



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO 566 OF 2013**

**MWAMBEJA RANCHING COMPANY LTD.....PLAINTIFF**

**Versus**

**KENYA NATIONAL CAPITAL CORPORATION LIMITED (KENYA)...1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LTD.....PROPOSED 2<sup>ND</sup> DEFENDANT**

*Title by Way of Counterclaim*

**KENYA NATIONAL CAPITAL CORPORATION LIMITED.....PLAINTIFF**

**Versus**

**MWAMBEJA RANCHING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**MAJANI MINGI SISAL ESTATE LIMITED.....2<sup>ND</sup> DEFENDANT**

**LOMOLO (1962) LIMITED.....3<sup>RD</sup> DEFENDANT**

**HARRIS HORN JUNIOR.....4<sup>TH</sup> DEFENDANT**

**PROJECT ADVISORY SERVICES LIMITED.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. This case typifies how a rather straightforward dispute can remain unresolved for years on end. The proceedings herein are a culmination of other proceedings between the same parties involving the same subject matter.

2. Project Advisory Services Ltd borrowed a sum of Ksh. shillings 30 million from Kenya National Capital Corporation Ltd (The Defendant or Lender) to finance development of Sisal farming on 1800 acres. The borrowing was through the letter of offer dated 3<sup>rd</sup> April 1992. In terms of the letter of offer the following securities were to be provided;

1. An all assets Debenture.

2. A fixed Legal Charge for Kenya shillings 30 million over the suit land.

3. Personal Guarantees of 30 million from the Directors of the Company for Corporate guarantees for 30 million from the Plaintiff, Majani Mingi Sisal Ltd and Lomolo Ltd.

3. In furtherance to the Agreement, the Plaintiff executed a legal charge dated 10<sup>th</sup> of July 1992 in favour of the Defendant over the Plaintiff's property known and described as Land reference number 16659. It is the Plaintiff's case that one of the salient features of the charge was that it secured the sum of Kenya shillings 30 million with interest. Secondly, the Plaintiff was a Guarantor Debtor.

4. In the Plaintiff herein dated 20<sup>th</sup> of December 2013, it is asserted that following diverse suits that had been filed by the Plaintiff, where injunctions were dismissed, a compromise of a debt owed by the principal debtor was reached and recorded in Civil suit No. 225 of 1998. The compromise is said to be comprised in a Consent dated 22<sup>nd</sup> July 1998. The view of the Plaintiff is that a compromise of some Kenya shillings 22,083,908 was agreed based on the total drawdown by the Principal Debtor out of the facility. This Consent is repeatedly discussed in this decision and its interpretation is central to the resolution of the matter at hand.

5. It is averred by the Plaintiff that on 24<sup>th</sup> December 2012 the Defendant secretly and without due notice of the Plaintiff, sold and transferred the suit property by way of private treaty. This, it is said, was notwithstanding the pendency of civil suit No. 468 of 2011 in which the Plaintiff had, inter alia, sought to redeem the charged property. In paragraph 6 of the Plaintiff are set out other particulars of the Private treaty sale. First, the property was sold for the sum of Ksh. 255, 159, 660 and secondly that a Land Control Board Consent was given to the transaction by Kwale Land Control Board on 27<sup>th</sup> December 2012.

6. The Plaintiff instructed a firm of Valuers namely Lloyd Masika Ltd to carry out a valuation of the sold land. In a report prepared on 8<sup>th</sup> April 2013, the Valuers returned the following valuations. The open market value was assessed at shillings 550 million while the forced sale value was at shillings 350 million. The Plaintiff's case is that the sale of the suit property was at a gross undervalue and in breach of the statutory duty by the Defendant to sell the suit property at market value. That duty would be in section 98 (1)(d) of the Land Act, 2012. The Defendant is also accused of failing to obtain the best price possible as would be required by section 97(1) of the Land Act, 2012. It is also charged that the Defendants failed to give the 2 statutory Notices required under the Act, being notices required by Sections 90 and 96.

7. A further complaint by the Plaintiff is that the Defendants have failed to avail to them a complete statement of account from 31<sup>st</sup> of August 1996. It is said that other information sought but not given include the list of potential Buyers prior to the sale and offers made, the Valuation Report relied on, an explanation as to why fresh Statutory Notice was not served. And why the court was not informed that the suit property had been sold notwithstanding the pendency of proceedings.

8. The Plaintiff seeks an account and enquiry as to the lawful debt that is due and owing to the Defendant. The particulars in support of accounts and enquiries are set out in paragraph 13 of the Plaintiff.

9. Ultimately the Plaintiff seeks the following orders:-

(a) A declaration that the sale of L.R No.16659 (CR No.22939) for the sum of Kshs.256,159,660/= was at a gross under value and below the market value of Kshs.550,000,000 which was contrary to Section 98(1)(d) of the Land Act, 2012 and the duty of care imposed by Section 97(1) of the Land Act.

(b) A declaration that the Defendant did not issue any valid statutory notice either under the Section 69(1) of the repealed Indian Transfer of Property Act or under Sections 90 and 96 of the Land Act 2012 prior to the sale by private contract.

(c) A declaration that the Defendant was only entitled to the compromise sum of kshs.22,083,908 less the sum of Kshs.500,000 that was paid pursuant to the Consent Order dated 22<sup>nd</sup> July 1998 recorded in Milimani HCCC No.225 of 1998 Mwambeja Ranching Company v. Kenya National Capital Corporation Ltd.

(d) A declaration that pursuant to Sections 4(4) of the Limitations of Actions Act the payment of the sum of Kshs.22,083,908 or such other outstanding balance following the taking of accounts and inquiries, became time barred on or about 1<sup>st</sup> January 2011 following the end of 12 years after the default payment of the last instalment that was due and payable by 31<sup>st</sup> December 1998 in Milimani HCC No.225 of 1998 Mwambeja Ranching Company vs. Kenya National Capital Corporation Ltd.

(e) A declaration that pursuant to Sections 4(4) and 19(4) of the Limitation of Actions Act the Defendant was not entitled to charge any arrears or interest for more than 6 years on the sum of Kshs.22,083,908 or such other outstanding balance following the taking of accounts and inquiries.

