Case Number:	Environment and Land Cause 429 of 2021
Date Delivered:	24 Feb 2022
Case Class:	Civil
Court:	Environment and Land Court at Nairobi
Case Action:	Ruling
Judge:	Joseph Oguttu Mboya
Citation:	Adil Waris v Monarch Developers Limited & 2 others [2022] eKLR
Advocates:	Mr. Chege H/b for Miller for the Plaintiff/Applicant Mr. Busaidy for the 1st Defendant Mr. Gathaiya for the 2nd Defendant Mr. Anthony Mbugua for the 3rd Defendant
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC CAUSE ELC 429 OF 2021

DR. ADIL WARIS……………………….......…….......….........………....………………………PLAINTIFF

-VERSUS-

MONARCH DEVELOPERS LIMITED……….............…......……1ST DEFENDANT/RESPONDENT

BANK OF BARODA (KENYA) LIMITED…....….....…....….........2ND DEFENDANT/RESPONDENT

MOHAMED MADHANI & COMPANY ADVOCATES………3RD DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the 14th of December 2021, the Plaintiff/Applicant has sought the following Orders:

I. ………………………………………………………………………………...(Spent).

II. Pending the hearing and determination of this Application, a Temporary order of Injunction does issue, restraining the Defendants/Respondents, whether by themselves, representatives, servants agents, and/or assigns from howsoever, selling, transferring ownership, alienating, trespassing onto, interfering with or otherwise dealing with Property known as office premises situated on the 3rd floor, office space A3 of the development known as Doctors Plaza erected on L.R No 209/21739 (original Number 209/17/4).

III. Pending the hearing and determination of this suit, a Temporary order of Injunction does issue, restraining the Defendants/Respondents, whether by themselves, representatives, servants agents, and/or assigns from howsoever, selling, transferring ownership, alienating, trespassing onto, interfering with or otherwise dealing with property known as office premises situated on the 3rd floor, office space A3 of the development known as Doctors Plaza erected on L.R No 209/21739 (original Number 209/17/4).

IV. Pending the hearing and determination of this suit a Mandatory of Injunction do issue compelling the 2nd Defendant/Respondent to withdraw and/or suspend any notices issued with an intention to sell the property known as office premises situated on the 3rd floor, office space A3 of the development known as Doctors Plaza erected on L.R No 209/21739 (original Number 209/17/4).

V. Any further reliefs that the court may deem fit and in the Interest of Justice.

VI. Cost of the Application be paid to the Plaintiff in any event.

2. Upon being served with the subject Application, the 1st Defendant/ Respondent filed a Notice of Appointment dated the 8th February 2022. However, the 1st Defendant did not file any response to the said Application.

3. On behalf of the 2nd Defendant, a Replying Affidavit sworn on the 21st January 2022, was filed and whereupon the 2nd Defendant opposed the subject Application.

4. On the other hand, the 3rd Defendant herein also filed a Replying Affidavit sworn on the 21st January 2022, wherein same raised a plethora of issues, but nevertheless opposed the subject Application.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE PLAINTIFF/APPLICANT:

5. Vide the Supporting Affidavit sworn on the 14th December, 2021, the Plaintiff/Applicant herein has averred that he is the bonafide owner of the Office premises situated on the 3rd floor, Office Space A3 of the development known as Doctors Plaza erected on L.R No 209/21739 (original Number 209/17/4).

6. It is further averred that the Applicant herein entered into an Agreement to Lease with the 1st Defendant/Respondent and the said Agreement was reduced to writing and the same is dated the 16th December 2013.

7. Further, the Applicant has averred that following the entry into and execution of the Agreement to lease, dated the 16th December 2013, same proceeded to and complied with the terms and/or obligation therein including, payment of the entire consideration which was agreed upon with the 1st Defendant/ Respondent.

8. Be that as it may, the Applicant has further averred that despite complying with the terms of Agreement to lease, the 1st Defendant/Respondent has since failed and/or neglected to avail the lease and/or execute the requisite lease, so as to confer interest to and/or in favor of the Applicant.

9. Nevertheless, the Applicant has further averred that at the time of entry into and execution of the Agreement to lease, the 1st Defendant represented to the Applicant that the suit property was charged to and/or in favor of M/S Diamond Trust Bank Ltd, which position has since transpired to be incorrect and erroneous.

