



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

**CIVIL CASE NOS. 12 OF 2009 CONSOLIDATED WITH 393 OF 2005**

GEORGE WILLIAMS OMONDI.....1<sup>ST</sup> PLAINTIFF

GETRUDE ATIENO OMONDI.....2<sup>ND</sup> PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT

GEOM HOLDINGS (K) LIMITED..... 2<sup>ND</sup> DEFENDANT

OYSTER COURT LIMITED..... 3<sup>RD</sup> DEFENDANT

**JUDGEMENT**

**Plaintiff's Case**

1. In these consolidated suits the plaintiff pleaded that at all material times the 1<sup>st</sup> Plaintiff was and is still the registered proprietor of L.R Number Nairobi Block 72/960 and L.R No.209/12823/6, the suit properties, while the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were at all material times the joint registered proprietors of L.R No. 209/10722/91.
2. On or about the 23<sup>rd</sup> September 2002 the 1<sup>st</sup> Defendant took over the affairs (assets and liabilities) of the now defunct Co-operative Merchant Bank (hereinafter “the Bank”) and by a gazette notice No. 6404 issued on the 4<sup>th</sup> October 2002 pursuant to the provision of Section 9 of the **Banking Act**, the minister for finance authorized and sanctioned the merger. The 1<sup>st</sup> defendant therefore was sued in these proceeding as the successors of the said Bank.
3. By a letter of offer dated 23<sup>rd</sup> March 1998 (hereinafter “the 1<sup>st</sup> Agreement”) the 1<sup>st</sup> Defendant offered to provide the 2<sup>nd</sup> defendant (hereinafter referred to as “the Company”) loan facility in the sum Kshs 6,000,000.00 on condition that the Company would provide suitable security to cover the facility. The plaintiffs pleaded that the amongst the securities that the 1<sup>st</sup> defendant demanded from the Company were the Company’s directors personal guarantees and a 1<sup>st</sup> legal charges over L.R No.209/12823/6 to be registered and stamped to cover Kshs 3,000,000.00, and L.R No. 209/10722/91 to be registered and stamped to cover the other Kshs 3,000,000.00.
4. It was contended that the charges which were intended to be created were guarantee charges. However, in breach of the terms of the letter of offer dated 23<sup>rd</sup> march 1998 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants deliberately and with intent to deceive failed, neglected and /or refused to draw a directors’ personal guarantee for execution by the plaintiffs. It was contended that as a guarantee

