REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJAIDO

CIVIL SUIT NO. 22 OF 2018

JAMII BORA BANK LIMITED.....PLAINTIFF

-VERSUS-

WAPAK DEVELOPERS.....DEFENDANT

JUDGEMENT

Coming up before me for determination is the Originating Summons dated 27th April 2018 in which the Plaintiff/Applicant seeks for orders including:

- **An order allowing the Applicant to sale the suit properties to recover the outstanding balances on account of the borrower.**
- **An order for vacant possession of the suit properties to enable the Plaintiff/Applicant to sell the suit property.**
- **Cost of the suit.**

The Application is supported by the Affidavit sworn by **CHRISTINE WAHOME**, the Legal Manager of the Plaintiff/Applicant, on 27th April, 2018. It is also premised on the following grounds:

That with a letter of offer dated 19th December, 2014 and supplemental letter of offer dated 27th April 2015, and the Application of the Defendant/Respondent, the Applicant/Plaintiff agreed to advance the sum of Kenya Shillings Sixty-One Million (Ksh. 61,000,000/-) to the Defendant/Respondent. The afore stated facility was repayable within Twenty-Four Months with a moratorium on the principal for Twenty-Three (23) months during which interest of Ksh. 762,500.00/- was payable on monthly basis and thereafter a bullet payment of Ksh. 61,763,500.00 was to be paid on the twenty fourth month. Its averred that the said facility was advanced on the strength of *inter alia* an Informal Charge dated 18th June, 2015 over property Title Numbers Kajiado/Kipeto/3743 subdivided into Kajiado /kipeto13442-13507 and Kajiado/Kipeto/3744. Subdivided into Kajiado /Kipeto13517-13572 Pursuant to the agreement between the parties, the said informal charge was dully executed by the parties upon which the Defendant deposited the abovementioned Title numbers.

Subsequently, with the consent of the Plaintiff, the Defendant subdivided portions of the above-mentioned properties. Title numbers Kajiado/Kipeto/ 3743 and 3744 were also deposited with plaintiff Bank. On or about June, 2016 the Defendant's account fell into arrears upon which the Plaintiff issued a demand notice dated 27th June, 2016 that the Defendant repays the outstanding amounts of Kshs. 64,956,545.40/- as at 27th June 2016.

The Plaintiff deponed that since the Defendant's account had stayed in arrears for 278 days, on or about 4th May, 2017, issued the Ninety days' statutory notice pursuant to section 90 of the land Act 2012 seeking that the Defendant rectifies the default by paying the outstanding arrears of Ksh. 10,971,814.58/-.

According to the Plaintiff the said notice elicited no response from the Defendant and the Plaintiff through its agents Messrs. Robson Harris & Company Advocates issued the forty days Notice to sale dated 18th August, 2017 pursuant to section 96 (2) of the Land Act which notice has expired. Its further stated that, despite the afore-stated notices, the Defendant has refused, failed and or neglected to settle the outstanding monies and the same is outstanding for Ksh. 79,655,558.68/- as at 9th January, 2018.

The Plaintiff urged the court to grant the order sought herein in the interest of justice.

The Plaintiff submitted that section 79(6) of the Land Act encapsulates the law on formal charges, creation and realization thereof. It quoted the said section. It further submitted that an informal charge was created under the loan facility herein as the same is witnessed by the Letter of offer dated 9th December 2014, Supplemental Letter of Offer dated 27th April, 2015 and the Informal charge instrument dated 18th June, 2015. *(annexed to the supporting affidavit to the application).*

Submissions by the Plaintiff

It was averred by the Plaintiff counsel Mr. Muchira in his submissions that the parties herein did not only execute a lien by deposit of title documents, but also executed a written corporate guarantee in favour of the plaintiff from Peak Credit Ltd and Kan Insurance Brokers Ltd and witnessed undertaking dated 18th June 2015 which set out the agreement as between themselves. Mr. Muchira further submitted that the directors of the defendant company executed a personal guarantee for Ksh 61,000,000. Further learned counsel contended that the creation of an informal charge in respect of titles number Kajiado/Kipeto 3743 and3744 to secure the debt was deposited with the plaintiff bank.

