REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 411 OF 2007

(Consolidated with CIVIL SUIT 665 of 2008)

KELLY PETROLEUM ..... 1ST PLAINTIFF

-VS-

EAST AFRICA BUILDING SOCIETY BANK LIMITED.....1ST DEFENDANT

P.V.R RAO (Sued as the Receiver/Manager of the Plaintiffs Petroleum Business on

L.R NO. 209/8872 .....2ND DEFENDANT

JUDGMENT

1. The action presented herein challenges the manner in which East African Building Society Bank Ltd (The 1stDefendant or EABS) has exercised its contractual and statutory power in respect to a facility granted to Kelly Petroleum Limited (The Plaintiff or Kelly). Common set of facts gave rise to two suits which were on 8th 0ctober 2012, by consent of the parties, consolidated for hearing and determination.

2. The two suits are Milimani Commercial Court Civil Suit No. 411 of 2007 Kelly Petroleum Limited Vs East African Building Society Bank Limited, PVR Rao(Sued as Receiver Manager of the Plaintiff's petroleum business on LR No 209/8872)(hereinafter civil suit 411 0f 2007) and Milimani Commercial Court Civil Suit No. 665 of 2008 Susan Wanjiru Muritu (as the legal and personal representative of the estate of John Muritu Kigwe(deceased)) vs EABS Bank Limited ,Canpan Investment Limited and Juja Forty Nine Limited (civil suit no 665 0f 2008). In the consent of 8th October 2012 it was agreed that the suits be dealt with under the title of civil suit No. 411 0f 2007.

3. At the time material to this suit Kelly, a limited liability company registered under the Companies Act (chapter 486 laws of Kenya), was involved in the business of supplying petroleum products. It needed finances and approached EABS to provide some working capital. On 21st June 2002, Kelly entered into a guarantee agreement under which EABS was to provide Kelly with working capital in the sum of Khs.37,000,000.00.As security for the facility the following were perfected: -

i. A charge in favour of EABS over LR No. 209/8871 and LR 10823/54 (the Thika property).

ii. A debenture over the assets of Kelly in favour of EABS.

iii. Personal guarantees executed by the directors of Kelly namely John Muritu Kigwe (now deceased and hereinafter **Kigwe)**, Susan Wanjiru Muritu (Mrs. Muritu), Kelly Walter Karanja and Titus Mwirigi. Mrs. Muritu is also the administratrix of Kigwe's estate.

4. The case of Kelly and the Co-plaintiffs is that notwithstanding it performing all the terms and conditions set out by EABS, on or about 7 th February 2003, EABS unlawfully appointed Pvr Rao (The Receiver Manager or Rao) as a Receiver/Manager over its business. It is alleged that this was without prior demand or notice or warning to the Plaintiffs.

5. Kelly complains that placing its business under receivership was illegal, in bad faith, capricious, malicious and in breach of the clear terms and conditions of the debenture and contract between the parties. The Bank is accused of acting dishonesty and in bad faith. Further, that it breached its duty to protect Kelly's equity of redemption when both setting out to exercise the power to appoint a Receiver Manager and in managing Kelly's business. A duty, it is said, to be one of care.

6. Kelly avers that since the illegal take over, EABS has failed, refused and/or neglected to respond to the numerous verbal and written requests by Kelly to explain the illegal take over, receivership and for accounts.

7. Separately, Mrs Muritu complains that that on 18th January 2005, EABS purported to exercise its statutory power of sale and sold LR. No.10823/54 to Canpan Investment Ltd (the 2nd Defendant or Canpan) and Juja Forty Nine ltd (the 3r Defendant or Juja 49) for Kshs.6,000,000.00 when its true value was more than Kshs 40,000,000.00. It is stated that at the time of the purported sale, the Receiver manager appointed by the Bank was still in control of the assets of Kelly including L.R No.209/8872.

8. Following the alleged sale, Juja 49 took possession of L.R No. 10823/54 which possession Kelly and Mrs. Muritu contend to be a trespass on the land.

9. The estate of Kigwe seeks to impeach the sale of the charged property. It alleges that the Deceased was never served with a demand or notice as required by the statute then applicable or the contract between him and the bank.