10. At any rate, the Applicant has further averred that same was not aware and/or knowledgeable that the suit property was charged to and in favor of the 2nd Defendant/Respondent.

11. Nevertheless, the Applicant has further averred that the 2nd Defendant/Respondent herein has since issued Notices, whereby same is seeking to exercise her Statutory Powers of Sale over and in respect of the suit property, premised on the basis that the 1st Defendant/Respondent, has since defaulted in the repayment of the banking facility which was granted unto it.

12. However, the Applicant has averred that having bought the suit property from the 1st Defendant/Respondent, same has acquired lawful rights and/or interest in respect of the suit property and in this regard, the actions by and/or on behalf of the 2nd Defendant/Respondent, are bound to interfere with his (*Applicants*) rights to the suit property.

13. Finally, the Applicant has averred that his rights to and/or interests over the suit property are protected pursuant to Article 40 of the Constitution, 2010 and therefore it is imperative that the court be pleased to protect and preserve his rights to the suit property by granting the orders injunction sought, to restrain the 2nd Defendant from selling, disposing of, alienating and/or otherwise dealing with the suit property, in a manner adverse to his rights.

1ST RESPONDENTS RESPONSE:

14. Other than filing a Notice of Appointment dated the 8th February 2022, the 1st Defendant/Respondent herein neither filed any Replying Affidavit nor Grounds of opposition.

2ND RESPONDENT RESPONSE:

15. On behalf of the 2nd Defendant/Respondent, a Replying Affidavit was filed, whereby the 2nd Defendant/Respondent stated that same was approached by the 1st Defendant/Respondent, with a request to take- over a Banking facility that had hitherto been granted by M/s Diamond Trust Bank Ltd.

16. It was further averred that pursuant to the request by and/or at the instance of the 1st Defendant/Respondent, same accepted and thereafter exercised a right of takeover, culminating into the debt which was due to M/s Diamond Trust Bank Ltd being paid and/or cleared by the 2nd Defendant.

17. Further, it is averred that upon the payment of the debt that was due to the previous charge, the suit property was duly charged to and in favor of the 2nd Defendant/Respondent thereby securing a loan of Kshs.450, 000, 000/= only, whose details are known to the 1st Defendant/Respondent.

18. It was averred that upon the advancement of the Banking facility, in the sum of Kshs.450, 000, 000/= Only, the 1st Defendant, as the chargor, was obligated to make repayments to and in respect of the instalments, up to and including full liquidation.

19. However, it has been averred that the 1st Defendant/ Respondent herein failed and/or neglected to service the Banking facility and therefore same lapsed into Substantial arrears.

20. Owing to the failure and/or neglect by the 1st Defendant to service the Banking facility, the 2nd Defendant/Respondent was compelled to and thereafter issued and served the requisite notices, under Sections 90(2) and 96(2) of the Land Act, 2012 (2016).

21. On the other hand, the 2nd Defendant has also averred that upon the expiration of the duration of the Notices, same has since issued and/or given instructions and/or retained a nominated valuers, to value the suit property, for purposes of sale of the Suit Property vide Public auction.

22. Based on the foregoing, the 2nd Defendant/ Respondent has therefore averred that her rights to foreclosure, has matured, ripened and/or accrued. Consequently, same is entitled to sell and/or dispose of the suit property.

23. Finally, the 2nd Defendant has also averred that the Plaintiff herein ought to have ascertained the status of the suit property, before entering into the Agreement to lease. For clarity, the 2nd Defendant contends that had the Plaintiff taken and/or exercised due diligence, same would have authenticated that the suit Property was charged to the 2nd Defendant.

24. At any rate, the 2nd Defendant has further averred that the Sale Agreement and/or Agreement to lease between the Plaintiff/Applicant and the 1st Defendant/Respondent, did not attract the consent of the 2nd Defendant/Respondent and in this regard, the 2nd Defendant/respondent has invoked the Doctrine of Privity of Contract.

RESPONSE BY THE 3RD DEFENDANT:

25. Vide a Replying Affidavit sworn on the 21st January 2022, on behalf of the 3rd Defendant/Respondent, it has been averred as hereunder;

26. First and foremost, that the 3rd Defendant/Respondent was retained by M/s Diamond Trust Bank Ltd to prepare and register a charge over the suit property, with a view to protecting the interest of the chargee, namely M/s Diamond Trust Bank Ltd.