- charge, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants could not alter the terms and conditions of their engagements without prior notice to the plaintiffs.
5. It was the Plaintiffs' case that by the 1<sup>st</sup> Defendant's takeover of the now defunct Co-operative Merchant Bank vide a gazette notice No 6404 without prior notice to the Plaintiffs, the contractual position between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was altered to the detriment of the Plaintiffs and thus further breaching the terms of the agreement between the plaintiffs and the Defendants.
  6. It was pleaded that the 1<sup>st</sup> defendant proceeded to open a new account for the Company without notice to the Plaintiffs thus further breaching the terms of the agreement between the Plaintiffs and the Defendants. In further breach of the terms of the guarantee charge purportedly executed by the plaintiffs in favour of the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant by a subsequent letter of offer dated 10<sup>th</sup> may 1999, (hereinafter "the 2<sup>nd</sup> agreement") the bank in replacement of, and not addition to the letter of offer dated 23<sup>rd</sup> march 1998, made the following offers;
    - a. To advance the company a further Kshs 10,000,000.00;
    - b. To discharge the charges in the first agreement and prepare fresh first legal charges on the securities for the following amount;
      - i. L.R No. 209/12823/6; Kshs 10,000,000.00
      - ii. L.R No. 209/10722/91; Kshs 3,000,000.00
    - c. Required the company to provide a further security with a limit of Kshs 3,000,000.00.
  7. It was however the plaintiffs' case that the chargors were neither consulted nor informed of the agreements between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hence the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant opted to alter their contractual agreements without informing the plaintiffs. It was averred that the Company accepted the offer and duly executed the said letter of offer thereby varying and setting aside the first agreement, executed and returned fresh charges presented by the Bank's Attorney's and entered into a new agreement with the Bank. By its letter dated 29<sup>th</sup> February 2000, the Bank acknowledged discharging the said purported charges; the intention was to create fresh legal charges over the securities and also confirmed the acceptance of the terms of the agreement by the Company.
  8. The Plaintiffs stated that as a result of the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants altered their positions so much that the Plaintiffs as guarantee chargors were discharged from their obligations to the Defendants and as at 23<sup>rd</sup> of October 2001 before the 1<sup>st</sup> defendant herein took over the operations of the Bank, the 1<sup>st</sup> Defendant as a complete stranger to the agreements between the Plaintiffs and the Bank directly dealt with the Company without prior notice to the Plaintiffs, thus discharging the Plaintiffs from their obligations.
  9. However, it was the Plaintiffs' case state that in breach of terms of agreement of the guarantee charge, and the provisions of the **Companies Act** Cap 486 of the Laws of Kenya, the chargee illegally and unlawfully transferred the company charges created herein to a Co-operative Society registered under the **Co-operative Society Act**. It was their case that the 1<sup>st</sup> Defendant was incorporated as a company on 3<sup>rd</sup> July, 2008 under registration No. C 23/ 2008 and prior to that date, the 1<sup>st</sup> Defendant was registered as a Co-operative Society under the **Co-operative Society Act** under registration No. 1530 of 1965.
  10. It was pleaded that the 1<sup>st</sup> Plaintiff gave his property LR Number Nairobi/Block 72/964 as further security as agreed under the terms of the 2<sup>nd</sup> agreement but while unaware of the new terms of agreements between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 1<sup>st</sup> Defendant purported to send to the Plaintiff a notice allegedly demanding for a payment of Kshs. 70,149,400.50 with respect to L.R No. 209/ 12823/6, 209/10722/91 and Nairobi block 72/964 respectively. However, the 1<sup>st</sup> Defendant had by then not attempted to recover any outstanding amounts from the principal borrower, the Company.
  11. The Plaintiffs stated that in breach of the terms of the Agreement between the Plaintiffs as

- guarantees chargors up to a maximum amount of Kshs 6,000,000/= the 1<sup>st</sup> Defendant unilaterally advanced to the Company an amount of money over and above that was initially agreed thus further discharging the Plaintiffs from their obligations.
12. It was therefore the Plaintiffs' case that the Statutory Notices served upon the Plaintiffs were unlawful, unprocedural and a nullity. Despite that on or about the 30<sup>th</sup> May 2007, the 1<sup>st</sup> Defendant purported to exercise its power of sale of the 1<sup>st</sup> Plaintiff's L.R. No. 209/12823/6 by Public Auction though the same did not materialize due to a court injunction in HCCC No. 393 of 2005 between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. Subsequently, no advertisement was carried out by the 1<sup>st</sup> Defendant and no Notification of Sale was ever given to the 1<sup>st</sup> Plaintiff on any subsequent sale of his property, L.R. No. 209.12823/6. However, on or around the 13<sup>th</sup> October, 2008, the 3<sup>rd</sup> Defendant purported to evict the Plaintiffs from L.R. No. 209/12823/6 allegedly claiming ownership of the property and alleged that the Plaintiffs owed the 3<sup>rd</sup> Defendant rent arrears of Kshs 120,000/= which allegation the Plaintiffs refuted.
13. To the Plaintiffs, they learnt of the purported sale of L.R. No. 209/12823/6 to the 3<sup>rd</sup> Defendant on the 13<sup>th</sup> October, 2008 when the 3<sup>rd</sup> Defendant without any valid court order evicted the 1<sup>st</sup> Plaintiff from the subject property hence the Plaintiffs' claim for damages for unlawful eviction against the 3<sup>rd</sup> Defendant.
14. To the plaintiffs, the purported sale of L.R. No. 209/12823/6 by the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant was illegal, fraudulent and in violation of the provisions of the law, and was procured through the 1<sup>st</sup> Defendant's misrepresentations and non-disclosure of material facts which were particularised as:
- a. Selling the property L.R. No. 209/12823/6 to the 3<sup>rd</sup> Defendant by Private Treaty in violation of the law.
  - b. Selling the property L.R. No. 209/12823 to the 3<sup>rd</sup> Defendant at a price of Kshs. 10,500,000/=, and which price was fixed by the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant through collusion way before actual date of sale.
  - c. Failing to advertise and issue Notices of the Intended Sale of L.R. No. 209/12823/6 to the Plaintiffs before any sale was effected.
  - d. Selling L.R. No. 209/12/823/6 in exercise of an illegal and void statutory notice of sale.
  - e. Demanding unconscionable Kshs 70,149,400.00 against a guarantee charge of limit of Kshs 6,000,000.00 without any lawful explanations.
  - f. Purporting to exercise a statutory power of sale based on a charge document whose execution was done by a stranger who had no proprietary rights to the property.
  - g. Purporting to exercise a statutory power of sale based on a charge devoid of a mandatory charging clause.
  - h. Purporting to exercise a statutory power of sale based on a charge whose contents were not explained to the 1<sup>st</sup> Plaintiff by the 1<sup>st</sup> Defendant's Advocates who drafted the charge document as is required by law.
  - i. Registering a charge document with the Land's Office while knowing very well that the Plaintiffs did not understand the consequences of the same.
  - j. Failing to inform and notify the Plaintiffs of the 2<sup>nd</sup> Defendant's inability to fulfil its obligations to the 1<sup>st</sup> Defendant.