10. In addition, the transfer of the land is assailed as being in breach of the Land Control Act. It is said that the consent supposedly granted by the Ruiru Divisional Land Control Board is irregular for many reasons. First, that the consent purports to name the Deceased as one of the parties to the application when he was not. Second, that the named transferees are some named individuals and not Juja 49. Further that the consent was obtained over three years after the date of the sale agreement and was therefore outside the time allowed under statute.

11. In civil suit 411 of 2007, Kelly seeks the following prayers:-

a. (i) A declaration that the appointment of the 2nd Defendant as a receiver over the Plaintiff's petroleum business was unlawful.

(ii) A declaration that the purported sale of LR No. 10823/54 in 2008 is null and void.

b. An order that the Defendants do provide full accounts of all money transactions between the Plaintiff and the 1st Defendant from the commencement of the guarantee and loan facilities.

c. An order that the Defendants to provide a full account of all the trading and transactions that the 2nd Defendant has carried out as Receiver Manager of the Plaintiff's petroleum business since 7.02.2003.

d. A permanent injunction restraining the Defendants from disposing of the Plaintiff's interest in LR No. 10823/54-IR No. 75763 and LR No. 209/8872-IR No. 59627.

e. A permanent injunction restraining the 2nd Defendant from continuing to occupy, run and or control or in any other way manage and or control the Plaintiff's petroleum business and depot.

f. (i) damages on account of lost business.

(ii) Mesne profits.

(iii) As an alternative to (ii) above, general damages.

g. Costs of this suit.

h. Such other and further reliefs that this Court may deem just and expedient to grant.

12. While the Estate of Kigwe bespeaks the following prayers against the defendants jointly and severally

i. A declaration that the purported sale of the suit property by the 1st Defendant to the 2nd Defendant; the subsequent assignment thereof by the 2nd Defendant to the 3rd Defendant, AND the purported transfer to the 3rd Defendant, and the registration thereof in favour of the 3rd Defendant; are irregular, illegal, null and void, and of no effect, and the same be set-aside.

ii. An order that the registration of the transfer by the 1st Defendant to the 3rd Defendant be set-aside, cancelled and reversed, and the requisite land register be amended and/or rectified accordingly.

iii. A declaration, in any event, that the purported Land control Board consent obtained by the 1st and 3rd Defendants is a nullity in law, and/or null and void for all purposes.

iv. A permanent order of injunction restraining the Defendants, whether acting jointly or severally, or through their successors, assignees, servants, or agents, or the successors, assignees, servants or agents of any of them, from interfering with the estate of JOHN MURITU KIGWE (Deceased) Plaintiffs right, title and interest in the suit property and his possession of the same; and/or restraining them from trespassing upon the suit property.

v. Costs of this suit, together with interest thereon, calculated at court rates.

13. EABS defends the suit. It avers that Kigwe was a guarantor and chargor for financial accommodation granted to Kelly Petroleum in the sum of Kshs.37,00,000.00. The facility was in form of a Guarantee facility of Kshs.15,000,000.00 and a Demand Loan Facility of

Kshs.22,000,000.00 The facilities were duly disbursed but there was default and the Bank issued demand letters dated 13th January 2003 to Kelly and its guarantors who included Kigwe.

14. Other than the demand letters, the defence of EABS is that it issued statutory notices dated 13th January 2003 in respect to LR. Nos.209/8872 and 10823/54. In addition, in exercise of its powers under the debenture it placed Kelly under Receivership. Following the statutory notices, the Bank sold LR. No.10823/54 to Canpan but was barred by a Court order of 27th October 2007 from disposing of LR. No. 209/8871.

15. For Juja 49, it is asserted that a sale agreement was entered on 18th January 2005 between the Bank and Canpan in which the term purchaser was described to include the purchaser's "successors in title and assigns". Vide an agreement dated 25th November 2007,and invoking that description, Canpan assigned to Juja 49 all its rights and interest in L.R No.10823/54. This assignment was with the knowledge and concurrence of EABS. That EABS duly executed a transfer in its favour. Juja 49 asserts that it obtained a lawful and proper Land Control Board Consent on 10th July 2008 and a transfer was registered on 28th July 2008 in its favour having paid the requisite Stamp Duty on the assessed value of Kshs.15,360,000/-.

