



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 2054 OF 1993**

MOHAN GALOT.....1<sup>ST</sup> PLAINTIFF

I.P GALOT.....2<sup>ND</sup> PLAINTIFF

S.P GALOT.....3<sup>RD</sup> PLAINTIFF

G.P GALOT.....4<sup>TH</sup> PLAINTIFF

GALOT INDUSTRIES LIMITED.....5<sup>TH</sup> PLAINTIFF

KING WOOLEN MILLS LIMITED (formerly)MANCHESTER

OUTFITTERS SUITINGS DIVISION.....6<sup>TH</sup> PLAINTIFF

VERSUS

KENYA NATIONAL CAPITAL CORPORATION LTD...DEFENDANT

**RULING**

**APPLICATION FILED ON 12<sup>TH</sup> JULY 2018**

By a certificate of Urgency application dated 12<sup>th</sup> July 2018, the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs urged the court to hear their matter on priority basis for reasons;

a. The Plaintiffs filed a suit against the Defendant seeking *inter alia* a declaration that the rate of interest applicable on the mortgage and the charge dated 11<sup>th</sup> August 1981 and 23<sup>rd</sup> September 1981 respectively be held to be between 13% and 15 % and has been so since 1981.

b. The Plaintiffs further prayed that a permanent injunction be issued to restrain the Defendant from selling **L.R. No. 209/1640/2, L. R. No. 209/7197 and L. R. No. 7022/7 Kiambu.**

c. On 27<sup>th</sup> August 2004 the Deputy Registrar ruled that the Defendant owed and should pay the Plaintiffs the sum of Ksh 48,957,536.00 together with interest accruing thereon at the rate of 19% per annum until payment in full.

d. On 29<sup>th</sup> October 2008 this Court delivered a ruling in which it adopted the decision of the Deputy Registrar and directed that a partial/preliminary decree shall issue in respect of the said sum decreed to be paid to the Plaintiffs by the Defendants.

e. The preliminary decree was issued on 1<sup>st</sup> December 2010 but execution of the same stalled after issues of representation arose and which issued have now been fully settled by the Court of Appeal.

f. The leasehold interest in the property **L.R. No. 209/1640/2, L.R. No. 209/7197 and L.R. No. 7022/7 Kiambu;** the subject of the suit has now expired.

g. The renewal process will require the surrender of the original indenture currently held by the Defendant.

h. Unless this matter is heard urgently and the titles released, there is a real threat and danger of the Plaintiffs being disinherited and ejected from their lawfully acquired property.

### **DEFENDANT'S REPLYING AFFIDAVIT**

The Application was opposed vide an affidavit dated 28<sup>th</sup> May 2019, sworn by Paul K. Chelanga a Manager – Recoveries Department of the Defendant herein. He stated that the Defendant advanced loan facilities to the Plaintiffs and the same were secured by a charge and Mortgage dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984, over **L. R. No. 209/1640/2/ Nairobi** and **L. R. No. 209/1797/Nairobi**. Additionally, a Mortgage dated 23<sup>rd</sup> September 1981, over L.R. No. 7022/7/Kiambu. Marked as **PKC-1** are copies of the Charge and Mortgage dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984, and Mortgage dated 23<sup>rd</sup> September 1981.

That the Plaintiffs filed this suit on the grounds that inter alia the Defendant was in breach of contract by charging inapplicable interest rates not incorporated in the lending contracts.

The Respondent asserted that vide a consent letter dated 16<sup>th</sup> September 1996, the parties agreed and this Court gave orders by consent on the interest rates applicable at various periods during the contractual term and that the Deputy Registrar shall examine the Parties' respective accounts as well as referee the cross examination of the parties' respective accountants and their affidavits.

That on 8<sup>th</sup> October 2002, Ringera J. (as he then was), dismissed the Defendant's application for review of the consent and ordered that upon completion of the examination of accounts, the Deputy Registrar should submit his report and findings to the Court for further proceedings and final orders in the suit since the dispute between the parties went beyond accounts.

The Respondent stated that on 27<sup>th</sup> August 2004, the Deputy Registrar ruled in favour of the Plaintiffs in the sum of Ksh 48,951,536 together with interest at 19% p.a until payment in full by the Defendant.

The Plaintiffs filed an application dated 18<sup>th</sup> October 2004, praying *inter alia* that the Court confirms and adopts the Deputy Registrar's decision as that of the court.

That on 29<sup>th</sup> October 2008, Kimaru J. allowed the Plaintiffs' application and adopted the Deputy Registrar's ruling as a judgment of the court. The Judge further ordered that as regards the other prayers sought by the Plaintiffs and the Defendant in the Plaint and Counterclaim respectively, should be heard by the court in a full trial.

