



**Omar (Suing on his behalf and as legal representative of the Estates of Sakinabal Ali Mohamed - Deceased) v Intergra Auctioneers (K) Company & 3 others (Environment & Land Case 231 of 2021) [2025] KEELC 1330 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1330 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 231 OF 2021  
LL NAIKUNI, J  
MARCH 14, 2025**

**BETWEEN**

**SHOKAT EBRAHIM ALI OMAR (SUING ON HIS BEHALF AND AS LEGAL REPRESENTATIVE OF THE ESTATES OF SAKINABAL ALI MOHAMED - DECEASED) ..... PLAINTIFF**

**AND**

**INTERGRA AUCTIONEERS (K) COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**KENYA FINANCE BANK LIMITED (IL) ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains a Civil Suit instituted through a Complaint dated 18<sup>th</sup> November, 2021. It was by Shokat Ebrahim Ali Omar (Suing on his behalf and as legal representative of the estates of Sakinabal Ali Mohamed (Deceased), the Plaintiff herein against Intergra Auctioneering (K) Limited, Kenya Finance Bank Limited (IL), the Land Registrar Mombasa and the Honourable Attorney General the Defendants herein.
2. Upon service of the pleading and Summons to Enter Appearance, the 2<sup>nd</sup> Defendant entered appearance through a Memorandum Appearance and filed its Amended Statement of Defence and Counter - Claim amended on 1<sup>st</sup> February, 2024.



## II. Description of the parties

3. The Plaintiff was described as a male adult of sound mind residing and working for gain in Mombasa within Mombasa County in the Republic of Kenya. He bring this suit on his behalf and as a representative of the estate SakinAbai Ali Mohamed (Hereinafter referred to as “The Deceased”) having been issued with a Limited Grant of Letters of Administration as colligenda bona on 7<sup>th</sup> December, 2018 in MSA CMC Succession Cause No.408/2018 to administer the estate of the said deceased.
4. The 1<sup>st</sup> Defendant was described as a Limited liability Company incorporated in Kenya under the provisions of the Companies Act, Cap. 486, the Laws of Kenya and/or other relevant Kenyan laws and whose registered offices are situated in Kenya whilst the 2<sup>nd</sup> is purported to be a limited liability Company operating in Kenya and purporting to be registered in Kenya under the laws of Kenya and carrying on the business of banking in the said Republic.
5. The 3<sup>rd</sup> Defendant was described as a public officer appointed under the Land Registration Act, No. 3 of 2012, the Laws of Kenya and is charged with theresponsibilities inter alia of issuance and/or custody of titles at the Lands Registry in Mombasa within the said Republic.
6. The 4<sup>th</sup> Defendant was described as the principal legal adviser to the Kenyan Government and represents the national government in Court or in any other legal proceedings to which the national Government is a party. He sued in that capacity on behalf of the Government and the 3<sup>rd</sup> Defendant.

## III. Court directions before the hearing

7. Nonetheless, on 25<sup>th</sup> April, 2024, the Honourable Court fixed the hearing dated on 29<sup>th</sup> July, 2024 with the parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witness PW - 1 testifying in Court on 29<sup>th</sup> July, 2024 after which he marked his case closed and the Defendants called their witness DW - 1 and DW - 2 on the same day after which they called their case.

## IV. The Plaintiff’s case

8. From the filed pleadings, the Plaintiff averred that at all material times to this suit Abdalla Haji Mohamed Sameja (deceased) and SakinAbai Ali Mohamed (deceased) are the registered absolute proprietors of Land Parcel Title No. Mombasa/Block XLI/156 situate in Old Town Mombasa in the said Republic (Hereinafter referred as “The Parcel of Land”) valued at about a sum of Kenya Shillings Fifty Million (Kshs.50,000,000/-). A three-storey building comprising of business shops and residential premises is developed on the parcel of land. The two deceased died intestate on 20<sup>th</sup> January, 1988 and 30<sup>th</sup> November, 2010 respectively. The said deceased held the said title in trust for the Plaintiff and eight other persons stated in the title namely;-
  - i. The Plaintiff Shokat Ibrahim Ali Mohamed Omar
  - ii. Zeitun Ibrahim Ali Mohamed
  - iii. Yasmin Ibrahim Ali Mohamed
  - iv. Sherali Ibrahim Ali Mohamed J
  - v. Rehmat Ibrahim Ali
  - vi. Roshan Ibrahim Ali



- vii. Hamida Ibrahim Ali
  - viii. Fatima Ibrahim Ali
  - ix. Shebanu Ibrahim Ali
9. The two deceased persons were friend of the late father and paternal aunt respectively of the Plaintiff and the other beneficiaries of the title in paragraph 6 above-stated. The Plaintiff averred that the deceased were not survived by any other persons other than the said beneficiaries. The land parcel was property of their late father as stated in the title deed of the above-stated issues who caused it to be registered in the names of the two deceased as trustees for the said beneficiaries who were minors at the time of registration of the transfer of the title to the said deceased. The said beneficiaries of the trust resulting from the title and their families totaling to about 28 people live on the parcel of land and have no other home
10. The said land parcel was the only asset of the deceased persons. The two having held the title in trust as above- stated the property in the land parcel was at all material times during the lifetime of the deceased and even after their death property of the beneficiaries of the trust and vests in the said beneficiaries. The Plaintiff received a redemption notice dated 12<sup>th</sup> October, 2018 and notification of sale of the parcel of land from the 1<sup>st</sup> Defendant in which it was claimed by the 1<sup>st</sup> Defendant that the Plaintiff owed the 2<sup>nd</sup> Defendant loan or was indebted to the 2<sup>nd</sup> Defendant to an amount of a sum of Kenya Shillings Sixteen Million Three Nineteen Thousand Seven Ninety Seven (Kshs.16,319,797.00/-).
11. Whereas the redemption notice and notification of sale were served on the Plaintiff by the 1<sup>st</sup> Defendant through the Plaintiff's daughter and whereas they mention the parcel of land the said notices were addressed to one Shokat Ibrahim Juneja a person unknown to the Plaintiff and the other beneficiaries of the parcel of land. The notice was addressed to one Shokat Ibrahim Juneja, a person unknown to the Plaintiff and other beneficiaries of the land. The 2<sup>nd</sup> Defendant entity on whose instructions the 1<sup>st</sup> Defendant purported to issue the notification of sale and advertisement for public auction did not exists.
12. The Plaintiff stated that he had never taken a loan or any amount or a sum of Kenya Shillings Sixteen Million Three Nineteen Thousand Seven Ninety Seven (Kshs.16,319,797.00/-) above state from the 2<sup>nd</sup> Defendant entity "Kenya Finance Bank Limited (IL)" or used the title for the parcel of land as collateral or guarantee for the purported loan in favour of the said entity. The deceased had never used the title of the parcel of land as collateral or to guarantee the purported loan amount or any amount of loan purportedly advanced to the Plaintiff by the 2<sup>nd</sup> Defendant entity named Kenya Finance Bank Ltd.
13. Despite the Plaintiff's demand to the 1<sup>st</sup> Defendant to cease from proceeding with the intended public auction and informing the 1<sup>st</sup> Defendant that the registered title holders above stated died and that the purported 2<sup>nd</sup> Defendant was a non-existent company and that the purported sale is a fraudulent scheme being perpetrated against the said estate, the 1<sup>st</sup> Defendant has proceeded to advertise the parcel of land for public auction. The notification of sale and the intended sale was irregular unlawful and fraudulent on the part of the 1<sup>st</sup> Defendant and purported 2<sup>nd</sup> Defendant.
14. The Plaintiff relied on the following particulars of irregularity, illegality and fraud:-
- a. The 1<sup>st</sup> Defendant purportedly acting on instructions of a non -existent company to issue the said redemption notice, notification of sale and advertisement.
  - b. The 1<sup>st</sup> Defendant proceeding to punish a public auction for sale of the parcel of land with the full knowledge that:-



- i. 2<sup>nd</sup> Defendant was a non-existent entity
  - ii. There was no way the 1<sup>st</sup> Defendant could receive instructions from a non - existent entity.
  - iii. The Plaintiff had never been indebted to the non-existent entity for the above- stated amount or any amount.
  - iv. A non - existent entity did not have legal capacity to advance a credit facility or be indebted by any person including the Plaintiff and advertisement yet the said notices were served on the Plaintiff by the 1<sup>st</sup> Defendant.
  - v. The Plaintiff was not the person named in the notification notices and advertisement yet the said notices were served on the Plaintiff by the 1<sup>st</sup> Defendant.
  - vi. The person claimed in the said notices and advertisement as Sabinabhai Alimohamed and as the registered owner of the parcel of land is not the title holder.
  - vii. The parcel of parcel is registered in the names of two persons above- stated and who only hold the title in trust for eight persons specified in the title.
  - viii. The title holders of the parcel of land were deceased hence the property was subjected of administration or succession and could not be disposed of or interfered with or dealt with in any way either by sale, transfer or otherwise except by way of succession proceedings.
- c. Refusing, failing or neglecting to inquire whether the estate of the deceased was under administration or not and whether it had a legal representative and issue notifications of sale to the legal representative of indeed the estate was used as a security for a loan advanced by the purported bank.
  - d. Despite the 1<sup>st</sup> Defendant having been informed by the Plaintiff that the title holders were deceased and not having served the notification of sale to the legal representative (the Plaintiff just having been appointed long after the property was published by the 1<sup>st</sup> Defendant for sale by public auction) the 1<sup>st</sup> Defendant intends to proceed with the shams public auction.
  - e. Not serving the purported notifications of sale to the person named in the notification as the debtor or to the administrator of the parcel of land or to the beneficiaries of the trust as per the title deed.
  - f. The 1<sup>st</sup> Defendant had knowledge the intended public auction was illegal and lawful since there was no way the beneficiaries under the title could be denied their rightful ownership of the parcel of land on account of some loan unknown to them and borrowed by a person unknown to them from non-existent company.
15. The redemption notice, the notification of sale and the advertisement for the sale of the parcel of land by the said public auction fraudulent, illegal, unlawful and null and void. The Plaintiff's claim was for an order of permanent injunction to restrain the 1st and 2nd Defendants from proceeding with the public auction of the parcel of land and for an order of injunction restraining the 3rd Defendant from registering any transfer, sale, disposition or any dealing arising from the said public auction. The parcel of land estate not only forms part of the estate of the twos deceased but also that the above - stated beneficiaries who were now of age were the bona fide owners of the parcel of land who should be registered as proprietors of the parcel of land following the death of the said deceased.