16. Although the hearing of this matter was somewhat lengthy, the issues that present themselves for determination are fairly clear and can be resolved on a pointed evaluation of the relevant evidence. Thus, the Court is minded to confine itself only to evidence that helps it determine the following issues;

i. Was Kelly in default?

ii. Did the bank serve demands and or notices as required by law?

iii. Was the appointment of the Receiver Manager in breach of the law or the contract?

iv. Did the Receiver Manager breach his duty in managing Kelly?

v. Was the sale of the charged property at an undervalue?

vi. Was the transfer of the land to Juja 49 in breach of the provisions of the Land Control Act?

vii. is Juja 49 an innocent purchaser of value without notice?

viii. What are the appropriate orders to make?

17. It is common ground that the Bank granted certain facilities to Kelly. Those facilities were duly secured by a charge over LR. No. 209/8871 and LR 10823/54. In addition, a debenture was created over the assets of Kelly. Lastly, personal guarantees were executed by the directors of Kelly namely Kigwe, Mrs. Muritu, Kelly Walter Karanja and Titus Mwirigi.

18. When she took the witness stand, Mrs. Muritu stated that Mwirigi passed to her a demand letter of 13th January, 2003 (P Exhibit 2 page 106) from the Bank. In that demand the Bank required Titus Mwirigi as a guarantor to pay Kshs. 27,690,914.00 within 24 hours of the letter. The letter reads;

13th January 2003

Mr Titus Mwirigi

C/o.Kelly Petroleum Limited

NAIROBI.

"By Registered Post"

Dear Sirs,

RE: CREDIT FACILITIES WITH THE BANK

We refer to the arrangement between the Bank and Kelly Petroleum Limited by which the Bank at your instance and request, agreed to grant financial accommodation to Kelly Petroleum Limited (the Company) by way of money Guarantee, Loans and Overdraft facilities and the company and yourselves as Directors agreed to repay the sums due to the Bank together with the applicable interest and incidental charges.

This is to inform you (as you are aware) that in breach of the said accommodation, the Company and yourselves have refused, failed and or neglected to repay the sums outstanding and to make good the Bank's claim.

This is to demand, as we hereby do, the immediate payment of the total sum of Kshs.27,690,914 as of the date of this Letter detailed particulars of which are as follows:-

1. Overdraft Account: Kshs.15,911,877.10(Dr)

2. Loan I Account : Kshs.5,330,637.00(Dr)

3. Loan II Account: Kshs.6,448,399.90(Dr)

The Overdraft continues to attract interest at 27% per annum while the Loans attract interest at the Rate of 19% per annum respectively and all are compounded and debited monthly until payment in full.

Take notice that unless we received immediate payment of the sums due in full within the next 24 hours, we shall proceed to file suit and take all other actions available to the Bank in Law at your risk as to the increased costs and incidentals thereto.

Yours faithfully

S. OWINO

LEGAL OFFICER

19. While she blew hot and cold as to whether Kelly was in default at the date of the demand, she was later to admit that Kelly was indeed in default. If ever there was doubt of indebtedness, then it is removed by Kelly's own letter of 15th January 2003 (P Exhibit 2 pages 107 and 108) which was written under the hand of Mrs. Muritu. In this letter Kelly unequivocally states;

15th January 2003

The Legal Officer,

Akiba Bank Limited,

Fedha Towers,

NAIROBI.

ATTN: S. Owino

Dear Sir,

CREDIT FACILITIES WITH THE BANK

We refer to your letter dated 13th January 2003, received by us on 14th January 2003.

The letter is referenced to credit facilities advanced to us by the bank, of which is contents we have noted.

Whilst we acknowledge that we owe the bank some money, we find the period of notice given of 24 hours for repayment not feasible. We certainly require some time to enable us confirm the figures advised and then organized ourselves to settle the amount of the claim.

In this regard, we therefore request the bank to urgently forward to us the following records:

1. Legal cards for the fixed deposit account, overdraft account, loan IT, and I accounts since the accounts were opened.

2. Advice slips for all bank charges applied and any other charge made by the bank on our behalf, since our relationship commenced. The slips should clearly indicate the nature of the charge.