According to Muchira the informal charge fell well within the scope of section 79(6) (a) and recognized under the section 79(6) (b) (i) of the Land Act. Reliance was placed on **Surya Holdings Limited & 4 Others v ICICI Bank Limited & another (2015) eKLR** in support of its proposition. Therefore, the agreement was entered between the parties herein on the strength of the Informal Charge. Further reliance was placed on section 79(8), and the Plaintiffs humbly submitted that the court upholds that indeed there is an informal charge created in favour of the Bank, the Plaintiff herein.

The Plaintiff counsel also submitted on section 90(3) of the Land Act 2012 which provides for the remedies that may be exercised by a charge upon failure by the chargee to rectify a default. In that respect the Plaintiff submitted that these remedies were equally reiterated by the parties themselves in their agreement encapsulated under Clause 8 of in the Informal Charge. Further reliance was placed on section 79(4) and 79(7) of the Land Act 2012 which requires a chargor to seek an order of the court if he wishes to possess or sell property deposited by a chargee under an informal charge. The Plaintiff counsel submitted and stated that it was on the basis of the above legal provisions that made the bank to approach the Court to enable it to exercise the remedies it has under the law.

The Plaintiff counsel also submitted that the bank deserves the orders it sought because there is no dispute that the Defendant took a loan facility from the Plaintiff., that further it is not in dispute that the Defendant is in default of the loan repayment to the plaintiff and that the loan account fell into arrears to the tune of Kshs. 79,655,558.68/- as at January, 2018. In that regard the Plaintiff relied on the case of **Andrew M. Wanjohi –v- Equity Building Society & 7 Another (2006) eKLR,** where the court held that:

> **"by offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon."**

The Plaintiff reiterated that since the suit properties were given as security for the loan, they became commodities for sale and they are therefore subject to sale in case of default in loan repayments. In the furtherance of the same proposition, the Plaintiff also relied on the decision of ***Ringera J in Isaac O. Litali v Ambrose W. Subai & Others HCCC No.2092 of 2000(unreported); John Nduati Kariuki T/A Johester Merchants –vs- National Bank of Kenya Limited (2006) 1 EA 96; Thomas Nyakamba Okong'o vs Co-operative Bank of Kenya Limited (2012) eKLR and Maithya –vs- Housing Finance Co. of Kenya & Another (2003) 1 EA 133.***

Further, the Plaintiff submitted that all the requisite notices were served in accordance of the law and despite having issued all the notices, the Defendant has not taken any steps to redeem the property or clear the outstanding arrears and continues to neglect their obligation to repay the loan amount when the monthly repayments fall due and thus the only option the Plaintiff is left with is to explore the only recourse available to the Bank under the Statute and that this application was lodged in good faith.

In response to the foregoing, the Defendant filed their replying affidavit and submissions dated the 17th and 22nd of August 2018 respectively. In its submissions and replying affidavit, the Defendant contested the validity of the Informal Charge in question herein. It was stated that by virtue of non-compliance with the provisions of section 6(1) of the Land Control Act, which requires that the Land Control Board Consent must be obtained, the Informal Charge in invalid. It was further averred that the suit properties are situated in a land control area and that when the Defendant bought the suit properties, they obtained the said consent.

Section 6(1) of the Land Control Act Cap 302 states that:

> **(1) Each of the following transactions that is to say—**
>
> **(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
>
> **(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;**
>
> **(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

It was the defendant's counsel Mr. Macharia's view that the interpretation section of the said act states that "mortgage" includes charge and it reiterated that the informal charge cannot be said to valid when consent of the land control board was not obtained. In further reiteration of its assertion, the Defendant relied on the decisions in ***Rose Wakanyi Karanja & 3 Others V Geoffrey Chege Kirundi & Another (2016) eKLR and Onyango & Another v Luwayi (1986) KLR 513.***

The Defendant counsel further argued that it was charged excessive and or exorbitant interest by the Plaintiff. The Defendant relied on page 3 under the clause on interest rates of the letter of offer dated 19th December, 2014 marked CW-1 which states as follows:

"The interest rates charged on the facility will be charged as indicated below for the time being, but subject to this condition may be changed by the Bank at its sole discretion subject to 30 days' prior notice….."

