenes Section 97 (3) of Lands Act. The Plaintiff also submitted that there were/are 2 Valuation Reports over the suit property. There are 2 valuations that are not reconcilable and both Valuers ought to ascertain and ensure the Plaintiff obtains the best price.
71. The Defendant deposed that by letter of 17/9/2019, marked KK-1, the Defendant offered and the Plaintiff accepted loan/credit facility of Ksh 375,000,000/-. Various securities were offered by the Plaintiff to the Defendant among them Legal Charge (s) over suit properties, Debenture & Company and Directors Guarantees. Among the securities was/is LR 18474/196 which the Legal Charge of 17/12/2019 was also executed between the Plaintiff Company through its Directors & Defendant Bank.
72. The Defendant deposed that by letter of 20/12/2019 the Plaintiff and Defendant agreed to vary the facility and modified the rate of interest a copy annexed to Replying Affidavit of 5/5/2023.
73. By letter of 18/5/2020 the Plaintiff and Defendant agreed to vary the terms of the facility owing to the difficult economic conditions caused by Corvid 19 pandemic, a copy also annexed to the Replying Affidavit.
- The moratorium for 1 year granted expired and the Plaintiff was still in default of servicing the Loan facility granted by the Bank.
74. By letter of 2/7/2021 the Defendant wrote to the Plaintiff and moved to realize the charge offered over LR No 18474/196 registered under Meru Greens horticulture EPZ Ltd under Section 90 of Land Act. The 90-day notice was for the Plaintiff to make payments to reduce the loan Ksh 22,064,588.05 & Euro 23,010. The Statutory Notice was sent by registered post to the Company and Directors and copy of demand letter and copy of mail sent by Registered Post annexed to the Replying Affidavit.
75. By letter dated 28/10/2022, the Defendant issued the 40-day Notice under Section 96 of Land Act of statutory notice of sale of the charged suit property in default of servicing the loan. The outstanding amount had risen to Ksh 217,461,476 & Euro 2,338,43. A copy is attached to the Replying Affidavit and copy of List of mail sent by registered Post is also attached.
76. The Defendant deposed even after the statutory notice period lapsed in December 2022, the Plaintiff failed to service the facility. Instead, on 10/1/2023 the Plaintiff through Director of the Plaintiff approached the bank with a proposal that the 3rd Party Scipion agreed to inject funds into the Plaintiff



Company and revamp the business and would defray the loan facility. Also, the Plaintiff proposed that the repayments be frozen for another 6 months. The defendant found the proposals unacceptable as there was no evidence that the 3rd Party /Financier Sciopion had committed to release to the Plaintiff Company funds or actually disbursed any funds to the Plaintiff.

77. The defendant appointed Garam Investments Auctioneers to carry out the sale of the suit property LR No 18474/196 and the Auctioneer, issued the Statutory Notice of 45 days Redemption Notice of 23/2/2023 together with Notification of Sale. The Plaintiff was served the Notices physically to 1 Plaintiff Director who acknowledged receipt by appending his signature. The served Director wrote/sent email for intervention; the copy is annexed to the Replying Affidavit.
78. The Defendant appointed the Valuer to inspect the suit property LR No 18474/196 and by Report dated 9/3/2023 market Value Ksh 327,450,000/- and forced sale value Ksh 253,000,000/- The Report is annexed to the Replying Affidavit.
79. The Defendant held meetings on 28/3/2023 & 12/4/2023 at the requests of the Plaintiff and the Plaintiff made/gave proposals on defraying the loan facility. No payment was made and advertisement for public auction was on 2/5/2023.
80. The defendant deposed that it was the Plaintiff's failure to repay the debt that occasioned the statutory power of sale/public auction of 2/5/2023 and not moved by malice or sabotage as the Defendant complied with statutory provisions and granted Plaintiff sufficient opportunity to settle outstanding amounts.