3. Any other record or explanations that we shall require from time to time to enable us confirm the amount of the claim.

Yours faithfully,

Kelly petroleum limited

SUSAN MURITU

MANAGING DIRECTOR

Cc: The Manager

Akiba Bank Limited

Plaza 2000 Branch

NAIROBI.

20. Now, at the hearing Mrs Muritu stated that this letter was written in response to the letter of 13th January 2003(see paragraph 18 above) addressed to Mwirigi and given to her by Mwirigi. However, it was the evidence of Jack Kimathi for the Bank that the Bank had issued a demand of even date but directed at the directors of Kelly (D Exhibit page 32).The difference being that the one to Mwirigi was to him as a guarantor of the debt and that to Kelly was to it as the principal debtor. For purposes of demonstrating this important dissimilarity, I reproduce this latter demand;

The Directors

Kelly Petroleum Limited

P.O. Box 34124 – 00100

NAIROBI.

"BY REGISTERED POST"

Dear Sirs,

RE: CHARGE IN FAVOUR OF AKIBA BANK LIMITED L. R NO. 209/887

As you are no doubt aware, the above-mentioned property was charged to Akiba Bank Limited (hereinafter called "the Bank") by a charge dated 2nd August 2002 to secure some advances made to Kelly Petroleum Limited upto a maximum sum of Kenya Shillings Thirty Seven Million (Kshs.37,000,000) plus interest thereon.

We, Akiba Bank Limited HEREBY REQUIRE YOU to pay to us at our Branch in Fedha Towers within the Next Three Months the principal money now owing under the Charge dated 2nd August 2002 over L.R NO. 209/8872 situate in Nairobi made between Kelly Petroleum Limited of the first part and Akiba Bank Limited of the second part registered as I.R.59627/7 with interest owing in respect thereof on the date of payment and we GIVE NOTICE that if such principal money shall not have been paid after the expiry of Three (3) months from the date of service and receipt of this notice by you, the Bank shall sell the properties comprised in the said Charge.

The amount outstanding as at the date of this letter is as follows:

Overdraft Account: Kshs.15,911,877.10(Dr)

Loan I Account : Kshs.5,330,637.00(Dr)

Loan II Account: Kshs.6,448,399.90(Dr)

Total Kshs.27,690,914.00(Dr)

The Overdraft continues to attract interest at 27% per annum while the Loans attract interest at the Rate of 19% per annum until payment in full.

DATED at Nairobi this 13th day of January 2003.

Yours faithfully

S. OWINO

LEGAL OFFICER

For the fact that Kelly responded to that letter in its own name, I accept the evidence of the Bank that it duly served the demand on the Company through its directors.

21. Default persisted and I therefore hold that the Bank was entitled to act on the Debenture it was holding. By virtue of clause 7 (c)(iii) of

the Debenture dated 2nd August 2002, the Bank reserved a right to appoint a receiver any time after payment of the secured money had been demanded and the company had defaulted. The Bank was entitled to exercise the power to appoint a receiver even though the power of sale of the charged properties was yet to arise. In the exact words the provision reads;-

> "(iii) The Statutory power to appoint a receiver may be exercised at any time after payment of the moneys hereby secured have been demanded and the chargor or the borrower has made default in paying the same whether the power of sale has arisen or not".

22. The evidence is that, by a Deed of Appointment (undated) the Bank appointed Rao and one Kolluri Venkata Subbaraya Kama Sastry as joint receivers over the income and rent accruing from and in respect to LR. No. 209/8872. From the terms of appointment, the mandate of the two was also to manage the affairs of the Company. It does not seem to be controversial that Rao took over the management of the affairs of Kelly on 7th February, 2003 and left after the Thika property had been sold. In so far as Kelly received the demand and also in so far as Kelly remained in default, the Bank properly exercised its right to appoint a Receiver.