The Respondent averred that being aggrieved by Kimaru J's ruling, the Defendant appealed against the decision in **Civil Appeal 324 of 2010** wherein the appeal was dismissed by the Court of Appeal on 8<sup>th</sup> February 2019. A copy of the Defendant's Memorandum of Appeal dated 15<sup>th</sup> December 2010 and the Court of Appeal's judgment dated 8<sup>th</sup> February 2019 are marked as **PKC-2**.

The Respondent, intending to appeal against the Court of Appeal's judgment, has filed an application dated 7<sup>th</sup> March 2019 at the **Supreme Court- No. 8 of 2019**, seeking extension of time to file a Notice of Appeal and an application for certification that a matter of general public importance is involved in the Defendant's intended appeal to the Supreme Court. Marked **PKC-3** is a copy of the application before the supreme court dated 7<sup>th</sup> March 2019.

That the Supreme Court matter is on-going and was mentioned on 6<sup>th</sup> May 2019, when the Deputy Registrar of the Supreme Court directed parties to file submissions and wait for a ruling date.

The 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs herein, vide their application dated 12<sup>th</sup> July 2018, are seeking for orders that the Defendant be compelled to release the suit properties' title documents to the 1<sup>st</sup> Plaintiff for purposes of renewing the leasehold interest in the suit properties.

He averred that according to annexure **MG-7** attached to the 1<sup>st</sup> Plaintiff's Supporting Affidavit dated 12<sup>th</sup> July 2018, the **property L.R. No. 209/7197 Nairobi** has a leasehold interest of **99 years** from **1<sup>st</sup> January 1969** and is set to expire on **1<sup>st</sup> January 2068**, therefore the release of the title was also not merited.

That the property **L.R. No. 209/1640/2 Nairobi** had a leasehold **interest of 99 years** from **22<sup>nd</sup> October 1914**, which expired on **22<sup>nd</sup> October 2013**.

It is therefore critically essential that the leasehold interest in this property must be renewed so as to avoid an automatic reversion of the property to the National or County Government which would not only deprive the Plaintiffs of the property but would also adversely affect the Defendant's interests under the Charge and Mortgage dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984.

The validity of the Charge and Mortgage dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984 was still a pending issue before the courts and as such the encumbrances should be reflected in the lease to be issued.

That releasing any of the suit properties' title documents to the Plaintiffs when there is an ongoing application in the Supreme Court and an unheard Counterclaim, would in effect prejudice and jeopardize the Defendant's position.

## **REPLYING AFFIDAVIT OF THE 4<sup>TH</sup> PLAINTIFF**

The application is further opposed by an affidavit of the 4<sup>th</sup> Plaintiff (herein “**Ganeshlal Pusharam Galot**”) brother of the 1<sup>st</sup> Plaintiff, dated 14<sup>th</sup> August 2018, where he stated that from the outset that Mohan Galot, the 1<sup>st</sup> Plaintiff, brought this application in very bad faith with a view to steal a match against the 4<sup>th</sup> Plaintiff.

He stated that Mohan Galot’s motive in bringing the application was to defraud the 4<sup>th</sup> Plaintiff and defraud the 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs.

Mohan Galot in the past had attempted to fraudulently convert real assets and lands belonging to the 5<sup>th</sup> Plaintiff without consulting 4<sup>th</sup> Plaintiff and he ended up being sued by the 5<sup>th</sup> Plaintiff in **HCC 298/2009**. The 1<sup>st</sup> Plaintiff also ended up being charged with criminal offences in the **Chief Magistrates Court Nairobi in Criminal Cases 1554/2012, 1555/2012 and 482/2014** which are pending before the subordinate court for determination. Marked as “**GG1**” is a set of the Charge sheets in **Criminal Cases 1554/2012, 1555/2012 and 482/2014**.

He stated that he opposed the application because it is incompetent, bad in fact and in law, and an abuse of the court process for reasons;

- a. The 4<sup>th</sup> Plaintiff is a joint Plaintiff with Mohan Galot but he had not consulted him before he filed the application. Instead he excluded the 4<sup>th</sup> Plaintiff and 5<sup>th</sup> Plaintiff.
- b. Although Mohan Galot was the principle mover, the 5<sup>th</sup> and 6<sup>th</sup> Plaintiff Companies, were supposed to be joint applicants.

The High Court had ordered on 10<sup>th</sup> July 2012, that prior leave is required to be obtained before any of the parties in **HCC 430/2012** which included the 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs filed any suit or application. Mohan Galot filed this application without seeking nor obtaining leave from the High Court as ordered. The application is therefore incompetent and this Court has no jurisdiction to entertain it.

A copy of the order in **HCC 430/2012** dated 10<sup>th</sup> July 2012 and the extension there of is marked “**GG 2**”.

- c. On the grounds of the application the Applicant stated that “the leasehold interest in the property L.R. No. 209/1640/2, L. R. No. 209/7197 and L.R. No. 7022/7 Kiambu, the subject of the suit has now expired.” This is on the backdrop of the prayer No. 2 which reads:

“This Honourable Court do and hereby order the Defendant to release the Title Documents for L. R. No. 209/1640/2, L. R. No. 209/7197 and L. R. No. 7022/7 Kiambu to the 1<sup>st</sup> Plaintiff.”