16. According to the Plaintiff there was no other suit pending and there was a civil suit ELC no. 28 of 2018 filed by the Plaintiff way back in 2018 when the 1<sup>st</sup> Defendant again made an attempt to sell the property and the same was struck out before being heard on merits. The cause of action arose within the jurisdiction of this Honourable Court.
17. The Plaintiff humbly prayed for Judgment against the Defendants, jointly and severally in the following terms:-
  - a. The 1<sup>st</sup> Defendant's notification of sale through public auction to be held on 23<sup>rd</sup> November, 2021 for sale of all that parcel of land known as Mombasa/Block XLI/156 situate in Old Town Mombasa is fraudulent, illegal, null and void.
  - b. A permanent order of injunction be issued restraining the 1<sup>st</sup> & 2<sup>nd</sup> Defendants jointly and severally whether by themselves, their representatives, agents, employees, servants, proxies and or assigns from selling, transferring, disposing of or dealing in or conducting sale by public auction to be held on the 23<sup>rd</sup> November, 2021 or on any other date of all that parcel of land known as Mombasa/Block XLI/156 situate in Old town Mombasa together with its fixtures and improvements.
  - c. Costs of this suit be provided for.
18. On 29<sup>th</sup> July, 2024 the Learned Counsel for the Plaintiff, Mr. Magolo Advocate had the following opening remarks stating that it was the case of fraudulency activities by the 2<sup>nd</sup> Defendant who was trying to acquire the suit land by creating a fraudulent/imposter and creating a story the property was charged. It was not brought up as the owners of the land was deceased and there has been succession i.e. Letter of Administration of the Estate had been taken. The deceased person died in year 2010.
19. The Plaintiff called PW - 1 on 29<sup>th</sup> July, 2024 who testified as follows:-

**A. Examination of PW - 1 by Mr. Magolo Advocate.**

20. PW - 1 testified under oath and in Swahili language. He identified himself as Shokat Ebrahim Ali Mohamed Omar. He was a citizen of Kenya with all the particulars appearing in the national identity card as shown to Court. He had recorded a witness statement dated 22<sup>nd</sup> February, 2024 which he adopted as his evidence in chief. He also brought list of documents dated 22<sup>nd</sup> February, 2024 i.e. four (4) documents, produced as "Plaintiff Exhibit No. 1 to 4". PW - 1 knew the suit property it was their house where they resided. The title was in the name of Sakinabal Ali Mohamed and Abdalla Haji Mohmaed Sameja jointly owner as Trustees, to the suit property. It was indicated to the title deed, Sakinabal Ali was his Auntie – sister to his father and Abdalla was the cousin to his father, both of them were deceased. He applied for Limited Grant Ad Litem to file this case.
21. PW - 1 told the court that in 2018, he received a letter from Integra Auctioneers (K) Company – 1<sup>st</sup> Defendant indicating that he had taken a loan for a sum of Kenya Shillings Sixteen Million Three Ninety One Thousand Seven Ninety Seven Hundred (Kshs. 16,391,797/=) and that they wanted to sell the house through Public Auction. The sale was advertised on the Daily Newspapers. They alleged having been sent by a Financier called Kenya Finance Bank Ltd. – the 2<sup>nd</sup> Defendant herein. He had never taken any loan from any financial institution so he approached the Court for injunction to stop the sale. PW - 1 told the court that he had never seen any letter from the 2<sup>nd</sup> Defendant.



## **B. Cross Examination of PW - 1 by Ms. Nyambura Advocate.**

22. PW - 1 confirmed that he had retired from Active business at P.M. Mashrui Transporters. He used to work there as a Trailer assembling i.e. Engineering. PW - 1 was the Legal Administrator to the Estate of Sakina Bal. He was referred to the Limited Grant. He confirmed that it did not specifically state as its purpose being to institute the case in court. The deceased were holding the land as trustees on behalf as a family as a Trust. The witness did not have a trust to that effect; he knew the beneficiaries of the Trust from the time the Trust was incorporated.
23. PW 1 told the court that he had heard of the 2<sup>nd</sup> Defendant. In the year 1991 he took a loan for a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) and he paid the sum of Kenya Shillings Six Fifty Thousand (Kshs. 650,000/- and did not have a copy of these documents. On being referred to the witness statement and he confirmed the signature was his. With reference to the 2<sup>nd</sup> Defendant, the witness told the court that page 10 – the signature on the verifying affidavit was his. With reference to the 2<sup>nd</sup> Defendant bundle of the documents dated 14<sup>th</sup> March, 2024, the witness stated that at page 5 it looked like his signature. Further, at page 8 he also confirmed that it was his signature.
24. PW - 1 stated that in the year 1994, he was aware his Auntie filed a Civil case – with reference to page 56 HCCC No. 667 of 1994. With reference to paragraph 6; he confirmed that he was the 1<sup>st</sup> beneficiary to the Trust, when he took the loan from KFC Ltd and he used the title deed as security for collateral. He was not aware where the title was whether it was with the bank or its in court. The witness was referred to page 4 stated that a short-term loan application form for a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-). On being referred to pages 7 and 8 of the bundle, the witness told the court that it's a letter dated 2<sup>nd</sup> October, 1991 by Kenya Finance Corporation Ltd; he confirmed he signed the letter. PW - 1 received a letter from Integra Auctioneer with intention to see the house.

## **C. Re – examination of PW - 1 by Mr. Magolo Advocate.**

25. PW - 1 on being referred to the Grant – he reiterated that the purpose was for the presentation of the estate. On pages No. 5 and 7 the signatures according to him were not his.
26. On 29<sup>th</sup> July, 2024, the Plaintiff through their counsel Mr. Magolo Advocates closed his case.

## **V. The Defendants' case**

27. The 2<sup>nd</sup> Defendant's case filed their Amended Statement of Defence and Counter - Claim amended on 1<sup>st</sup> February, 2024 pursuant to leave grant in open court by Honourable Justice L.L. Naikuni on the 31<sup>st</sup> day of January, 2024 where the 2<sup>nd</sup> Defendant in the Statement of Defence averred that:-
  - a. The 2<sup>nd</sup> Defendant in response to paragraph 3 of the Plaint averred that it was a Banking institution placed under liquidation by the Governor of Central Bank vide Gazette Notice No. 6269 of November 8, 1996 and the Deposit Protection Fund Board appointed as liquidator.
  - b. The Kenya Deposit Insurance Corporation is a Statutory Body established under Section 4 of the *Kenya Deposit Insurance Act*. No. 10 of 2012 and a successor of the Deposit Protection Fund Board and as per Section 76 of the Act all assets and liabilities, and all powers, rights, obligations and privileges conferred upon the Deposit Protection Fund Board under any existing agreement or written law now vests in the Corporation.
  - c. The 2<sup>nd</sup> Defendant avers that the suit herein was an abuse of the court process, incompetent and fatally defective and it shall be raising the following preliminary point of law to be determined in limine:-



- i. No proper leave had been granted to the Plaintiff prior to the institution of this suit as provided for under Section 56 (2) of the [Kenya Deposit Insurance Act, 2012](#) and the suit herein was thus fatally defective.
- ii. The suit herein was Res Judicata and an abuse of the court process, with two different suits over the same subject matter having already been dispensed with namely:-
  - a. Mombasa ELC No. 289 of 2018: Shokat Ebrahim Ali Mohamed Omar – Versus - Integra Auctioneers (K) Co., Kenya Finance Bank (IL.), the Land Registrar Mombasa and the Hon. Attorney General.
  - b. Mombasa HC Civil Suit No.66 of 1994:SakinAbai Ali Mohamed – Versus - Kenya Finance Corporation Limited
- iii. The Plaintiff had no locus standi to institute this suit on behalf of the Estate of SakinAbai Ali Mohamed as the Limited Grant of letters of Administration Ad colligenda bona dated 7<sup>th</sup> December, 2018 never gave the Plaintiff the legal authority to institute a suit with regard to the said property.
- iv. The Plaintiff further had no locus standi to institute the suit herein under any circumstances as claimed in the Plaintiff.
  - a. Without prejudice to the above, the Limited Grant of Letters of Administration Ad colligenda bond dated 7<sup>th</sup> December, 2018 did not appoint the Plaintiff as administrator of the Estate of SakinAbai Ali Mohamed and the Plaintiff therefore had no authority to act on behalf of the said Estate.
  - b. The 2<sup>nd</sup> Defendant avers that the Plaintiff had not presented a trust deed before this Honourable Court to prove its existence or his relation to the trust, if any, and therefore had no locus standi to present this suit.
  - c. The 2<sup>nd</sup> Defendant further averred that Trust Land was not the subject of succession proceedings and can only be disposed of in accordance with the alleged Trust deed.
  - d. The 2<sup>nd</sup> Defendant in response to Paragraphs 6 of the Plaintiff agrees that the said SakinAbai Ali Mohamed and Abdalla Haji Mohamed Sameja were the registered proprietors of the subject property but deny that the property was worth a sum of Kenya Shillings Fifty Million (Kshs. 50,000,000/-) as alleged.
  - e. The Plaintiff was put to strict proof with to the contents of Paragraphs 7, 8, 9, 10,11,12 and 13 of the Plaintiff.
  - f. The 2<sup>nd</sup> Defendant further averred that on 5<sup>th</sup> September, 1991 Shokat Ebrahim Juneje (deceased) (herein referred to as ‘the borrower’) applied for a credit facility with the same being secured by a Third-Party Legal Charge over the subject property dated 16<sup>th</sup> October, 1991 over the subject property.
  - g. The Plaintiff was not a party to the charge and had not proven ownership of the suit property therefore had no locus standi before this Honourable Court.
  - h. The facility had been in arrears since the year 1993 and the 2<sup>nd</sup> Defendant had every right under the law to proceed with its statutory power of sale having issued all the required notices under the law.