23. That said a Receiver owes both the Bank and the Chargor certain duties and the decision in *Medforth v Blake & others (1999) 2 ALLER 97* cited by counsel for Kelly says as follows about that obligation;-

> "Where a receiver managed mortgaged property, his duties to the mortgagor and anyone else interested in the equity of redemption were not necessarily confined to a duty of good faith. Rather, in exercising his powers of management, the receiver owed a duty to manage the property with due diligence, subject to his primary duty of attempting to create a situation where the interest on the secured debt could be paid and the debt itself repaid.
>
> Thus although due diligence did not oblige the receiver to continue a business at the mortgaged property, it did require him to take reasonable steps to manage it profitably if he did choose to continue that business. Such a duty, like the duties owed by a mortgagee to the mortgagor, was imposed by equity. Accordingly, in the instant case the Judge had been correct to hold that the receivers owed an equitable duty of care in managing the mortgaged business, and the appeal would be dismissed".

24. A grievance of Kelly is that the Receiver has not accounted for the period of receivership. This is not just raised in the Plaint but as early as 2nd November 2006. In a letter of that date (P Exhibit 2 pages 1 and 2) the advocates of Kelly request, inter alia, for an account during the Receiver's tenure. No response was made to that demand and Rao did not participate in these proceedings. If the Receiver is duty-bound to manage the company in the best interests of the debenture holder and the company, then he has a duty to account to both. The only conclusion to be reached is that the Receiver has failed in his duty to account to the Company in respect to the period it managed its affairs.

25. The Court now turns its attention to the manner in which the Bank purported to exercise its statutory power of sale. L.R No.59627/7 is registered in the name of Kelly. So as to sell the property the Bank states that it issued a statutory notice on 13th January 2003. It is a 3 month's notice addressed to Directors of Kelly and is as follows;

> 13th January 2003
>
> The Directors
>
> Kelly Petroleum Limited
>
> P.O. Box 34124 – 00100
>
> NAIROBI.
>
> "BY REGISTERED POST"
>
> Dear Sirs,
>
> RE: CHARGE IN FAVOUR OF AKIBA BANK LIMITED L. R NO. 209/887
>
> As you are no doubt aware, the above-mentioned property was charged to Akiba Bank Limited (hereinafter called "the Bank") by a charge dated 2nd August 2002 to secure some advances made to Kelly Petroleum Limited upto a maximum sum of Kenya Shillings Thirty Seven Million (Kshs.37,000,000) plus interest thereon.
>
> We, Akiba Bank Limited HEREBY REQUIRE YOU to pay to us at our Branch in Fedha Towers within the Next Three Months the principal money now owing under the Charge dated 2nd August 2002 over L.R NO. 209/8872 situate in Nairobi made between Kelly Petroleum Limited of the first part and Akiba Bank Limited of the second part registered as I.R.59627/7 with interest owing in respect thereof on the date of payment and we GIVE NOTICE that if such principal money shall not have been paid after the expiry of Three (3) months from the date of service and receipt of this notice by you, the Bank shall sell the properties comprised in the said Charge.
>
> The amount outstanding as at the date of this letter is as follows:
>
> Overdraft Account: Kshs.15,911,877.10(Dr)

Loan I Account : Kshs.5,330,637.00(Dr)

Loan II Account: Kshs.6,448,399.90(Dr)

Total Kshs. 27,690,914.00(Dr)

The Overdraft continues to attract interest at 27% per annum while the Loans attract interest at the Rate of 19% per annum until payment in full.

DATED at Nairobi this 13th day of January 2003.

Yours faithfully

S. OWINO

LEGAL OFFICER

26. The said property was registered under the now repealed Registration of Titles Act. The exercise of the statutory power of sale was regulated by section 69A of the Indian Transfer of Property Act which reads;-

> "(1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-(a)notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or(b)some interest under the mortgage is in arrear and unpaid for two months after becoming due; or(c)there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon".

27. As required by the law the notice warned the Chargor of the sale of the property if default persisted after 3 months from the date of service and receipt of the letter. Receipt of this letter is denied by Kelly and this Court did not sense any effort by the Bank to prove that it had actually served it by registered post as alleged. The Court finds that service was not proved. And even if it was indeed served, it would be ineffective for the Thika property as the notice does not mention the Thika property nor is it issued upon the Deceased who was the registered owner.