There is no doubt that the applicant is telling the court that the leasehold interest in each and all the three properties has expired and the titles are required for extension purposes.

- d. The statements were false and a fraud. It was not true that the leasehold interest in all the plots and properties had expired. The allegation is untrue. The position is as follows:

- i. **L. R. 209/7197**: Held for 99 years from 1<sup>st</sup> January 1969 will expire in the year 2068, it did not yet expire in 2018.
  - ii. **L.R. 7022/7**: This conveyance gave title to be held in “fee simple” which means perpetually. It is not a leasehold. Its term has not expired. To say it has, is a lie.
  - iii. **L. R. 209/1640/2**: This owned jointly by four brothers; 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs,

Lalchand, Ganeshlal(4<sup>th</sup> Plaintiff), Mohan, Sohanlal.

Term is 99 years from 1914, it has expired but why is Mohan Galot acting surreptitiously and without consulting 4<sup>th</sup> Defendant when he is a joint owner. The three (3) titles L.R. 209/7197 marked as “**GG 3**”; L. R. 209/1640/2 marked as “**GG 4**” and L. R. 7022/17 marked as “**GG 5**”

## **SUPPLEMENTARY REPLYING AFFIDAVIT OF THE 4<sup>TH</sup> PLAINTIFF**

The 4<sup>th</sup> Plaintiff further opposed the application vide an affidavit dated 20th June 2019. He stated that in response to paragraph 1 of the Further Supporting Affidavit where Mohan Galot depones that he is the Governing Director of the 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs and that he has authority to depone on their behalf, he categorically denied that Mohan Galot is the Governing Director of the Companies. Mohan Galot is the 4<sup>th</sup> Plaintiff’s younger brother. Our eldest brother Lal Galot was the Governing Director of the 5<sup>th</sup> and 6<sup>th</sup> Plaintiff companies. He died. He has never been succeeded. The companies’ board of directors have never met to appoint a successor as required under **section 205 of the Companies Act**. Mohan Galot is therefore masquerading as Governing Director fraudulently.

That in further response to paragraph 1 of the Further Supporting Affidavit, he averred that Mohan Galot had no authority to swear an affidavit on behalf of the 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs without board resolutions of the Company. Paragraph 1 of the Further Supporting Affidavit is therefore a forgery, a purgery.

In response to paragraph 3 of the Further Supporting Affidavit the 4<sup>th</sup> Plaintiff averred and contended that the contents thereof are totally scandalous, irrelevant and oppressive. In particular;

a. The allegation that the 4<sup>th</sup> Plaintiff is of unsound mind is defamatory. It goes against the statutory requirement that affidavits should be confined to such facts as a deponent is able of his own knowledge to prove. The allegation is disgraceful and ignominious.

b. The allegation that Mohan Galot employed and dismissed 4<sup>th</sup> Plaintiff as a tailor in his company called Manchester Outfitters Limited is ridiculous and not true:

i. He has never solely owned Manchester Outfitters Limited; 4<sup>th</sup> Plaintiff is a shareholder of the company just as Mohan Galot is. The 4<sup>th</sup> Plaintiff has more shares than him. A copy of the Annual Returns dated 15<sup>th</sup> March 1991 delivered for filing and signed by Mohan Galot is marked as "GG 1".

ii. The allegation of the 4<sup>th</sup> Plaintiff's conduct is also scandalous and defamatory and breaches the statutory requirements for affidavits.

That **Order 19 of the Civil Procedure Rules** prohibits such averments as Mohan Galot has done. He cannot of his own knowledge prove the said allegation.

c. As a younger brother of 4<sup>th</sup> Plaintiff, Mohan Galot has displayed bad manners by scandalizing the 4<sup>th</sup> Plaintiff. Since their father and eldest brother died, the 4<sup>th</sup> Plaintiff is the patriarch of the Galot family, a family that consists of the houses of the four brothers two of whom are deceased. Mohan Galot culturally should look up to 4<sup>th</sup> Plaintiff equivalently as his father. His utter disrespectful conduct raises the question whether he is mentally normal.

d. Galot Estate, L. R. 7022/7, the title deed in which Mohan Galot appears is still family property which he holds in trust for the other members of the Galot family. The 1<sup>st</sup> Plaintiff is a co-owner with the widow of the late Lal Galot who owns 25% share of the property as confirmed by a Confirmed Grant of the Estate of Lal Galot. Mohan Galot is therefore a co-proprietor with others and does not own the property exclusively. Infact in his own Supporting Affidavit dated 28<sup>th</sup> April 1993 in this matter Mohan Galot swore;

"That as stated above on L. R. 7022/7 Kiambu stand the only homes which the first, second, third and fourth Plaintiffs and our respective families have known for a long period."