(f) An account and inquiry be undertaken on the final sum due to the Defendant pursuant to the Consent Order in Milimani HCC No.225 of 1998 Mwambeja Ranching Company vs. Kenya National Capital Corporation Ltd or such other outstanding balance following the taking of accounts and inquiries taking into consideration the provisions of Sections 4(4) and 19(4) of the Limitation of Actions Act and the *in duplum* Rule. Following the taking of accounts and inquiries , the final sum due to the Defendant be paid out of the purchase price of Kshs.256,159,660/= and the difference to be paid to the Plaintiff with interest at court rates from when the payment lawfully fell due.

(g) Damages for the unauthorized, improper and irregular power of sale of L.R No.16659 (C.R No.22939) be assessed at Kshs.550,000,000 or such sum as may be found due and credit be given for any lawful sum that may be found due and owing to the Defendant and the same be deducted from the award of damages.

(h) Costs of the suit on a full indemnity basis with interest at court rates until payment in full.

10. The Defendant has defended this matter on the basis of the Amended Defence and Counterclaim dated 26<sup>th</sup> of February 2014. The highlights of Defence can be abridged. That the principal debtor completely defaulted in servicing the facility granted to it and the debt stood at Kenya shillings 151,430,207.65 as at 30<sup>th</sup> November 1997. After making several demands, the Principal Debtor was unable to regularize default and consequently the Defendant put up the suit land for sale. This would be pursuant to the Defendants exercise of its Statutory Power of Sale. The Defendant was faced with a barrage of Injunction Applications seeking to stop the exercise of the said Power. Worth of mention is one mounted in Civil suit No. 225 of 1998.

11. It is in that suit that the Consent of 22<sup>nd</sup> July 1998 was entered. The Defendant's position is that the content lapsed due to deliberate nonperformance on the part of the Plaintiff. It is argued that the Plaintiff is now statute barred by issue estoppel and estoppel by record from re-litigating materially similar issues touching on the outstanding principal debt and the right and manner of sale. In addition it is averred that the Plaintiff is statute barred by Limitations of Actions from enforcing, re-arguing or seeking to review the Consent order after the lapse of more than 18 years.

12. The Defendants' case is also that the Plaintiff, in its capacity as a chargor/guarantor, lacks any locus standi to challenge the composition of the outstanding Principal debt or to require the taking of accounts for lack of privity of contract especially when the principal debtor has not challenged the debt to date.

13. The Defendant has set up a Counterclaim against the Plaintiff and four other parties. The 5<sup>th</sup> Defendant to the Counterclaim is the principal debtor. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, just like the Plaintiff, guaranteed the facility to the 5<sup>th</sup> Defendant. The Defendant alleges that there remains a substantial shortfall of Kshs.1,694,676,615.13 together with interest at the reserved rate of 21% until

payment in full.

14. The prayers sought against the Defendants is as follows:-

- a) in terms of paragraphs 32,33 and 34 above.
- b) In the alternative and without prejudice to the foregoing, a declaration that sums owed to the Defendant(Kenya National Capital Corporation Limited) by the Plaintiff, far offsets the Plaintiff's claim if upheld.
- c) Orders for lifting of the Company veil against 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants and that the 4<sup>th</sup> Defendant in the Counterclaim be responsible for the costs of defending the Plaintiff's suit on a full indemnity basis.
- d) Costs of this suit jointly and severally against all Defendants in the Counterclaim on a full indemnity basis.

15. The witnesses called by the rivals during the hearing generally rehashed the position set out in the pleadings. Details of that evidence, in so far as they are relevant to answering the issues for determination, are discussed in greater depth in the opinion of the Court. The parties hereto proposed different issues for determination. Given the pleadings, the evidence, the submissions and having regard to the proposals by both sides, the Court identifies the following questions as requiring answers:-

- a. Did the Plaintiff and the Defendant compromise the Plaintiff's indebtedness under the charge in suit NO.225 of 1998 at shillings 22,083,908 pursuant to the Consent recorded on 22 July 1998?
- b. If the answer to (a) is in the affirmative, does the *in duplum* rule apply?
- c. Was the suit property lawfully sold?
- d. If the answer to © is in the negative, what damages is the Plaintiff entitled?
- e. Is there any surplus due to the Plaintiff?
- f. Is the claim by the Lender against the Defendants in the counterclaim time-barred?
- g. If the answer to (f) in the negative, how much is due from each of the Defendants to the Counterclaim?

16. A linchpin of the Plaintiff's case is the Consent of 22<sup>nd</sup> July 1998 entered in Civil suit 225 of 1998. These are the terms of that consent:-

“Upon reading the application presented to this Honourable Court on the 11<sup>th</sup> day of June 1998 by the Counsel for the Applicant under order XXXIX Rules 1,2 and 3 of the Civil Procedure Rules, Order 50 Rule 7 and Section 3A Civil Procedure Act, Auctioneers Act 1996 and Rules made thereunder and the Transfer of Property Act and Upon reading the supporting affidavit of Harris Horn the Plaintiff's director sworn on 10<sup>th</sup> day of June, 1998 and the Defendant's grounds of opposition dated 8<sup>th</sup> July 1998 in opposition an Upon hearing both Counsels for the Plaintiff/Applicant and the Defendant/Respondent;-

It is ordered by Consent:-

THAT the Plaintiff do pay to the 1<sup>st</sup> Defendant the sum of Kshs.22,083,908.00 by instalments as follows:-

1. THAT the Plaintiff do pay the Defendant Kshs.7.4 million not later than 31<sup>st</sup> August 1998.
2. THAT a similar sum of Kshs.7.4 million be paid by 30<sup>th</sup> November 1998.
3. THAT the balance be paid by 31<sup>st</sup> December 1998.
4. THAT in default of any one of these instalments or party thereof on its due date, the 1<sup>st</sup> Defendant be at liberty to execute for such sums as are due and payable but are unpaid as aforesaid, without further application to this Court.
5. THAT the interim orders issued on 12<sup>th</sup> June 1998 be and are hereby extended until/and unless other or further orders on application”.

17. It is submitted by the Plaintiff that whilst this Consent was entered in the course of Interlocutory Proceedings, it was nevertheless a Consent judgement settling the entire dispute between the Plaintiff and the Defendant. No doubt a Consent entered at an Interlocutory stage is capable of finally determining issues in a suit. See the Court of Appeal decision in Specialized Engineering Co. Ltd Vs. Kenya Commercial Bank Ltd [1988] eKLR. The Court of Appeal observed as follows;

“In my opinion, a Civil suit can be compromised and that done, litigation is so far as the issues compromised are concerned, is at an end. The common law position is stated at page 403 paragraph 756 of vol. 30 of Halsbury’s Laws of England 3<sup>rd</sup> Edn as follows:-

*“All or any of the questions in dispute in an action may be settled between the parties by compromise without trial, and if such compromise is bona fide and validly entered into, the court does not allow the question so settled to be again litigated between the parties to the settlement”.*

As I have endeavoured to show, the main question in controversy between the bank and the appellant was, which of them was entitled to the furniture and fittings in dispute. Counsel for both parties having discussed this matter, reached an agreement. They therefore prepared and signed a consent order which they asked the Court to adopt. The Court did so and that compromise shows that the bank accepted that the appellant was entitled to the possession of those items and they conceded their right to remove them without interference.