It was the Defendant's counsel contention that they were never notified of the increase of the rate of interest from 15% p.a to 22.5% p.a. Further, the Defendant counsel argued and contended that the Plaintiff has not complied with the Banking Act (amendment) Act 2016 which commenced on 14th September, 2016 which capped interest rates at no more than 4% the base rate set by Central Bank of Kenya. The Defendant counsel placed reliance on section 33b of the said Act and contended that interest charged on the loan after the effective date did not reflect compliance with the said law. Further reliance was placed on section 84 of the land Act, No.6 of 2012, which stipulates that the charge should give a chargor 30 days' notice of the increase of the interest rate where it was contractually agreed upon that the rate of interest is variable. In that respect the Defendant relied on the case of ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited {2014} eKLR.*** In the foregoing, the Defendant further relied on Section 61 of the Consumer Protection Act which states that;

"Default charges

(1) A lender is not entitled to impose on a borrower under a credit agreement default charges other than—

(a) reasonable charges in respect of legal costs that the lender incurs in collecting or attempting to collect a required payment by the borrower under the agreement;

(b) reasonable charges in respect of costs, including legal costs, that the lender incurs in realizing a security interest or protecting the subject matter of a security interest after default under the agreement; or

(c) reasonable charges reflecting the costs that the lender incurs because a cheque or other instrument of payment given by the borrower under the agreement has been dishonoured**."**

By virtue of the above arguments and legal provisions, the Defendant reiterated that the Plaintiff has charged them excessive and or exorbitant interest.

Lastly, the Defendant counsel submitted that the application herein should be dismissed with costs.

ANALYSIS AND DETERMINATION

The issues for determination in this matter are as follows:

a. Whether or not the informal charge was valid.

b. Whether or the charge is entitled to exercise the right possess or exercise the statutory power of sale of the suit properties.

c. Whether or not the Defendant charged the Plaintiff excessive and exorbitant interest.

d. Who bears costs of suit?

Dispute on the Interest Charged.

On the issue as to whether or not the plaintiff charged the charged the plaintiff, the Defendant argued that it was charged excessive and or exorbitant interest rates. In that respect the Defendant argued that the plaintiff ought to have complied with the Banking (Amendment) Act 2016 which commenced on 14th September, 2016 which capped interest rates at no more than 4% the base rate set by Central Bank of Kenya. On the contrary, the Plaintiff has contended that the Banking Act was not intended to apply retrospectively and as such does not apply to the banking facility that was made available to the plaintiff by the defendant before the said Act came into force.

I'm well alive to the existence of the strong presumption the legislation is never intended to be retrospective or retroactive.

The Black's Law Dictionary (6th Edition, defines retrospective law as:

"A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred."

In the case ***of Municipality of Mombasa vs. Nyali Limited [1963] E.A 371 Newbold J.A*** stated as follows:

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation

unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary".

The above position in ***Municipality of Mombasa vs. Nyali Limited (supra)*** was followed by the ***Supreme Court of Kenya*** in the case of ***Samuel Kamau & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR:***

(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury's Laws of England*, 4th Edition Vol. 44 at p.570).

"…. legislation is never meant to invalidate that which was previously valid or vice versa. Legislation is never intended to inhibit existing rights of impair obligations. Legislation is always considered to affect only future matters. These presumptions will however be rebutted where statute states so expressly or where out necessary implication the intention of the legislature is expressed in the wording of the legislation, indicates the contrary. It is also crucial to note that presumptions however strong ought to merely aid the interpretation of statutes and must yield where the intention of the legislature emerges."

I entirely agree with approval to the above statements of law. Section 33B(1)(a) and (b) of the Banking Act sets out the maximum interest rate which a banking institution can charge for a credit facility and the minimum interest rate which a banking institution should pay on the deposits held in an interest earning account. In light of the above authorities, it is common cause that the aforementioned section does not expressly provide that it is intended to apply retrospectively.

In this particular case, there is no dispute that the loan agreement between the Plaintiff and the Defendant which provided for the interest rate payable by the Plaintiff to the Defendant on the loan amount that was advanced by the Plaintiff to the Defendant was entered into before the enactment of the Banking (Amendment) Act, 2016. Going by the case of ***Municipality of Mombasa (supra)***, in the instant case, there is no doubt that the Banking Act is not a procedural legislation. It affects substantive rights of lenders and borrowers. Therefore, in my view, it was the intention of the legislature that the Act does not apply retrospectively, since the same was not expressly provided in the said Act. There is no indication in the Act that that was the intention of the legislature. In view of the fact that the Banking Act affects substantive rights as I have indicated above, it's the court's finding that the law as regards capping of interest rates does not apply retrospectively.

