



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**

**HCCC NO. 878 OF 2009**

**KAWAMAMBANJO LIMITED .....1<sup>ST</sup> PLAINTIFF**

**TIMOTHY BENSON KAMANDE.....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**DAVID KARIUKI T/A**

**WATTS ENTERPRISES AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**JULIET THEURI .....3<sup>RD</sup> DEFENDANT**

**MR. GICHURU.....4<sup>TH</sup> DEFENDANT**

**CHARLES PATRICK VINCENT WALKER..... 5<sup>TH</sup> DEFENDANT**

**HON. JOHN NJOROGE MICHUKI.....6<sup>TH</sup> DEFENDANT**

**NEW HOMES DEVELOPMENT LIMITED.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit by filing a plaint dated 2<sup>nd</sup> December 2009, seeking for judgment jointly and severally against the Defendants for: -

*(a) A permanent injunction restraining the defendants, their servants, employees, advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say from; interfering with the first plaintiff's right of possession of the suit premises, charging, leasing, sub-leasing, advertising for sale, disposing of, subdividing, selling by public auction or otherwise howsoever or completing any conveyance or transfer of any sale conducted by auction or private treaty, leasing, letting or otherwise; howsoever interfering with the ownership of title to and/or interest in all that parcel of land known; as L.R. No. 170/35 Redhill.*

*(b) A declaration that the purported auction sale or private treaty sale by the 2<sup>nd</sup> defendant over the suit property; L.R. No. 170/35 Redhill on 2<sup>nd</sup> July 2009, is illegal, null and void and an order directed to the Registrar of Titles, Nairobi to cancel the transfer of title (if any) of the 3<sup>rd</sup> and 4<sup>th</sup> defendants over L.R. No. 170/35 Redhill and to reissue a title in the names of the first plaintiff over that property.*

*(c) A declaration that all clauses in the letters of offer and mortgage dated 12.3.93 executed between the first plaintiff and first defendant allowing the charging and variation of rates of interest at a rate of over or exceeding 19%, and/or without the approval of the Minister for Finance were and are null and void under the doctrine of "Ex Turpi causa non oritur actio"*

*(d) An order that the 1<sup>st</sup> defendant do render true and proper complete and accurate accounts of all their dealings and for accounts to be taken and declaration that the mortgage dated 12.3.95 is unenforceable.*

*(e) A declaration that if any debt is owed to the first defendant then the same is payable by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants and the first defendant has no recourse or remedy against the plaintiffs and a further declaration that the first defendant's conduct of moving to realize the suit property in the manner it has done is unlawful and it is not entitled under the law to realize the suit property.*

*(f) An order directing the first defendant to deliver up to the first plaintiff the said documents of title duly released and discharged from the mortgage and a further order that the said defendant forthwith concurs in doing all acts and things and executes all the necessary deeds and documents in order to effectuate the orders aforesaid, and upon failure to do so the Deputy Registrar be mandated to do so. And a further order directing the first defendant to release titles for L.R. No. 170/75, 170/77 and 170/76 Redhill which are not charged to it.*

*(g) General damages for fraud.*

*(h) Such other or further orders as the Honourable court may deem fit to grant;*

*(i) Costs of the suit together with interest thereon.*

2. The background facts of the case are that, on or about the year 1987, a company by the name of; Kenya National Capital Corporation Limited (herein "KENYAC") filed a suit HCCC No. 4698 of 1987, vide a plaint dated 17<sup>th</sup> November 1987 against; New Homes Development Ltd and 4 others, inclusive of the 2<sup>nd</sup> Plaintiff herein.

3. Upon service of summons to enter appearance, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants therein, filed a statement of defence admitting the debt and pleading for time to repay. Subsequently, by a chamber summons application dated 7<sup>th</sup> March 1988, KENYAC sought for judgment on admission against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants and the application was allowed as prayed. In the same vein, on 4<sup>th</sup> May 1988, KENYAC requested for judgment against the 3<sup>rd</sup> and 5<sup>th</sup> Defendants, who had not entered appearance and the judgment was entered in favour of KENYAC.

4. The judgment in both cases was in the sum of; Kshs 1, 963,364.85 against the Defendants jointly and severally plus interest at 18% per annum from; 16<sup>th</sup> October 1987 until payment in full. The Plaintiff therein was also awarded the costs of the suit.

5. Pursuant to the entry of judgment, two decrees were issued dated 3<sup>rd</sup> March 1988 and 11<sup>th</sup> November 1988; against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants on one part and the 3<sup>rd</sup> and 5<sup>th</sup> Defendants on the other part respectively. Consequently, KENYAC commenced execution whereupon the parties except the 2<sup>nd</sup> Plaintiff herein recorded a consent in court for apportionment of the decretal sum among the Defendants.

6. However, the 2<sup>nd</sup> Plaintiff's was apportioned a sum of; Kshs 450,626, together with interest at the rate of 18% per annum. The evidence reveals that all the Defendants except the 2<sup>nd</sup> Plaintiff herein, fully discharged their liability by paying off their apportioned sum and were discharged accordingly.

7. Consequently, due to the 2<sup>nd</sup> Plaintiff's default, on or about June 1992, KENYAC applied for a warrant of arrest against him and he was arrested and arraigned in court to show cause why he should not be committed to civil jail. Upon arrest, and to avoid committal to civil jail, the 2<sup>nd</sup> Plaintiff and his wife, being the directors of the 1<sup>st</sup> Plaintiff offered the property L.R 170/35 (herein "the suit property") as security for the decretal sum.