27. It was further averred that upon receipt of the aforesaid Instructions, same proceeded to and crafted the charge instrument, culminating into the charge of the suit property to and/or in favor of the said Bank.

28. Further, it has also been averred that upon the execution of her mandate, the Professional responsibility, which was owed to and/or in favor of the chargee, namely, the Bank, terminated and/or stood extinguished.

29. As concerns the subject matter, it has been averred that the 3rd Defendant never acted for the Plaintiff herein and therefore the 3rd Defendant/Respondent owes the Plaintiff/Applicant no Professional duty, whatsoever and/or howsoever.

30. Owing to the foregoing, the 3rd Defendant/Respondent has therefore contended that the subject suit, does not raise and/or disclose any reasonable cause of action against same and in this regard, the 3rd Defendant/Respondent has sought to have the subject Application be dismissed.

SUBMISSIONS BY THE PARTIES:

31. The subject matter herein, was fixed and/or scheduled for hearing on the 10th February 2022, on which date the court ordered and/or directed that the subject Application be canvassed and/or disposed of by way of Oral submissions.

32. Pursuant to the directions of the court, the Parties herein proceeded to and indeed made their respective submissions, in support of and in opposition to the Application.

33. On behalf of the Plaintiff/Applicant, it was contended that same entered into and executed an agreement to lease dated the 16th December 2013 and that same was reduced into Writing and executed by the respective Parties.

34. It was further submitted that upon the entry into and/or execution of the said agreement to lease, the Plaintiff paid to and/or in favor of the 1st Defendant the entire consideration and therefore same acquired lawful rights over the suit property.

35. It was further submitted that having bought and therefore acquired rights over the suit property, same cannot be sold and/or alienated by the 2nd Defendant/Respondent, in a manner that would interfere with and/or affect the rights of the Plaintiff/Applicant.

36. It was further submitted that the Plaintiff/Applicant has therefore established a Prima facie case, with overwhelming chances of success and thus his rights to the suit property should be protected.

37. Other than the foregoing, the Plaintiff/Applicant further submitted that unless the orders sought are granted, same shall be disposed to suffer Irreparable prejudice and/or loss, not compensable in monetary terms.

38. On her part, the 1st Defendant/Respondent supported the position taken by the Plaintiff and indeed contended that the Plaintiff had established a prima facie case, with overwhelming chances of success.

39. Nevertheless, the 1st Defendant/Respondent did not disputed having procured and/or obtained a Banking facility in the sum of Kshs.450, 000, 000/= Only, from the 2nd Defendant/Respondent.

40. Further, the 1st Defendant/ Respondent also did not dispute that same has lapsed and/or fallen in arears and as a result of the arears, the 2nd Defendant, has since issued and served the relevant statutory Notices.

41. On her part, the 2nd Defendant/ Respondent contended that same advanced to and/or in favor of the 1st Defendant a loan facility in the sum of Kes.450, 000, 000/= Only, and in respect of which the 1st Defendant charged the suit property.

42. It was further submitted that the 1st Defendant was obliged to settle the loan facility by way of monthly instalment, but the 1st Defendant has since breached the terms of the charge document and has lapsed into substantial arears.

43. Owing to the foregoing, the 2nd Defendant continued to submit that same was therefore obliged to and indeed issued and served the statutory Notices and thereby laying a basis for the exercise of the Statutory Power of Sale.

44. In any event, the 2nd Defendant further submitted that same has complied with and adhered to the relevant provisions of the law and in the premises, same ought to be allowed to exercises her Statutory Power of Sale.

45. Other than the foregoing the 2nd Defendant also contended that the transaction between the Plaintiff/Applicant and the 1st Defendant/Respondent, was carried out and/or undertaken without her participation, involvement and/or consent. In this regard, the 2nd Defendant contended that the impugned transaction was therefore contrary to the Provisions of Section 88 of the Land Act, 2012.

46. Finally, the 2nd Defendant submitted that having not entered into any transaction with the Plaintiff/Applicant, there is no Privity of Contract between the Plaintiff/Applicant and herself, namely the 2nd Defendant/Respondent.

