Johnson Muigai Mungai t/a Subukia Heshima Hardware v Faulu Microfinance Bank Limited (Civil Appeal E349 of 2023) [2024] KEHC 2869 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2869 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E349 OF 2023

HM NYAGA, J

MARCH 20, 2024

BETWEEN

JOHNSON MUIGAI MUNGAI T/A SUBUKIA HESHIMA HARDWARE ..... APPLICANT

AND

FAULU MICROFINANCE BANK LIMITED ..... RESPONDENT

RULING

1. The Applicant moved this court vide an application dated 7th December, 2023 brought under Order 50 Rule1, Order 40 Rule 1 & 2, Order 43 Rule 1 of the Civil Procedure Rules,2010 and Section 3A of the *Civil Procedure Act*. The Application seeks for orders: -

    a. Spent

    b. Spent

    c. That this Honourable Court be pleased to issue an order of injunction restraining the respondent either acting by themselves and/or agents Watts Auctioneers from auctioning/ selling and/or dealing with the Applicants land titles numbers Subukia/Subukia Block 6/361 and Subukia/Subukia Block 6/591 (Nguba) pending the hearing and determination of the Applicant's Appeal being Nakuru HCCA Number E349 OF 2023.

    d. Spent

    e. That this Honourable Court be pleased to issue any other orders as it may deem just, appropriate and expedient in the interest of justice.

    f. That the costs of this Application be in the Cause.

2. The grounds upon which the application was premised are set out on the face of it and are buttressed by the Applicant's affidavit sworn on 7th December, 2023.

3. It is the Applicant's case that he is the registered owner of parcels of land title numbers Subukia/ Subukia Block 6/341 and Subukia/Subukia Block 6/591(Nguba) which the respondent had advertised for sale by way of public auction which was scheduled to take place on 8th December,2023 at 12 noon.

4. The Applicant states that the said properties were offered as security for a loan facility which he received from the respondent of ksh. 16,000,000/= (sixteen Million).

5. He contends that he paid the said loan in accordance with the terms of the charge documents but in the course of paying the same, it came to his knowledge that the respondent by itself or through its agents committed fraud while dealing with his loan account which led to unauthorised further loan that was advanced in his account and channelled to other foreign account not related to him.

6. He states the said illegal interference with his loan account increased the loan amount and to date it is unclear how much is owing. His unsuccessful attempt to resolve the said issues with the respondent prompted him to seek legal redress in the court vide Nakuru CMCC No.1152 of 2019 seeking for an order for an independent joint forensics audit of his loan account but the same was dismissed on 8th November,2023.

7. He states he subsequently lodged an appeal against the said ruling and he now prays for temporary injunction restraining the respondents from disposing the suit properties pending the determination of his appeal.

8. He believes his appeal is meritorious and shall be rendered nugatory if the injunctive order sought is not granted.

9. He is ready and willing to abide by any stay orders that will be granted by this Court.

10. The application is opposed by the respondent through a replying affidavit sworn by its Legal Officer one Fredrick Nyabuti.

11. He avers that the application is fatally defective, grossly incompetent, founded on falsehoods and material non-disclosure and should not be entertained by this court.

12. He depones that it is trite law that parties are bound by their pleadings and no order of injunction has been sought in the Memorandum of Appeal dated 5th December,2023 and as such the instant application is pegged on a vacuum and thus unsustainable under the law.

13. He posits that the provisions of law under which this application has been brought are inapplicable of being granted and the applicant is merely forum shopping herein since there is a similar application dated 6th December,2023 seeking similar reliefs which is pending before the trial court.

14. He states that the applicant herein is playing cat and mouse with this court as he filed the instant application a day later after the trial court declined to issue interim orders sought in a similar application before it on grounds that the application was an abuse of the court process.

15. He states that the applicant had filed plethora of applications all seeking temporary injunctions and all of them were dismissed by the lower court for being res judicata and clear abuse of the court process.

16. He depones that arising from the continued acts of abuse of the court process, the respondent herein was forced to file a judicial review application seeking the applicant to be prohibited from filing or hearing any further interlocutory application(s) seeking for temporary injunction orders and the said

Judicial review application is serialized as Nakuru HC JR No. E022 of 2023- Faulu Microfinance Bank Ltd Vs The Chief Magistrates Court At Nakuru & Anor.