In that regard, this court finds that the Defendant is bound by the agreement it entered into with the Plaintiff on the interest that was to be paid on the loan amount that was advanced to it by the Plaintiff. It is instructive to note that the court has no jurisdiction to vary the rate of interest that was agreed upon by the parties as much as the court cannot also vary the period within which the plaintiff was to repay the loan.

Mr. Macharia also invited the court to the report by an expert from IRAC an institution which deals with reassessment of interest and tariffs between banks and their customers whenever a dispute arises. It was Mr. Macharia's view that the forensic analysis revealed an excess interest charge of about 11000000.In my opinion the contention does not hold water in view of the prima facie evidence of the amount still due and outstanding. It's plain that even the court was to admit the excess interest as a counterclaim to the dispute a colossal amount of the debt due of over Ksh 690000000 would be demanded from the plaintiff.

In the above issue, I place reliance on the case of ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit & another (2001) KLR 112*** the court stated that:

"A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved''.

I entirely agree with the above position of the law and that it is still good law. Interest must be charged in conformity with the agreement between the parties.

In addition, I wish set it clear that in accordance with the already existing jurisprudence, a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a chargor from exercising its statutory power of sale. In the case of ***Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R)*** (unreported), the court stated as follows: -

"Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."

The circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale are set out in **Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725** which says: -

"725**. When mortgagees may be restrained from exercising power of sales--**

"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the

> **sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

This passage was quoted with approval by Kwach J.A. in **Mrao Ltd –Vs- First American Bank of Kenya Ltd [2003] K.L.R.** 125, at page 127.

In the foregoing, there is no dispute in this case that the Defendant borrowed Kshs.61, 000, 000/- from the Plaintiff Bank on the security of an informal legal charge over the suit property herein. There is no doubt that the Defendant owes the Plaintiff Bank a substantial amount of money. This court is in total agreement with the decisions provided above that the chargee may not be restrained from exercising its power of sale merely because there is a dispute as to the amount owing or interest charged. However, the chargee maybe be retrained where the amount claimed is paid in court or is excessive and unconscionable, and or the interest charged is uncontractual or illegal. It is my view that the Defendant before challenging the issue of interest charged and or amount owing, he ought to have produced evidence before court to the effect that the principal amount of the loan advanced to him was repaid as required by the contract they entered into. Disputes as regards interest charged must be seen as a subsidiary issue which can only be given enough attention where the Chargor has honoured his obligations to repay the loan or where a charger in default shows willingness to repay the outstanding amount of money owed to lender.

Furthermore, as regards expert opinion, the Court of Appeal in the case of **Choge & Others vs Republic [1985] eKLR**, expressed the following view regarding the role of expert witnesses:

> **"The function of the expert witness was succinctly stated by Lord President Cooper in Davis vs. Edinburgh Magistrates [1953] SC 34 at 40 when he said:**
>
> **'Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence...***"*

As regards the weight to be given to expert evidence, I will at this juncture place reliance to the expressions of Mativo, J in **Stephen Kinini Wang'ondu vs The Ark Limited [2016]** that:

> **"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less...the weight to be given to expert evidence will derive from how that evidence is assess the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess... expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision."**

In the foregoing, it may be useful in these circumstances to refer to what appears in ***Taylor on Evidence (12th Ed.) Vol. 1., para. 58 at p.59*** as follows: -

> **"Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These witnesses are usually required to speak, not to facts, but to opinions, and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or interests of the parties who call them. They do not, indeed willfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans, their Belief becomes synonymous with Faith as defined by the Apostle, for it too often is but "the substance of things hoped for, the evidence of things not seen". To adopt the language of Lord Campbell, skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." emphasis**

In the foregoing, it is clear that the cardinal characteristic of expert evidence is that it is opinion evidence and the role of it is to practically assist the court by providing as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded. **Sir George Jessell MR** in the case ***Abringer v Ashton*** where he used the phrase *"paid agents*" while describing expert witnesses. Almost 100 years later **Lord Woolf** joined the list of critics of expert witnesses. In his Access to Civil Justice Report, he said this: -