- i. The 2<sup>nd</sup> Defendant denied each and every particular of fraud and irregularity as laid out in paragraph 20 of the Plaintiff and the Plaintiff was put to strict proof on each and every allegation raised therein.
- j. In further response to the particulars of fraud and irregularity the 2<sup>nd</sup> Defendant reiterated the contents of paragraph 3 of the statement of defence and averred that the 2<sup>nd</sup> Defendant was in fact an existing Banking institution as per Gazette Notice No. 6269 of November 8, 1996.
- k. The 2<sup>nd</sup> Defendant reiterated the contents of paragraph 8, 8a and 9 supra in response to paragraph 21 of the Plaintiff.
- l. The 2<sup>nd</sup> Defendant in response to Paragraph 22 of the Plaintiff averred that the Plaintiff was not deserving of the prayer as sought for all the reasons enumerated in the defence.
- m. The Plaintiff was hereby put to strict proof in the contents of Paragraph 23 of the Plaintiff both factually and legally.
- n. The 2<sup>nd</sup> Defendant in response to Paragraph 24 of the Plaintiff reiterated that the suit herein was Res Judicata and the 2<sup>nd</sup> Defendant shall be raising a preliminary objection on a pure point of law with regard to the same.
- o. Paragraph 25 of the Plaintiff was admitted.

28. In the Counter - Claim, the 2<sup>nd</sup> Defendant averred that:-

- a. In furtherance of the above the 2<sup>nd</sup> Defendant stated that on or about September 1991, Shokat Ebrahim Juneja applied for a short-term credit facility in the sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) to enable him purchase a printing press.
- b. The loan was approved and secured by a Third-Party Legal Charge over Title Number Mombasa Block XLI/156 Old Town which property was registered in the names of Abdalla Haji Mohammed Sameja (deceased) and Sakinabai Ali Mohammed (deceased).
- c. The Charge was registered against the said Title document on the 16<sup>th</sup> day of October, 1991 as entry number C1 and after registration, the Original Land Certificate and Charge document were forwarded to the Bank for safe keeping.
- d. In year 1993 the borrower defaulted on the loan and the 2<sup>nd</sup> Defendant has made several efforts since then to lawfully recover the said sum which efforts have been hindered by various persons including Sakinabai Ali Mohammed (deceased) and the Plaintiff herein.
- e. Furthermore, the Plaintiff herein had intentionally misrepresented the facts to this Honourable Court with the intention of prevent the 2<sup>nd</sup> Defendant from exercising its Statutory Power of Sale.
- f. The 2<sup>nd</sup> Defendant relied on the following particulars of Plaintiff's misrepresentation:-
  - i. Failure to disclose to this Honourable Court that there was in fact a loan facility secured on Title Number Mombasa Block XLI/156.
  - ii. Denying knowledge and existence of the Borrower one Shokat Ibrahim Juneja alias Shokat Ibrahim.



- iii. The Plaintiff was a stranger to this Honourable Court and had instituted this suit as the Legal Representative of the Estate of SakinAbai Ali Mohamed but had failed to present the order that granted him the order to act as such.
- iv. The Plaintiff had also misrepresented himself as a representative of a Trust but had failed to present a Trust Deed to show the existence of one and whether he was a party to the said Trust.
- v. The 2<sup>nd</sup> Defendant appointed the Law firm of M/s. Asige, Keverenge & Anyanzwa Advocates to recover the sum of Kenya Shillings Nine Hundred and Thirty-One Thousand Eight Hundred and Eleven and Eighty-Five Cents (Kshs.931,811.85) which was the sum due as at 1993.
- vi. To facilitate the said instructions, the Original Title. Transfer document and charge documents were surrendered to the said Advocates.
- vii. The said firm represented the 2<sup>nd</sup> Defendant in HC Civil Suit No.667 of 1994 SakinAbai Ali Mohamed – Versus - Kenya Finance Corporation Limited.
- viii. During and after the conclusion of the aforementioned suit the Bank made several efforts to contact the Law firm of M/s. Asige, Keverenge & Anyanzwa Advocates and restart the recovery process but the firm was not responsive.
- ix. After several correspondence it was brought to the 2<sup>nd</sup> Defendant’s attention that the documents in their custody being the Original Transfer. The Original Title document and the Charge, had been misplaced.
- x. The 2<sup>nd</sup> Defendant had since applied for and acquired a replacement of the Original Tide Deed which continues to be in its possession however a copy of the change was yet to be recovered.
- xi. The debt owed to the 2<sup>nd</sup> Defendant continues to accrue interest and the borrower has not demonstrated any intention to pay the outstanding debt which as at 12<sup>th</sup> October, 2018 stood at Kenya Shillings Sixteen Million Three Hundred and Nineteen Thousand Seven Hundred and Ninety-Seven (Kshs,16,319,797.00).
- xii. The 2<sup>nd</sup> Defendant avers that it does hold a legal and equitable charge over the property known as Mombasa Block XIJ/156 and the borrower having defaulted in year 1993, the 2<sup>nd</sup> Defendant had a legal and statutory right to exercise its powers of sale.
- xiii. As highlighted above, this is the third suit filed by the Plaintiff and/or his representatives as against the 2<sup>nd</sup> Defendant hindering it from exercising its Statutory Power of Sale.
- xiv. Through the Plaintiff’s blatant misrepresentation of the facts of the case he cannot purport to acquire equitable remedies sought in this suit with unclean hands.

29. For the reasons thereof the 2<sup>nd</sup> Defendant (Plaintiff in the Counter - Claim) prayed for:-

- i. A Declaration do issue that the 2<sup>nd</sup> Defendant holds a Legal Charge over all that property knows as Tide Number Mombasa Block XIJ/156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.



- ii. A Declaration do issue that the 2<sup>nd</sup> Defendant holds an Equitable Charge over all that property known as Title Number Mombasa Block XII/156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.
  - iii. General and exemplary damages for misrepresentation from the Plaintiff.
  - iv. Costs of the original suit herein and the counterclaim.
30. The Learned Counsel to the Defendants Ms. Nyambura commenced her case through the following opening remarks. She stated that the Plaintiff took a loan in the year 1991, but had constantly been evading payment using this court. He has admitted having taken the loan and there was a balance and interest. The interest kept on accruing and the costs from the filed court suits. He defaulted immediately he took the loan. The charge was registered. As result, on being sued it became necessary to file the Counter - Claim.
31. The Defendants called their 1<sup>st</sup> witness on 29<sup>th</sup> July, 2024 who testified as follows:-

**A. Examination in Chief of DW – 1 by Ms. Nyambura Advocate.**

32. DW - 1 was sworn and testified in English language. She identified herself as DORCAS NAFULA WANJALA. She was a citizen of Kenya with all the particulars as shown in the national identity card. She had worked for Kenya Deposit Insurance Corporation a state corporation – under it has institution which were under receivership/liquidation. One such institution was the Kenya Finance Bank Limited (under liquidation) Referred to Page 2 of the 2<sup>nd</sup> Defendants documents. She told the court that she had filed a Counter - Claim before this Court and witness statement dated 23<sup>rd</sup> February, 2024 which she adopted as part of her evidence. She had also filed a bundle of documents – 34 documents dated 14<sup>th</sup> March, 2024, produced as Defendants Exhibit Numbers “1 to 34” . There was a 2<sup>nd</sup> bundle dated 2<sup>nd</sup> February 2022 – of 3 documents produced as “The Defendants Exhibit numbers 35, 36 and 37”.