17. That upon the same being filed, leave to commence judicial review proceedings was granted on 1st December,2023 by Hon. Justice Muhochi S.M. and the said leave is to operate as stay of proceedings in Nakuru CMCC No.1152 of 2019.

18. He avers that the annexures attached to the supporting affidavit and marked "JMM 1" "JMM2" &" JMM 3" are all new documents and which does not form part of the record in the trial court and was not part of the documents the court relied upon while delivering its ruling on 8th November 2023 and that at the opportune time the respondent shall raise a preliminary objection to have the said documents expunged.

19. He contends that there has been inordinate delay in this matter and it would be a miscarriage and travesty of justice if four years later after instituting of the primary suit interim orders of temporary injunction would issue.

20. He prays that the Application be dismissed with costs.

21. The Applicant swore a further affidavit in response to the aforestated Replying affidavit wherein he deposes that the application herein is well founded in law and seeks to preserve the subject of litigation pending the hearing and determination of the appeal as the respondent is hell bent on proceeding and disposing off his properties without addressing the grievous irregularities committed in his loan account.

22. He avers that the several applications made before the lower court were informed by the urgent need to preserve the subject matter of litigation pending hearing and determination of the main suit since the respondent have always proceeded to advertise the suit properties making it impossible to proceed with the said hearing.

23. He admitted moving the court via an application dated 6th November 2019 seeking for an injunction and the application was slated for hearing on 13th November 2019 but states that his then advocate failed to attend court during hearing despite assuring him that he was well represented and failed to fix the matter for hearing and the interim orders which were granted lapsed by operation of the law.

24. He contends that mistakes of an advocate should not be visited upon him or used as a weapon by the respondent against him in this case.

25. He avers that upon discovering the legal implication of the said mistakes he hastily instructed another advocate to represent him but all his attempts to reinstate the injunctive orders or maintain the status quo have been unsuccessful.

26. He avers that the respondent will not suffer any prejudice if the orders sought are granted since they are still holding the securities in their custody but on his part he will suffer irreparably since the respondent will proceed to exercise its statutory power of sale to recover the loan amount which is contentious.

27. The Application was canvassed through written submissions.

Applicant's Submissions

28. The counsel for the Applicant submits that the Applicant has established the three (3) requirements set out in the Giella vs Cassman Brown Case [1973] E.A. 358 in respect to grant of an injunction.

29. The counsel referred to the case of Mrao Ltd vs First American Bank of Kenya & 2 others, (2003) KLR 125 on the definition of a prima facie case.

30. It is Counsel's submission that a prima facie case has been demonstrated by the plaintiff/applicant. That it has filed an appeal against the ruling by the trial court in an application seeking orders for an independent account audit. That the said application was informed by the numerous irregularities in his loan account which are not related to him, and despite informing the respondent of the same they have failed to address it and have even deliberately failed to further respond to the same in its response herein. He argues that if the orders sought are not granted the respondent shall proceed to sell his properties making his appeal an exercise in futility.

31. Counsel has further submitted that the applicant will suffer irreparable injury which cannot be compensated by an award of damages. He attaches this to the fact that the suit properties were offered as security for a loan facility by the respondent and despite the anomalies which led to the unnecessary increase of his loan balance, the respondent continue demanding for payment of the loan balance disregarding the said anomalies reported by the applicant. He submits that if the injunctive order sought is declined the respondent shall proceed to auction the applicant's properties hence the applicant shall suffer irreparable loss that cannot be compensated by way of damages.

32. The counsel argues that it is not enough for the bank to state that it is capable of reimbursing the money if the appeals succeeds as that will be tantamount to maintaining an advantageous position gained through flouting of the law. To support this proposition, reliance was placed on the case of Said Almed vs Mannasseh Benga & Another [2019] eKLR & Joseph Siro Mosioma vs Housing Finance Company of Kenya & 3 Others [2008] eKLR, for the proposition that damages cannot be substituted for the loss which is occasioned by a clear breach of the law and that financial strength of a party is not always a factor to refuse an injunction.

33. On the balance of convenience counsel asks the court to find that more injury would be caused to the plaintiff/applicant than the defendant/respondent if the injunction is not granted as he will be subjected to unrealistic and exaggerated loan amounts and his properties would be sold and will have no recourse in case his appeal succeeds. He relied on the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR on the meaning of balance of convenience.