Analysis

Loan Repayments/servicing Facilities

81. The Plaintiff Company and Defendant Bank entered into a valid and legal contract of granting loan facility in exchange for security vide the letter of 17/9/2019. In the event of Default Clause 5 of the Agreement spelt out the legal process to conduct of statutory power of sale of the Charged property as security vide Legal Charge of 17/12/2019. The Plaintiff Company Bank Statement/confirm default and escalating interest and charges.
82. The Plaintiff does not deny default/indebtedness but attributes it to Corvid19 pandemic and Defendant's refusal of 3rd Party Financier to inject capital to keep the business a going concern and enable the Company defray the loan. This Court finds that although Corvid 19 pandemic resulted in adverse social and economic impact between 2019-2020 the Defendant agreed to a moratorium of 1 year and resumed demand in 2021. The indebtedness is evident as no payment was/is made since 2019 towards defraying the loan and/or any evidence of part payment produced as evidence in Court.
83. In the case of Patrick Waweru Mwangi & Another –vs- Housing Finance Company of Kenya Limited [2013] eKLR the Court said;

“There is nothing before me to show that further payments have been made since that date, over a year ago. In this regard, I am cognizant of the finding of Njagi J. in *Kyangaro –vs- Kenya Commercial Bank Ltd & Another* [2004] 1 KLR 126. At page 145 the learned Judge had this to say:

An injunction is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. He admitted in this court, quite frankly, that since leaving employment of the bank four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he



is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfil all or substantially all his outstanding obligations before insisting his rights. The Plaintiff has not done that. Consequently, he has not done equity. In the hands of the Plaintiff, a permanent injunction would wreak havoc to the first Defendant, and that would be inequitable. While charges are enjoined by law to follow the laid down procedures for the realization of their security, the courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and charges have their own rights.”

Default/demand/statutory Notices

84. The Letter of 2/7/2021 by the Defendant to the Plaintiff on the 90-day Notice for the outstanding loan Ksh 22,064,588.05 & Euro 23,010 was sent through registered post to the Company and individual Directors of the Plaintiff Company. Copy of the letter is attached and copy of Registered mail posted is attached and shows the following;
- a. Directors of Meru Green Horticulture Ltd P.O.Box 607-00242 Kitengela
 - b. Directors of Mount Kenya Gardens Ltd P.O.Box 1730-60200-Meru
 - c. Directors of Meru Green Horticulture Ltd P.O.Box 1730-60200-Meru
 - d. Rosemary Kagondu Muthomi P.O.Box 1730 – 60200- Meru
 - e. Gerald Muthomi Mutuambugu P.O.Box 1730 – 60200- Meru
85. The contested addresses are as outlined in the Banking Facility Letter of 17/9/2019 where the addresses are as follows;
- Borrower: Meru Greens Horticulture EPZ Ltd
Box 607-00242 Kitengela
- Guarantors:
- Meru Green Horticulture Ltd P.O. Box 1730-60200-Meru
Mount Kenya Gardens Ltd P.O. Box 1730-60200-Meru
Gerald Muthomi Mutuambugu P.O. Box 1730 – 60200-
Meru
Rosemary Kagondu Muthomi P.O.Box 1730 – 60200-
Meru
- From the above details in the banking Facility letter the Plaintiffs gave the addresses used to send the Notice(s) by Registered Post.
86. The letter dated 28/10/2022 by the Defendant to the Plaintiff, of the 40-day Notice under Section 96 of *Land Act* was sent by Registered Post as shown in Copy of List of mail sent by Registered Post similarly as outlined above in the next Registered Mail List attached to Replying Affidavit/Defendant's bundle.



87. High Court Civil Case 12 of 2018 Michael Gitere & Anor vs Kenya Commercial Bank Ltd [2018] eKLR, the Court observed;

“It must be understood in the face of denial of receipt of statutory notice(s) it is incumbent upon the Chargee to prove posting. It would have been a very simple exercise for the bank to produce slip(s) or letters containing statutory notice(s) The bank did not do so. Instead an Officer from the Bank simply produced file copies of the notices to prove 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 (s) shifts to the addressee.....”The Court further held that the requirement of the service of statutory notice was not meant to enable borrowers escape from their obligations but was meant to enable the borrowers have sufficient time within which to redeem their charged properties.