He is therefore misleading the Court by alleging that 4<sup>th</sup> Plaintiff is his tenant.

The 4<sup>th</sup> Plaintiff live in his house which he has built. Marked "GG3" if a copy of the Grant.

The 4<sup>th</sup> Plaintiff contended that Mohan Galot is estopped from claiming sole proprietor ship of L. R. No. 7022/7 Kiambu when he knows the claim is fake, bogus and fraudulent.

a. By a memo date 1<sup>st</sup> March 1986, Mohan Galot advised on how they, his brothers, should meet the costs of the construction and maintenance of their houses on the L. R. No. 7022/7 Kiambu. Marked "GG 4" is copy of the memo.

b. He is therefore misleading the court by this false claim.

#### **NOTICE OF MOTION DATED 28<sup>TH</sup> MAY 2019**

By a Notice of Motion Application dated 28<sup>th</sup> May 2019, brought pursuant to **Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules** and all the enabling provisions of the Law. The Applicant/Defendant Kenya National Capital Corporation Ltd sought orders;

a. That this Court do and hereby order the Plaintiffs to provide and execute all requisite documents necessary for renewing the leasehold interest under the Title L.R. No. 209/1640/2 and reinstating the Charge and Mortgage therein dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984.

b. That the costs of renewing the lease and reinstating the Charge and Mortgage dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984 be in the cause.

The Application was based on grounds;

a. That during the course of litigation, the leasehold interest in L. R No. 209/1640/2 Nairobi of 99 years granted by the Government of Kenya to the Plaintiffs on 22<sup>nd</sup> October 1914 expired on 22<sup>nd</sup> October 2013.

b. That the leasehold interest of L.R. No. 209/1640/2 Nairobi must be renewed so as to avoid an automatic reversion of the property

to the National or County Government which would not only deprive the Plaintiffs of the property but would also adversely affect the Defendant's interests under the Charge and Mortgage dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984.

c. That the validity of the Charge and Mortgage Dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984 is still a pending issue before the Courts and as such the encumbrances should be reflected in the new lease to be issued.

The Application is supported by Ganeshlal Galot, the 4<sup>th</sup> Plaintiff herein vide his Replying affidavit dated 26<sup>th</sup> July 2019, where he stated that he was not opposed to the application seeking the renewal of the lease on plot **No. 209/1640/2**.

### **REPLYING AFFIDAVIT OF THE 1<sup>ST</sup> PLAINTIFF**

The Application was opposed vide an affidavit dated 30<sup>th</sup> July 2019 sworn by Mohan Galot the 1<sup>st</sup> Plaintiff herein as the Principal Shareholder, Chairman of the Board of Directors and Governing Director of the 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs. He averred that he had seen, read and explained to by Messrs. Prof. Tom Ojienda & Associates, Advocates on record for the 1<sup>st</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs and understood the contents of the Defendant's Notice of Motion Application dated 28<sup>th</sup> May 2019 and filed on 17<sup>th</sup> June 2018 (the Application), and where necessary consulted with his advocates on record and he depones to this affidavit in opposition of the same.

That the application is a knee-jerk reaction to the 1<sup>st</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Plaintiffs' application dated 12<sup>th</sup> July 2018, and thus the same was an after-thought and undeserving of the Court's favour.

That in a Ruling dated 27<sup>th</sup> August 2004, the Deputy Registrar made a finding that the Plaintiffs had overpaid the Defendant by Ksh 48,957,536/- and ordered that the same be paid to the Plaintiffs with interest accruing therefrom at the rate of 19% per annum until payment in full.

That the Defendant failed to file the appeal on time, and had moved the Supreme Court in **Supreme Court Civil Application No. 8 of 2019** seeking extension of time to file a Notice of Appeal.

That there lacks any appeal in the Supreme Court and therefore the decisions of the High Court herein and the Court of Appeal in **Civil Appeal No. 324 of 2010** still stand. The effect was that the Defendant owed the Plaintiffs a total sum of Ksh 48,957,536/- plus interests at the rate of 19% per annum from 27<sup>th</sup> August 2004.

That there was therefore no basis whatsoever for Defendant to continue holding on the Plaintiffs security when even the Court of Appeal had confirmed the Defendant's indebtedness to the Plaintiffs. As a matter of fact, it was the Defendant which now ought to provide for security to the Plaintiffs, and not the other way round.

### **SUBMISSIONS**

#### **DEFENDANT/APPLICANT**

The Defendant, Kenya National Capital Corporation Ltd submitted as Applicant on 31<sup>st</sup> July 2019, in Notice of Motion dated 28<sup>th</sup> May 2019 seeking orders to have the Plaintiffs to execute all requisite documents necessary for renewing the lease hold interest under the **Title L.R. No 209/1640/2** and reinstating the charge and mortgage of 11<sup>th</sup> August 1981 & 27<sup>th</sup> February 1984 respectively, relied on **Section 1A & 1B & 3A of CPA** the Overriding Objective and Inherent jurisdiction of the Court to effect the renewal and registration of **Title L.R. No 209/1640/2**, in the best interest of justice and equity.