8. The 2<sup>nd</sup> Defendant's debt continued to attract interest and as at 17<sup>th</sup> October 1988, it stood at; Kshs 482,365.35. By a letter dated 9<sup>th</sup> November 1992, KENYAC, instructed the firm of; Ndungu Njoroge & Kwach Advocates to prepare a mortgage for; Kshs. 1,000,000, over the suit land. This letter is important in the sense that it gives the details upon which the parties were engaging. The salient particulars thereof include the following: Borrower: Timothy Benson Kamande, P.O. Box 42916, Nairobi, Guarantor: Kawamambanjo Limited registered owner of L.R No. 170/35, Kiambu, P.O. Box 42916, Nairobi; amount: Kenya Shillings 1 Million and Rate of Interest: 23% per annum.

9. However, the Plaintiffs aver that; the purported mortgage is null and void and of no legal effect, due to the fact that; it is not supported by a resolution from the 1<sup>st</sup> Plaintiff's board of directors; the 2<sup>nd</sup> Plaintiff acted under duress to execute the mortgage in order to avoid committal to civil jail. That the 1<sup>st</sup> Plaintiff's memorandum of association did not authorize it, to mortgage its property to secure third party debts or to do any act that did not benefit the company.

10. Similarly, no valid Land Control Board consent was sought and/or obtained prior to the purported registration of the mortgage. Additionally, the mortgage was to guarantee a purported debt by the 2<sup>nd</sup> Plaintiff who was a guarantor of the 7<sup>th</sup> Defendant, thus Guarantee by a Guarantor. Further, the mortgage infringes on the mandatory requirements of; Section 59 & 69 of the Indian Transfer Property Act and section 44 of the Banking Act, to the extent that, it permitted the 1<sup>st</sup> Defendant to charge the Plaintiffs penal interest.

11. In addition, whilst the "mortgage" allowed the 1<sup>st</sup> Defendant to vary the interest rate upon notification to the 1<sup>st</sup> Plaintiff, no such notification was served on the Plaintiffs. Therefore, the various unilateral decisions to charge different rates are uncontractual and illegal. The Plaintiffs further impugn mortgage, on the ground that Nyambura Musyimi Advocate who purportedly signed the certificate under section 69 of the Indian Transfer of Property Act (ITPA), did not have a practicing certificate at the time.

12. Further, the 1<sup>st</sup> Plaintiff's second director; Mrs. Lucy Wambui Kamande, did not read the mortgage documents and neither was the

contents of the same explained to her prior to the execution thereof. Thus, she did not know or understand the legal meaning and effect of the same when she signed it. In particular, she did not understand at the time that, the document she signed was a mortgage over the suit property and that the same conferred upon the 1<sup>st</sup> Defendant the power to sell the suit property in the event that the monies secured there under was not repaid to the 1<sup>st</sup> Defendant by the borrower.

13. The Plaintiffs further aver that KENYAC, was obliged to ensure that, she received independent legal advice as to the contents, meaning and legal effect of the mortgage before she co-executed the same but did not. Therefore, the execution of the said mortgage was procured under duress, coercion and undue influence and misrepresentation. Finally, the time of enforcing the decree in HCCC No. 4698 of 1987, has in any event expired, the decree being more than 20 years old.

14. The 2<sup>nd</sup> Plaintiff avers that, notwithstanding the aforesaid irregularities in the security, he has paid the amount of; Kshs. 1,000,000, as follows; Kshs. 605,000, paid as at August 1997; Kshs. 200,000, paid to D. Njogu Advocate on 23<sup>rd</sup> July 05; and Kshs. 835,000, as admittedly in the affidavit of; J. K. Kamau sworn on 7<sup>th</sup> September 2007, together with other payments shown in the statement.

15. However, despite the payments made, on or about the 15<sup>th</sup> day of June 2009, the 2<sup>nd</sup> Defendant issued a notification of sale, indicating that the suit property would be sold by way of public auction on 2<sup>nd</sup> July 2009, unless the 1<sup>st</sup> Plaintiff paid the sum of; Kshs. 6,161,285.50 with interest till payment in full. But the Plaintiffs faults the notice of sale on the grounds inter alia that; no statutory notice was ever served on the 1<sup>st</sup> plaintiff prior to the instructions to the Auctioneers; the 1<sup>st</sup> plaintiff's name is not Kamwonjo Limited and the notice was void for mis-description. That, there has been no valuation of the suit land for the last one year (1) year as required by the Auctioneer Rules, and no valid redemption notice was ever served upon the Plaintiff company, 45 days prior to the purported auction.

16. That subsequently, the 2<sup>nd</sup> Defendant purported to conduct an auction of the suit property on the 2<sup>nd</sup> July 2009. The Plaintiffs avers that, there was no valid auction sale or any sale at all, due to non-compliance with the provisions of; Rule 21(3) and 21(4) of the Auctioneer Rules. The conditions of sale did not state whether the sale was subject to reserve price nor whether the right to bid was reserved.

17. Further, the purported sale and transfer violated the provision of Rule 17(4) of the Auctioneer Rules in that, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, were neither the highest bidders nor did they comply with the conditions of sale. In additional, there was no payment of the mandatory 25% deposit at the fall of the hammer or on that day and neither was the balance of the auction price paid in accordance with the terms of the auction and the advertised conditions.

18. The Plaintiffs aver that, there no valid certificate of sale was executed on the purported auction date, and the purported auction realized a price of only Kshs. 4,000,000 which is a gross undervaluation of the suit land and in itself evidence of fraud.

19. Finally, the Plaintiffs further aver that, the 1<sup>st</sup> Defendant has failed, neglected or refused to take any or sufficient or appropriate action against the other principal debtors; the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants, to recover its indebtedness.