The Judge also thought the issue which the appellant raised, cannot as a matter of procedural law, be raised by an interlocutory application. He must be wrong because I have already shown that a Consent order can properly be taken on an interlocutory application. If it can be taken at that stage, it can be asserted in interlocutory application”.

18. The Plaintiff asserts that the effect of the order was that the Plaintiff would pay Kshs. 22,083,908 in instalments by 31<sup>st</sup> December 1998 with liberty to the Defendant to execute in default. In support of the assertion that the Consent was a final determination of the issues, the Plaintiff makes reference to the Affidavit of Peter Bonyo made on behalf of the Defendant. In that Affidavit the deponent refers to the Consents of 14<sup>th</sup> July 1998 and 22<sup>nd</sup> July 1998 as Consent judgements. In addition there is an Affidavit of Catherine Muthiora, again, made on behalf of the Lender in which it is said that she admitted that the suit would be settled by the Consent dated 22<sup>nd</sup> July 1998.

19. The Plaintiff thinks that there is more that suggests that indeed the Consent had a finality. It is stated that in reaction to an affidavit made on behalf of the Plaintiff, the Defendant had confirmed that the actual debt was Kshs. 22,083,908 (see affidavit of Zipporah Mogaka of 2<sup>nd</sup> July 1998). This is the amount that the consent had required the Plaintiff to settle. Lastly there would be the affidavit of Damaris Gitonga of 24<sup>th</sup> November 2006 in which it is alleged that she had admitted that the redemption sum in the consent was Kshs. 22,083,908 payable by 31<sup>st</sup> December 1998.

20. The reaction of the Defendant to this argument is that the attempt by the Plaintiff to frame the interpretation of the order as a controversy is frivolous. The Defendant takes the position that the consent order has been interpreted by both the High Court and the Court of Appeal in several decisions. These decisions shall be discussed presently.

21. I have given an anxious consideration to this pivotal issue and take the following view. The backdrop to the entry of the consent was an attempt by the Defendant to exercise its Statutory Power of Sale and which attempt was expressed in a Notification of Sale dated 9<sup>th</sup> April 1998 (See Mr. Harris Horn's Affidavit of 10<sup>th</sup> June 1998 found in Defence Exhibit pages 513-517). Aggrieved by the Notice, the Plaintiff moved Court in HCCC 225 of 1998 and sought an order of Injunction to stop the realization process. It is common ground that the Consent of 22<sup>nd</sup> July 1998 was entered in an interlocutory session. Not agreed however, is the effect of that Consent.

22. Because of its centrality in resolving a substantial part of the matter at hand, this Court reproduces the consent;

“Upon reading the application presented to this Honourable Court on the 11<sup>th</sup> day of June 1998 by the Counsel for the Applicant under order XXXIX Rules 1,2 and 3 of the Civil Procedure Rules, Order 50 Rule 7 and Section 3A Civil Procedure Act, Auctioneers Act 1996 and Rules made thereunder and the Transfer of Property Act and Upon reading the supporting affidavit of Harris Horn the Plaintiff's director sworn on 10<sup>th</sup> day of June, 1998 and the Defendant's grounds of opposition dated 8<sup>th</sup> July 1998 in opposition an Upon hearing both Counsels for the Plaintiff/Applicant and the Defendant/Respondent;-

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2. THAT a similar sum of Kshs.7.4 million be paid by 30<sup>th</sup> November 1998.
3. THAT the balance be paid by 31<sup>st</sup> Decembe3r 1998
4. THAT in default of any one of these instalments or party thereof on its due date, the 1<sup>st</sup> Defendant be at liberty to execute for such sums as are due and payable but are unpaid as aforesaid, without further application to this Court.
5. THAT the interim orders issued on 12<sup>th</sup> June 1998 be and are hereby extended until/and unless other or further orders on application”.

Of course it is true that there will be occasion when an interlocutory consent is capable of determining the issues in a suit with finality. But if the finality of such a consent has to be accepted, then its terms must brook of no ambiguity. This is because of its significance to the dispute between the parties. Looking at the Consent, it does not seem unequivocal one way or other. It may have been better worded. And had it, then they would have been no controversy as to its true meaning and purport. It must be because of its lack of clarity that the parties hereto have had to look outside the Consent to construe it.

23. It is true that in an Affidavit sworn on 27<sup>th</sup> July 1999, Peter Obonyo made the following disposition;

*“That although there is a Consent judgement recorded on 14<sup>th</sup> July 1998 and 2<sup>nd</sup> July 1998, the first Defendant is currently exercising its statutory power of sale of the charged property. It is not true that the 1<sup>st</sup> Defendant is executing a decree by selling the charged property”*

The deponent baptizes the consent, 'a consent judgement'. But can that alone make the consent a final determination of the issues that were outstanding between the parties herein? Even when one looks at the entire disposition in that single paragraph, it is clear that the deponent does not accept that the 2 Consents precluded the Defendant from exercising its statutory power of sale. In other words the deponent does not accept that the consent was indeed a final determination of the matter. This Court would not, without more, find that because Mr. Obonyo referred to the Consent as a judgement then it was indeed a final determination.

24. Does the affidavit of Catherine Muthiora further the Plaintiff's argument? This is what she said;

"24. THAT on 2<sup>nd</sup> February 1999 this Honourable Court dismissed the Applicant's similar application for injunction. The present application based on the same Plaint filed by the Applicant is therefore "Res judicata" as it is made on a matter that had been settled by the consent of the parties. The Applicant sought to have filed a fresh suit to seek the injunction sought herein. The present application is made on a suit that was fully compromised by consent orders dated 22<sup>nd</sup> July 1998.