The Defendant /Applicant relied on **Section 13 of Land Act 2012** and annexed **Guidelines for Extension & Renewal of Leases – Gazette Notice No 5734**.

With regard to the Plaintiffs application, the Defendant/Applicant submitted that **Title L.R. No 209/1640/2** should not be released to the Plaintiff as there subsisting charges and mortgages;

- a. Charge & Mortgage of 11<sup>th</sup> August 1981 over LR 209/1640/2/Nairobi & LR 209/1797/Nairobi**
- b. Charge & Mortgage of 27<sup>th</sup> February 1984, over LR 209/1640/2 Nairobi & LR 209/1797/Nairobi**
- c. Mortgage dated 23<sup>rd</sup> September 1981, over LR 7022/7/Kiambu.**

Secondly, the Plaintiff's reliance on the **Court of Appeal Case 324 of 2010** where the Appellate Court determined that the Defendant ought to refund Ksh 48,951,536/-; the Defendant's application in the **Supreme Court No 8 of 2019** vitiates its enforcement.

In the circumstances, releasing **Title L.R. No 209/1640/2** to the Plaintiff as requested in their application of 12<sup>th</sup> June 2018 is prejudicial to the Defendant/Applicant due to pending application in Supreme Court and its Counterclaim Ksh 150,230,273.35. Instead, there should be maintenance of *status quo*.

See: **Republic vs National Environment Tribunal & Anor [2013] eKLR** on meaning of *status quo*,

“...Therefore when a Court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs.....”

See also: Kenya Power & Lighting Co Ltd vs Benzene Holdings Ltd T/a Wyco Paints [2016] eKLR on definition of inherent jurisdiction,

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

#### 1<sup>ST</sup> 5<sup>TH</sup> & 6<sup>TH</sup> PLAINTIFF'S SUBMISSIONS

The Plaintiffs in support of their application of 12<sup>th</sup> July 2018, for the Court to compel the Defendant to release the security titles to the 1<sup>st</sup> Plaintiff relied on the Court's issuance of mandatory injunction. The Plaintiff /Applicants relied on cases;

Kenya Breweries Ltd & Anor vs Washington O. OKeyo [2002] eKLR

Alex Wainaina T/A John Commercial Agencies vs Janson Mwangi Wanjihia [2015] eKLR ;

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff .... a mandatory injunction will be granted on an interlocutory application.”

In opposing the Defendant's Application, the Plaintiffs /Applicants submitted that the instant case has special circumstances to warrant grant of orders sought. It is undisputed that one of the leasehold security deposited with the Defendant has expired and is due for renewal. Further, there is no basis whatsoever for the Defendant to continue holding on to the Plaintiff's securities whereas it is the Defendant that is indebted to the Plaintiffs. It is in the interest of justice that the expired title document is released to the 1<sup>st</sup> Plaintiff for renewal and safe custody. The Court has jurisdiction to grant orders to ensure there will be no prejudice to the other Plaintiffs.

In opposing the Defendant's application of 28<sup>th</sup> May 2018, the Plaintiff's considered the Defendant & 4<sup>th</sup> Plaintiff's position. The position entailed;

- a. That there is only one expired title document for renewal.
- b. The validity of the charge and mortgage instruments is subject to determination in the main suit and ought to be heard and determined before title documents are released.
- c. The Title documents should be released to the 4<sup>th</sup> Plaintiff as the elder child than the 1<sup>st</sup> Plaintiff.

To these assertions, the Plaintiffs asserted that;

- a. The Defendant lacks the right to retain the title documents as it is indebted to the Plaintiffs vide the Court of Appeal decision in **C.A 324 of 2010** where the appeal was dismissed on 8<sup>th</sup> February 2019. The Defendant owes Ksh 48,957,536 and interest at 19% from 27<sup>th</sup> August 2004. This decision is binding on this Court.
- b. The validity of the charge and mortgage instruments has never been challenged. What is in dispute was amounts due under the said charge and mortgage instruments.
- c. The 4<sup>th</sup> Plaintiff never filed any application seeking release of title documents to him.

#### 4<sup>th</sup> PLAINTIFF'S SUBMISSIONS

The 4<sup>th</sup> Plaintiff vide submissions filed on 29<sup>th</sup> July 2019, averred as follows;

- a. **LR NO 7022/7-** is a conveyance issued under Government Land Act in Fee simple and not expired- held perpetually;

b. **LR NO 209/7197-** is a leasehold for 99 years from 1969 – to expire in 2068;

c. **LR NO 209/1640/2-** is a leasehold from 1914 for 99 years and it is the only one that has expired.

The 4<sup>th</sup> Plaintiff objected to Plaintiffs application on the ground that in **HCC 430 of 2012**; the parties /other Plaintiffs were restrained from filing any suit or application without prior leave of the Court.