**B. Cross - examination of DW - 1 by Mr. Magolo Advocate.**

33. DW - 1 confirmed to the court that she never worked for Kenya Finance Bank Limited – 2<sup>nd</sup> Defendant. From her statement its Shokat Ebrahim who took the loan. Mr. Shokat Ebrahim Ali was the Plaintiff. The title deed was registered in the names of Sakinabhai Ali and Abdalla. By that time the two were still alive. They never signed any agreement. By that time, he was not the registered proprietor to the suit land. The Plaintiff had authority of Sakinabhai Ali – the Auntie. By that time the property was jointly owned by the Trustees.
34. DW – 1 stated that she was not aware whether the bank conducted due diligence. It was the Plaintiff who took the loan for himself but not for the family. There were 9 people who were beneficiaries to the Trust and some of them had not been born in the year 1991. With reference to the 45 days’ Notice of Sale prepared by the Auctioneers for a sum of Kenya Shillings Sixteen Million Three Ninety One Thousand Seven Ninety Seven (Kshs. 16,391,797/-) the witness confirmed that it was twenty times from the year 1991 when the loan was taken. The Notice was served on 12<sup>th</sup> October, 2018 – to sell the property No. 196 – it was served to Sakinabhai Ali and Shokat Ebrahim Ali on 15<sup>th</sup> October, 2018 as per the Affidavit of Service.
35. With reference to the Grant for Sakinabhai Ali, the witness told the court that he died on November, 2010. Thus, she confirmed that she could not have been served as he was dead by then. She got this information from the affidavit of service. She did not know any of the legal Representatives of the



estate of Abdalla and the beneficiaries. They only knew Shokat Ebrahim Ali as he was the one who took the loan.

### **C. Re - examination of DW - 1 by M/s. Nyambura Advocate.**

36. The witness was referred to the Plaintiff under paragraph 6 on page 56; She was aware of the Gullum Principles on the Interest of accruing; the costs of this matter kept on accruing and chargeable from this loan facilities. She was aware that the Plaintiff would be served with the notices and he would be receiving them as per the affidavit of service.
37. The Learned Counsel Ms. Nyambura called the case of the Defendants to a close on 29<sup>th</sup> July, 2024.

### **VI. Submissions**

38. On 4<sup>th</sup> December, 2024 after the Plaintiff and Defendants marked the close of their cases, the Honourable court directed that the parties file their submissions within stringent timeframe thereof on. Pursuant to that the Honourable court reserved a date to deliver its Judgement on 27<sup>th</sup> January, 2025 which date was deferred to 14<sup>th</sup> March, 2025.

#### **A. The Written Submission by the Plaintiff**

39. The Plaintiffs through the Law firm of Messrs. J. O. Magolo & Company Advocates dated 24<sup>th</sup> September, 2024 filed their written submissions. Mr. Paul Magolo Advocate commenced his submissions by stating that what was before the Honourable Court was the Plaintiff's Plaintiff filed on 18<sup>th</sup> November 2021 where the Plaintiff sought for the above stated reliefs.
40. The Learned Counsel submitted that the 2<sup>nd</sup> Defendant filed an Amended Statement of Defence and Counter - Claim amended on 1<sup>st</sup> February 2024 seeking the following orders:-
  - a. A declaration do issue that the 2<sup>nd</sup> Defendant holds a Legal Charge over all that property known as Title Number Mombasa/Block XLI/ 156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.
  - b. A declaration do issue that the 2<sup>nd</sup> Defendant holds an Equitable Charge over all that property known as Title Number Mombasa/Block XLI/ 156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.
  - c. General and Exemplary damages for misrepresentation from the Plaintiff.
  - d. Costs of the original suit herein and the counterclaim.
41. On the background of this suit, the Learned Counsel submitted that SAKINAbai Ali Mohamed died intestate on 30<sup>th</sup> day of November, 2010 at Old Town, Mombasa in Kenya. The Plaintiff/Applicant was the administrator of the estate of the deceased having been issued with a Grant of Letter of Administration in MSA SMC No. 408 of 2018 to administer the estate and collect and preserve its assets. SakinAbai Ali Mohamed was the Applicant's aunt and was not survived by any issues.
42. The deceased and Absalla Haji Sameja (who died on 20<sup>th</sup> January, 1998) were absolute proprietors of land title No. Mombasa/Block XLI/156 Old Town on which is developed a three-storey building comprising of shops and residential premises. They hold the title in trust for the Applicant and eight others who were the applicant's siblings. They hold the title in trust for the Plaintiff herein and eight others who were his siblings, that is;
  - i. Zeitun Ibrahim Alimohamed



- ii. Yasmin Ibrahim Ali Mohamed J
  - iii. Sherali Ibrahim Ali Mohamed
  - iv. Rehmat Ibrahim Ali
  - v. Hamadi Ibrahim Ali
  - vi. Fatima Ibrahim Ali
  - vii. Shebanu Ibrahim Ali
43. The land parcel was property of the Applicant's father who caused it to be registered in the names of the two deceased and the beneficiaries of the trust including the applicant with their families of about 28 people live on the said premises and had no other home. The said land parcel was the only known asset registered in the names of the deceased persons. The two having held the title in trust as above-stated the property in the land parcel was at all times during the lifetime of the deceased and even after their death property of the beneficiaries of the trust and vests in the said beneficiaries.
44. The Plaintiff received a letter dated 12<sup>th</sup> October, 2018 from Integra Auctioneering (K) Company claiming that they had been instructed to recover from the Plaintiff loan amounting to Kenya Shillings Sixteen Million Three Ten Thousand Seven Ninety Seven Hundred (Kshs. 16,310,797/-) plus interest which they claimed the one Shokat Ibrahim Juneja owed the 2<sup>nd</sup> Defendant. The person named in the notices as Shokat Ibrahim Juneja was not the Plaintiff and he has never taken a loan or any amount or Kenya Shillings Sixteen Million Three Ten Thousand Seven Ninety Seven Hundred (Kshs. 16,319,797.00/-) above stated from the 2<sup>nd</sup> Defendant or used the deceased land title as collateral for the purported loan.
45. The Learned Counsel averred that the Plaintiff received the letter way back in the year 2018, he made enquiries at the Central Bank of Kenya where he paid a physical visit to them at their Mombasa Branch and also by the Registrar of Companies and by internet searches, the entity 'Kenya Finance Bank Ltd' on whose behalf the auctioneer purport to act did not exist. The Plaintiff had never taken a loan or any amount or Kenya Shillings Sixteen Million Three Ten Thousand Seven Ninety Seven Hundred (Kshs. 16,319,797.00/-) above stated from the entity 'Kenya Finance Bank Ltd' or used the deceased land title as collateral for the purported loan.
46. On the issue of locus standi, the Learned Counsel submitted that the Plaintiff had attached Limited Grant of Letters of Administration Ad Colligenda bona of all the estate of the Late SakinAbai Ali Mohamed for purposes of collecting, getting in and receiving the Estate and doing such acts as may be necessary for Purposes of preservation of the same. The Plaintiff filed this suit after receiving a letter from Integra Auctioneering (K) Company claiming to have been instructed to recover a loan that is unknown of and no documents have been supplied to that effect. Integra Auctioneering (K) Company further expressed their intention to sell the suit premises registered in the name of the deceased
47. It was stated by the Plaintiff that this is being done by crooks and fraudsters who want to defraud the estate of the deceased and he was therefore forced to institute this suit in order to preserve the estate if the deceased as required of him by the Grant of Letters of Administration Ad Colligenda bona. Furthermore, SakinAbai Ali Mohamed (deceased) was the Plaintiff's aunt and was not survived by any issues. To add to that, it had been deponed by the Plaintiff that SakinAbai Ali Mohamed (deceased) and Absalla Haji Sameja (who died on 20<sup>th</sup> January, 1998) are absolute proprietors of land title No. Mombasa/Block XLI/156 Old Town on which was developed a three-storey building comprising of shops and residential premises.



48. The Learned Counsel held that the title in trust for the Plaintiff herein and eight others who are his siblings, that was:-
- i. Zeitun Ibrahim Alimohamed
  - ii. Yasmin Ibrahim Ali Mohamed J
  - iii. Sherali Ibrahim Ali Mohamed
  - iv. Rehmat Ibrahim Ali
  - v. Roshan Ibrahim Ali
  - vi. Hamadi Ibrahim Ali
  - vii. Fatima Ibrahim Ali
  - viii. Shebanu Ibrahim Ali
49. The land parcel was property of the Plaintiff's father who caused it to be registered in the names of the two deceased. The beneficiaries of the trust include the Plaintiff with their families of about 28 people live on the said premises and have no other home. The said land parcel is the only known asset of the deceased persons. The two having held the title in trust as above-stated the property in the land parcel was at all times during the lifetime of the deceased and even after their death property of the beneficiaries of the trust and vests in the said beneficiaries. According to the Learned Counsel it went without saying that the Plaintiff also had the locus standi to bring this suit.
50. The 2<sup>nd</sup> Defendant duly know that the Plaintiff has the locus standi and that is why the Plaintiff is the only person being served with the letter dated 12<sup>th</sup> October, 2018 from Integra Auctioneering (K) Company claiming that they had been instructed to recover from the Plaintiff loan by sale of the property.
51. On the purported charge on property land title No. Mombasa/ Block XLI/156, the Learned Counsel submitted that the Defendant's witness alleged that in the year 1991, Shokat Ibrahim Juneja applied for a loan of Kenya Eight Hundred Thousand (Kshs. 800,000/-) and the agreement was attached at page 7 of the Defendants list of documents. The witness further stipulates that the borrower presented to the bank the original land certificate for Mombasa/Block/XLI/156 in the names of Abdalla Haji Mohammed Sameja and SakinAbai Ali Mohamed as trustees.
52. It was noted that in the agreement, there was no mention of any guarantors anywhere and the same is not signed by either Abdalla Haji Mohammed Sameja and SakinAbai Ali Mohamed or both. The repealed Registered Land Act, Cap. 300 which was the applicable law at that time in Section 65 stipulates as follows:-
- (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, 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, by one of the persons attesting the affixation of the common seal.
  - (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee



on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee. (3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.