88. The Defendant has proved on a balance of probabilities that the requisite statutory Notices were sent by registered post to the Plaintiff Company and each of the respective Directors to the addresses they gave in the Agreement/contract of 17/9/2019. The Defendant complied with legal requirements before embarking on statutory power of sale and the Plaintiff through 1st Director admitted to the statutory notices being sent and received in the Minute 2 of Minutes of Meeting held on 12/4/2023.
89. The 3rd Legal & Statutory Notice was/is by the Auctioneer Garam Investments, who vide Letter dated 24/2/2023 by registered Mail wrote/sent to Meru Green Horticulture Ltd with Notification of sale signed by Gerald Muthomi & but not Rosemary Kagendo Muthomi Co Director of Meru Green Horticulture Ltd. Minute 4 of Minutes of Meeting held on 12/04/2023 it was disclosed both Directors were physically served with the 45 -day Notices but the 2nd Director refused to sign when the Notice was presented to her. The claim has not been subjected to oral evidence and cross examination to test the veracity of such claim /evidence.

Valuation

90. The Plaintiff contested the Valuation by Tysons Limited and that there are 2 Valuations which were at variance and hence the matter ought to proceed for hearing inter partes. Again, the Minutes of the Meeting held on 12/4/2023, Minute 3, the 1st Director raised the issue of the Valuations conducted were very low and did not present the true position of the suit property LR No 18474/196 which from Valuation on record holds food processing factory and equipment.
91. On the other hand the Defendant raised the issue that property market shifted and where properties were escalating in value of recent time the experience was that land depreciated or held constant for 4 years.
92. In Zum Zum Investment Limited versus Habib Bank Limited [2014] eKLR the Court held; -

“It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.”



93. Patrick Kangethe Edward Vs Co-operative Bank of Kenya limited & Another, supra, the Court succinctly held that:

“Section 97 (1) of the Land Act now places a duty of care on a chargee while exercising its power of sale. That duty to this court includes the duty to ensure that the best achievable price is realized and further that the chargor whose land is sold is not exposed to unnecessary and avoidable expenses and costs”

Palmy Company Limited vs Consolidated Bank of Kenya Limited [2014] eKLR, the Court observed as follows:

“The purpose of a valuation under Section 97(2) of the Land Act is twofold. The first one is to obtain the best price reasonably obtainable at the time of the sale, thus protecting the right of the Chargor to property...the second one is to prevent unscrupulous Chargee from selling the charged property at a price which is peppercorn or not comparable to interests in land of the same character and quality.”

“The onus of establishing on prima facie basis, that the Applicant’s right has been infringed by the Respondent by failing to discharge the duty of care under section 97(1) of the Land Act lies on the Applicant.”

“The court needs cogent evidence and material in order to say that prima facie, there has been an undervaluation of the suit property which is an infringement of section 97(2) of the Land Act by the Respondent as to entitle the court to call for an explanation or rebuttal from the Respondent’

94. From the above consideration of pleadings, evidence and submissions, the Court finds that the Plaintiff’s issue raised that statutory notices under Section 90 & 96 of Land Act were not served on/to the Plaintiff Company and 2 Directors is not borne out by evidence on record.

95. The Notice under Rule 15 of Auctioneers Rules of 45 days and Notification of Sale/Auction is contested; on record is evidence of 1 Director was served the 2nd Director was not served/served and refused to sign. This is a valid issue to be resolved before any statutory power of sale is taken up on the charged suit property.

96. The Valuations are contested Zenith Valuers & Paragon Valuers in 2018 & 2019 respectively when the loan facility was obtained and the current Valuations by Tysons Ltd in March 2023 are at variance. The issue is in contest and there are competing explanations by parties/Counsel on reconciling the Valuations. Rule 10 of Auctioneer’s Rules 1997 allows a party to seek valuation by an independent valuer.