The 4<sup>th</sup> Plaintiff objected to Plaintiffs application also on the ground that in **HCC 298 of 2009**, it is alleged that the 1<sup>st</sup> Plaintiff attempted to fraudulently transfer properties of the 5<sup>th</sup> Plaintiff, Galot Industries Limited.

The 5<sup>th</sup> Plaintiff sued the 1<sup>st</sup> Plaintiff and obtained Interlocutory injunction which is in force. It would be contrary to the Court order to allow the 1<sup>st</sup> Plaintiff to singlehandedly deal with 5<sup>th</sup> Plaintiff's property without Co owners.

The 4<sup>th</sup> Plaintiff alluded to criminal proceedings with regard to 5<sup>th</sup> Plaintiff's assets.

On that note, the 4<sup>th</sup> Plaintiff supported the Defendant's application and objected to the 1<sup>st</sup> 5<sup>th</sup> & 6<sup>th</sup> Plaintiffs application.

#### **DETERMINATION**

After consideration of the pleadings and submissions on record, the issues that emerge for determination are;

a. Whether the Plaintiffs shall provide and execute all requisite documents necessary for renewing the leasehold interest under the Title L.R. No. 209/1640/2 and thereby reinstating the Charge and Mortgage therein dated 11th August 1981 and 27th February 1984.

b. Whether the surrender of the original indenture currently held by the Defendant shall be released to 1<sup>st</sup> Plaintiff for the renewal process to commence as there is a real threat and danger of the Plaintiffs being disinherited and ejected from their lawfully acquired property.

#### **ANALYSIS**

#### **CONSENT**

The parties consented to hearing of applications dated 12<sup>th</sup> July 2018 by 1<sup>st</sup> 5<sup>th</sup> & 6<sup>th</sup> Plaintiffs and Defendant's application of 28<sup>th</sup> May 2018 be heard and determined together.

#### **SERVICE**

The 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs whom the Court was informed on 2<sup>nd</sup> October 2019 are deceased and the Court granted orders allowing their estate's administrator(s) to replace and represent them in these proceedings. Their Administrators/executors/trustees did not appear in Court, they were not represented and they did not file any pleadings with regard to the 2 instant applications.

On 9<sup>th</sup> October, 2019, this Court granted Plaintiff's application to serve the 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs representatives through substituted service by either using Courier services abroad and/or advertisement in the print media if any of them resided in Kenya.

On 5<sup>th</sup> November, 2019, Counsel for 4<sup>th</sup> Plaintiff informed Court that the 3<sup>rd</sup> Plaintiff's family/Representative resides in UK and would avail the address to enable service to be effected. Counsel provided address on 13<sup>th</sup> November 2019; **18 DAVENHAM COLLEGE READING BERKSHIRE RG64DX**. The Court granted leave to serve 3<sup>rd</sup> Plaintiff's representative through registered post of the said address. On 24<sup>th</sup> February 2020, Plaintiff's Counsel disclosed to Court that he served the 3<sup>rd</sup> Plaintiff via registered post. Secondly, it was disclosed that the 4<sup>th</sup> Plaintiff's advocate represented 3<sup>rd</sup> Plaintiff's representative Mr Kevin Galot in a related case ***HCCC 298 of 2009*** involving similar parties in Commercial Division. The 4<sup>th</sup> Plaintiff's Counsel objected to the Court proceeding in the absence of confirmation of service to 3<sup>rd</sup> Plaintiff's representative via registered Post. At this point, the Court was satisfied by Plaintiff's substituted service to both 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs representatives and the affidavits of service filed. The Plaintiff's advocate confirmed serving the 3<sup>rd</sup> Plaintiff's representative by registered post. The Plaintiff's advocate's assertion that the 4<sup>th</sup> Plaintiff's advocate represents 3<sup>rd</sup> Plaintiff in another case was not controverted by Counsel. The Court was/is satisfied that Plaintiff/Applicant's service to 2<sup>nd</sup> & 3<sup>rd</sup> Plaintiffs representatives vis substituted service is sufficient service under **Order 5 CPR 2010**.

#### **DOCUMENTS**

The parties through Counsel annexed relevant documents to aid the Court in fact finding mission to resolve the current dispute.

**Application by Defendant/Applicant of 28<sup>th</sup> May 2019 annexed;**

**a. Charge & Mortgage of 11<sup>th</sup> August 1981- duly executed by**

**Lalchand Pushram Galot**

**Ganeshlal Pushram Galot**

**Mohanlal Pushram Galot**

**Sohanlal Pushram Galot**

On behalf of **Galot Investment Limited** whose Company seal was/is embossed and confirms execution by the said Company.