53. It would be noted that the alleged charge document has not been produced at all, there was no evidence that the same was signed by either Abdalla Haji Mohammed Sameja and SakinAbai Ali Mohamed or both and there was no evidence that the said was even registered. Further note that even either Abdalla Haji Mohammed Sameja and SakinAbai Ali Mohamed or both could not have validly charged the suit premises Mombasa/Block/XLI/156 as the title clearly indicates that they hold the title as TRUSTEES. The Learned Counsel therefore submitted that since the alleged charge was null and void.
54. On the issue of the trust, the Learned Counsel submitted that the land certificate for Mombasa/Block/XLI/156 in the names of Abdalla Haji Mohammed Sameja and SakinAbai Ali Mohamed as Trustees. Trust Deed had not been produced before this court. It was trite law that a Trustee may not use or deal with trust property for his own profit or for any other purpose unconnected with the trust. The Defendant's witness testified that one Shokat Ibrahim Juneja approached the bank for a loan in order to set up his own business and in doing so property for Mombasa/Block/XLI/156 which is trust property was charged. It was also in evidence that the alleged business had nothing whatsoever to do with the trust or the beneficiaries and the said Shokat Ibrahim Juneja was not even a trustee with regards to the property charged.
55. The Learned Counsel asserted that since the alleged charge on the property Mombasa/Block/XLI/156 was not for the benefit of the trust and in the interest of the beneficiaries, the same was null and void.
56. On the duplum rule, the Learned Counsel submitted that in the Defendant's Replying Affidavit, at page 15 in the annexures, they have attached a letter 11<sup>th</sup> August 2016 from Shiganga & Company Advocates where they claim a total of Kenya Shillings Sixty-One Million, Two Hundred and Eighty-Eight Thousand, Nine Hundred and Seventy-Seven (Kshs. 61,288,977/-). In the letter dated 12<sup>th</sup> October 2018 attached to our application, it states that the borrower in arrears of Kenya Shillings Sixteen Million, Three Hundred and Nineteen Thousand, Seven Hundred and Ninety-Seven (Kshs. 16,319,797 /- ) as at 9<sup>th</sup> September 2016. The provisions of Section 44 (A) of the Banking Act were pertinent herein. The law states as follows:-

“ 44A. Limit on interest recovered on defaulted loans

- (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).
- (2) The maximum amount referred to in subsection (1) is the sum of the following-
  - (a) the principal owing when the loan becomes non-performing;
  - (b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and



- (c) expenses incurred in the recovery of any amounts owed by the debtor.”

57. The Learned Counsel had relied on the case of “Francis Mbaria Wambugu – Versus - Jijenge Credit Limited [2020] eKLR”, where Justice C. Meoli when considering a similar application for injunction stated as follows:-

“26. Concerning the In duplum rule imported via the enactment of Section 44A of the *Banking Act* in 2007, the Court of Appeal stated in Kenya Hotels Limited – Versus - Oriental Commercial Bank Limited (Formerly known as Delphis Bank Limited) [2019] eKLR that:

In duplum” is a Latin phrase derived from the word “in duplo” which loosely translates to “in double”. Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May,2007 it has been applied by the courts with reasonable degree of consistency. See Lee G. Muthoga - Versus - Habib Zurich Finance (K) Limited &another [2016] eKLR, Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation [2019] eKLR, along a host of many others where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.

The In duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides

58. It was the submission of the Learned Counsel that the Defendant as per her on allegation is in breach of Section 44A of the *Banking Act* which is the Duplum Rule for attempting to recover more than twenty (20) times of the loan amount.

59. On the figures thrown at the court by the Defendant, the Learned Counsel submitted that in the Replying Affidavit by the Defendant, at page 15 in the annexures, they had attached a letter 11<sup>th</sup> August 2016 from Shiganga & Company Advocates where they claim a total of Kenya Shillings Sixty-One Million, Two Hundred and Eighty-Eight Thousand, Nine Hundred and Seventy-Seven (Kshs. 61,288,977/-). In the letter dated 12<sup>th</sup> October 2018 attached to our application, it stated that the borrower in arrears of Kenya Shillings Sixteen Million, Three Hundred and Nineteen Thousand, Seven Hundred and Ninety-Seven (Kshs. 16,319,797 /-) as at 9<sup>th</sup> September 2016.

60. The Defendant’s witness alleges that in the year 1991, Shokat Ibrahim Juneja applied for a loan of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) and the agreement is attached at page 7 of the Defendant’s list of documents and it is as a result of the loan that the figures. The Defendant’s witness further testified that the sum claimed was the loan taken together with interests, legal fees and



other expenses. Note that she did not specify the sums being claimed for interests, legal fees and other expenses, and she simply throws figures at the court without any logical explanation.

61. In the case of “Capital Fish Kenya Limited – Versus - The Kenya Power & Lighting Company Limited [2016] eKLR” where a party merely listed without any explanation or proof of the same, the court stated as follows:-

“The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.....”

62. In the case of:- “David Bagine – Versus - Martin Bundi [1997] eKLR”, the Court cited the Judgment of Lord Goddard CJ. in the case of:- “Bonham Carter – Versus - Hyde Park Hotel Limited (1948) 64 TLR 177”, where the court held as follows:-

“The Plaintiff’s must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so as to speak, throw them at the head of the court saying ‘this is what I have lost, I ask you to give me these damages; they have to prove it.”

63. In conclusion, the Learned Counsel urged the Court to be pleased to allow the Plaintiff as prayed and to dismiss the Counter – Claim by Defendant.

#### **B. The Written Submissions by the 2<sup>nd</sup> Defendant**

64. The 2<sup>nd</sup> Defendant through the Law firm of Messrs. Maitai and Company Advocates LLP filed its submissions dated 8<sup>th</sup> October, 2024. M/s. Nyambura Advocate stated that the submissions were made with regards to the main suit which was instituted vide a Plaintiff dated the 18<sup>th</sup> day of November, 2020 where the Plaintiff sought the above stated orders.

65. The 2<sup>nd</sup> Defendant responded by filing an Amended Statement of Defence and Counter - Claim dated the 24<sup>th</sup> day of January, 2024 seeking the orders as stated herein above.

66. The case proceeded to trial and was heard on the 29<sup>th</sup> day of July, 2024 where each party presented one witness and closed their case and this Honourable Court directed parties to file submissions to which they address the Honourable Court hereunder.

67. The Learned Counsel relied on the following issues for determination:-

- a. Was there fraud, illegality or irregularity on the part of the 2<sup>nd</sup> Defendant?
- b. Is there misrepresentation on the part of the Plaintiff?
- c. Is there a Legal Charge registered in favour of the 2<sup>nd</sup> Defendant on property Title Number Mombasa/Block XLI/1562?

68. On the issue of whether there was fraud, illegality or irregularity on the part of the 2<sup>nd</sup> Defendant, the Learned Counsel submitted that in the Plaintiff’s Plaintiff dated the 18<sup>th</sup> day of November, 2020 the



Plaintiff has accused the 2<sup>nd</sup> Defendant of various actions of fraud, illegality and/or irregularity. The Black's Law Dictionary defined fraud as:

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

69. The Plaintiff's main fraud allegation against the 2<sup>nd</sup> Respondent, as contained in the Plaintiff, was that it was allegedly a non-existent entity therefore unable to issue any instructions to the 1<sup>st</sup> Respondent. It was important to note that the Plaintiff had not provided any evidence to corroborate these allegations, neither in their documentation nor in witness testimony. The 2<sup>nd</sup> Defendant was an existing entity previously operating under the name and style of Kenya Finance Corporation Limited and in the year 1994 it changed its name to Kenya Finance Bank Limited as evidenced by the Certificate of Change of name attached to the 2<sup>nd</sup> Defendant's bundle of documents at page 2.
70. The other allegations of fraud were baseless and were founded on typographical errors and false allegations. Therefore, the Learned Counsel's humble submission that the Plaintiff had not met the standard of proof for an allegation of fraud.
71. In the case of: "Civil Appeal Number 246 of 2013 Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 others", the Court therein stated that: -
  53. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.'
72. The Court went further to state that the evidence of fraud was a matter of evidence and before this Honourable Court it was clear that there was no evidence of fraud as alleged by the Plaintiff as against the 1<sup>st</sup> Defendant and definitely not to the standard required by law.
73. As to whether there was misrepresentation on the part of the Plaintiff, the Learned Counsel submitted that the Plaintiff in this case had rushed to this Honourable Court seeking an injunction against the Defendants having received Notices served upon him by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant's case, proven by the evidence before this Honourable Court was that these Notices were served justly in an effort to exercise its Statutory power of sale for a loan taken by one Shokat Ebrahim Juneja in the year 1991 and secured by property Title Number Mombasa/Block XLI/156 (hereinafter referred to as "the suit property").
74. The backbone of the Plaintiff's case was anchored on the assertion contained in the pleadings that the Plaintiff was not the borrower, Shokat Ebrahim Juneja but one Shokat Ebrahim Ali Omar. The Plaintiff had asserted in his Plaintiff dated the 18<sup>th</sup> day of November, 2020 that the borrower Shokat Ebrahim Juneja was unknown to them and even further that the Plaintiff has never taken a loan from the 2<sup>nd</sup> Defendant. However, during cross-examination the Plaintiff admitted that he had taken a loan with Kenya Finance Corporation in the year 1991 worth Kenya Shillings Eight Hundred Thousand



(Kshs. 800,000.00). He confirmed that this loan that he took with the Kenya Finance Corporation was secured by a Legal Charge registered in favour of Kenya Finance Corporation on the suit property.