25. THAT as indicated to the Court by Mr. Osmond advocate on 14 February 2001, the case herein was settled by the Consent Order dated 22<sup>nd</sup> July 1998. The 1<sup>st</sup> Defendant awaits taxation of costs to enable them execute the decree but still reserves the right to realize the security herein. To date there has not been any application for execution against the applicant as the 1<sup>st</sup> Defendant has high chances of realizing the security for the benefit of its depositors who are waiting for the sale proceeds on account of their deposits held by the bank due to defaulters like the applicant herein."

I would agree with the Plaintiff that the impression created by the contents of this affidavit is that the Defendant had accepted the consent as settling the quantum of the Plaintiff's indebtedness to the Defendant. It must be borne in mind that the affidavit was in response to the Plaintiff's Application which included a prayer that the Court declares that all matters in dispute between the Plaintiff and the Defendant were resolved and fully compromised by the said Order. To be noted, however, is that the Plaintiff did not pursue this Application.

25. If that was all to the matter then the Plaintiff's argument would be unassailable. However, this Court has seen the affidavit of Mr. Harris Horn sworn on 26<sup>th</sup> July 1999 in support of an application for Review of the decision of 26<sup>th</sup> July 1999. In that affidavit he states,

*"There is an error on the face of the record when the Court considered that the consent judgement resolved the whole issue whereas in fact it only dealt with the principal. There is a further error on the record in that the Court confused the Defendant's Notice of sale as an execution of the consent judgement"*

By this affidavit, the Plaintiff was stating that there was only compromise on the question of the principal sum owed.

26. Both sides are guilty of approbating and reprobating!

27. But before considering the matter any further, this Court looks at 2 other affidavits. Zipporah Mogaka swore an affidavit on 2<sup>nd</sup> November, 2006. The Plaintiff picked out paragraph 16(1) thereof:-  
*"That it is not denied by the plaintiff in his affidavit that the sum of Ksh.22,083,908/stated by the plaintiff to be the debt, represents only the principal sum advanced, without interest at all"*

There can be no difficulty understanding what the deponent meant. It is not an admission that the consent precluded the Defendant from levying interest on the compromised sum.

28. The Affidavit of Damaris Gitonga was also pointed out as being an admission that the redemption sum in the consent was Ksh. 22,083,908/. This is what she says:-

*"The consent order page 45 of the application) of 22<sup>nd</sup> of July 1998 did not purport to take away the Respondents right of sale, but merely permitted the Applicant, if he so wished, to redeem the charged Property, latest by 31<sup>st</sup> December 1998, at an agreed sum of Ksh 22,083,908/,or to suffer the exercise of the power of sale, in default".*

Surely this cannot be interpreted to mean that, even in the event of default of the terms of the consent, the only amount that the Defendant could pursue was Kshs.22,083,908/.

29. In my own analysis both sides have on at least one occasion taken the position that the consent resolved the all issues between them. On other occasion, however, they have taken a diametrically different stance that the compromise was only in respect to the principal sum. These shifting positions does not help the Court resolve this all-important question. The Court must therefore look elsewhere in finding an answer. As noted earlier the consent is vague as to whether it compromises the suit and the issues in the suit in their entirety. The consent, granted, was entered in the context of an interlocutory application in which the Plaintiff sought to restrain the Defendant from exercising its Power of sale. Because the Consent is unequivocal then the context in which it was reached is important. At the time of entry of the consent, the Plaintiff was enjoying the protection of some interim orders. The last item of the consent extended those interim orders *"until other or further orders on application"*. What the consent did, in my view, was to give respite to the Plaintiff of a matter that had caused it anxiety, that is the threatened sale.

30. It is for this reason that there would be little difficulty in agreeing with the observation of Hon. Okwengu J (as she then was) in respect to the consent in a decision in HCC 225 of 1998 thus:-

*"Clearly, the Plaintiff herein, was not entitled to a fresh statutory notice as the consent order did not extinguish the early statutory notice, but merely suspended it. Moreover, the Plaintiff having failed to comply with the consent, the first Defendant was not obligated to execute the consent"*

31. At most, in my view, the consent represented a compromise of the principal sum and that the intended sale would be suspended as long as the Plaintiff kept to the terms of the consent. It did not take away the right of the Defendant to continue charging the contractual interest and neither did it curtail the right of the Defendant from exercising its Statutory Power of sale in the event of default. Not surprisingly Hon. Ransley Commissioner of Assize, had earlier, through a ruling dated 26<sup>th</sup> July 1999 declined the Applicant's plea seeking to stop the realization process after there was default of the consent judgement. In a short ruling the Commissioner had observed;-

*"There is no dispute that the Plaintiff took a loan from the 1<sup>st</sup> Defendant and indeed a Court order was recorded on the 14<sup>th</sup> and 2<sup>nd</sup> July 1998 in which the Plaintiff agreed to pay Kshs.22,083,908/- on or before 31<sup>st</sup> December 1998 which was not done nor has anything been paid since. In default of any instalment which it was agreed being paid the 1<sup>st</sup> Defendant was given liberty to execute. Orders stopping a sale was extended to 1.9.98 but ceased on the default of payment. The result is that there is now no nor restraining orders and hence this Application "*

Perhaps it needs to be noted that the Court of Appeal in a decision dated 23<sup>rd</sup> April 2010 endorsed the manner in which the Commissioner had resolved the issues before him. The Court of Appeal stated;

*"Lastly, even if the principles guiding the Court in application under rule 5(2)(b) were to be considered, still we would not be satisfied that the intended appeal is arguable as Ransley Js' Ruling clearly resolved the issues complained of and no appeal was preferred against the Ruling"*

32. On the first issue, I reach an answer that the consent of 22<sup>nd</sup> July 1998 only compromised the Principal debt to Kshs. 22,083,908/. The Defendant was entitled to levy the contractual rate of interest as the Plaintiff had breached the Consent. That leads to the next question as to whether the *in duplum* Rule is applicable to the compromised sum.

33. Section 44(A) of the Banking Act came into force on 16<sup>th</sup> May 2007. That Section provides;

“(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.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

“(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.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) In this section—

(a) “**debtor**” includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;

(b) “**loan**” includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and

(c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

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

Important for the matter at hand is whether the rule enacted in this section is applicable. It is common ground that the loan that was granted to the Plaintiff became non-performing way before the coming into operation of the rule. It being so, subsection (6) finds relevance to the capping of the interest of the debt herein. What the Court was unable to find was a demonstration by the Plaintiff that the Defendants breached this provision. What the Plaintiff had to prove was the Lender sought to recover more than double the amount that was owed in principal and interest on 16<sup>th</sup> May 2007(the Date the Section came into operation) .Yes, the Plaintiff has requested for an order of accounts in which the provisions of this rule would be applied. But an order for accounts is not sought in vacuum. A party seeking accounts must provide a basis for that request. The Plaintiff has been well aware of the claim by the Defendant before the filing of this Suit. That, once more, was set out in the Counterclaim. This Court has no evidence that the counterclaim is founded on an infraction of subsection (6).