The facility from the Defendant was Ksh 2.5 m. The securities lodged and perfected were LR 209/1640/2/Nairobi & LR 209/1797/Nairobi

**b. Charge & Mortgage of 27<sup>th</sup> February 1984-executed by**

**Lalchand Pushram Galot**

**Ganeshlal Pushram Galot**

**Mohanlal Pushram Galot**

**Sohanlal Pushram Galot**

On behalf of **Manchester Outfitters Limited**, whose Company seal was/is embossed and confirms execution by the said Company.

The facility from the Defendant was Ksh 1 m. The securities lodged and perfected were LR 209/1640/2/Nairobi & LR 209/1797/Nairobi.

**COURT RULINGS & JUDGMENTS**

This is a dispute originating from 1993, over 20 years ago and has been the subject of litigation in various Courts and in various other Court files. So that whether to grant or dismiss the present applications, it is imperative for this Court to appraise itself of the relevant decisions by superior Courts that bind the Court so as to arrive at an informed decision on the current dispute.

**The Defendant /Applicant in application dated 28<sup>th</sup> May 2019 filed;**

- a. **C.A. 324 of 2010** appeal decision of 8<sup>th</sup> February 2019; which upheld the High Court decision of 29<sup>th</sup> October 2008 by Hon J Kimaru

Which adopted the Deputy Registrar's Ruling of 27<sup>th</sup> August 2009 pursuant to parties Consent of 16<sup>th</sup> September 1996, that the Defendant was indebted to the Plaintiffs at Ksh 48,951,536.

However, with regard to the issue of the Defendant's Counterclaim and the Plaintiff's subsequent application for discharge of charge & Mortgage registered against Plaintiff's properties; LR 7022/7, L.R 209/1640/2 & LR 209/7197 Nairobi charged to secure repayment of Ksh 2.5 m& 3m respectively, the Court of Appeal upheld as per Ruling of 29<sup>th</sup> October 2008 by Hon Kimaru J as follows;

**'said Aspects of the Plaintiff's claim and the Defendant's Counterclaim shall be heard by the Court in a full trial.'**

- b. **S.C. A No 8 of 2019** – On 12<sup>th</sup> March 2019, the Defendant/ Applicant lodged certificate of urgency to file an appeal of the Court of Appeal decision out of time. The same remains pending to date. No information was presented by either of the parties on the position of the pending application; whether the Supreme Court granted leave to appeal out of time or dismissed the application. This position, halted the full hearing of Plaintiffs remaining prayers and Defendant's Counterclaim in the High Court.

**The Plaintiff/Applicant to the application of 12<sup>th</sup> July 2018;**

- a. The Plaintiff/Applicant annexed **C.A 47 of 2011**, the decision of C.A of 11<sup>th</sup> December 2015 on the retention of Legal Counsel arising from the Company's resolution and in compliance of **Order 24 Rule 3 CPR 2020 within 1 year of the Plaintiff's demise in default the suit abates.**

This Court in considering the evidence went through pleadings and documents annexed and binding judicial decisions on the matter.

This Court is bound by the Court of Appeal decision **C.A. 324 of 2010** appeal decision of 8<sup>th</sup> February 2019; that upheld the Ruling by Hon. Kimaru J of 29<sup>th</sup> October 2008 which determined as follows;

**“The Court hereby directs that a partial or preliminary decree shall issue in respect of the said sum decreed to be paid to**

**the Plaintiffs by the Defendant. As regards the other prayers sought by the Plaintiffs in their Plaint and the Counterclaim of the Defendant, the said Deputy Registrar did not render any decision with respect of the same. The said aspects of the Plaintiffs claim and Defendant's Counterclaim shall be heard by the Court in full trial.**

The Court of Appeal decision is binding on this Court unless and until it is successfully appealed against in Supreme Court. The Decision remains a valid legal and regular order of the Court. This Court cannot discharge nor grant release of title documents before hearing and determination of the other prayers in the Plaint and the counterclaim.

Secondly, the Court cannot rewrite terms of the contract between parties. Parties are bound by their terms and each ought to fulfil obligations under a valid contract.

The Court of Appeal in *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another*[2001]eKLR, held that;

**“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proven. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”**

The Plaintiffs duly executed the charge and mortgage contracts with the Defendant and perfected the securities. The validity of the charges and mortgages is not in question. The Plaintiffs under these contracts requested for financial facilities, which the Defendant obliged, and funds were advanced. The Plaintiffs enjoyed the said benefit from remit of funds by the Defendant. The Plaintiffs alluded to the fact that they made repayments. However, in the absence of evidence presented by the parties in this Court that the loan facilities were repaid in full and in light of contested interest rates over the years is settled; the issue of discharging the charges and mortgages remains a live issue for determination.

### **Section 56 of Land Registration Act on Form and effect of charges**

**Prescribes;**

**1) A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money's worth, or the fulfilment of a condition and, unless the chargee's remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal.**

Defendant secured its advancement of loan facility to the Plaintiffs by holding to the securities provided, charges, and mortgages to minimize or insure its risk. Under the charge and mortgage contracts, the Plaintiffs are to service the loan facility by periodic payments when due and owing and to exercise their right of redemption.