75. The 2<sup>nd</sup> Defendant has highlighted several documents before this Honourable Court containing both the signatures of Shokat Ebrahim Juneja (the Borrower) and Shokat Ebrahim Ali Omar which to the naked eye were quite similar. When the said documents were presented to the Plaintiff on the stand, he confirmed that the signatures were his save for one that he was uncertain about but did not deny. These documents were:-

1. The undated Plaintiff's Witness Statement in this suit.
2. The Verifying affidavit dated the 10<sup>th</sup> day of December, 2018.
3. The Executed Letter of Offer dated the 3<sup>rd</sup> day of October, 1991

76. The Learned Counsel's averred which was supported by the insurmountable evidence before this Honourable Court including his own testimony that the Plaintiff, Shokat Ebrahim Ali Omar is in fact the Borrower Shokat Ebrahim Juneja who knowingly and willingly took a loan with the 2<sup>nd</sup> Defendant which loan he has refused to pay and has used the Courts as a means to prevent the 2<sup>nd</sup> Defendant from realizing its security. In view of the foregoing, it was clear that the Plaintiff has come before this Honourable Court seeking justice with unclean hands.

77. The Plaintiff he relied upon was scandalous and was riddled with falsehoods in an effort to hoodwink this Honourable Court into granting an injunction. In the case of:- "J.P Machira T/A Machira & Company Advocates – Versus - Wangethi Mwangi & another [1998] eKLR" Justice R. S. C. Omolo defined a scandalous pleading as follows:-

“While I would broadly agree with the Judge. I can find no warrant for restricting the meaning of the term scandalous to only that, which is indecent, offensive or improper. Surely if everybody who knows a man, including his parents know his names to be Tom Njuguna Onyango and when he is sued under those names he pleads “I deny that my names are Tom Njuguna Onyango”, that kind of denial apart from being frivolous and vexatious, can also be properly described as scandalous. What I am saying is that the category of what may be described as scandalous cannot be limited to the indecent, the offensive or the improper. Denial of a well-known fact can also be rightly described as scandalous.”

78. The Learned Counsel contended that no prayers should be granted on the basis of a scandalous Plaintiff which is founded on blatant and intentional misrepresentations on the part of the Plaintiff.

79. On issue three on whether there was a legal charge registered in favour of the 2<sup>nd</sup> Defendant on property Title Number Mombasa/Block XLI/156, the Learned Counsel submitted that in 1991, the Plaintiff herein, as established hereinabove, approached the 2<sup>nd</sup> Defendant via a Loan application form dated the 29<sup>th</sup> day of July, 1991 seeking a loan of Kenya Shillings Five Hundred Thousand (Kshs. 500,000.00) only and indicating in the said Loan Application form that the security he would offer the Bank would be Property (Title Deed).

80. This Application was reviewed and the Plaintiff was offered a loan via a Letter of Offer dated the 2<sup>nd</sup> day of October, 1991 of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000.00) only that would be secured by a First Legal Charge over the suit property. This offer was accepted by the Plaintiff on the 31<sup>st</sup> day of October 1991 when the Plaintiff appended his signature on the Letter of Offer a signature, he confirmed to be his. The Plaintiff confirmed this position and stated under oath that he handed in the Original Title Deed of the suit property to the 2<sup>nd</sup> Defendant where the security was registered



evidenced by the Green Card at page 19 of the 2<sup>nd</sup> Defendant's bundle of documents. The Original Title remains in the custody of the 2<sup>nd</sup> Defendant.

81. The Plaintiff had highlighted before this Honourable Court that the suit property was the subject of a trust held on behalf of the Plaintiff and his siblings but has failed to provide a copy of the Trust Deed before this Honourable Court as enunciated in their submissions. The presence of a trust however does not preclude a property from being charged as implied under provision of Section 126 (3) of the now Registered Land Act, Cap. 300 (Repealed) that was in force as at the time the Plaintiff took the loan.
82. The Learned Counsel submitted that furthermore, the Late Sakinabhai Ali Mohamed in her Affidavit contained at Page 58 of the 2<sup>nd</sup> Defendant's bundle of documents stated therein that she and the other beneficiaries of the alleged trust were fully aware of the loan taken by the First beneficiary to the trust, the Plaintiff (as described by her in the said Affidavit and as he describes himself in the Plaintiff). She even goes further to state therein that the other beneficiaries agreed to the Plaintiff taking this loan.
83. Despite the fact that the Plaintiff was aware of the importance of this property, he allowed his account to go into arrears in July 1992. The 2<sup>nd</sup> Defendant sent several reminders for payment which were ignored. Since the year 1992 the Plaintiff had taken the 2<sup>nd</sup> Defendant on a 32 - year rollercoaster of negotiations and court battles in an effort to evade payment of this loan which now stands at Kenya Shillings Seventeen Million Three Hundred Thousand Eight Hundred and Ninety-Seven (Kshs. 17,300,897.00/=) and continued to grow in terms of costs utilized in an effort to recover this amount.
84. However, despite all the shenanigans portrayed by the Plaintiff, what remained constant was that the Plaintiff applied for a loan which was disbursed to him and was secured by a Legal Charge over the suit property; which loan remains outstanding. Facts presented to this Honourable Court by the 2<sup>nd</sup> Defendant and confirmed by the Plaintiff in his testimony. The Chargee, had a right and power to sell the Charged property as enshrined under Section 96 (1) of the Land Act and only seeks to exercise this right.
85. The Learned Counsel submitted that in an effort to do so, the Chargee had issued several notices as enshrined in law and most recently the ones that brought us before this Honourable Court being the 90 days' Notice issued by Shiganga and Company Advocates on the 11<sup>th</sup> day of August 2016 and the 45-day Redemption Notice issued by the 1<sup>st</sup> Defendant herein dated the 12<sup>th</sup> day of October, 2018. The Plaintiff confirmed receipt of these Notices and did not raise any issues arising from these Notices and the 2<sup>nd</sup> Defendant has provided this Honourable Court with a clear and current Statement of Account of the Plaintiff's current debt at page 110 of the 2<sup>nd</sup> Defendant's bundle of documents.
86. In the Counter - Claim before this Honourable Court, the 2<sup>nd</sup> Defendant sought a declaration that a Legal Charge does indeed exist in favour of the 2<sup>nd</sup> Defendant on the suit property and the circumstances in which the Charge document was misplaced clearly highlighted in the pleadings with evidence in support contained in the 2<sup>nd</sup> Defendant's bundle of documents. They noted further that these facts had not been opposed by the Plaintiff and they therefore pray that they Counterclaim be allowed as prayed.
87. In conclusion, the Learned Counsel submitted that a quick overview of the Plaintiff's case clearly indicated that the Plaintiff was grasping at straws in an effort to preserve the suit property that he willingly offered up as security for a loan he had and had no intention of paying. However, as aptly demonstrated in their submissions herein, the Plaintiff had evidently misrepresented the facts even to the extent of denying his own names and sought equity before this Honourable Court with unclean hands.



88. The 2<sup>nd</sup> Defendant's cause, on the other hand, was a noble one seeking to put money in the pockets of all those who lost money when the 2<sup>nd</sup> Defendant went into liquidation and the debt owed by the Plaintiff continued to hinder these efforts. The Learned Counsel prayed that the Plaintiff's suit be dismissed with costs and the 2<sup>nd</sup> Defendant's counterclaim be allowed as prayed.

## VII. Analysis and Determination

89. I have keenly assessed the filed pleadings by all the Plaintiff and Defendants herein, the written submissions, the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

90. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -

- a. Who is the sole proprietor of the suit property known as Mombasa/Block XLI/1562 and whether the Plaintiff has the locus standi to prosecute this suit
- b. Whether there was fraud, illegality or irregularity on the part of the 2<sup>nd</sup> Defendant?
- c. Whether the Plaintiff is entitled to the orders sought in the Plaint.
- d. Whether the 2<sup>nd</sup> Defendant is entitled to the orders sought in the Amended Counter – Claim.
- e. Who bears the costs of the Plaint and the Amended Counter - Claim?

### Issue No. a) Who is the sole proprietor of the suit properties known as Mombasa/Block XLI/1562.

91. Under this sub - title the Honourable Court shall discuss the ownership of the suit properties. The provision of Section 24 of the Land Registration No. 3 of 2012 provides as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

92. The provision of Section 25 (1) of the said Act further provides that:

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

93. The provision of 26 (1) of the *Land Registration Act*, No. 3 of 2012 provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge.”