20. That, in view of the admission made by 6<sup>th</sup> and 7<sup>th</sup> Defendant and their request to the court to be allowed to liquidate by instalments, they are equally liable for any amounts purportedly due to the 1<sup>st</sup> Defendant. As such the 2<sup>nd</sup> Plaintiff seeks for an order that, they be compelled to make good the said decree in HCCC No. 4698 of 1987, as per their prayers to the court in that case.

21. However, the 1<sup>st</sup> Defendant filed a statement of defence dated 14<sup>th</sup> January 2010 and joined issue in the averments that, in order to guarantee satisfaction of the decree, the 2<sup>nd</sup> Plaintiff procured the 1<sup>st</sup> Plaintiff to execute the subject mortgage in favour of the 1<sup>st</sup> Defendant.

22. That, the mortgage was given for valuable consideration and was properly executed and registered. That it was attested to by the 2<sup>nd</sup> Plaintiff and the co-director and not Nyambura Musyimi Advocate as alleged. The particulars of undue influence, coercion and misrepresentation were denied. Further, it was argued that, all the claims of illegality and invalidity of the mortgage are statute barred by virtue of the Limitation of Action Act, as the mortgage was executed on 12<sup>th</sup> March 1993 and any cause of action should have been brought by March, 1999.

23. In relation to the sale, it was averred that, the notification of sale was legal. The statutory and redemption notices were served and the nominal error in the 1<sup>st</sup> Plaintiff's name in the notification of sale cannot render the sale invalid. The mortgage debt has not been paid in full. Further, the 1<sup>st</sup> Defendant denied selling the property at an undervalue or in conspiracy, malice or fraud.

24. Finally, the 1<sup>st</sup> Defendant denied charging interest in contravention of the law and argued that, there is no appeal against the judgement entered against the 2<sup>nd</sup> Plaintiff in HCCC No. 4698 of 1987 and it is lawfully executing the debt.

25. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a statement of defence dated 20<sup>th</sup> January 2010 and filed in court on the 25<sup>th</sup> January 2019. They averred that, they participated in a public auction which was properly constituted. That they purchased the suit property, lawfully and procedurally and the ownership thereof passed to them at the fall of the hammer. Therefore, they are purchasers for value without notice of any defect.

26. That as purchasers for value and without notice, they were not concerned to inquire or ascertain whether: a case had arisen or arose to authorize the sale, statutory notice had been issued or the power of sale had accrued; the mortgage or charge was valid and whether the 1<sup>st</sup> Defendant had exercised its power of sale procedurally.

27. That the Plaintiffs' claim for any illegality or irregularity lies in a suit for damages, as against the 1<sup>st</sup> Defendant. Finally, it was averred

that the suit is scandalous, frivolous, vexatious and instituted in bad faith against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, as it does not disclose any reasonable cause of action against them.

28. The 5<sup>th</sup> Defendant filed a defence dated 30<sup>th</sup> March 2020, and averred that, he is no longer a director of the 7<sup>th</sup> Defendant. That, pursuant to the decree issued in; HCCC No 4698 of 1987, against all the Defendants jointly and severally, he settled his portion of the decretal sum. He denied the allegation that he received undue time and indulgence to settle his portion of the decretal sum.

29. He further denied owing any monies and/or is liable to pay more monies on account of the decree; in HCCC No. 4698 of 1987. He contended that, the plaintiffs' claim and/or declaration against him is statutory time barred under the Limitation of Actions Act (cap 22) of the Laws of Kenya. He also asserted that the Plaintiff's claim is bad in law and unmaintainable as against him as it does not disclose any reasonable cause of action and the orders sought are not capable of being granted.

30. The suit against the 6<sup>th</sup> and 7<sup>th</sup> Defendants was withdrawn, following the demise of the 6<sup>th</sup> Defendant. The case proceeded to full hearing. The Plaintiffs case was supported by the evidence of the 2<sup>nd</sup> Plaintiff. He relied on his statement dated 5<sup>th</sup> March 2014 and filed in court on the same date together with the bundle of documents filed. He literally reiterated the background facts of the case summarized herein.

31. However, he averred further that, all along he was not aware of the suit in which the debt herein arose nor the apportionment of the debt. He came to know of it when KENYAC moved to enforce the judgment against him in 1992, when he was to be committed to Civil Jail for 6 months. The amount sought from him was; Kshs 2,422,297.60 as at 26<sup>th</sup> April 1990. That after giving the suit property to secure his release, the 1<sup>st</sup> Defendant requested for and he gave three other titles without charging them.

32. He confirmed that he was aware of the suit, HCCC No 4698 of 1987 against him and other co-directors and was also aware of the judgment entered therein and the apportionment of the debt. The amount apportioned to him was Kshs 482,365.35 which information he got through a letter via his postal box number 42946 Nairobi.

33. He also confirmed that, through his lawyers, he sought for indulgence to pay his portion of the debt and that the property not to be sold. He conceded that the Land Control Board Consent was obtained for charging of the suit property which was given on 11<sup>th</sup> February 1993.

34. He further averred that, he did not see the advert by WATTS Enterprises which was not clear as the company's name was misspelt to read "Kamonjo Ltd". However, he confirmed that the publication of the public auction by; Ndaragu Merchants was in relation to the property described as; L.R No. 170/35, situated in Red Hill.

35. In further cross examination he stated that, he was issued with a notification of sale indicating that, the 1<sup>st</sup> Defendant would sell the suit property. He also confirmed that he was aware that the auction took place. He did not stop it and that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were the successful bidders.