> **"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."**

In light of the above, it is important to note that expects are now being abused by those that hire them. For them to be paid or to be seen as if they have done a good job, they have to work in the best interests of their clients. That explains why the reports IRAC report herein are far from being objective and reasonable as far as the value of the suit business is concerned. I agree that the report acts as a guide but it doesn't go too far to fix the dispute between the chargor and the chargee. The position I hold is that Expert evidence sometimes taken as whole depending on the facts of the case can be misleading in assisting the court to address the underlying issues in the dispute particularly mortgage contracts. The evidence of the expert report is less precise on how the parties account stood at the time when an excess of 11000000 interest was occasioned.

Therefore, I take the position that the IRAC report produced by the Defendant herein cannot be given much weight. This court also takes judicial notice of the fact that in every case that IRAC has handled, they have always failed to give an objective report. Their reports are

always in favour of the client who have hired or contracted them. Their presence in court proceedings should be able to guide the in the administration of justice. Even though the IRAC report was to be given weight herein, that cannot be used by the defendant to discredit and impeach the contract they entered into with the Plaintiff. It terms of the fundamentals of the said contract, the dispute on interest charged is a non-issue. It does not change the fact that the Defendant failed to perform his obligations as per the contract between it and the Plaintiff.

Whether or not the informal charge was valid.

As regards the valid of the informal charge herein, the court is well aware of the fact that section 79(6) recognizes an informal charge which may be created where a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land with the repayment of money or monies worth obtained from the charge. Section 2 of the land Act envisages the definition of an Informal Charge. The legality of such agreements is clearly spelt out in section 79 of the land Act which provides as under:

> **"Informal charges.**
>
> **79(6) An informal charge may be created where –**
>
> > **(a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee;**
> >
> > **(b) the chargor deposits any of the following-**
> >
> > > **(i) a certificate of title to the land;**
> > >
> > > **(ii) a document of lease of land;**
> > >
> > > **(iii) any other document which it is agreed evidences ownership of land or a right to interest in land.**
>
> **(7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.**
>
> **(8) An arrangement contemplated in subsection (6) (a) may be referred to as an "informal charge" and a deposit of documents contemplated in subsection (6) (b) shall be known and referred to as a "lien by deposit of documents."**
>
> **(9) A chargee shall not possess or sell land whose title document have been deposited with the chargor under an informal charge without an order of the Court. "**

Section 2 of the Land Act of the Land Act further defines a charge as follows:

> **"Charge" means an interest in land securing the payment of money or money's worth or the fulfillment of any condition, and includes a subcharge and the instrument creating a charge, including –**
>
> > **(a) an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor's land with the repayment of money or money's worth obtained from the chargee…."**

As regards creation of an Informal Charge I wish to place reliance on ***Tassia Coffee Estate Limited and Another v. Milele Ventures Limited (2014) eKLR*** in which the court stated that by depositing the title deed with the Plaintiff, the Defendant created an informal charge in favour of the Plaintiff over the suit property as security for payment of the balance of purchase of purchase price and other parcels of land. The Plaintiffs became chargees of an informal charge over the suit property and enjoyed a lien by deposit of the documents.

Similar position was taken in the case of **Lincoln Kivuti Njeru v. Insurance Company of East Africa** [2017] eKLR in which Lady Justice Nyamweya held that informal charges must be by way of instruments and evidenced in writing and that the Defendant must enter into further charges or agreements in the event that they want security provided for other monies found to be owed.

In light of the above, it is evident from the applicable provisions of law that informal charges must be by way of an interest and it must be reduced into writing, and the Chargee must enter into further charges or agreements in the event that they want security provided for any other monies that maybe found to be owed by the Chargor.

In *casu*, it is clear from the terms of the agreement that the parties herein created an informal charge under the loan facility and I have taken note of the fact that the letter of offer dated 19th December, 2014, Supplemental letter of offer dated 27th April, 2015 and an informal charge instrument dated 18th June, 2015……was duly executed by the Defendant. Thus the parties herein duly executed a lien by the deposit of title with the Plaintiff by the Defendant, written and witnessed undertaking as between them.