94. The Plaintiff has averred that he was the administrator of the estate of the deceased having been issued with a grant of letter of administration in MSA SMC No. 408 of 2018 to administer the estate and collect and preserve its assets. SakinAbai Ali Mohamed was the Applicant's aunt and was not survived



by any issues. The deceased and Absalla Haji Sameja (who died on 20<sup>th</sup> January, 1998) were absolute proprietors of land title No. Mombasa/Block XLI/156 Old Town on which is developed a three-storey building comprising of shops and residential premises. They hold the title in trust for the Applicant and eight others who were the applicant's siblings. They hold the title in trust for the Plaintiff herein and eight others who were his siblings, that is;

- i. Zeitun Ibrahim Alimohamed
- ii. Yasmin Ibrahim Ali Mohamed J
- iii. Sherali Ibrahim Ali Mohamed
- iv. Rehmat Ibrahim Ali
- v. Hamadi Ibrahim Ali
- vi. Fatima Ibrahim Ali
- vii. Shebanu Ibrahim Ali

95. The land parcel was property of the Applicant's father who caused it to be registered in the names of the two deceased and the beneficiaries of the trust including the applicant with their families of about 28 people live on the said premises and had no other home. The said land parcel was the only known asset registered in the names of the deceased persons. The two having held the title in trust as above-stated the property in the land parcel was at all times during the lifetime of the deceased and even after their death property of the beneficiaries of the trust and vests in the said beneficiaries.
96. PW - 1 brought list of documents dated 22<sup>nd</sup> February, 2024 that is four (4) documents produced Plaintiff Exhibit Numbers 1 to 4. PW - 1 knew the suit property it was their house where they resided. The title was in the name of SAKINABAL ALI MOHAMED and ABDALLA HAJI MOHMAED SAMEJA jointly owner as Trustees, to the suit property. It was indicated to the title deed, SAKINABAL ALI was his Auntie – sister to his father and Abdalla was the cousin to his father, both of them were deceased. He applied for Limited Grant Ad Litem to file this case.
97. PW - 1 was the Legal Administration to the Estate of Sakina Bal referred to the Limited Grant – it did not give it as purpose to institute the case in court. The deceased were holding the land as trustees on behalf as a family as a Trust. The witness did not have a trust to that effect; he knew the beneficiaries of the Trust from the time the Trust was incorporated.
98. Is a claim under customary trust founded? The provision of Section 28 of the [Land Registration Act](#), No. 3 of 2012 states that unless the contrary is expressed in the register, all registered land shall be subject to such overriding interest as may for the time being subsist and affect the land without the necessity of the overriding interests being noted thereon. Customary trust is an overriding interest in registered land. In the case of "Isack M'Inanga Kieba – Versus - Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015", the apex Court stated that occupation and possession are not necessary for a trust to be established. The "Kieba case supra" held as follows:-

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie – Versus - Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a Customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:



the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group”.

99. Going by the Kieba case above the following are critical in proving the existence of a trust:-
- a. The land in question was before registration, family, clan or group land.
  - b. The claimant belongs to such family, clan, or group.
  - c. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
  - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
  - e. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
100. Customary trust are rights that attach to the land and move or subsist on the land. In the case of “Peter Gitonga – Versus - Francis Maingi M’ikiara Meru HC.CC NO. 146 of 2000”- it was stated that:-
- “A “trust” can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J. to say this; “Registration of titles are a creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged”. (Emphasis is mine).
101. It is not in dispute that the parties are related. The 2<sup>nd</sup> Defendant has however challenged the locus standi of the Plaintiff. Black’s law dictionary defines “Locus Standi” as the right to bring an action or to be heard in a given forum. The forum includes a Court of law. In the case of: “Rajesh Pranjivan Chudasama – Versus - Sailesh Pranjivan Chudasama [2014] eKLR” the Court of Appeal held that:-
- “.....a litigant is clothed with locus standi upon obtaining a limited or full letter of administration in cases of intestate succession.....”
102. The Judges in the “Rajesh Pranjivan Chudasama (Supra) case” underscored the need to determine an issue of locus standi first hand. In their words the justices of the appellate Court had this to say:-
- “In our view issues of locus standi and jurisdiction are critical preliminary issues which ought to have been settled before dwelling on other substantive issues. Thus in our view, the learned Judge erred when she refused to determine the issues raised in the Preliminary Objection on the basis that there were other pending applications on the same issues. The Judge should have determined the Preliminary Objection on its merits. We agree with the Appellant’s position that a Preliminary Objection, if upheld, serves the interest of justice by saving time and costs by expeditiously disposing off matters in their entirety. In this case the Preliminary Objection dated 8th February, 2012 questioned the respondent’s locus standi and the Court’s jurisdiction. The issues for determination before the learned Judge should have been whether the Preliminary Objection was purely on a point(s) of law? If the answer



to that question was in the affirmative, were the points properly raised or merited so as to dispose of the suit and any other pending applications? If she then upheld the objection it would have saved the parties herein both time, costs and served the interest of justice by disposing off all other pending applications raising the same issues.”

103. In the case of:- “Julian Adoyo Ongunga – Versus - Francis Kiberenge Abano [CA No.119 of 2015](#)”, the Court had this to say on the issue of a party filing a suit without having obtained a limited grant.

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

104. It is trite that the estate of the deceased vests in the personal representatives who then have capacity to file or defend suit. Such persons must be appointed by the Court either through probate or grant in the case of intestate succession. It is to be noted that in the instant case the Plaintiff obtained letters of grant of administration ad colligenda. The point is whether this kind of grant gave him locus to file the instant suit.

105. The provision of Section 54 of the [Law of Succession Act](#), Cap. 160 which states that:

“A Court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any forms described in the Fifth Schedule.”

106. A grant ad colligenda is provided for under the provision Section 67(1) of the Succession Act, Cap. 160 as follows:-

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the Court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”

107. It is clear from the above section that the grant is specifically meant for collection and preservation of the deceased assets. Filing suit is not one of them. The provision of Rule 36 of the Probate and Administration Rules provides as follows:-

“(1) Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the Court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the Court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts



as may be necessary for the preservation of the estate and until a further grant is made”.

108. The purpose of limited grant *ad colligenda bona* as stated in the afore cited provisions is the collection the property of a deceased person’s estate where it is of a perishable or precarious nature, and where regular probate or administration cannot be granted at once. - See also Jowitt’s Law Dictionary, Volume 1 at page 45. In the case of “Morjaria – Versus - Abdalla [1984] eKLR” the Court of appeal held that “the appointment of a person “*ad colligenda bona*” cannot possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb “*colligere*” means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated, and not for purpose of representation in a suit or in an appeal.”
109. Thus, if parties intend to file suit to recover assets or liabilities for the estate then the right grant is the limited grant *ad litem* under para 14 of Schedule 5 of the Act as thus:-
- “When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administer is unable or unlikely to act, letters of administration may be granted to the nominee of a party to the suit, limited for the purpose of representing the deceased herein or in any other cause or suit which may be commenced in the same, or in any other Court between the parties or any other parties touching the matters at issue in the cause or suit and until a final decree shall be made therein and carried into complete execution”
110. I have examined the decisions of the Court of Appeal in *Morjaria* and *Peter Owade Ogwang* and with tremendous respect to the Plaintiff’s Counsel I do not find any conflict in the two decisions to warrant me to elect which one to be bound by and which one I should reject as suggested by the Counsel. The Appellate Judges in both benches were in agreement that the purpose of a grant *ad colligenda* is not the appropriate one to file suit. In *Morjaria* they allowed the substitution of the parties nevertheless after the death of a party in an ongoing case. In any event the *ad colligenda* in this case specifically stated that it was for purposes of filing an appeal. Similarly, in the case of *Peter Owade Ogwang* the Court was of the view that an application had been granted by the High Court judge and therefore another Judge of concurrent jurisdiction could not overturn the decision. These two decisions are distinguishable to the extent of the circumstances that were allowed. That notwithstanding it is my considered view that both decisions reiterated the point of law which is that *ad colligenda* is not the appropriate grant to clothe a party with locus to file a suit unless it is specifically stated in the grant. There being no conflict and interpretation of the provisions of Section 69 and Rule 35, the Court may not depart from the decisions of the Court of Appeal aforesaid.
111. I have looked at the wording of the grant in issue and I find that it does not include filing of suit as the Plaintiff has done in this case. Clearly, the said grant, in addition to being inappropriate, had also not been tailored to include institution and maintenance of a suit, at least going by its contents and wording. Similarly, there is no evidence that the grant was ever rectified in order to give locus to the Plaintiff.
112. It is the finding of the Court that the Plaintiff having filed suit on the basis of a grant *ad colligenda* is not clothe with locus to file suit. The Court finds that the cause of action is incontestably wrong noting that locus is an issue that goes to the root of the case and that all proceedings here are a nullity since the



Plaintiff did not have locus standi to file the suit. I can do no better than to cite Denning, L.J. in the case of:- “Macfoy – Versus - United Africa Co. Limited [1961] 3 ALL ER 1169 at 1172” who stated that;

“If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”

113. In other words the issue of legal capacity “Locus Standi” is not a technicality but it goes to the root of the case. Thus, in an application to this suit, the Plaintiff has no locus to prosecute this case which issue dispenses off the claim entirely.

**Issue No. b). Whether there was fraud, illegality or irregularity on the part of the 2<sup>nd</sup> Defendant.**

114. Under the other sub – title, we have analyzed the contention of the legitimacy of the title and who it belongs to. It is trite that he who alleges must prove, as provided by Section 107 of the Evidence Act. The Plaintiff has alleged fraud on the part of the 2<sup>nd</sup> Defendant, and they had a duty to prove the existence of such fraud. It is trite that fraud must be specifically proved. See the case of “Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR”, where the Court held:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

115. See also the case of “Koinange & 13 others – Versus -Charles Karuga Koinange 1986 KLR at page 23”, where the court held that:-

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

116. In the case of “Kirugi and Another – Versus - Kabiya & 3 Others (1987) KLR 347”, the Court of Appeal held that;

“It is not automatic that (in) instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

117. The provision of Order 2 Rule 10 (1) (a) of the Civil Procedure Rules, 2010 provides as follows: -

“(1) Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—(a)particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies;”

118. It is trite law fraud must be proved on parameters beyond a balance of probabilities but below reasonable doubt. This principle of law was well elucidated in the well cited Court of Appeal decision



of “Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others [2015] eKLR” where the court expressed itself as follows: -

“As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained.”

119. Taking that the Plaintiff’s suit has been struck out on the sole reason the Plaintiff has no locus standi, it follows that the same cannot be claimed.

**Issue No. c). Whether the Plaintiff is entitled to the orders sought in the Plaintiff**

120. Under this substratum we shall examine the prayers sought by the Plaintiff. The Plaintiff’s case as it is has been struck out due to his standing before this Court therefore the Plaintiff is not entitled to all the prayers sought in the Plaintiff.