28. That property is now registered in the name of Juja 49 after it had been sold by the Bank to Canpan. The sale and subsequent transfer was therefore contra statute for lack of a statutory notice.

29. Yet that was not the end of the matter. Mrs. Muritu complains that the property was sold at a gross undervalue. The sale price to Canpan on 18th January 2005 was at Kshs. 6,100,000.00. While the provisions of section 69 of the Transfer of Property Act allows a sale by way of private treaty, I accept the submission by counsel for Mrs. Muritu's that the a chargee exercising a power of sale owes a duty to the chargor to obtain the best price reasonably obtainable at the time of sale. Just to note that under the current law that price cannot be below twenty-five per centum the market price (section 97 of the Land Act). But of course this matter is decided on the basis of the law that existed then and which was not as precise on what amounted to the best reasonably obtainable price. That would have to depend on the circumstances of each case.

30. In support of the argument that the property was sold at an under value, the Plaintiff produced two valuation reports. That of Petrum Valuers of 17th June 2002 which placed the open market value at Kshs. 20,600,000.00 and that of Lloyd Masika of 28th June 2008 which returned an open market value of Kshs. 60,000,000.00.The first of the valuations had been taken on instructions of Kigwe for purposes of returning an opinion on the value for sale purposes at date of the valuation. The veracity of that opinion was not debunked at hearing. In the face of the allegations by the Plaintiff and the valuations produced, the Bank was obliged to justify the sale price reached between it and Canpan. However, in his evidence on behalf of the Bank, Mr. Jack Kimathi did not produce any valuation report in support of the sale price. The sale price was at a third of value of the property three years earlier and one tenth of its value three years later. This court is constrained to find that the sale was at a gross under value.

31. There is evidence that through a Deed of Assignment of 28th November 2007, Canpan assigned its rights in the property to Juja 49. On 7th April 2008, the Bank executed a transfer in favour of Juja 49 and the same was effected on 28th July 2008.

32. It is not in dispute that the transfer was a controlled transaction under the provisions of the Land Control Act. The transfer was effected on the basis of a consent dated 1st July 2008. That consent is however fraught with difficulties. First, it was granted on the basis of an application which was time barred. Section 8(1) of the Act provides:-

> "(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:
>
> Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit".

33. The deed of assignment is dated 18th November, 2007. It was to assign rights acquired through a sale agreement of 18th January, 2005.

Even if one was to take the latter deed as representing the agreement of the controlled transaction, the application of 23rd June 2008 upon which consent was granted is outside the six months prescribed by statute. A second flaw is that although the property was transferred to Juja 49, the consent was given in the name of James Kimondo, Harrison Marira, Moses Moni, Rose Muhoro and Edward Muchai. Whilst the five are directors of the company, it is commonplace that a company is a separate legal entity from its directors. For that reason a consent to the directors is not a consent to the company.

34. There is a string of decisions that have held that a controlled transaction that does not receive the consent as prescribed under the Land Control Act is void and of no effect. Amongst the decisions would be the Court of Appeal judgment in David Sironga Ole Tukai v. Francis Arap Muge and 2 Others [2018]e KLR where the court held;-

> "Lastly, we do not share the view that the express provisions of the Land Control Act can be equated to procedural technicalities that can be overlooked by virtue of Article 159 (2) (d) of the Constitution and the overriding objective under the Appellate Jurisdiction Act. We have already adverted to the history and the policy considerations behind the Land Control Act, which firmly convinces us that the requirement for application for consent of the land control board before a transaction involving agricultural land can be legally recognized is far much more than a procedural requirement. We must never lose sight of the fact that the overriding objective is first and foremost a case management tool; it was never intended to sound the death knell for substantive requirements of the law."

35. Standing on the other end of the spectrum, however, would be Court of Appeal decisions in **Willy** Kimutai Kitilit v. Michael Kibet and Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri [2014] eKLR. In the former, the Court observed;-

> [25] The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from Black's Law Dictionary, Ninth Edition will suffice for our purpose:
>
> "1.
>
> ---2. The body of principles constituting what is fair and right.
>
> 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ---
>
> 4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called "Law" in the narrower sense) when the two conflict"

Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.