In *casu*, it is clear from the terms of the agreement that the parties herein created an informal charge under the loan facility and I have taken note of the fact that the letter of offer dated 19th December, 2014, Supplemental letter of offer dated 27th April, 2015 and an informal charge instrument dated 18th June, 2015 was duly executed by the Defendant. Thus the parties herein duly executed a lien by the deposit of titles with the Plaintiff by the Defendant.

According to the terms of the agreement, terms of payment were such a facility to the tune of 61,000,000/- was to be disbursed to the Plaintiff which was payable on demand, and unless or otherwise demanded. Repayments were to be made within 24 months with a moratorium on principal for 23 months during which interest of Kshs. 762, 500/- payable on a monthly basis and a bullet payment of Kshs. 61,762.500/- which to be paid on the 24th month as per the attached schedule facility. The plaintiff in the same respect was provided with an informal legal charge over the property known Kajiado/Kipeto/3743; Kajiado/Kipeto/3744; And Kajiado/Kipeto 3743 AT Ksh 61,000,000/- as security for the debt and the remedies due to the plaintiff upon default of payment of the said monies were also outline in the agreement. It is not in dispute that the defendant defaulted repayment of the sum secured which culminated to the Plaintiff seeking to exercise its rights accorded to it under the agreement and under section 90 to 100 of the Land Act as regards the realization of the suit property.

However, going by the provisions of law as laid above, it appears that the Defendant having deposited his title deed in respect of the suit property with the Plaintiff, they created an informal charge in favour of the Plaintiffs over the suit property as security for the loan facility. The Plaintiffs therefore became the chargees of an informal charge over the suit property and enjoy a lien by deposit of documents.

As regards the contention touching on the lack of the requisite Land Control Board Consent to charge the land in question, it is not in dispute that the suit property is agricultural land and that consent of the Land Control Board was neither sought nor obtained in respect of the informal charge herein. In the foregoing, what is in contention is whether or not the aforementioned requisite consent was necessary?

In that respect, whereas the Plaintiff argued in its supplementary submissions dated 27th August 2018 that consent of the Land Control Board was unnecessary as the same is not required for an informal charge to be valid due to its very nature that it's not a requirement of law that it be registered, the Defendant argued to the contrary. The Defendant argued that the informal charge is void and unenforceable for non-compliance with the provisions of section 6(1) of the Land Control Act.

I have considered the above rival submissions by both parties on this issue in contention. Section 6(1)(a) stipulates that:

> **"Transactions affecting agricultural land**
>
> **(1) Each of the following transactions that is to say—**
>
> **(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
>
> **is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."**

The only exceptions to the requirement enumerated in the section above is provided for in section 6(3) of the same Act, and these include; transmission of land through a will or intestacy of a deceased person or transaction in which the government or the settlement fund trustee or a county council is a party. It is clear from the foregoing that an informal charge is not among the transaction that are expressly exempted from the requirements of section 6(1) of the Land Control Act, Chapter 302 Laws of Kenya.

The Chargee in the present case is seeking a vesting order pursuant to section 79(9) of the Land Act since the informal charge need not be registered. As a result, the Plaintiff cannot be able to exercise its statutory power of sell on its own motion, it requires the consent of the court.

When the instrument is registered, the chargee moves according the terms of the instrument without seeking consent of the court. Under Section 79(9) above, a chargee holding an informal charge may only take possession or sell the land which is the subject of the informal charge on obtaining an order of the court. The plaintiff herein is seeking consent of the court to proceed to exercise the remedies envisaged under section 90 of the Land Act, No.6 of 2012. In the circumstances, it is the court's view that since the instrument was not registered, no Land Control Board consent was required to be obtained in that respect. This is because in an informal charge, no interest or title in the property will pass from one the chargor to the chargee. Thus it only means that the charge is holding title of the property until the loan facility is fully repaid. Interest or title in that property or the right to sell the same can only accrue with the consent of the court.