36. In cross examination by the 5<sup>th</sup> Defendant, he confirmed that New Homes Development Ltd had taken a loan from KENYAC and the directors thereof guaranteed the loan. He confirmed that loan was apportioned after judgment and that all the directors had paid their portion including the 5<sup>th</sup> Defendant. He confirmed that he had no claim against the 5<sup>th</sup> Defendant.

37. In re-examination, he stated that 1<sup>st</sup> Defendant did not disclose that the other directors had paid their shares and it executed for the full decretal sum of Kshs 2, 000,000. He confirmed that the 1<sup>st</sup> Defendant holds titles of three other properties.

38. Mr. Wainaina Kironyo, a Land Economist and Certified Valuer testified on behalf of the Plaintiffs and stated that, on 16<sup>th</sup> November 2009, he carried out a valuation on the suit property and established that the open market value was Kshs 23,000,000 and forced sale value of; Ksh 14,950,000. That, at the time of giving evidence, the value of the land was Kshs 100,000,000 and forced sale value of Kshs 75,000,000. He stated that, he was aware Premier Valuers Limited, had on the instruction of the 1<sup>st</sup> Defendant, carried out a valuation of the property in the year 2006, as per their report dated 16<sup>th</sup> May 2006, gave the value for the land as; Kshs 6.500, 000 and forced sale value of; Kshs 3.600,000.

39. In cross examination by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he insisted that his valuation report is the correct one as the area is on high demand and disagreed with the valuation given by the 1<sup>st</sup> Defendant's valuers. He confirmed that, there were no permanent developments on the land, which is used for agricultural purposes. He further confirmed that for a valuation to be valid, it should be signed and have a company seal and that the seal of the company is not visible on his report.

40. Mr. Paul Chelanga the 1<sup>st</sup> Defendant's Accounts Manager testified for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He relied on his undated statement filed in court on 5<sup>th</sup> March 2014 and a bundle of documents dated 6<sup>th</sup> February 2014, 23<sup>rd</sup> and November 2018. He stated that KENYAC merged business with the 1<sup>st</sup> Defendant in the year 1988, He reiterated the averments in the 1<sup>st</sup> Defendant's statement of defence and emphasized that, by January 1991, all the other directors except the 2<sup>nd</sup> Plaintiff had settled their portions of the debt of; Kshs 425,000, with interest thereto.

41. That as a result of failure to pay and/or honour the promises to pay, and after indulgence, the property was sold by public auction on 2<sup>nd</sup> July 2009, at Kshs 40,000,000. He denied all the allegations of improper sale of the property and argued that it was done in accordance with the law and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants properly pronounced as the highest bidders and/or purchasers.

42. In cross examination by the Plaintiffs' counsel, he stated that the 2<sup>nd</sup> Plaintiff paid; Kshs 835,000 after the parties entered into negotiation, but at the time of the intended committal to civil jail, the amount outstanding was, Kshs 1,963,364.85 as the total decretal sum.

43. The case of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants was supported by the evidence of; Juliet Theuri, an Advocate of the High court of Kenya She relied on her statement dated 4<sup>th</sup> February 2014 and bundle of documents dated 20<sup>th</sup> March 2014 and averred that the Defendants lawfully purchased the suit property; L.R 170/35 Red Hill through public auction on 2<sup>nd</sup> July 2009. That, they paid 25% deposit vide a bankers cheque at the fall of the hammer and the balance fully and were issued with a valid certificate of sale.

44. In cross examination by the Plaintiffs' Counsel, she stated that the auction was advertised in the daily nation newspaper and there were three (3) or four (4) bidders for the property, although she could not recall the number of people who attended.

45. The 5<sup>th</sup> Defendant was not called as a witness but his lawyers filed submissions on his behalf. The parties then filed their final submissions which I have considered alongside the evidence adduced and I find that the following issues have arisen for considerations: -

- a) *Did the plaintiff incur any liability in suit HCCC No. 4698 of 1987, in favour of the 1<sup>st</sup> defendant;*
- b) *If the answer to (a) above is in the affirmative, did the plaintiff discharge that liability;*
- c) *If the debt was not paid; was it properly secured;*
- d) *Did the 1<sup>st</sup> defendant lawfully realize the security in the sale of the suit property;*
- e) *Did the 3<sup>rd</sup> and 4<sup>th</sup> defendant get a clean title to the subject property after the sale;*
- f) *Has the plaintiffs proved its case on the balance of probability and/or are the plaintiffs entitled to the prayers sought;*
- g) *Who will bear the costs of the suit?*

46. As regards the 1<sup>st</sup> issue, I find that, the genesis of this case, is the suit HCCC 4698 of 1987. It is not in dispute that, the 2<sup>nd</sup> Plaintiff was a party to that suit, named as the 5<sup>th</sup> Defendant. He did not file a defence therein and judgment was entered against him, jointly with his co-defendants in the sum of Kshs 1,963,364.85 together with interest thereon at 18% per annum from 16<sup>th</sup> October 1987. Subsequently, following negotiations between the parties, his liability was settled at an apportioned sum of; Kshs 450,626 together with interest at the rate of 18% per annum. The 2<sup>nd</sup> Plaintiff has not appealed against the judgment in HCCC 4698 of 1987 and/or set it aside. Therefore, he is liable on the subject sum therein.

47. It is also evident that, the 2<sup>nd</sup> Plaintiff did not pay the apportioned sum necessitating execution to commence for recovery. The evidence reveals that, the debt was secured by the suit property. In that regard, the 1<sup>st</sup> Defendant has produced the mortgage document created on 12<sup>th</sup> March 1993, over the suit property to secure a sum of; Kshs 1,000,000.