- k. Lending to the 2<sup>nd</sup> Defendant for a term of 8 years while knowing very well that it was against the law.
  - l. Charging the interest not agreed on in the purported charge document.
  - m. Fraudulently selling the 1<sup>st</sup> Plaintiffs' L.R. No. 209/12823/6 at a low price of Kshs 10,500,000/= whereas the property was valued at Kshs 28,000,000/=
15. It was further contended that the action by the 1<sup>st</sup> Defendant to demand Kshs. 70,149,400.00 from them was fraudulent and meant to fetter the Plaintiffs equity of redemption in that whereas the 1<sup>st</sup> Defendant demanded from the Plaintiffs Kshs. 70,149,400.00 on or around 5<sup>th</sup> November 2008, the 1<sup>st</sup> Defendant sold L.R. No. 209/10722/91 to one of its Directors for Kshs 4,000,000/= and discharged the Plaintiffs L.R. No. 72/964.
16. By accepting Kshs. 4,000,000/= from the Plaintiffs' L.R. No. 209/10722/91 and discharging the Plaintiffs' L.R. No. 72/964 without any conditionality, the Plaintiffs averred that the 1<sup>st</sup> Defendant was by implication not entitled to demand from the Plaintiffs Kshs 70,149,400/= from the onset.
17. The Plaintiffs disclosed that on or about the 8<sup>th</sup> May 2003 the Bank without any legal capacity and or authority or first giving notice or obtaining the Plaintiffs' authority or consent purported to convey the charges over LR No. 209/12823/6, L.R. No. 209/10722/91 and L.R. No. 72/964 to the 1<sup>st</sup> Defendant herein and the Chargee registered the deed of conveyance aforesaid in favour of the 1<sup>st</sup> Defendant. The Plaintiffs contended that the transfers and registrations were fraudulent and were carried out without any legal authority and capacity, the same having been discharged by the unilateral decision of the 1<sup>st</sup> Defendant to alter its terms of Agreement with the Company. In their view the particulars of fraud were:
- a. Discreetly conveying charges to the 1<sup>st</sup> Defendant without giving notice.
  - b. Conveying the charges knowing very well that the same had been varied set aside and discharged in the 2<sup>nd</sup> Agreement.
  - c. Conveying the charges and purporting to register the same knowing very well that it had no legal capacity to do so.
  - d. Conveying the charges to create a purporting statutory power of sale to the 1<sup>st</sup> Defendant which is knew or ought to have known was not in existence
  - e. Conveying the charges to undermine and frustrate the Plaintiffs equity of redemption.
  - f. Varying the interest rate on the principal borrower, the 2<sup>nd</sup> Defendant herein, without informing the Plaintiffs.
  - g. Donating the purported Power of Attorney and conveying the charges with the intention of carrying out illegal activities and going against the grain of its Agreement with the Plaintiff herein.
  - h. Conveying the charges with the intention of unlawfully taking the Plaintiff's suit properties and consequently selling them.
  - i. Exercising statutory powers of sale over charges which were drawn in violation of Section 34 and 35 of the *Advocates Act*.
  - j. Exercising Statutory Power of sale over charges drawn in violation of Section 69(4)(a) of the *Transfer of Property Act*.