34. Counsel therefore urged the Court to grant the injunctive orders sought.

Respondent's Submissions

35. With respect to whether the Appellant has an arguable appeal, the respondent's counsel submits that neither an order for an injunction nor any triable issues have been specifically pleaded in the memorandum of appeal and as such the same is idle, null and void ab initio

36. On whether the refusal of an injunction will render the appeal nugatory, the respondent cited the cases of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR where the court held that "Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages" & Reliance Bank Limited vs Norlake Investment Limited [2002]1 EA 227 where the court held that "the factors which render an appeal nugatory are to be considered within the circumstances of each case, and in so doing the court is bound to consider the conflicting claims of both sides. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed

or restrained, if allowed to happen is reversible, or if not reversible, whether damages will reasonably compensate the party aggrieved."

37. The counsel for the respondent then argues that the appeal will not be rendered nugatory given that it is the respondent who will suffer irreversibly and its business stands undermined as it will not be able to recover the advanced loan amount and interest if temporary injunction is granted. To bolster his submissions, the counsel cited the case of Amir Suleiman v Amboseli Resort Limited [2004] eKLR where the court stated that;

> " The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice".

38. On costs, the counsel referred to the case of Party of Independent Candidate of Kenya & another vs Mutula Kilonzo & 2 others [2013] eKLR for the proposition that award of costs is two-fold. First one being that costs is discretionary and the second one being that it should be awarded to the successful party, and which rule should not be departed from without the exercise of good grounds of doing so.

39. The counsel thus urges the court to grant costs of the Appeal and costs of the suit in the trial court to the respondent.

Analysis & Determination

40. The issues that fall for determination are: -

    1. Whether the instant application is an abuse of the court process.

    2. Whether the injunctive orders sought should be granted.

Issue No.1.

41. Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11 defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use"

42. The Court of Appeal in Meme vs Republic & Another (2004) eKLR discussed abuse of the court process thus: -

> " An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused."

43. The court of Appeal in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) eKLR in regards to constitutes abuse of court process held as follows:

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive."

44. It is generally accepted that the court is entitled to protect itself from abuse, as persuasively stated by the court in Stephen Somek Takweny & Anor vs David Mbuthia Githare & 2 Others Nairobi (Milimani HCC No. 363 of 2009) as follows:

> "...The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process, it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."

45. In Public Drug Co vs Breyerke Cream Co, 347, Pa 346, 32A 2d 413, 415h, the court held that the concept of abuse of court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

46. In the Nigerian case of Amaefule & other vs The State, Oputa JSC stated that an abuse of process can also mean abuse of legal procedure or improper use of the legal process

47. In Agwusin vs Ojichie Justice Niki Tobi JSC observed, abuse of court process creates a factual scenario where a party is pursuing the same matter by two or more court process. In other words, a party by the two-court process is involved in some gamble, a game of chance to get the best in the judicial process

48. The respondent avers that the Applicant had filed numerous application before the trial court seeking same orders as sought herein and all were dismissed. The Respondent also pointed out that there is a similar application dated 6th December, 2023 which is pending determination before the trial court. The Applicant does not dispute this position but states that filing of the same were necessitated by the Respondent's advertisement for sale of his properties prior the determination of the main suit.

49. I have perused the lower court record. The applicant vide Nakuru CMCC 1152 of 2019 commenced a suit against the respondent herein praying for: -

    a. Declaration that the defendant's statutory power of sale has not crystalized and the intended auction is a nullity in law and further the defendant has been paid in full.

    b. A perpetual injunction restraining the defendant by themselves, their servants or employees from offering for sale, advertising, selling, transferring, alienating or in any way disposing of all those parcels of land known as Subukia/Subukia Block 6/591 and Subukia/Subukia Block 6/361

c. Any other order that the honourable court may deem just and fit.

d. Cost of the suit.

50. Contemporaneous with the filing of the suit the applicant filed an application dated 6th November 2019 seeking temporary injunction restraining the Respondent from dealing with the aforementioned parcels of land pending the hearing and determination of the main suit.

51. The lower court on 6th November,2019 made interim orders whose effect was to restrain the respondents from dealing with the land parcels in issue and fixed the matter for inter partes hearing on 13th November,2019.