48. However, the 2<sup>nd</sup> Plaintiff has impugned the mortgage on several grounds as aforesaid, inter alia that, he executed the mortgage document under duress. However, I note from his own statement that he states; "I was desperate and in a bid to secure my release I forwarded my title to the suit property as security for my release" Further in the letter dated 28<sup>th</sup> March 2006, the 2<sup>nd</sup> Plaintiff expressly states that "I was not aware of the judgment until I was summoned to appear in court in 1992. I had to offer L.R No 170/35 registered in my family name Kawamabanjo Limited to secure the loan". He does not state the 1<sup>st</sup> Defendant exerted pressure on him or unduly coerced him to execute the mortgage document.

49. He further averred that, he took the security documents to the wife; Lucy Kamande at home to sign. She did not appear before Nyambura Musyimi Advocate as indicated in the mortgage documents. Therefore, she did not receive independent legal advice and did not understand the import of what she was signing. However, the Plaintiffs state in their submissions that; "the 1<sup>st</sup> Defendant's advocates misrepresented to the 1<sup>st</sup> Plaintiff's co-director that her signature was required as a formality to get her husband out of incarceration and that the document she was executing was conferring on the said KENYAC the power to sell the suit property if the monies were not paid". That submission is contradictory to the evidence that; she did not appear before the lawyer.

50. However, unfortunately these allegations by the 2<sup>nd</sup> Plaintiff about the co-director are not supported by any statement and/or evidence from her. It is even more unsubstantiated by virtue of the fact that, the document executed show on the face value that she executed them before a lawyer. It is also in evidence that; she was willing to remove the caveat on the suit property. The allegation is thus unfounded.

51. The Plaintiffs also allege that the lawyer who allegedly witnessed the mortgage document did not have a valid practicing certificate, but there is no evidence produced in support thereof. He who alleges proves. Similarly, although the Plaintiffs allege that the memorandum and/or articles of association of the 1<sup>st</sup> Plaintiff did not authorize it to guarantee third party debts, the subject clauses have not been cited.

52. Further, the 2<sup>nd</sup> Plaintiff is the director of the 1<sup>st</sup> Plaintiff and cannot seek to invalidate the mortgage on the basis of his own intentional flouting of the clauses (if any). He who goes to equity must go with clean hands. Be that as it were, the court held in the celebrated case of; Royal British Bank v Turquand (1856) 6 E&B 327 that people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not. This "indoor management rule" or the "Rule in Turquand's Case" and is applicable in most of the common law world. Thus, the directors who act in an ultra vires manner will incur personal liability.

53. In the same vein, the 2<sup>nd</sup> Plaintiff alleged that; no board of directors' resolution was provided by the 1<sup>st</sup> Plaintiff before the property was mortgaged and neither was the land control board consent obtained. However, the 1<sup>st</sup> Defendant has produced copies of the said documents, rebutting the Plaintiffs' allegation. Finally the Plaintiffs aver that the provisions of section 59 and 69 of the ITPA were flouted but I find that, the mortgage document is properly executed as the signatures thereto are not disputed and in view of the afore findings, the execution and registration thereof was properly done. I find and hold the mortgage instrument is valid.

54. The next issue to consider is whether the 2<sup>nd</sup> Plaintiff repaid the secured amount of; Kshs 1,000,000. It is clear from all the correspondence produced that, the 2<sup>nd</sup> Plaintiff kept on requesting for indulgence to pay off the outstanding sums. On 12<sup>th</sup> March 1990, the firm of; Monoru, Kagiri & Wamae, on behalf of the 2<sup>nd</sup> Plaintiff, wrote to the firm of; Hamilton Harrison & Mathews & Co, Advocates, acting for KENYAC requesting that, the 2<sup>nd</sup> Plaintiff be allowed time to pay the amount apportioned, as he was in the process of selling some property. He further requested for 14 days to make a firm proposal.

55. By a letter dated 1<sup>st</sup> November 1990, the same law firm wrote to the 1<sup>st</sup> Defendant's lawyers regretting that, there was a delay in the finalization of the sale transaction and proposed to make a payment of monthly instalments of; Ksh 30,000 pending the finalization of the same and enclosed a cheque of Kshs 30,000

56. In that regard, by a letter dated 26<sup>th</sup> July 1993, the 2<sup>nd</sup> Plaintiff states that, he was making arrangements to pay with immediate effect monthly payments of Ksh 69,592. On 6<sup>th</sup> August 1996, the 2<sup>nd</sup> Plaintiff wrote to KENYAC stating that he had entered into an agreement with Mr. Seki, for the sale of the suit property at a sum of; Kshs 7,000,000 and the proceeds would be utilized to clear the loan. He requested that the auction scheduled for 8<sup>th</sup> August 1996, be postponed for at least 30days from the date of the letter. He further stated that, if the loan was not repaid by that time, KENYAC was at liberty to proceed with the realization of the security.

57. On 26<sup>th</sup> September 1996, the firm of Kirundi & Company Advocates wrote to KENYAC to the effect that they had been instructed by the 2<sup>nd</sup> Plaintiff to notify KENYAC, that the 2<sup>nd</sup> Plaintiff had identified a potential purchaser for the property herein or its adjacent plot. Proceeds whereof would be utilized to offset the outstanding balance on the account of New Homes Development Ltd.

58. On 26<sup>th</sup> June 1998, S.G Mbaabu & Company Advocates wrote to the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> Plaintiff to the effect that, the 2<sup>nd</sup> Plaintiff had identified a buyer for the property and requested that, the matter be held in abeyance to enable the parties execute the sale agreement.