34. Attention is now turned to the legality or otherwise of the sale of the charged property. The sale happened by way of private treaty in November 2012. By this time the Land Act, 2012 was in operation having commenced on 2<sup>nd</sup> May 2012. The argument by the Plaintiff is that the Defendant ought to have issued a fresh Statutory Notice because the consent redefined the redemption amount and that the *in duplum* rule applied. The argument appears to concede that a statutory notice had properly issued under the regime of Law before the commencement of the Land Act. Indeed there is evidence that a further statutory notice dated 9<sup>th</sup> August 2005 was served upon the Plaintiff on 20<sup>th</sup> September 2005(D Exhibit pages281-283).This was issued pursuant to the provisions of the Transfer of Property,1882. Whether or not a fresh statutory notice needed to be issued under the pre-2012 legal framework had been raised and resolved in at least one previous decision in HCC No. 225 of 1998. Hon Okwengu J (as she then was) had expressed the following opinion;

**“Regarding the issue of statutory notice, this was also a subject of the ruling of Ransley J, of 26<sup>th</sup> July 1999 wherein he made a finding that a notice of sale was given to the Plaintiff on the 4<sup>th</sup> April 1998. That finding remains binding. The question is whether, that statutory notice was extinguished by the consent order of 22<sup>nd</sup> July 1998. In the case of; Mbuthia vs Jimba Credit Finance Corp. & Another (1988) KLR 1, the court of Appeal states as follows:-**

**“It is plain that Section 74 did not impose on the chargee the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the chargor any time a sale was suspended to accommodate him. If such was a legal requirement, no chargee in his right mind will suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor.”**

**Although that case was dealing with statutory powers of sale under the Registered Land Act, the principle is the same and would in my view equally apply to a statutory power of sale under the Indian Transfer of Property Act.**

Even post 2012 the outcome would be the same because the consent order merely suspended the statutory notice Conterminous the interim orders. Having found that there existed a valid statutory notice that had been issued under the previous regime, there was no necessity for a fresh notice just because the defendant intended to effect that notice when the Land Act was operational.

35. An argument that the application of *in duplum* rule necessitated a fresh notice is an argument that the redemption amount which the sale sought to realize was erroneous. Unfortunately for the Plaintiff it has

not provided evidence of any such error. The non-issue of a fresh Statutory Notice on this argument is without merit.

36. That said, the Defendant would have to be worried of the implication of section 97(1) of the said Act. That provision reads ;

**“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a *lien* to obtain the best price reasonably obtainable at the time of sale”.**

Although I have found that in respect to statutory notice, there would have been no necessity for a fresh Sale Notice, the sale having happened when the provisions of the Act were in force, the Chargee needed to pay heed to the duty bestowed on it by section 97(1). Whilst testifying for the Defendant, Paul Chelanga admitted that on the date of the sale, the lender had relied on a valuation that was more than a year old. That it was 15 days outside a year. This admission was a confession that the Defendant had not observed the requirement of Rule 11 of the Auctioneers Rules which provides as follows;

**(1) A court warrant or letter of instruction shall include, in the case of—**

**(a) movable property—**

**(i) the decretal amount, date of decree, date of return to court or where there is no decree, the exact amount to be recovered as at a date not later than the date of the letter of instruction plus the estimated daily or monthly interest or rent to accrue thereafter;**

**(ii) the person amongst whom the decree is to be executed;**

**(iii) the exact location of goods;**

**(iv) the person to point out the goods;**

**(v) where ascertainable, a list of the goods to be attached or repossessed;**

**(vi) where appropriate, reserve prices or where there are to be no reserves prices, a record of the reasons for not selling subject to such reserve prices;**

**(b) immovable property—**

**(i) as in (i) to (v) in paragraph (a);**

**(ii) the land reference number, file number, plot number, or flat number, as the case may be;**

**(iii) the area in hectares or in square metres;**

**(iv) the user and any restrictions by statute or otherwise on the disposition of the property or any interest in it;**

**(v) the tenure and in the case of leasehold, particulars of the landlord and the annual land rent;**

**(vi) the location, and in the case of land situated within a township or municipality, the amount of the most recently available annual site value tax;**

**(vii) on accurate description of improvements and developments;**

**(viii) the names, and addresses of encumbrancers on the title together with— (aa) the estimated amount due to any encumbrancer; and (bb) the estimated amount of arrears of land rent rates and taxes;**

**(ix) the names addresses and titles of any persons in possession of the property to be sold or any part of it;**

**(x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.**

**(2) The letter of instruction shall be in the Sale Form 1 out in the Appendix. (my emphasis)**

In failing to do so the Defendant took a risk and had in fact breached a statutory duty.

37. Aggrieved by that conduct of the Defendant, the Plaintiff commissioned a firm of Valuers to return an opinion of the value of the property. Peter Githae Kibera (PW1) is a Valuer with the firm of LLoyd Masika which received instructions from the Plaintiff to carry out an open market and forced Sale valuation of Mwambeja Ranch. In the Report (Plaintiff's exhibit page 71 to 80), it is stated that the instructions were to carry out a valuation as at 30<sup>th</sup> of June 2012. However the property was inspected on 24<sup>th</sup> of March 2013. The opinion of the valuer was that the open market value was Kshs. 550 million and the forced sale value was Kshs.350 million.

38. There is uncontroverted evidence that the property was sold for Ksh. 305 million to Shimbaland Ranching Co.Ltd (D exhibit pages 475-482). The actual price paid was Ksh 256,159,660/-. This was because vast land made up of 13,000 acres was occupied by squatters. The evidence by the Defendant's witness was that, notwithstanding the amount paid by the purchaser, Plaintiff's account was credited for the purchase price of Kshs. 305 million.

39. The Plaintiff takes the position that the purchase price was an undervalue given that the value of the property at the date of sale was Kshs. 550 million. The Valuer was taken through an incisive cross examination. The property was a leasehold for 50 years from 1<sup>st</sup> May 1992. In the report it is stated that the opinion is based on the unexpired leasehold interest. The Valuer did admit that if the lease would not be extended then that would have an impact on the value. On the question of squatters, the Valuer did not ascertain the land occupied by them. However he thought that they were less than a hundred households. Notably however, the Valuer stated that the value returned did not consider the element of squatters.