47. On the part of the 3rd Defendant, two pertinent issues were canvased and/or ventilated. First and foremost, the 3rd Defendant contended that same did not conduct any business on behalf of the Plaintiff/Applicant and therefore same does not owe the Plaintiff/Applicant any Professional duty and/or responsibility.

48. Secondly, the 3rd Defendant also submitted that there is no Privity of contract between herself and the Plaintiff/Applicant. In this regard, the 3rd Defendant/Respondent contended that the entire suit, as well as the Application do not raise any reasonable cause of action as against herself.

ISSUES FOR DETERMINATION:

49. Having reviewed and evaluated the Notice of Motion Application dated 14th of December 2021, the Supporting Affidavits thereto, as well as the oral submissions tendered by and/or on behalf of the Parties, the following issues do suffice for determination;

i. Whether the Plaintiff/Applicant has established a Prima facie case with overwhelming chances of success.

ii. Whether the Plaintiff/Applicant is disposed to suffer Irreparable Loss, if the orders sought are not granted.

iii. In whose favor does the Balance of Convenience tilt.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER ONE

Whether the Plaintiff/Applicant has established a Prima Facie case with overwhelming chances of success.

50. The starting point to unlocking the subject issue, that is whether the Plaintiff/Applicant has established a Prima facie case with overwhelming chances of success, is to understand and/or appreciate the meaning and tenor of the term Prima facie case.

51. As pertains to the meaning of what constitutes a prima facie case, it is sufficient to refer to and apply the holding of the Honorable Court of Appeal in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 others [2003] eKLR;**

"So what is a prima facie case" I would say 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

52. Perhaps just to reinforce the position underscored in the preceding paragraph, the Honorable Court of Appeal returned to the definition of what is a Prima facie case in the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Honorable Court observed as hereunder;

"Prima facie" is a Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the ***American Cyanamid Co. Ethicon Ltd*** *[1975] AC 396 is a case in point.*

The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in ***Ramanlal Trambaklal Hatt V. Republic*** *[1957] E.A. 332.*

53. Armed with the definition of what constitutes a Prima facie case from the foregoing decisions (*supra),* I must now venture to determine, whether the totality of evidence before the court by the Plaintiff/Applicant has met and/or established the existence of a Prima facie case.

54. In respect of the subject matter, there is no dispute that the suit Property was previously charged to and in favor of M/S Diamond Trust Bank Limited, by and/or at the instance of the 1st Defendant/Respondent.

55. Besides, it has not been disputed that subsequently the 1st Defendant/Respondent approached the 2nd Defendant/Respondent with a view to taking-over the banking facility hitherto granted by M/S Diamond Trust Bank Ltd.

56. For clarity, it is conceded that the 2nd Defendant/Respondent indeed effected a take over from M/s Diamond Trust Bank Ltd, culminating into the charge of the suit property in favor of the 2nd Defendant/Respondent.

57. To the extent that the suit property stood charged to and/or in favor of the 2nd Defendant/Respondent, same therefore acquired and/or accrued lawful and legitimate rights over and in respect of the suit property, which rights superseded the rights of the 1st Defendant/Respondent.

58. Owing to the nature of the rights possessed by and/or at the instance of the 2nd Defendant/Respondent, the 1st Defendant/Respondent could therefore not deal with and/or transact over the suit property, without the blessings, participation, involvement and/or consent of the 2nd Defendant/respondent.

59. For the avoidance of doubt, the Consent of the 2nd Defendant/Respondent, in any transaction and/or dealing affecting the suit Property was/is mandatory and statutorily circumscribed.

60. In support of the foregoing observation, it is worthy to take note of the Provisions of **Section 88 of the Land Act, 2012 (2016)** which provides as hereunder;

88. (1) There shall be implied in every charge covenants by the chargor with the chargee binding the chargor—

(a) to pay the principal money on the day appointed in the charge agreement, and, so long as any of the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money that for the time being remains unpaid at the rate and on the days and in the manner specified in charge agreement;

(b) to pay all rates, charges, rent, taxes and other outgoings that are at all times payable in respect of the charged land;

(c) to repair and keep in repair all buildings and other improvements upon the charged land or to permit the chargee or chargee's agent to enter the land and examine the state and condition of such buildings and improvements at after a seven days notice to the chargor until the charge is discharged;