59. On 31<sup>st</sup> August 1999, the 2<sup>nd</sup> Plaintiff wrote to the 1<sup>st</sup> Defendant and enclosed a cheque for a sum of; Kshs 225,000 and stating that he would make a total payment of; Kshs 605,000 to clear the principal sum leaving interest amount of Kshs 156,000. He regretted that he had not been making regular payments due to poor health of both himself and his wife, loss of his sons and the fact that his company by the name of Chui Soap Factory was placed under receivership.

60. On 5<sup>th</sup> August 2004, the 2<sup>nd</sup> Plaintiff wrote to the 1<sup>st</sup> Defendant making reference to his earlier letter of; 7<sup>th</sup> June 2004, seeking for indulgence to pay the sum due. On 9<sup>th</sup> September 2004, the 2<sup>nd</sup> Plaintiff wrote to the 1<sup>st</sup> Defendant thanking it for indulging him and allowing him to continue marketing three plots for sale. He stated that he would be forwarding the titles thereto to the 1<sup>st</sup> Defendant for custody and expects to complete the sales within 180 days from the date of the letter.

61. On 5<sup>th</sup> September 2005, the 2<sup>nd</sup> Plaintiff wrote to the 1<sup>st</sup> Defendant enclosing a banking slip of; Kshs 80,000 as 10% mandatory deposit for Plot No. L.R 170/78 and a sale agreement for the same. He requested the 1<sup>st</sup> Defendant to release his title to enable him do the documentation and transfer the land. On 12<sup>th</sup> September 2005 the 1<sup>st</sup> Defendant acknowledged the Kshs 80,000 payment and confirmed that they had no objection to the sale price of Kshs 800,000 and requested the balance of Kshs 720,000 be paid directly to them. By a letter dated 14<sup>th</sup> October 2005, the 2<sup>nd</sup> Plaintiff conceded to direct payment of; Kshs 720,000 to the 1<sup>st</sup> Defendant requesting for his title deed to be released.

62. On 28<sup>th</sup> March 2006, the 2<sup>nd</sup> Plaintiff offered a final settlement of the debt at Kshs 2,000,000, payable from the proceeds of the sale of the family house. He also requested for the return of the titles not charged to the 1<sup>st</sup> Defendant. On 4<sup>th</sup> April 2006, the 2<sup>nd</sup> Plaintiff wrote to the 1<sup>st</sup> Defendant and stated that he intended to pay in five (5) equal instalments a sum of; Kshs 400,000 every two months should the sale of house delay beyond the end of May 2006.

63. However, the 2<sup>nd</sup> Plaintiff did not make the payments and on 25<sup>th</sup> September 2006, the 1<sup>st</sup> Defendant wrote to him in response to his numerous letters, noting that he had not honoured his proposal to sell the plots through private treaty nor submitted any payments from the sale of the family house. The 1<sup>st</sup> Defendant asked him to liquidate the outstanding sum or conclude an acceptable repayment proposal, by 15<sup>th</sup> October 2006 or the sale would proceed.

64. On 30<sup>th</sup> October 2006, the 2<sup>nd</sup> Plaintiff through his lawyers Kabiro Ndaiga & Company Advocates, wrote to the 1<sup>st</sup> Defendant responding to the letter dated 25<sup>th</sup> September 2006, informing it that the sale of the family house did not materialize.

65. On 22<sup>nd</sup> May 2009, Muturi, Kamanda & Company Advocate wrote to the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> Plaintiff offering to give a professional undertaking in the sum of; Kshs 2,600,000 as he awaits the sale of a property owned by the 2<sup>nd</sup> Plaintiff. Similarly, on 26<sup>th</sup> May 2009, the firm of; Ochieng, Onyango, Kibet and Ohaga, wrote to the 1<sup>st</sup> Defendant on behalf of the 2<sup>nd</sup> Plaintiff, in reference to a notification of sale dated 28<sup>th</sup> April 2009, issued by Watts Enterprise Auctioneers and made an offer to settle the outstanding sum of; Kshs 3,600,000 enclosing therewith a professional undertaking from the firm of; Muturi, Kamanda & Company Advocates.