52. On this date both parties were absent and the interim orders were extended and the matter was placed before the trial court. The lower court record does not have any other action until on 24th February,2021, when the Applicant filed an application of even date, seeking reinstatement of the interim orders that were issued on 6th November, 2019 on grounds that upon extension of the interim orders the matter was not given a hearing date, that the advocate on record failed to fix a hearing date, that he was unable to visit the advocates office due to Covid 19 pandemic and in February 2021 he learnt that the interim orders had lapsed. He also filed an application dated 26th March,2021 seeking temporary injunction restraining the respondent or its agents from dealing with the aforesaid parcels pending the hearing and determination of his application and interim orders to that effect were issued on the 26.3.2021. The trial court upon considering the application for reinstatement delivered its ruling on 28th January,2022 dismissing the same on grounds that there was no special circumstance or plausible explanation for the delay in the prosecution of the case.

53. On 13th April,2022, the Applicant filed another application similarly seeking the aforesaid injunctive orders and for the aforesaid application dated 6th November 2019 to be heard to conclusion for reasons that the respondent had gazetted the said parcels of land for sale on 14th April,2022 which gazettement he believed was illegal. The court in its ruling dated 26th October,2022 opined that since there was no appeal or review of its earlier ruling of 28th January,2022, the only issue for determination is whether status quo could issue. It found that the same could not be ascertained and there was need for status conference and invoked its inherent powers and ordered that the suit be heard on priority basis.

54. On 2nd December,2022, the respondent gazetted the Applicants aforesaid parcels of land for sale by way of public auction and the Applicant sought for the said injunctive orders via an application dated 29th November,2022 for reasons that the same was illegal and unlawful. The Respondent raised a preliminary objection dated 13th December,2022 to the Application on grounds that the same was res judicata for reasons that the Applicant had sought similar orders in an application dated 24th February,2021 that was dismissed on 28th January,2022, and that the Applicant had never lodged an appeal or review against the said ruling. The court in its ruling upheld the Respondent's Preliminary objection and struck out the Application on 12th May,2023.

55. The Applicant prior the delivery of the Ruling of 12th May,2023 had lodged an appeal against the ruling of the lower court delivered on 28th January,2022 on 10th February,2022 vide Civil Appeal No. E016 of 2022 but he withdrew the same via a notice of withdrawal of appeal dated 21st April,2022.

56. On 12th July,2023 the Applicant filed an application dated 11th July,2023 seeking similar orders as sought in this case. The Respondent raised a preliminary objection (P. O) dated 18th July,2023to it similarly on grounds that it was res judicata and an abuse of the court process. The court in its ruling

delivered on 8th November,2023, upheld the P.O and proceeded to dismiss the Applicant's application with costs.

57. The Applicant thereafter lodged the instant appeal and filed an application dated 6th December,2023 seeking similar injunctive order sought herein. The said application is pending hearing and determination before the lower court.

58. Subsequently, the Respondent filed a Judicial Review Application against the Lower court and the Applicant herein as the 1st and 2nd Respondents respectively seeking an order of prohibition prohibiting the 1st Respondents from entertaining any further interlocutory application by the 2nd Respondent/ Applicant herein seeking for temporary injunction in a suit serialized as Nakuru CMCC No. 1152 of 2019 between it and the Applicant.

59. On 2nd December,2023, my brother Justice Mohochi considered the above Application and issued the following Orders: -

    a. The motion is certified urgent warranting hearing and disposal on priority basis.

    b. Leave to commence Judicial Review Proceedings is hereby allowed.

    c. The leave so granted, shall operate as a stay of proceedings in Nakuru Chief Magistrate's Court Civil Suit No. 1152 of 2019.

    d. An Inter parte mention date shall be fixed after 21 days from today.

60. I had a chance to peruse the Judicial Review court file and noted that the Respondent herein had not filed a substantive application for judicial review within the 21 days given by the court.

61. From the chronology of events as set out above, it is clear the Applicant filed numerous application seeking similar orders as sought herein before the lower court. The latest one being the Application dated 6th December,2023 which is pending hearing and determination.

62. So what has prompted the applicant to file these applications, one after the other?

63. It is apparent that after the initial orders were issued in respect to the application dated 6th November 2019, no action was taken to prosecute the suit.

64. It should be remembered that in March 2020, the Government of Kenya, in response to the Covid 19 pandemic, issued directives that effectively shut down the country for the rest of the year and beyond. It is thus not hard to explain the lack of activity in the matter for that period.