10. Independent valuation of goods attached

A debtor may, at any time before the property seized or repossessed is sold, apply to a court for an order that the property be valued by an independent valuer.

97. The Auctioneers Rules 1997 also require before the auction that the Court warrant or letter of instruction is accompanied by Valuation Report of valuation carried on the suit property carried out not more than 12 months.

11. Contents of court warrant or letter of instruction.....

1 (b) (x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.



98. The Defendant relied on the latest Valuation report valid as the valuation was carried out within 12 months before the sale/auction. The Plaintiff/Applicant's valuations is of 2018 & 2019 and would not aid to obtain the best price reasonably obtainable at the time of sale as prescribed by Section 97 of Lands Act. The Defendant's Valuation is of March 2023 and therefore before any statutory power of sale shall ensure a Valuation Report is valid for 12 months at the time of sale.
99. The Plaintiff deposed that the sale was actuated by malice as the Defendant refused to accommodate the Plaintiff who had a 3rd Party, Sciopion Trading Capital to inject funds and revamp the business to enable the Plaintiff to repay the Loan. The Defendant refused the Plaintiff's offer that United Bank of Africa & Access Bank & Africa Haet Ltd to provide working capital to restore the business and the subject of the loan/credit facilities resolved once funds were availed.
100. In June 2022 the Plaintiff had agreed with the Defendant to have a consultant by the name of Peter Nyaga who still works with the Plaintiff and paid by the Defendant to report on the business viability and provide turnaround Plan. The Plaintiff stated that the Defendant trashed the Consultant's report and went ahead to instruct Auctioneers to attach the assets the premises of this suit.
101. With respect, the Defendant is not party/privy to the business operations of the Plaintiff Company as a going concern, the management and operations of Company are solely within the Board of Directors of the Company. The Defendant is informed of any developments and/or change of the Company so as to protect its legal interest in the business so as to safeguard the securities, legal charges, debentures and guarantees. The Defendant from the attached Minutes seemed to accommodate help/assist the Plaintiff Company to revamp and salvage the business.
102. The Plaintiff submitted that the Company stands to suffer irreparable loss and damage not compensatable in damages should the Defendant sell the suit property which is industrial investment and prime property by virtue of food processing and value of the property.
103. The Plaintiff/Applicant obtained letter of offer from the Respondent for loan and overdraft facilities. The Plaintiff Company accepted the offer executed the Agreement Letter of 17/9/2019 and funds were advanced. The Plaintiff defaulted 2019-2020 due to circumstances beyond them -Corvid 19 pandemic and the Defendant offered moratorium for 1 year and restructured the loan repayments schedule. Thereafter, various meetings between the Plaintiff and Defendant on various options to revamp the Plaintiff's business and service the loan but there was payment proposal.
104. The Plaintiff/Applicant does not contest the validity of the legal charge that gives rise to right of the Respondent to exercise statutory power of sale. The Plaintiff has not presented payments made before/ during the default period.

Disposition

1. The Court finds that the Plaintiff has not established prima facie case to warrant grant of temporary injunction pending hearing and determination of the application/suit.
2. The Court finds that the Defendant served the Plaintiff Company and Directors by registered post the statutory notices as provided Sections 90 (2) & 96 (2) of *Land Act*.
3. The Court finds that 45 Day Notice was served to 1 Director physically and he signed whereas it is contested if the 2nd Director was/was not served or She refused to sign. The 45 day notice shall be served to 2nd Director and Affidavit of Service filed.



4. The Plaintiff shall have valuation of the suit property LR No 18474/196 and the Defendant may have Valuation conducted too after 12 months validity is agreed.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 22/2/2024
(VIRTUALLY/PHYSICAL CONFERENCE).**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR THE PLAINTIFF

MS WINNIE SONGOK FOR THE DEFENDANT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