66. It is therefore evident from all the correspondence above that, the 2<sup>nd</sup> Plaintiff did not repay the mortgaged sum on the due date. In fact, from the 26<sup>th</sup> July 1993 when the 2<sup>nd</sup> Plaintiff started seeking for indulgence to 26<sup>th</sup> May, 2009, it took a period of sixteen (16) years of indulgence! Although the 2<sup>nd</sup> Plaintiff alleges that, he paid certain sums of money, there is evidence that he made several proposals to pay the balance but did not.
67. In that regard on 25<sup>th</sup> July 1990, he proposed to pay monthly instalments of Kshs 30,000 and on 26<sup>th</sup> July, 1993 Kshs 69, 593 monthly. On 13<sup>th</sup> March, 1995, he offered Kshs 300,000 and on 6<sup>th</sup> August 1996, Kshs 2,000,000 and repeated on 5<sup>th</sup> April 2006. However, he did not honour any of these proposals, obviously he could not have sought for indulgence all along, if he fully repaid the mortgage sum.
68. It also suffices to note that, the sum sought for, is the mortgage amount of; Kshs 1,000,000, plus interest and not the decretal sum. The Plaintiffs parted ways with the decretal sum upon the restructure of the debt and conversion of the same into a loan. In that case, all the arguments advanced to the effect that, the decree relied on has lapsed does not arise, in that at the time of creation of the mortgage, the decree was still valid.
69. In the same vein, as per the banks statements produced by the 1<sup>st</sup> Defendant, it is not executing the decretal sum but the mortgaged sum. Therefore, the argument that, the 1<sup>st</sup> Defendant wrongfully failed to inform the court of the payment by the other directors and applied for execution of the total sum less Kshs 200,000 which the 2<sup>nd</sup> Plaintiff had paid, and/or failed to take action against the co-defendants in the initial suit does not lie.
70. Be that at it were, the 2<sup>nd</sup> Plaintiff having failed to repay the loan, the 1<sup>st</sup> Defendant embarked on realization of the suit property. However, the Plaintiffs have faulted the sale on several grounds inter alia that, the instrument registered was a mortgage and not a charge and therefore no power of sale can arise from the mortgage. However, I find that, the mortgagee has a right under section 69 of the ITPA (applicable herein) to exercise the statutory power of sale.
71. The Plaintiffs further disputed receipt of the necessary statutory redemption notices and/or notification of sale. However, the 1<sup>st</sup> Defendant stated that, the Plaintiffs had received several other notices before the sale, a fact not contested. The 1<sup>st</sup> Defendant relied on the case of; George Gikubu Mbuthia vs Jimba Credit & Another Civil Appeal No 111 of 1986, and argued that section 74 of the repealed Registered Land Act, does not impose on the chargee the obligation to give more than one notice. Thus, the notification of sale issued on 12<sup>th</sup> July 1996, suffices under the law and in any case a further notification of 15<sup>th</sup> June 2009 was issued before the sale.
72. I note from the evidence that; the first scheduled sale by Richard Muchai Auctioneer was to take place on 18<sup>th</sup> June 1996, however, it was put off at the request of the 2<sup>nd</sup> Plaintiff. This was thirteen (13) years of indulgence! On 12<sup>th</sup> July 1997, he was served with a notification of sale by Ndarugu Merchants Auctioneers. On 16<sup>th</sup> October 1996, the property was re-advertised for sale, however, on 1<sup>st</sup> November 1996, although the auction was held it did not materialize as the highest bid was Kshs 1, 200,000 which was below the reserve price. This is a clear indication that, the 1<sup>st</sup> Defendant was acting in good faith and for the benefit of both parties.
73. Be that as it were, on 28<sup>th</sup> April, 2009, Watts Enterprise served a notification of sale notice, though the 1<sup>st</sup> Plaintiff's name was misspelt. The property was then advertised for sale on 2<sup>nd</sup> July 2009 and sold. In my considered opinion, the 2<sup>nd</sup> Plaintiff was all along aware that he was in default and the suit property would be sold.
74. On the issue of the name of the 1<sup>st</sup> Plaintiff which was misspelt, having considered the evidence, I agree with the 1<sup>st</sup> Defendant that, it may have been an error that did not prejudice the Plaintiffs.
75. I also note the Plaintiffs raised further issues of the valuation of the property, payment of the purchase price and conditions of sale. Having considered the evidence, I note that a register of attendance at the auction is produced. There is evidence of the Auctioneer acknowledging payment of the 25% after the fall of the hammer. A memorandum of sale, certificate of sale and a final report on the auction are produced and it shows total purchase price was paid. I am therefore satisfied that, the auction was properly conducted in accordance with the law.
76. The conduct of the auction is further faulted on the basis that, the property was sold at an under value and based on a valuation report done on 16<sup>th</sup> May 2006 three (3) years prior to the sale. The Plaintiffs relied on the case of Sheila Wamuchi v Housing Finance Company Limited HCCC No 2754 of 1998 to argue that the sale is null and void. The 1<sup>st</sup> Defendant maintained that the valuation was proper. However, it is obvious, the valuation relied on was more than one (1) year old.
77. Be that as it may, I have considered the respective valuation produced by the Plaintiffs carried out by Bel Air Limited dated 16<sup>th</sup> November 2009 and that of Premier Valuers Limited dated 16<sup>th</sup> May 2006, produced by the 1<sup>st</sup> Defendant. The analysis reveals that, Premier's report shows the date of instruction and inspection as 5<sup>th</sup> and 10<sup>th</sup> May, 2005 and Bel Air's report does not. The details of; L.R No, location of the property, area, tenure and the registered owner are the same. The Plaintiffs report shows improvement on the property as; series of fish ponds with some having fish. The 1<sup>st</sup> Defendant's shows pump house, some fish ponds in progress and states that there was a portion covered by marshy basin and two acres was covered by water logged basin so the sum of Kshs. 4,000,000 was good value for it.
78. It is also noteworthy that the Plaintiffs report was made three (3) years after the Defendants and was prepared four (4) months after the auction sale. Of great significance is the disparity in the value of the property within three (3) years;

a) Forced value sale: Plaintiffs; Ksh 14,900,000 and 1<sup>st</sup> Defendant's Kshs 3, 600,000. Difference Kshs 9,300,000;

*b) Open market price: Plaintiffs; Kshs 23,000,000 and 1<sup>st</sup> Defendant's Kshs 6,500,000 the variance is Kshs 16, 000,000.*

79. It is clear that these reports are irreconcilable and would require an independent report taking into account that they were made on instructions of the respective interested parties. Be that as it were, I hold that there was a valid sale and as submitted by the 1<sup>st</sup> Defendant there is no prayer or relief sought for cancellation of the sale.