18. The Plaintiffs averred that as a direct consequence of the Defendants' breaches, the Plaintiffs suffered loss and damage wherein the Plaintiffs were deprived of their properties worth Kshs. 50,000,000/=. To them, the preparation, execution and registration of the transfer documents were in breach of statutory provision of the law and were void and null and should therefore be cancelled and set aside.
19. Although the 1<sup>st</sup> Plaintiff filed HCCC No. 393 of 20005 against the 1<sup>st</sup> Defendant, while the case was still pending, the 1<sup>st</sup> Defendant proceeded and sold the 1<sup>st</sup> Plaintiff's L.R. No. 209/12823/6 to the 3<sup>rd</sup> Defendant herein thus necessitating the second suit.
20. As a result the Plaintiffs sought the following orders:
- a. A declaration that the charges created over L.R No. 209/10722/91, 209/12823/6 and Nairobi Block 72/964 are illegal null and void.
  - b. A declaration that the transfer of charges dated 8<sup>th</sup> May 2003 over LR No. 209/10722/91, 209/12823/6 and Nairobi Block 72/964 from Co-operative Merchant Bank to Co-operative Bank of Kenya are illegal null and void.
  - c. An order that the sale LR NO. 209/12823/6 to the 3<sup>rd</sup> Defendant be declared null and void and cancelled.
  - d. Mandatory injunction directing the Defendant to release titles of LR Nos. 209/12823/6 and 209/10722/91 to the Plaintiffs.
  - e. General damages
  - f. Costs of the suit together with interests thereon at court rates.
  - g. Such other of further orders as the court may deem just to grant in the interest of justice.
21. In support of the suit the 1<sup>st</sup>, Plaintiff, **George Williams Omondi**, testified as PW1. According to him, sometimes in the first quarter of 1998 the Company approached the Bank for a loan of Kshs 6,000,000.00 which was duly given vide a letter of offer dated 23<sup>rd</sup> March, 1998 by which the said Bank agreed to advance the Company the said sum on the security of personal guarantees and legal charge over LR 209/12823/6 to be registered and stamped to cover Kshs 3,000,000.00 and LR 209/10722/91 in respect of the other sum of Kshs 3,000,000.00. The said properties, it was averred, were registered in the names of the Plaintiffs who are husband and wife respectively and directors of the Company.
22. It was confirmed that the said sum was disbursed to the Company despite the fact that the guarantees were neither prepared nor signed. It was however confirmed that a charge for the sum of Kshs 3,000,000.00 was duly registered with the Lands Office. Subsequently, however the charge was varied to read first legal charge instead of a guarantee charge. There was however another letter of offer dated 19<sup>th</sup> May, 1999 which though not copied to PW1 and not signed by him was the basis of a further disbursement of Kshs 7,000,000.00. However as the Company defaulted in repayment, the guarantor's security was sold by the 1<sup>st</sup> Defendant following a demand notice dated 6<sup>th</sup> November, 2006 for the sum of Kshs 70,149,400.50. According to the witness he only charged his property for the sum of Kshs 3,000,000.00. However the property was sold by public auction without his knowledge or consent and a sum of Kshs 10,500,000.00 recovered though the 1<sup>st</sup> Defendant never accounted for the balance. It was further contended that one of the two remaining properties was sold for the sum of Kshs 5,000,000.00 while the other property was returned following a purported unexplained reduction of the debt to Kshs 14,500,000.00 from the initial sum of Kshs 70,149,400.50. It was the evidence of the witness that the said excessive sum was meant to clog his equity of redemption.
23. Referred to the valuation report by Prudential Valuers the witness testified that though the report valued the property in the sum of Kshs 14,800,000.00 and further indicated that the property was charged for the sum of Kshs 8,000,000.00, there was no such charge as he was only aware of the