40. The probative value, if any, that should be attached to this opinion has attracted a debate. I am urged by the Plaintiff that the evidence of an expert can only be challenged by the evidence of another expert (Dick Omondi Ndiewo T/A Ditech Engineering Service v CellCare Electronics [2015]eKLR). This Court is told that in the absence of an Expert to counter the report by Lloyd Masika, then the Court must accept it hook, line and Sinker. On the other hand, the Defendant asked me to be skeptical about the evidence by the Valuer. In this regard it was proposed that correct approach was that taken in Republic vs Akuthe[2006]KLR 466, in which the High Court held:-

“The evidence of an expert is a mere opinion which is not binding on the trial Court. The Court has to make its own independent evaluation and finding, notwithstanding the opinion of the expert. The Court has to examine the document itself, and such aid as can be furnished by experts, and come up to a conclusion”.

41. On the part of the Court, it finds no difficulty on the approach to take, thanks to the comprehensive consideration of the matter by my brother Hon Mativo J in Stephen Kanini Wangondu v The Ark Limited[2016]eKLR. The decision deserves an extensive quotation;

“While there are numerous authorities asserting that expert evidence can only be challenged by

another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this. Firstly, 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.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially, separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.

A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd vs. Minories Finance Ltd.* And another [13] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “if the reasons stand up the opinion does, if not, not”. A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion. Where there is a conflict between experts on a fundamental point, it is the Court’s task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning”.

42. Given that the Defendant failed to carry out a current valuation for purposes of the Sale as required by the law, this Court takes the view that question of the value of the property at the time of sale was inevitable. It was bound to be a live issue for determination. It indeed was. Only the Plaintiff bothered to provide Expert opinion on the value. The Plaintiff's Expert explained his opinion and how he arrived at the value. The Expert visited the property and obtained price comparisons from the Kwale District Valuer, a valuer in locality of the property. Although the Court was asked to disregard the value, no good reason was proffered as to why it should do. Of course it is true that the value given was historical but in the circumstances of the case, where no value as required by the law was taken at the time of sale, the method adopted by the Valuer was the only feasible method. Challenged as to the remainder of the lease, the Valuer explained that his opinion had accounted for it. This Court did not have the advantage of a contrary opinion that the value given after the lease period was considered was in fact incorrect.

43. It was nevertheless admitted by the Valuer that he did not discount for the area occupied by the squatters. As to that area, the only evidence available is that of the Defendant that the squatters occupied 13,000 acres. This area is not insignificant as it is about 1/8 of the area of the entire Ranch which is 81,182 acres. This land would not be available for the use and enjoyment of the landowner. While, for reasons I have stated, I give deference to the value reached by Valuer I cannot ignore his failing in respect to area occupied by Squatters. Its value needed to be discounted. A pro rata value of the area occupied by squatters would be 88,062,000/=. The true open market value of the property that would have been available to the Plaintiff is therefore Kshs.461,938,000/=. This Court has applied a pro rata value because the Valuer ignored any developments or improvements in the Valuation (see page 7 of the Report). The

valuation was on undeveloped land.

44. The obligation of the Defendant was to obtain the best price reasonably obtainable at the time of sale (Subsection 1 of section 97). And as the sale was by private treaty the Lender was required by Section 98(1)(d) to sale at the Market price. This is how the said provision reads;

**“If a chargee or a receiver becomes entitled to exercise the power of sale, that sale may be;**

**(a)**

**(b)**

**(c)**

**(d) by private contract at market price**

45. The Private Treaty was a Sale at Kshs.305,000,000/- .This is way short of the Market price. The Lender transgressed the clear provisions of the Law. For this breach the Plaintiff has sought damages. The Damages shall be the difference between the price at which the property was sold and the Market price.

46. I have made a finding even in the face of the argument by the Defendant that the issue of an undervalued sale was *res judicata*, Civil suit No.468 of 2011 (O.S). This is because the sale had not happened by the time the suit was filed.

47. This Court’s attention turns to the Counterclaim. The evidence is that after the sale of the property a substantial amount was still owing by the Principal Debtor to the Defendant. Statements of accounts shows that a sum of Kshs.1,729,747,185.91 was due after the sale (see D exhibit page 275). The accuracy of these accounts is not disputed or at any rate has not been disproved.

48. An important issue however arises as to whether the debt is not stale on account of the provisions of The Limitations of Actions Act. On this, I subscribe to the view that as long as a charge is subsisting and a debt for which the charge was taken remains unpaid the right of a Chargor to enforce its/his/her statutory remedies remain alive. In Rajnikantkhetshi Shah vs. Habib Bank A.G. Zurich [2016]eKLR Hon. Gikonyo J. had held,

“These arguments are quite robust and useful, but one matter stands out and is agreed by both parties; That the Charge herein still subsisting on the suit property. In my considered opinion, as long as the charge is subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive”

49. Under the Provisions of section 67 of the Repealed Transfer of Property Act, the mortgagee has a right to sue the mortgagor for the mortgage money where the mortgagor binds himself to repay(subsection 68(a)).The Land Act has similar provisions(section 91(1)).Under clause 1 of the Charge instrument the Plaintiff bound itself to repay the mortgage sum.

50. The Defendant elected to first sell the charged property. The Sale was on 15<sup>th</sup> November 2012. The Defendant was thereafter entitled to seek recovery of what remained owing by way of civil action. As against the principal debtor and the Guarantor by way of charge, the time for recovery by way of civil action, for purposes of Limitation started to run from the date of Sale. This is the date the Defendant had exercised its Statutory Power of Sale. The Counterclaim for the outstanding debt was mounted on 31<sup>st</sup> January 2014. This was well within the 6 years bar for Actions founded on contract (Section 4(1) of The Limitation of Actions Act).

51. But the Counterclaim does not only target the principle Debtor and Mwambeja (the Guarantor by way of charge). It is also a claim against Majani Mingi Sisal Estate Limited, Lomolo (1962) Limited and Harris Horn Junior named as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the Counterclaim respectively. The claim against these three Defendants is for Kshs.30 million and interest secured under Guarantees made by them from the date of institution of the Counterclaim until settlement in full.