36. Yet because of the discussion that follows I need not say which of the apparently conflicting positions this Court prefers and if either of them is relevant in resolving the matter at hand.

37. A difficult question that confronts Mrs. Muritu is whether the prayers she seeks in regard to the Thika property are available to her. Not only does she seek nullification but also the setting aside, cancellation and reversal of the transfer that has been made to Juja 49. The difficulty stems from the law on extinction of the right of redemption as it existed at the time material to this suit.

38. The law was emphatically stated by Shah JA in Patrick Kanyagia & Another –vs- Damaris Wangechi & 2 others [1995] Eklr to be as follows:-

> "When does the title pass; or putting it another way: when does the right of redemption vested in the mortgagor come to an end?
>
> Section 60 of TPA as amended by Act No 20 of 1985 sets out the right of a mortgagor to redeem. This section says where relevant:
>
> "60. At anytime after the principal money has become payable, the mortgagor has a right, on payment or tender ..... or to execute ..... that any right in derogation of his interest transferred to the mortgagee has been extinguished: Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a court and is exercised before the mortgagee has under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property". (emphasis mine).

It is to be noted that the emphasised part was brought in by way of amendment in 1985. Until then the equity of redemption remained in the mortgagor until the date of registration of the transfer in the name of the buyer.

39. The position is further contextualized by Akiwumi JA in the same decision when he says:-

> "This statement of the law does not take into account certain statutory provisions of the laws of this country. The present legal position was enunciated in the celebrated case of Mbuthia v Jimba Credit Finance Corp and another civil appeal No.111 of 1986 in which the bench was unanimous on what happens on the fall of the hammer at a public auction where the mortgagee is exercising his statutory right of sale. Apaloo J.A. as he then was then stated the legal position as follows:

"Since reporting this judgment, my attention has been drawn to the statute Law (Miscellaneous Amendments) Act 1985 (No.19 of 1985) which amends section 60 the Indian Transfer of Property Act 1882, by adding to the words "a Court" in the second paragraph of the proviso to the section of the following:

"And is exercised before the mortgagee, has under the provisions of this Act, either by public auction or private contract entered into a binding contract for the sale of the mortgaged property."

This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. "

Masime J.A. also put the matter succinctly when he stated as follows:

"In this regard I respectfully agree with Platt and Apaloo JJ.A. that the effect of the long line of English authorities and decisions of this court in respect of mortgages under the Indian Transfer of Property Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale. "

These statements of the law reflect fully the purpose of the amendments to S. 60 of the transfer of Property Act which were expressed as follows in the memorandum of objects and reasons of the Statute Law (miscellaneous amendments) Bill, 198 which introduced the amendment:

"The amendment to the transfer of Property act will remove an anomaly where the right of a mortgagor to redeem the mortgage could be exercised even after the mortgagee had contracted to upon the foregoing, it is clear that the law as stated by Shields J. is wrong"

40. The upshot is that because Canpan entered into a contract with the Bank in respect to the sale, Muritu lost the right of redemption on execution of that contract. Even if it were to be accepted that the conduct of the Bank was so reckless and egregious that a reverse of the registration might otherwise be deserving, Juja 49 is somewhat insulated because of the clear provisions of Section 69 (B) (2) of the Indian Transfer of Property Act which reads:-

69B (2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

41. It has to be remembered that the primary contract upon which Juja 49 obtained the assigned rights is the contract of 18th January 2005 entered between Canpan and the Bank. So as to impeach that sale and any title obtained by Juja 49, the Plaintiffs needed to demonstrate that Canpan or Juja 49 or both were at the time of the contract aware that the power of sale was not exercisable or that there was impropriety in the sale.

42. This Court has given keen attention to evidence led by the Plaintiffs and does not find any evidence of knowledge or any collusion on the part of Canpan and/or Juja 49 in the lack of statutory notice or sell at an undervalue. For that reason the equity of redemption of Kigwe was effectively extinguished when the binding contract between the Bank and Canpan was entered.