I also note that in the formal charge, section 6(2) of the Land Control Act comes into operation, the instrument must be registered and it goes through the normal transfer and have that particular undertaking registered as an encumbrance which shows that the Bank has rights which has been conveyed by virtue of the registered formal charge. On the other hand, that is not the case in informal charges due to the lack of registration. Herein the parties enter into an agreement which sets out the terms of the law that is to govern the covenant which they have agreed to be bound with in all its terms and conditions. For instance, the chargor deposited title documents with the Chargee which will be held by the Chargee as a lien for security. That in case there is a default in the repayment of the loan amounts, the Chargor may move to section 90 of the Land Act with the consent of the court. It is trite that a contract that the parties have agreed to perform, the court will not interfere unless that contract is tainted with illegalities, fraud, is against public policy, misrepresentation etcetera. In that respect, the parties are expected by the court to be able to perform their part of the bargain.

Its indeed trite law for this court to uphold the sanctity of lawful commercial transactions to give effect to the intentions of the parties. The defendants in this case by raising an estoppel under the provisions of section 6 (2) of the land control Act is an attempt to evade their obligations under a legally binding contract. The doctrine of unclean Hands could as well be echoed in this case as stated by their Lordship in **Jajbhay v Cassim 1939 AD 537** where they observed that All writers upon our land agree in this no polluted hand shall touch the pure fountains of justice. The above pronouncement as I understand it is that he who seek equity must come with clean hands. The defendant applied for loan facilities from the plaintiff. Having come to a meeting of minds both parties executed a written covenant setting out obligations to be complied with by each party. Therefore, before the defendant seeks protection of the law he must show that he has performed and kept his part of the bargain in the agreement

Considering the matter all round this court construes the transactions between the plaintiff and the defendant to be covered doctrine of equity of conversion and constructive trust. According to **Pomeroy on Equity Jurisprudence 3 Rd Edition General Books London 1941** the learned author stated interalia as follows:

> **"Conversion is often seen as the result of applying the maxim done as ought to be done. Equity must recognize and protect beneficial title and equitable interest arising, brought about by the change in estates, and looks on agreements regarding those things as actually performed. The result of the application is that where land had been directed to be sold or charged the land is treated in equity as money. Secondly equity's constructive trust jurisdiction arises on the making of the contract intending to transfer property, denial of the original intention would be unconscionable."**

I agree with the position of the law as articulated in this passage which I find relevant to the facts of this case.

I consider the effect of a contract of a mortgagor and mortgagee to be of such a nature that it is protected under the nuances of constructive trust. The mortgagors interest in the land is acquired upon the contract formation by signing of legal or informal charge enforceable as equitable mortgage. In the instant case the defendant action of conveyance and deposit of titles to the suit land retained the legal title while the plaintiff obtained equitable beneficial title to the properties.

The question at stake can be succinctly answered by the dictum in the case of **Ibrahim Seikei T/A Masco Enterprises V Delphis Bank 2004 eKLR** where the court held **"we *must protect the intention of the parties so that every party adheres to his contractual duty to the other. The appellant was advanced the money on the strength of the security he provided to the bank and had an obligation to repay the monies under the terms agreed. Banks do not give monies as gratuity or love for human kind. I cannot issue an injunction against a party wanting to exercise its statutory power of sale merely because the amount due is in dispute*."**

With the leave of the court the plaintiff has the backing of the law to proceed accordingly to enforce the mortgage contract.

In the premises, this court finds no reason to refuse to grant the vesting order sought herein, the Chargor should then move to section 90 of the Land Act to issue the relevant statutory notice of sell in respect of the formal securities deposited by the plaintiff. That the suit property should be valued by a qualified valuer to obtain the best status valuation report before exercising the statutory power of sale. The right of redemption available to the defendant shall apply in the circumstances of this case. For avoidance of doubt the plaintiff has to comply with the provisions in section 96,97,98,99,100 and 101 of the land Act to realize the securities. Speaking for myself, it would be illegal, unjust, and unconscionable and against the interest of justice to let the defendant off the hook on the basis that section 6(2) of the Land Control Board Act was not complied with in so far as creating of a formal legal charge is concerned. It follows that the plaintiffs claim succeeds in terms of the above orders.

The cost of this Originating Summons be borne by the defendant.

Dated, signed and delivered in Open Court at Kajiado this 19th day of October 2018.

.....

R. NYAKUNDI

JUDGE

Representation

Mr. Waiganjo for Mr. Mbugua Atudo Macharia Advocates for the Defendant

Mr. Nairi for Robson Harris for the Plaintiff