80. The next issue raised is on the amount payable. The Plaintiffs argue that the sum demanded by the letter dated 3<sup>rd</sup> July 2001 of Kshs 6,461,969.25 is composed of illegal and un-contractual interest rate, which flouts the provisions of section 44 of the Banking Act. The 1<sup>st</sup> Defendant denies the same. However, I note from the correspondences herein that, by a letter dated 28<sup>th</sup> February 1995, the 1<sup>st</sup> Defendant made a demand upon the 2<sup>nd</sup> Plaintiff for a sum of; Kshs 2,058,630, whereupon the 2<sup>nd</sup> Plaintiff responded vide a letter dated 13<sup>th</sup> March 1995, written by the firm of; Farouk & Company Advocate, protesting at the amount demanded and noting that by 31<sup>st</sup> August 1994, the sum outstanding as per the statement furnished was; Kshs 1,209,319.10 but it was unconceivable how the sum had risen by over 80% within six months. The interest rate charged at 18% was also contested with the 2<sup>nd</sup> Plaintiff stating that the interest rate applicable should be court rate of 12%.

81. The 2<sup>nd</sup> Plaintiff further sought for an accurate and correct statement of accounts to enable him make satisfactory proposal to liquidate the account and also information on the outstanding balance on the account as at 31<sup>st</sup> December 1996. He then requested that the interest on the loan be waived. On 8<sup>th</sup> February 2000, the 2<sup>nd</sup> Plaintiff made a further similar appeal. Similarly, on 29<sup>th</sup> October 2009 the Plaintiff's lawyers wrote to the 1<sup>st</sup> Defendant and requested for an account of the proceeds of the auction.

82. Having considered the evidence on the issue and the statements produced I find that, the 1<sup>st</sup> Defendant was demanding Kshs 6,461,969.25, the account was subject to a maximum of Kshs 1, 000,000, plus interest. The amount realized from the auction was Kshs 4,000,000, there is no explanation on how it was applied. There is no final settled account. No indication as to whether the interest is still accruing. The statement produced by the 1<sup>st</sup> Defendant starts from 26<sup>th</sup> May 1988 to 31<sup>st</sup> December 1992, under title "New Homes Development a/c Timothy Benson Kamande". The next statement is for the period 1991 to 1998. Then two statements for 1999, entitled "loan enquiry", one statement for 2002, two for 2007 and 2009. These statements are not only incomplete but are unexplained. The Plaintiffs statement were also not helpful as they run from 1988 to 1999 and were not explained too. In that case, they need to be analyzed and explained for understanding.

83. The Plaintiffs also submitted that the 1<sup>st</sup> Defendant has declined to release the original title documents in respect of L.R 170/76, 170/78, which were not signed or registered and charged or mortgaged in favour of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant did not respond to the same but I find that indeed those titles were not a subject of the mortgage.

84. A further issue raised by the 5<sup>th</sup> Defendant is that the Plaintiffs should pay him costs, since on 14<sup>th</sup> September 2010, he applied to court to be removed from the proceedings and the Plaintiffs filed an affidavit on 17<sup>th</sup> September 2010, which was withdrawn but they still opposed the application on points of law, and the 5<sup>th</sup> Defendant lost the application. The Plaintiffs did not deal with this issue.

85. Be that as it were, having considered all the evidence adduced and the surrounding circumstances of the case and in particular as to whether the Plaintiffs should be granted the orders sought, I hold and find as follows:

*a) Prayer (a) and (b) seeking for a permanent injunction restraining the sale of the suit property and/or a declaration that the auction sale is null and void are not allowed as I have held the sale of the suit property was proper, legal and valid;*

*b) Prayer (c), seeking that certain clauses in the letter of offer and mortgage be declared null and void is not allowed. The subject letter of offer and/or the specific clauses have not been produced and/or disclosed;*

*c) Prayer (d) seeking for true and proper accounts be provided by the 1<sup>st</sup> Defendant is allowed. The 1<sup>st</sup> Defendant to render true and accurate accounts within thirty (30) of the date of this order subject to the maximum principal sum of Kshs 1,000,000, plus interest at the contractual rate agreed on by the parties and within the maximum period within which interest is chargeable under the law. The 1<sup>st</sup> Defendant should also render an account on how the proceeds of sale were applied, as against the outstanding amount.*

*d) Prayer (e) seeking for a declaration that the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants are liable to pay the outstanding debt and the purported sale of the suit property is unlawful; are not granted;*

*e) Prayer (f), seeking for release of title to suit property is declined, however, I order that, the two titles held which are not subject to the mortgage be released;*

*f) Prayer (g), seeking for general damages is not allowed as there was no evidence to prove fraud;*

*g) Prayer (h), seeking for such other order as may be deemed appropriate. In that regard, I order that, an independent valuer be appointed by the relevant professional body to evaluate the two reports produced herein and give an independent view on the value of the suit property within one year preceding the sale. The parties will be notified of the appointed person or entity, who or which must file a declaration of no interest in the matter and/or disclosure thereof. If the report establishes under valuation, the 1<sup>st</sup> Defendant to make good the difference between the amount of the sale and the amount established. The exercise be conducted within thirty (30) days of the date of this order;*

*h) As the claims against the, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants are dismissed. I award them costs;*

*i) In view of the findings aforesaid, no costs are ordered in favour of or against the Plaintiffs and/or the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

86. Those then are the orders of the court.

**Dated, delivered and signed on this 15<sup>th</sup> day of September 2020, virtually.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of:**

**Mr Kingara for the Plaintiffs;**

**Mr. Onyango for 1<sup>st</sup> and 2<sup>nd</sup> Defendants;**

**No appearance for 3<sup>rd</sup> and 4<sup>th</sup> Defendants;**

**Ms. Nduma for the 5<sup>th</sup> Defendant;**

**Roberts-----Court Assistant.**