- charge for Kshs 3,000,000.00. In his evidence, the 1<sup>st</sup> Defendant increased the guarantor's liabilities for a sum not supported by the charge document.
24. According to him, he neither participated in the auction nor was he aware of the list of the bidders. Further, the copy of the charge produced by him was different from that relied upon by the 1<sup>st</sup> Defendant hence the same was fraudulent. He asserted that he never executed any assignment of the charge from the Bank to the 1<sup>st</sup> Defendant a process which according to him prejudiced him by making him lose his assets. It was his evidence that on the property were flats which were 60% complete.
25. The witness stated that whereas the Bank was a company, the 1<sup>st</sup> Defendant was a society registered in 1995 but was incorporated on 3<sup>rd</sup> July, 2008.
26. The 1<sup>st</sup> Plaintiff therefore prayed for the orders sought in the plaint.
27. In cross-examination by **Mr Echesa**, learned counsel for the 1<sup>st</sup> Defendant, PW1 stated that the Bank was taken over by the 1<sup>st</sup> Defendant but he was not informed of the transaction. In his view his transaction was with the Bank though he confirmed that the take over was approved by the Minister for Finance pursuant to the **Banking Act** provisions as indicated in the Kenya Gazette. He reiterated that the 1<sup>st</sup> Defendant was incorporated in 2008 and prior to its incorporation what was in existence was a co-operative society. He therefore testified that he had a contract with the Co-operative Merchant which was transformed into Co-operative Society. In his view the resolutions of the Merchant Bank were a misrepresentation since one was a Co-op Society while the other was a limited liability company. He affirmed that the 2<sup>nd</sup> Plaintiff was his wife and they were and are still directors of the Company which was the borrower. He confirmed that the resolution to borrow was done by the directors of the company, himself and the 2<sup>nd</sup> plaintiff, who were the guarantors of the borrowing of Kshs 6,000,000.00.
28. Referred to both the 1<sup>st</sup> charge dated 28<sup>th</sup> April 1998 and the second charge dated 28<sup>th</sup> April, 1998, he confirmed that he executed both. He also confirmed that he executed the last charge dated 13<sup>th</sup> July, 1999.
29. In his evidence LR No. 209/12823/6 was sold to the 3<sup>rd</sup> Defendant by private treaty in the sum of Kshs 10.5 million though the same was valued at Kshs 28 million. He however confirmed that the valuation which placed its value at Kshs 28 million was not exhibited by him. He confirmed that his postal address was 54379 and that it was the same address for the Company. He stated that the interest rate was to be negotiated with the guarantor. Whereas according to him, the rate was varied, he did not have the information with him. He however confirmed that the charges had no mandatory charging clause.
30. According to the witness he got the charges from the bank. He however confirmed having heard of the firm of Wasuna & Co. Advocates. Whereas one of the charges was drawn by an advocate, it was his evidence that the rest were not drawn by advocates. In his view the charges exhibited by him were complete. He asserted that contrary to the law the lending which was done for 8 years since lending on the basis of a guarantee was illegal. Further the charge instrument was executed by a stranger though it had 2 signatures.
31. The witness however confirmed that the Company was served with statutory notices. According to the witness, the second property was sold to the 1<sup>st</sup> Defendant's director. He however confirmed that he was involved in the transaction and that he signed the transfer on condition that the 1<sup>st</sup> Defendant would drop the sum of Kshs 70,149,400.00.
32. Referred to the law firm of **Otieno Arum**, he confirmed that the firm acted for him but on the 1<sup>st</sup> Defendant's prompting. He however confirmed that **Mr Otieno Arum** acted for him in the transaction and that he collected the title for L.R Number Nairobi Block 72/960. PW1 confirmed that the Company was the principal borrower and that though he applied for an injunction restraining the sale of LR Nos. 209/12823/6 and 209/10722/91, the orders were not granted as the application was dismissed and an appeal against the said decision was withdrawn. He confirmed that the amount was not repaid.
33. Cross-examined by **Mr Odoyo**, learned counsel for the 3<sup>rd</sup> Defendant, PW1 confirmed that he was aware of LR 209/12823/6 which was his property and which the 1<sup>st</sup> Defendant wanted to sell. He confirmed that he gave the property to the Bank under a charge guarantee pursuant to a letter