52. The trio separately gave Guarantees for the sum of Ksh.30 million together with interest thereon in support to the facility granted by the Defendant to principal Debtor (see D Exhibit pages 102-125.) Unlike that of the Plaintiff these Guarantees were not supported by any charge or security. There is evidence that, upon default by the principal Debtor, the Guarantees were called in against them, together with the Plaintiff; in separate letters all dated 13<sup>th</sup> September 1994 (D Exhibit pages 148, 149, 150 and 151). The Demands called in the Guarantees within 15 days of the letters. As against the three (Majani Mingi Sisal Estate Limited, Lomolo (9162) Limited and Harris Horn Junior), time for purposes of the statute of limitation started to run on the expiry of the Demand Notice (ie. 27<sup>th</sup> September 1994 or thereabout) and I have to find that the Counterclaim mounted against them 20 years later is time barred. In this respect I uphold their Defences of Limitation.

53. The Principal Debtor has no answer to the Counterclaim but as for the Plaintiff it is argued that its exposure was limited at Kshs.30,000,000/=. For this argument the decision of Hon. Ochieng J. in **Javaid Iqbal Khan & another vs. Iqbal Transporters Limited & another [2016] eKLR** was cited, where he held:-

**24. I agree with the decision of Gikonyo J. in Rajnikantheshi Shah vs Habib Bank A.G. Zurich HCCC No. 246 of 2011, when he said;**

**“...more trouble arises where the guaranteed sum is of a specific sum and the principal debt is for a larger sum. In such a situation, the law is that, unless otherwise provided, where a guarantee limits the guarantor’s liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt as the principal debtor.”**

**25. I do not understand the plaintiffs to be asserting that the bank has demanded that they settle the entire debt of the principal debtor.**

**26. The bank has at all times asked the plaintiffs to pay Kshs. 12,000,000/-, together with interest from 8<sup>th</sup> October 2012. That situation is comparable to that in R. Shaw vs Habib Bank A.G. Zurich HCCC No. 246 of 2011, in which Gikonyo J said;**

**“In the case before me, the guarantee was given in form of a legal charge and was for a fixed amount of money of Kshs. 5,000,000/- together with interest. As such, whether the chargor is a guarantor or both guarantor and principal debtor, his liability is to the sum fixed in the charge.”**

**27. If the guarantor pays to the bank the sum of Kshs. 12,000,000/- together with interest from 8<sup>th</sup> October 2012, the bank would be obliged to discharge the charge. By insisting that the sum be paid by the guarantor, the bank was not clogging the equity of redemption.**

54. The Plaintiff herein guaranteed the principal debt by way of a charge and a Deed of Guarantee and Indemnity. In the Charge the Plaintiff made a commitment as follows:-

(1) The Borrower do hereby covenant and agree with the Lender to pay to the Lender:

(a) On the 30<sup>th</sup> day of August One Thousand nine hundred and Ninety Two next (hereinafter called “the Legal Date of Redemption”) to pay to the Lender such sum not exceeding Kenya Shilling THIRTY MILLION ONLY (Kshs. 30,000,000/-).

Then be due and owing by the Borrower to the Lender whether in respect or moneys advanced or paid to or for the use or the Lender or charges incurred on the account of the Lender for any moneys whatsoever which then be due and owing by the owner to the Lender either as principal or surety and either solely or jointly with any other person or persons in partnership or any company society or corporation or in any other matter whatsoever or otherwise however or for any actual or contingent liability together with commission and other usual bank charges law and other costs charges and expenses and together with interest at such rate or rates (subject to a minimum of Twenty (21%) per centum as the Lender shall in its sole discretion from time to time decide with full power to the Lender to charge different and penal rates for different accounts such interest to be calculated on daily balances and debited monthly by way of compound interest PROVIDED ALWAYS that the Lender shall not be required to advise the Borrower prior to any change in the rate of interest so payable not shall any failure by the Lender to advise the Borrower as aforesaid prejudice in any way howsoever the recovery by the Lender of interest charged subsequent to any such change”.

55. The Plaintiff was described as the borrower and covenanted to pay a sum not exceeding Khs.30,000,000/= together with Bank charges, other costs, charges , expenses and interest.

56. I have not understood the decision in **Javaid Iqbal Khan** (*supra*) to be proposing that where a Guarantor covenants to pay an amount specified in the charge plus interest thereon then the Guarantors obligation is only limited to the Principal sum stated in the charge. Indeed in paragraph 27 Hon. Ochieng J. holds,

“If the Guarantor pays to the Bank the sum of Khs.12,000,000/- together with interest from 8<sup>th</sup> October 2012, the Bank would be obliged to discharge the charge. By insisting that the sum be paid by the Guarantor, the Bank was not clogging the equity of Redemption”.

57. Yet I need to say this, the holder of a Guarantee is obliged to call in a Guarantee immediately the event upon which Guarantee is predicated happens. If for instance the event is default of repayment of a debt, the Lender should call in the Guarantee as soon as the default occurs. The Lender should not permit the debt to balloon on interest before issuing a notification of default and demand. A delayed demand can be viewed as inequitable.

58. The circumstances here are that a 14 day Demand was issued by the Defendant to the Plaintiff on 13<sup>th</sup> September 1994. The debt then stood at Kshs.44,505,250.90(interest having been last applied on 6<sup>th</sup> September 1994 (D Exhibit page 150). I have not heard the Plaintiff assert that there was undue delay in the call up of the Guarantee. There is evidence on the other hand that the Plaintiff failed to make the payment demanded and through well-orchestrated Court litigation delayed the sale of the charged property for over 18 years after the Statutory Notice was issued. Indeed, this abuse of Court process by the Plaintiff attracted the following comment by the Court of Appeal in Civil Application No.40 of 2008,

“The history of this matter demonstrates the extent to which Court process can be abused by parties in order to defeat the ends of justice from being realized. The record shows a sad disregard for the interest of justice as selfish ends are being pursued”.

The debt has over the years of delay caused by the Plaintiff grown by leaps and bounds. The amount now sought by the Lender is in excess of Khs.1,694,7674,615.13. The Plaintiff only has itself to blame for this overly grown debt.

59. As to the extent of the liability of the Plaintiff and the principal debtor, the Plaintiff had submitted that it was incomprehensible that the Lender was counterclaiming Khs.1,694,676,615.13 from the Plaintiff but a lesser sum of Kshs.307,327,455.15 from the Principal Debtor. If that was true then it would indeed be absurd. However a close look at the Defendants’ pleadings reveals a somewhat different position. The amount sought from the principal Debtor is Kshs.307,324,55.15 at 1<sup>st</sup> May 2001 with further interest at reserved Commercial rate up to 1<sup>st</sup> December 2012 less the sale proceeds of Ksh.305 million and further

interest thereon at Court commercial rates until payment in full.