**Issue No. d). Whether the 2<sup>nd</sup> Defendant is entitled to the orders sought in the Amended Counter - Claim**

121. In the Amended Counter - Claim, the 2<sup>nd</sup> Defendant sought the following prayers:-

- a. A declaration do issue that the 2<sup>nd</sup> Defendant holds a Legal Charge over all that property known as Title Number Mombasa/Block XLI/156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.
- b. A declaration do issue that the 2<sup>nd</sup> Defendant holds an Equitable Charge over all that property known as Title Number Mombasa/Block XLI/156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.
- c. General and Exemplary damages for misrepresentation from the Plaintiff.
- d. Costs of the original suit herein and the counterclaim.

122. The 2<sup>nd</sup> Defendant’s case is that on 5<sup>th</sup> September, 1991 Shokat Ebrahim Juneje (deceased) (herein referred to as ‘the borrower’) applied for a credit facility with the same being secured by a Third-Party Legal Charge over the subject property dated 16<sup>th</sup> October, 1991 over the subject property. The Plaintiff was not a party to the charge and had not proven ownership of the suit property therefore had no locus standi before this Honourable Court. The facility had been in arrears since the year 1993 and the 2<sup>nd</sup> Defendant had every right under the law to proceed with its statutory power of sale having issued all the required notices under the law.

123. The 2<sup>nd</sup> Defendant denied each and every particular of fraud and irregularity as laid out in Paragraph 20 of the Plaintiff and the Plaintiff was put to strict proof on each and every allegation raised therein. In further response to the particulars of fraud and irregularity the 2<sup>nd</sup> Defendant reiterated the contents of Paragraph 3 of the Statement of Defence and averred that the 2<sup>nd</sup> Defendant was in fact an existing Banking institution as per Gazette Notice No. 6269 of November 8, 1996.

124. In its Counter – Claim, the 2<sup>nd</sup> Defendant averred that in furtherance of the above the 2<sup>nd</sup> Defendant stated that on or about September 1991, Shokat Ebrahim Juneja applied for a short-term credit facility in the sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) to enable him purchase a



- printing press. The loan was approved and secured by a Third-Party Legal Charge over Title Number Mombasa Block XLI/156 Old Town which property was registered in the names of Abdalla Haji Mohammed Sameja (deceased) and Sakinabai Ali Mohammed (deceased). The Charge was registered against the said Title document on the 16<sup>th</sup> day of October, 1991 as entry number C1 and after registration, the Original Land Certificate and Charge document were forwarded to the Bank for safe keeping.
125. In the year 1993 the borrower defaulted on the loan and the 2<sup>nd</sup> Defendant has made several efforts since then to lawfully recover the said sum which efforts have been hindered by various persons including Sakinabai Ali Mohammed (deceased) and the Plaintiff herein. Furthermore, the Plaintiff herein had intentionally misrepresented the facts to this Honourable Court with the intention of prevent the 2<sup>nd</sup> Defendant from exercising its Statutory Power of Sale.
126. DW - 1 confirmed to the court that she did not work for Kenya Finance Bank Limited – 2<sup>nd</sup> Defendant. From her statement its Shokat Ebrahim who took the loan. Mr. Shokat Ebrahim Ali was the Plaintiff. The title deed was registered to Sakinabhai Ali and Abdalla. By that time the two were still alive. They never signed any agreement. By that time, he was not the registered proprietor to the suit land. The Plaintiff had authority of Sakinabhai Ali – the Auntie. By that time the property was jointly owned by the Trustees.
127. It was the Plaintiff who took the loan for himself but not for the family. There were 9 people who were beneficiaries to the Trust and some of them were not born in the year 1991. With reference to the 45 days' Notice of Sale prepared by the Auctioneers for a sum of Kenya Shillings Sixteen Million Three Ninety One Thousand Seven Ninety Seven Hundred (Kshs. 16,391,797/-) the witness confirmed that it was twenty times from the year 1991 when the loan was taken. The Notice was served on 12<sup>th</sup> October, 2018 – to sell the property No. 196 – it was served to Sakinabhai Ali and Shokat Ebrahim Ali on 15<sup>th</sup> October, 2018 as per the Affidavit of Service.
128. According to the 2<sup>nd</sup> Defendant, the backbone of the Plaintiff's case was anchored on the assertion contained in the pleadings that the Plaintiff is not the borrower, Shokat Ebrahim Juneja but one Shokat Ebrahim Ali Omar. The Plaintiff has asserted in his Plaint dated the 18<sup>th</sup> day of November, 2020 that the borrower Shokat Ebrahim Juneja is unknown to them and even further that the Plaintiff has never taken a loan from the 2<sup>nd</sup> Defendant. However, during cross-examination the Plaintiff admitted that he had taken a loan with Kenya Finance Corporation in the year 1991 worth Kenya Shillings Eight Hundred Thousand (Kshs. 800,000.00). He confirmed that this loan that he took with the Kenya Finance Corporation was secured by a Legal Charge registered in favour of Kenya Finance Corporation on the suit property.
129. Further, the 2<sup>nd</sup> Defendant averred that Shokat Ebrahim Ali Omar is in fact the Borrower Shokat Ebrahim Juneja who knowingly and willingly took a loan with the 2<sup>nd</sup> Defendant which loan he has refused to pay and has used the Courts as a means to prevent the 2<sup>nd</sup> Defendant from realizing its security. In view of the foregoing, it was clear that the Plaintiff has come before this Honourable Court seeking justice with unclean hands
130. I take note that the 2<sup>nd</sup> Defendant sent several reminders for payment which were ignored. Since 1992 the Plaintiff has taken the 2<sup>nd</sup> Defendant on a 32-year rollercoaster of negotiations and court battles in an effort to evade payment of this loan which now stands at Kenya Shillings Seventeen Million Three Hundred Thousand Eight Hundred and Ninety-Seven (Kshs.17,300,897.00) and continued to grow in terms of costs utilized in an effort to recover this amount. I therefore find and hold that the 2<sup>nd</sup> Defendant had a legal charge and that the Plaintiff was in default of the same. The Chargee, had a right



and power to sell the Charged property as enshrined under Section 96 (1) of the *Land Act*, No. 6 of 2012 and only seeks to exercise this right.

131. The Court observed that the 2<sup>nd</sup> Defendant sought for general and exemplary damages for misrepresentation from the Plaintiff. Exemplary damages, also known as punitive damages, are awarded in two instances. First, where the Government action or conduct complained of is oppressive, arbitrary or unconstitutional. Second, where the Defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant. This was affirmed by the Court in the case of:- “Godfrey Julius Ndumba Mbogori & Another – Versus - Nairobi City County [2018] eKLR” as follows:-

“The Appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes – Versus - Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

- i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii. cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii. where exemplary damages are expressly authorized by statute.”

132. The Court does not consider that any of the circumstances exist herein warranting the grant of exemplary damages and this prayer is unmerited.

133. Be that as it may, the 2<sup>nd</sup> Defendant is granted all the prayers sought in the Amended Counter - Claim as sought save for prayer number 3. Thus, the Amended Counter - Claim by the 2<sup>nd</sup> Defendant is herein found to have merit and is allowed.

**Issue No. e). Who bears the costs of the Plaint and the Amended Counter - Claim.**

134. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “*Harun Mutwiri – Versus - Nairobi City County Government* [2018] eKLR and “*Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another* [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “*Hussein Muhumed Sirat – Versus - Attorney General & Another* [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

135. In the case of:- “*Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others* [2013] eKLR” quoted the case of “*Levben Products – Versus - Alexander Films (SA) (PTY) Limited 1957 (4) SA 225 (SR) at 227*” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given



discretion (Fripp – Versus - Gibbon & Co. 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

136. In the present case, for the fact that the Plaintiff has no locus standi to prosecute this suit, thus the suit is struck out. In that case, the 2<sup>nd</sup> Defendant is entitled to costs of the struck - out Plaintiff and the Amended Counter - Claim.

### **VIII. Conclusion and Disposition**

137. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has not established his case against the Defendants. Thus, the Court proceeds to make the following specific orders:

- a. That Judgment be and is hereby entered in favour of the 2<sup>nd</sup> Defendant with respect to the Amended Counter - Claim dated 1<sup>st</sup> February, 2024.
- b. That the Plaintiff's suit as per the Plaintiff dated 18<sup>th</sup> November, 2021 be and is hereby struck out on the grounds that the Plaintiff has no legal capacity (“Locus Standi”) to institute this suit.
- c. That a declaration do and is hereby issued that the 2<sup>nd</sup> Defendant holds a Legal Charge over all that property known as Tide Number Mombasa Block XLI/156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property.
- d. That a declaration do and is hereby issued that the 2<sup>nd</sup> Defendant holds an Equitable Charge over all that property known as Title Number Mombasa Block XLI/156 and the 2<sup>nd</sup> Defendant is at liberty to proceed with the sale of the said property
- e. That the costs of the struck-out Plaintiff and the Amended Counter – Claim be awarded to 2<sup>nd</sup> Defendant to be borne by the Plaintiffs herein.

**JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**HON. MR. JUSTICE L.L. NAIKUNI**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Paul W. Magolo Advocate for the Plaintiff.
- c. No appearance for the 1<sup>st</sup> Defendant.
- d. M/s. Nyambura Advocate for the 2<sup>nd</sup> Defendant.

**HON. JUSTICE L.L. NAIKUNI (ELC JUDGE)**