43. Whilst it is accepted that the transfer to Juja 49 is premised on an unlawful consent of the Land Control Board, in the circumstances of this case it would not help Kigwe's estate to reverse the transfer because the sale and subsequent assignment cannot be assailed. Put differently, while the Court finds the Bank liable for an improper sale, it cannot fault Canpan and Juja 49 on the contract of sale. That contract is beyond impeachment. The remedy to the Plaintiff would have to be in damages (See various authorities including Kanyagia *(supra)*.

44. This then leads the discussion to a hurdle that the Mrs Muritu(of course on behalf of the estate of Kigwe) has placed on her own path. In her pleadings she does not bespeak damages. Concerned that the Plaintiff would have made out a good case against the Bank on liability but would not obtain a remedy because of her pleadings, I invited parties to submit on whether it would be open to me to grant damages anyway.

45. Having listened to the submissions, this Court was unable to find that the issue of damages was a matter that had been embraced by the parties as an issue that the Court should determine. That is, the Court did not find a basis to consider the question of damages under the proposition restated in Odd Jobs –vs- Mubia [1970] EA 476. The law that parties are bound by pleadings has been consistently followed in our jurisdiction. In this regard the court of appeal in Ole Tukai (*supra*) stated:-

"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are

the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.

The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in GANDY V CASPAR AIR CHARTERS LTD [1956] 23 EACA, 139:

"[T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given"

Later in GALAXY PAINTS CO LTD V FALCON GUARDS LTD [2000] 2 EA 385, this Court reiterated that the issues for determination in a suit generally flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination. The Court added that unless pleadings were amended, parties were confined to their pleadings.

The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Hence in ODD JOBS V MUBIA [1970] EA 476, Law, JA; speaking for the predecessor of this Court stated that:

"[A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision." (See also VYAS INDUSTRIES LTD V DIOCESS OF MERU [1982] KLR 114)

46. While the Court sympathizes with the Plaintiffs it observes that they would have been well aware, as early as 26th October 2007, that damages was the remedy available to the estate of Kigwe. It was on that day that Hon. Okwengu J (as she then was), in a ruling on an interlocutory application herein, observed;

> "Nevertheless, the 1st respondent maintained that it has already disposed off the two properties in exercise of its statutory powers of sale. Copies of the agreement of sale have been exhibited. Assuming therefore, that the property has been sold albeit irregularly, I am of the view that under Section 69B of the Indian Transfer Property Act, it is clear that the applicant's remedy lie only in damages. Indeed this was the position taken by the Court of Appeal in the case of Priscilla Grant v Kenya Commercial Finance Company Limited & 2 Others, Civil Application No. Nai 227 of 1995, which was followed by Ringera J. in the case of David Ngugi Mbuthia (supra).
>
> Arising, from the above, I come to the conclusion that there is prima facie evidence, that there is money due and owing from the applicant to the 1st respondent in respect of the financial facility, and that the 1st respondent has appointed the 2nd respondent as Receiver/Manager pursuant to the Debenture, and that any loss suffered by the applicant as a result of the irregular exercise of the 1st respondent's statutory power of sale, it recoverable by way of damages.

47. So in respect to reliefs, the only remedy available is to Kelly for an order that the Bank do provide a full account of all trading and transactions that was carried out by the Receiver Manager of its petroleum business since 7th February 2003. Thereafter the Court will make further orders as to whether damages in that regard are due and if so the quantum thereof. For purpose of clarity this is only in respect to the claim by Kelly as against the bank and the Receiver Manager and not the claim by the estate of Kigwe as against the bank and the other Defendants.

48. Save for the limited order made in the preceding paragraph, the rest of the Plaintiff's case is dismissed. In the circumstances of this matter and for the fact that the estate of Kigwe had a justifiable grievance against the Bank, I feel constrained not to punish it in costs on the cause it has lost. Each part shall bear its own costs in the matter that constituted civil suit no665 0f 2008. As to the other suit, an order on costs shall await the outcome of the further proceedings contemplated in paragraph 47 above.

Dated, Signed and Delivered in Court at Nairobi this 27th day of September 2019.

F. TUIYOTT

JUDGE

PRESENT;

Kamau Kuria (S.C) and Mongori for Plaintiff

Ondonyo holding brief Wambugu for 3rd Defendant (665/2008)

Mochama for 1st Defendant

Nixon – Court Assistant