60. The parties will have to work out this amount after factoring in interest and giving credit for the sale proceeds with a view to determining whether it falls short or exceeds Kshs.1,699,676,615.13. Should the amount exceed Kshs.1,694,676,618.13 then the Lender will not be entitled to more than this sum from the Plaintiff as it had pleaded that amount. Should it be less, then both the Principal Debtor and the Plaintiff will be liable to the smaller amount as the indebtedness of the Plaintiff cannot exceed that of the Principal Debtor.

61. In conclusion the Court deals with one issue raised by the Lender. In paragraph 4 of the Amended Defence, it is pleaded:-

**“4. The Defendant will at the appropriate opportunity apply for orders for provision of security for costs of this suit, legal instruments of the Plaintiff and its associated companies (sued in the counterclaim), and the lifting of the company veil of the aforesaid inter-related companies with common directorship and shareholding on the grounds that:-**

**a) At all material times Harris Harrison Horn Senior (now deceased) and his son Horn Junior (hereafter called the 4<sup>th</sup> Defendant) were the only common directors and shareholders of the aforesaid companies.**

**b) The companies are being directed contrary to law with a membership below the prescribed minimum following the recent demise of Harris Horn Senior.**

**c) These are Shell Companies, long defunct, indigent, and with neither a place of business, attachable assets nor any business activity.**

**d) The Companies have for a long time failed to submit annual returns contrary to law, as a result of their ceasing to carry on any activity.**

**e) The Defendant therefore avers that the 4<sup>th</sup> Defendant, who is sued in the Counterclaim, is personally liable for the costs of defending the suit on a full indemnity basis for unnecessarily and wrongly dragging the Defendant into these proceedings without any justifiable cause.**

62. This is reiterated in the Counterclaim and one of the Prayers bespoken by the Defendant is for an order for the lifting of the Corporate veil against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants to the Counterclaim and that the 4<sup>th</sup> Defendant in the Counterclaim be responsible for costs of defending the Plaintiffs suit on a full indemnity basis. It is therefore inescapable this Court decides whether the Lender has made out a case for lifting of the veil.

63. Following *Palmers Company Law* Vol 1(22 ed), Wambuzi Jsc in a Ugandan case of Mugenyi & Company Advocates v. Attorney General [1999] 2EA 199 at pages 205 and 206 lists 10 instances in which the veil of corporate personality may be lifted. These are:-

**1. Where Companies are in the relationship of holding and subsidiary Companies.**

**2. Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder.**

**3. In certain matters relating to taxation.**

**4. In the law relating to exchange control.**

**5. In the law relating to trading with the enemy.**

**6. In the law of merger control in the United Kingdom.**

**7. In the competition of the European Economic Community.**

**8. In abuse of law in certain circumstances.**

**9. Where the device of incorporation is used for some illegal or improper purpose and;**

**10. Where the private company is founded on personal relationship between the members.**

However, the good Judge offers a word of caution that all may not be applicable to Uganda (just like Kenya) because the Statutory Law in England may be different.

64. The lender proposes the lifting of the veil on 4 grounds set out in paragraph 4 of the Amended Defence (These are reproduced in paragraph 61 of this decision). Harris Horn Jnr has not accepted those grounds and the Lender bore the onus of proving each one of them.

65. On the ownership of the Companies, Harris Horn Jnr had testified,

“The Plaintiff is owned by 5 Defendants. The 2<sup>nd</sup> shareholder is my father and myself. The 5<sup>th</sup> Defendant is owned by Lomolo (1962) Ltd. And my father and me are Directors. Mwembeja is not active only Lomolo. We are people behind these companies and are related”

66. An allegation by the Lender was that the Companies were being directed contrary to law with membership below the prescribed minimum following the demise of Horn Senior. In the entire evidence before the Court the issue as to whether or not the membership of the Companies fell below the prescribed minimum does not feature. And the Lender’s lawyer does not take it up in the opportunity presented by the cross-examination of Harris Horn Jnr. This allegation stands unproved.

67. The same can be said about the contention that the Companies have for a long time failed to submit annual Returns contrary to law as a result of their ceasing to carry on any activity. There was no evidence of an infraction of the said law by the Companies.

68. As to whether the Companies are a shell, long defunct and indigent, there was an admission by Harris Horn Jnr that only Lomolo (3<sup>rd</sup> Defendant) was active. What was not proved was that the defunct Companies have been deliberately driven into inactivity for some illegal improper or fraudulent purpose or so as to avoid their legal obligations.

69. In a word, no evidence has been placed before the Court to warrant it to look behind the legal persona of the Companies.

70. This now is the outcome.

71.1 The Court declares that the Sale of LR.No.16659 (CR.No.22939) for the sum of Kshs.305,000,000 was at an undervalue and below the market value of Kshs.461,938,000/= and the Defendant shall indemnify the Plaintiff for the difference being Kshs.156,938,000/-. This amount shall attract interest at Court rates from the date of filing of this suit.

71.2 All the other prayers in the Plaint are dismissed.

71.3 Judgement is entered in favour of the Defendant as against Mwambeja Ranching Company Limited (the 1<sup>st</sup> Defendant to the Counterclaim) and Project Advisory Services Limited (the 5<sup>th</sup> Defendant to the Counterclaim) jointly and severally for the sum of Kshs.307,327,455,455.15 as at 1<sup>st</sup> May 2001 with further interest at reserved commercial rates up to 1<sup>st</sup> December 2012 less the sale proceeds of Kshs.305 Million, and further interest thereon at Court commercial rates until

payment in full BUT which sum shall not exceed Ksh.1,694,676,615.13.

71.4 To whatever sum shall be due from Mwambeja Ranching Company Limited under paragraph 71.3 above credit shall be given for the Sums due to it under paragraph 71.1.

71.5 The Defendants Claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the Counterclaim is hereby dismissed with costs.

71.6 As the Plaintiffs claim partly succeeded and partly failed each party shall bear its own costs.

71.7 The costs of the Counterclaim shall be to the Defendant as against Mwambeja Ranching Company Limited and Project Advisory Services Limited.

**Dated, Signed and Delivered in Court at Nairobi this 29<sup>th</sup> Day of November, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Wawire holding brief for Gichuhi for the Plaintiff

Odhambo for the Defendant

Alex - Court clerk