Where there is default of repayment or discharge of debt, the defendant bank is entitled under the charge and mortgage contract to enforce the securities under various remedies;

- a. An action against the mortgagor for the amount of debt**
- b. Statutory power of sale of the charged suit property (ies)**
- c. Appointment of Receiver**
- d. Foreclosure**
- e. Taking possession of the suit property(ies)**

The Defendant holds onto the title documents as security of its loan facility until the Plaintiffs exercises redemption. If there is default upon demand and in the absence of or after negotiations on restructuring with a view to allow the Plaintiffs settle the debt, the debt remains outstanding, the Defendant's recourse is any of the remedies above as contracted between the parties or provided by law. The title documents are the Defendant's only protection to its risk pending redemption by the Plaintiffs of the advanced loan facilities.

An Applicant may seek orders or discharge of charge and release of title documents only under the statutory prescribed process or manner. The Plaintiff may redeem or discharge of charge in the following statutory process;

### **85. Right to discharge**

**(1) Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale.**

With subsisting charges and mortgages as outlined above, the release of any or all title documents by the Defendant is subject to terms of redemption or release as contained in the charges and mortgages.

The 1<sup>st</sup> 5<sup>th</sup> & 6<sup>th</sup> Plaintiffs and Defendant agree on the issue of expiry of the title document L.R No. 209/1640/2 but disagree on the way forward; who and/or how to renew the expired title document. The 1<sup>st</sup> Plaintiff seeks release and custody of the title document and to process renewal of the expired lease. The Defendant legally holds title documents as security for loans advanced to the Plaintiffs and awaits outcome of its Counterclaim after hearing and determination. The 4<sup>th</sup> Plaintiff supports the Defendant's application to have Directors of the Companies to execute the relevant documents and produce relevant documents to aid the renewal of lease process. At the same time, the 4<sup>th</sup> Plaintiff objected to the Plaintiff's application for release of the title document solely to him for renewal based on detailed allegations arising out of the family businesses.

There seems to be a simmering dispute between family members and/or directors of defunct Companies as illustrated by annexed Court documents of various proceedings between Plaintiffs. It would be dangerous in light of disclosed disharmony to release the documents to any or either of the parties as it would be detrimental to other relevant and interested parties. Notably, there are Plaintiffs who are Directors of the Companies who were not represented in these proceedings despite being served with Court process. Their rights must be protected too in the decision whether to order release of title document for renewal or not so as no party suffers prejudice.

The Court cannot order release of the expired Title document L.R. 209/1640/2 until hearing and determination of the Plaintiffs remaining prayers and Defendant's counterclaim as ordered by C. A. 324 of 2010. The release may also be allowed as per the contract in the charge by redemption of the loan facility.

#### **DISPOSITION**

**1. Therefore, in light of the contested positions and competing interests by parties the Court finds it logical and reasonable to compromise the Plaintiff's and Defendant's application in the following manner;**

**2. The only viable practical process to aid renewal of title document Title L.R. No. 209/1640/2 and thereby reinstating the Charge and Mortgage therein dated 11<sup>th</sup> August 1981 and 27<sup>th</sup> February 1984, respectively, is to ensure that all directors of the subject Companies consider,**

**Lalchand Pushram Galot**

**Ganeshlal Pushram Galot**

**Mohanlal Pushram Galot**

**Sohanlal Pushram Galot**

**And/or their legal representatives as directors of Galot Investment Limited & Manchester Outfitters Limited to execute necessary documents and avail relevant documents/ information within 90 days of the Ruling to the Defendant to aid renewal process.**

**3. The Court is bound by the Court of Appeal decision of C.A. 324 of 2010 appeal decision of 8<sup>th</sup> February 2019; which upheld the High Court decision of 29<sup>th</sup> October 2008 by Hon J Kimaru that mandated a hearing of the Plaintiff's prayers in the Plaint of release of title documents and the Defendant's counterclaim. The Parties may set the matter for hearing in nay court within the Commercial & Tax Division.**

**4. The Court cannot interfere with contractual obligations of each party under the charge and mortgage documents.**

**5. The Court can only enforce release of the title documents as prescribed by Section 80 of Land Act.**

**6. The parties/legal representatives jointly may also consider the alternative of Plaintiffs presenting an alternative security of equal value and/or sufficient value acceptable to the Defendant to secure outstanding debt and exchange /replace with release of the expired title document to the Defendant with Title L.R. No. 209/1640/2 to allow renewal process to take place. The exchange if agreed shall be within 90 days of the Ruling delivery.**

**7. Each party to bear its own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 30<sup>TH</sup> OCTOBER 2020. (VIDEO CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MS MAUMO FOR 1<sup>ST</sup>, 5<sup>TH</sup> & 6<sup>TH</sup> RESPONDENTS**

**MR OTIENO FOR THE DEFENDANT/APPLICANT**

**COURT ASSISTANT- TUPET**