(d) to ensure by insurance or any other means that may be prescribed or which are appropriate, that resources will be available to make good any loss or damage caused by fire to any building on the land, and where insurance is taken out, it is done so in the joint names of the chargor and chargee with insurers approved by the chargee and to the full value of all the buildings;

(e) in the case of a charge of land used for agricultural purposes, to use the land in a sustainable manner in accordance with the principles and any conditions subject to which the land or lease under which the land is held, and in compliance with all written laws and lawful orders applicable to that use of the land;

(f) not to lease or sublease the charged land or any part of it for any period longer than a year without the previous consent in writing of the chargee, which consent shall not be unreasonably withheld;

(g) not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;

(h) in the case of a charge of a lease, during the continuance of the charge, to pay, perform and observe the rent, covenants and conditions contained in or implied by and in the lease contained and implied and on the part of the lessee to be paid, performed and observed and to keep the chargee indemnified against all proceedings, expenses and claims on account of non-payment any part of the rent or part of it or the breach or non-observance of any covenants and conditions referred to above, and, if the lessee

has an enforceable right to renew the lease, to renew it; 61 No. 6 Land 2012

(i) if the charge is a second or subsequent charge, that he chargor will pay the interest from time to time accruing on each prior charge when it becomes due and will at the proper time repay the principal money or part of it due on each prior charge at the proper time;

(j) if the chargor fails to comply with any of the covenants implied by paragraphs (b), (c), (d), (e) and (h) of this subsection, that the chargee may spend any money which is reasonably necessary to remedy the breach and may add the amount so spent to the principal money and that amount shall be deemed for all purposes to be a part of the principal money secured by the charge.

(2) Reference to the obligation of the chargor in subsection (1) (b) to keep all buildings upon the charged land in repair shall be taken to be an obligation to keep such buildings in a reasonable state of repair as set out in section 65.

(3) The provisions of section 66 shall apply to an application by a chargor to a chargee for consent under paragraphs (f) and (g) of subsection (1).

61. Secondly, the 2nd Defendant/Respondent has contended that same was approached by the 1st Defendant and as a result of the approach, same proceeded to and dealt with the 1st Defendant. For clarity, the charge instrument was executed between the 1st and 2nd Defendant/Respondent.

62. On the other hand, the 2nd Defendant/Respondent has averred that same did not enter into any dealing and/or transaction with the Plaintiff/Applicant herein. In this regard, the 2nd Defendant/Respondent has contended that there is no Privity of contract between herself and the Plaintiff/Applicant.

63. Based on the foregoing, the 2nd Defendant/Respondent has therefore submitted and correctly so, that the Plaintiff/Applicant herein cannot file and/or maintain any civil proceedings against her, as pertains to the rights accruing from the charge instrument.

64. In the premises, the 2nd Defendant/Respondent, has therefore submitted that based on the Doctrine of Privity of Contract, the Plaintiff's suit does not therefore raise and/or disclose any cause of action, let alone disclosure of a Prima facie case, whatsoever.

65. In my humble view, the Doctrine of privity of contract, does not allow a Party who was not anticipated by such a contract to commence and/or implead a suit, that seeks to enforce the rights and/or obligations of the Parties thereto.

66. The foregoing position was underscored by the Honorable Court in the case of **Savings & Loans (K) Limited vs Kanyenje Karangaita Gakombe & Another [2015] eKLR;**

"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 847,Lord Haldane, LC rendered the principle thus:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER (supra) and WILLIAM MUTHEE MUTHAMI V BANK OF BARODA, (supra).

Thus in AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person

who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in SHANKLIN PIER V DETEL PRODUCTS LTD [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the been subject of much criticism.

In DARLINGTON BOUROUGH COUNCIL V WITSHIRE NORTHERN LTD [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties) Act, 2001 have respectively been enacted."

67. I have evaluated the Plaintiff's/Applicant's claim and/or case as against the 2nd Defendant/Respondent and I must say, I am unable to discern any reasonable cause of action .For clarity, I am in doubt about the Existence of a Prima Facie case.

68. Consequently, I conclude that the Plaintiff/Applicant have not established any prima facie case, with any realistic chance of success as against the 2nd and 3RD Defendants/Respondents.

ISSUE NUMBER 2

Whether the Plaintiff/Applicant is disposed to suffer Irreparable Loss, if the orders sought are not granted.