65. From a perusal of the lower court record it is clear that after issuance of the initial orders of injunction the suit has never been heard on merits. I did note that there is actually no defence by the respondent in answer to the plaint filed in the lower court. What has happened, as I see it, was the applicant filing one application after another to stop any intended sale by the respondent. The respondent has kept on advertising the applicant's property for sale over time and this has led to the multiple applications by the applicant.

66. Is this, then, to be considered an abuse of the court process? I don't think so. The applicant was, in my view, entitled to take action every time the respondent advertised the property for sale.

67. As I have noted above the suit in the lower court has never been heard on merits. Even as the respondent moved the High Court for Judicial Review, and which it has not prosecuted, it has never filed any substantive response to the issues raised by the applicant in the suit in the lower court. What has happened is that the lower court has been kept busy with one application after another, and not moved

an inch to have the applicant prosecute the main suit. As matters stand, the substantive issues raised have remained unresolved for years. The trial court, in my opinion ought to have taken steps to have the substantive suit heard and determined. This would have saved the parties from the time and energy spent to prosecute one application after another.

68. Having been aggrieved by the decision of the trial court dated 8th November 2023, to dismiss the application dated 11th July 2023, the applicant was well entitled to appeal against it.

69. In the circumstances therefore it is my opinion that the filing of the appeal and the application dated 7th December,2023 cannot be termed as an abuse of the process of the court.

70. So is the Applicant entitled to the injunctive orders sought?

71. Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit.

72. In Giela vs Cassman Brown & Co. Ltd [1973] 358 at 360, the Hon. Spry V.P. held as follows: -

> " The conditions 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 in damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

73. The Court of Appeal in Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR reiterated the above principles as follows:-

> " in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> 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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"

74. The case of Mrao Ltd vs First American Bank Of Kenya Ltd (2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

> " ... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

75. There is no contention that the Applicant is the registered owner of the aforementioned parcels of land and therefore has a legal right and beneficial interest to the property as established under Article 40 of *the Constitution* of Kenya 2010. I therefore find that the Applicant has established that he has a prima facie case with a likelihood of success.

76. On the issue of irreparable harm, the court in Pius Kipchirchir Kogo vs Frank Kimeli Tenai(Supra) defined irreparable harm as follows: -

> " irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

77. In the instant case, the applicant indisputably offered the aforesaid properties as security for loan that was advanced by the respondent. The applicant avers that the respondent tampered with his loan account and committed serious irregularities therein that increased his loan balance and which the respondent continues to demand without addressing the irregularities raised. The Respondent has not denied this position and neither has it offered any explanation on the same. The respondent has over time advertised the applicant's properties for sale by public auction before the real issues in controversy between the parties is resolved and if the injunctive orders are not issued, the respondent will proceed to sell the Applicant's properties to his detriment. The Applicant has therefore succeeded on this limb.

78. On balance of convenience, similarly the court in Pius Kipchirchir Kogo vs Frank Kimeli Tenai(supra) defined the concept of balance of convenience as:

> 'The meaning of balance of convenience in favor of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which ma)' be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.
>
> In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting"

79. I am persuaded by the Applicant's submissions on this particular issue. The injury he is likely to suffer is higher compared to that of Respondent. He will lose his properties before the substratum of his case is determined. On the other hand, the Respondent still has a chance to exercise its statutory power of sale once it is shown that there were no fraudulent acts committed by it as alleged by the Applicant and that the applicant has failed to redeem its loan. The balance of convenience therefore tilts in favour of the Applicant.

80. Having considered the matter I am satisfied that the applicant is entitled to the injunctive orders sought. It would be the greatest injustice to him if his property is sold yet his case on merits, which raise serious and pertinent questions on the respondent's conduct, is not resolved. Even though he can be blamed for not setting his suit down for hearing, the several attempts by the respondent to sell the two properties seem to be the reason that the parties forgot about the suit itself.

81. Having considered the application, the response thereto and the submissions by the parties I find it fit and just to grant prayer 3 of the application. the said prayer is so granted.

82. Given the nature of the matter and the history of the dispute, I direct that the applicant proceeds to file and serve the record of appeal in the next 21 days. The court will then hasten the hearing of this appeal, to avoid delays as those experienced in the lower court.

83. The lower court file is to be returned to the Chief Magistrate's Court for safe custody and to enable the applicant prepare the record of appeal.

84. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF MARCH, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Oleperon

Mr. Mburu for Applicant

Mr. Mwangi for Karanja for Respondent