- of offer to the Company and that the facility was also secured by a legal charge on the same property to cover Kshs 3 million as well as LR 209/10722/91 for a sum of Kshs 3 million. The witness however testified that he did not execute a charge for LR 209/12823/6 but simply gave a guarantee. According to him the charge was a variation from what was meant to be prepared. He however confirmed that the facility was advanced to the Company and that he guaranteed it by securing it by a charge though in his view he was misled. The Company, according to him, received the Kshs 3 Million and its directors were the 2 plaintiffs. While conceding that the 1<sup>st</sup> Defendant was entitled to recover the money, he contended that this recovery ought not to be through misrepresentation.
34. The witness was however aware that the auction was staged in respect of LR No. 209/12823/6 though in his view the sale was fraudulent. Though the signatures were not forgeries, he contended that the charge document itself was a forgery. He did not know how the loan of Kshs 70 million demanded arose. He confirmed that he had not adduced the evidence with respect to the value of LR 209/12823/6 though according to him, its current value was about Kshs 100 million. To him the property was sold at a gross undervalue.
35. In re-examination by **Mr Koceyo**, PW1 stated that he was aware of the purported auction on 15<sup>th</sup> August, 2007 at which the 3<sup>rd</sup> Defendant claimed it bought the property though he could not say whether or not it took place as he had never seen any bids and there was no evidence of the alleged auction according to him. He stated that he was evicted without a court order hence his eviction was unlawful.
36. In his view, based on the 3<sup>rd</sup> defendant's documents the 3<sup>rd</sup> defendant could not have been innocent purchasers as the purported sale was a fraud.
37. At the end of PW1's evidence the plaintiff's case was closed.

### **Defendants' Case**

38. According to the 1<sup>st</sup> Defendant it merged under authority granted by Section 9(1) of the **Banking Act** (Cap.488) laws of Kenya thereby taking over the assets and liabilities of the Bank, which is no longer in operation. It was however admitted that the 1<sup>st</sup> Plaintiff was the registered proprietor of Nairobi Block 72/964 though it was denied that he was the registered proprietor of L.R. No. 209/12823/6 that was sold by public on 15<sup>th</sup> August, 2007 to the 3<sup>rd</sup> defendant in the valid exercise of the 1<sup>st</sup> Defendant's statutory power sale. It was pleaded that parcel of land known as L.R. No. 209/10722/91 is encumbered by a first legal charge in favour of the 1<sup>st</sup> Defendant to secure facilities advanced to the Company.
39. According to the 1<sup>st</sup> Defendant, the purported letter of offer dated 23<sup>rd</sup> March, 1998 was replaced by the letter of offer dated 19<sup>th</sup> May, 1999, which letter expressly had a provision of a loan secured by the Plaintiffs properties. It was pleaded that the notice of the takeover of the assets and liabilities of the Bank was publicly published in the Kenya gazette and as such the Plaintiffs cannot claim they did not have such notice in any event there was no fundamental or substantive alteration made as asserted by the Plaintiff.
40. It was averred that the 1<sup>st</sup> Defendant agreed to issue certain advances of monies amounting to Kshs. 13,000,000.00 to the 2<sup>nd</sup> Defendant herein a body corporate in which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs herein are the sole directors and shareholders by a letter of offer dated 10.05.1999 secured by:-
- a. A charge over all that property known as L.R. No. 209/12823/6/282 Nairobi, L.R. No. 209/10722/91 Nairobi, and L.R. No.72/964 Nairobi.
  - b. Directors' personal guarantee for Kshs. 10,000,000.00 each.
41. To the 1st Defendant, the Plaintiffs being the sole directors and principal officers of the 2<sup>nd</sup> Defendant with the mandate to act on behalf of the 2<sup>nd</sup> Defendant cannot possibly claim not to know any agreements entered into by the 2<sup>nd</sup> defendant and whichever entity. The 1<sup>st</sup> Defendant however denied making any alteration without consulting with the Plaintiffs. To the 1st

Defendant, the transfer of charges was pursuant to the transfer of assets and liabilities of the Co-operative Merchant Bank Limited over to the 1<sup>st</sup> Defendant in terms of Section 9 of the **Banking Act** (Cap. 488) Laws of Kenya and as such this has no legal effect of discharging any obligations owing to or due to the Co-operative Merchant Bank Limited. It was asserted that the 1<sup>st</sup> Defendant held a charge over L.R. No. Nairobi/Block 72/964 and that contrary to what is alleged in the plaint that no attempt had been made to recover from the principal borrower, there is no legal mandate upon a chargee to recover from principal debtor as a matter of priority and that where the debts is secured, the charge has the legal right to elect which course of recovery to pursue.