69. The Plaintiff/Applicant has also contended that same are disposed to suffer Irreparable loss, if the suit property were to be alienated and/or disposed of by way of sale and/or auction, in the manner envisaged by the 2nd Defendant/Respondent.

70. Before considering whether or not the Plaintiff/Applicant is disposed to suffer Irreparable loss and/or prejudice, it is important to appreciate the meaning and import of what constitutes Irreparable loss. Suffice it to say, that Irreparable loss is such loss that it is not compensable in monetary terms.

71. To fortify what constitutes Irreparable loss, I beg to adopt and reiterate the holding in the Case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 others [2014] eKLR,** where the Honorable Court observed as follows;

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that

cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

72. In my humble view, the Plaintiff/Applicant herein would not suffer any Irreparable loss. If anything, the loss that the Plaintiff/Applicant would suffer is measurable in monetary terms and same shall entail Recovery of the Purchase price paid to and/or in favor of the 1st Defendant/Respondent, Special damages, if any, incurred in the perfection of the agreement, as well as proven damages for breach of Contract.

73. It is therefore important to note that in the absence of Irreparable loss, an order for temporary injunction cannot therefore issue, either in the manner sought or at all.

74. For clarity, the foregoing position was amplified in the decision in the case of **Kenya Commercial Finance Co. Ltd V. Afraha Education Society** [2001] Vol. 1 EA 86, where it was observed as hereunder;

"***If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage."***

75. Suffice it to say, that such Damages, (sic) may not ensue as against the 2ND Defendant/Respondent. Nevertheless, the success or otherwise, of such a claim shall however, have to await a plenary hearing.

ISSUE NUMBER THREE

In whose favor does the Balance of Convenience tilt.

76. On the issue of balance of convenience, I must say that the loan balance due and owing from the 1st Defendant/Respondent, shall continue to accumulate interest and penalties. In this regard, there is a likelihood that the ultimate balance, may far outstrip the value of the suit Property.

77. The 1st Defendant/Respondent, in whose favor the Banking facility was granted, has neither disputed nor controverted the fact that the Debt has fallen into arears. Besides, the 1st Defendant/Respondent has also not disputed that the Statutory Notices were issued and served, in accordance with the law.

78. At any rate, it is also worthy to note that no evidence was placed before the court that the Banking facility and in particular, that the Loan arrears are being serviced by the chargor. In this regard, the 2nd Defendant/Respondent, remains exposed, including a likelihood of not being able to recover what was disbursed at the foot of the banking facility.

79. To the contrary, the Plaintiff/Applicant herein entered into and executed an agreement to lease with the 1st Defendant/Respondent, but without exercise of due diligence, the exercise of which, would no doubt, have shown that the suit Property was duly charged.

80. In view of the foregoing, I find and hold that the balance of convenience tilts to and in favor of the 2nd Defendant/Respondent, who holds a legitimate charge over the suit Property and whose Statutory rights have since accrued, materialized and/or ripened.

81. In a nutshell, it is my humble finding, that even if I were to come to the third condition, for purposes of making a determination, I would still have been constrained to hold against the Plaintiff/Applicant.

FINAL DISPOSITION:

82. I have endeavored to address the issues enumerated herein before and in respect of each of the foregoing issues, the Plaintiff/Applicant has failed to meet the established threshold to warrant the grant of the Orders sought.

83. Consequently, the Notice of Motion Application dated the 14th December 2021, by the Plaintiff/Applicant is ripe for Dismissal and same be and is hereby **Dismissed**.

84. As to costs, I find and hold that the 2nd and 3rd Defendants/Respondents are entitled to same. In the premises, costs are awarded to and/or in favor of the 2nd and 3rd Defendants/Respondents only.

85. During the proceedings in respect of ELC E432 of 2021, the parties agreed and/or consented that ruling in respect thereof, shall apply to the subject matter.

86. In the premises, the Notice of Motion Application dated the 14th December 2021, be and is hereby Dismissed with costs, in the same terms as in ELC No. E432 of 2021.

87. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24th DAY OF FEBRUARY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE.

In the Presence of;

June Nafula Court Assistant

Mr. Chege H/b for Miller for the Plaintiff/Applicant

Mr. Busaidy for the 1st Defendant

Mr. Gathaiya for the 2nd Defendant

Mr. Anthony Mbugua for the 3rd Defendant

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