42. However, owing to the default by the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant in keeping with its contractual and statutory rights issued the requisite notices for sale of the charges properties and subsequently the auction scheduled for 30th May, 2007 was stopped on account of an interim order of injunction issued out of HCCC No. 393 of 2005 which application was after a substantive hearing dismissed and the interim injunction was discharged by an order made on 15th June, 2007. Thereafter, the 1<sup>st</sup> Defendant in exercise of its statutory power of sale by the public auction conducted out on 15th August, 2007 sold L.R. No. 209/12823/6 to the 3<sup>rd</sup> defendant as the highest bidder for Kshs. 10.5 million against a reserve price of Kshs. 10.36 million. Accordingly, the 1<sup>st</sup> Defendant denied that the sale of L.R. 209/12823/6 by public auction was illegal and in violation of any provisions in law or that it was done through misrepresentation and non disclosure of any material facts or at all. It was further denied that any fraudulent demand was made with the effect of fettering the Plaintiffs equity of redemption or at all and that L.R. No. 209/10722/91 was sold to its one of its directors for Kshs. 4,000,000.00. The 1<sup>st</sup> defendant averred that:

- a. the plaintiffs as directors of the 2<sup>nd</sup> Defendant negotiated with the bank to allow them pay Kshs. 15 million in full and final settlement of the outstanding liabilities;
- b. the outstanding debt due from the 2<sup>nd</sup> Defendant was discounted to Kshs. 14.5 million;
- c. the Kshs. 10.5 million was realized out of the public auction was to be taken as part payment of the outstanding debt which was dully accepted by the plaintiff's in their capacities as the directors thereof;
- d. the Plaintiffs in their actual capacities as directors of the 2<sup>nd</sup> Defendant did agree to allow the 1<sup>st</sup> defendant to sale property known as L.R. No. 209/10722/91 by private treaty to facilitate settlement of the discounted liability;
- e. in keeping with the terms agreed upon the Plaintiffs voluntarily entered into a sale agreement with **Fredrick Fanuel Odhiambo** with respect to the sale of L.R No. 209/10722/91 and voluntarily transferred the said property to him vide a transfer made on 2nd September, 2008 and registered on 30th September, 2008 at a consideration of Kshs. 5,000,000.00;
- f. upon the sale L.R. No. 209/10722/91 by private treaty and repayment of the balance of Kshs. 4 million the 1<sup>st</sup> Defendant discharged property known as L.R. No. NAIROBI/BLOCK 72/964 and released the title documents to the Plaintiffs in their respective capacities as the directors of the 2<sup>nd</sup> Defendant.

43. The 1<sup>st</sup> Defendant averred that the Plaintiff's as guarantors in addition to the 2<sup>nd</sup> Defendant as the principal borrower have to date not repaid the amounts due and owing to it which in aggregate exceeds the value of the securities charged. It was further pleaded that contrary to what is stated in the Plaint there were proceedings relating to the subject matter herein pending in the Court of Appeal - Civil Appeal No. 211 of 2007 (UR 131/2007) George Williams Omondi -vs- The Co-operative Bank of Kenya Limited as well as in the High Court in HCCC No. 85 of 2004 Geom Holdings Limited, George Williams Omondi and Gertrude Atieno Omondi -vs- the Co-operative Bank Limited & Baseline Auctioneers.

44. As for the 2<sup>nd</sup> Defendant, the defence was in substance a general denial of the allegations, made by the plaintiffs.

45. As for the 3<sup>rd</sup> Defendant it was pleaded that it lawfully bought L.R. No. 209/12823/6 (the suit property) through public auction on 15th August, 2007 in the valid exercise of the 1<sup>st</sup> defendant's statutory power of sale and it emerged the highest bidder and declared the purchaser following a competitive bidding process at a purchase price of Kshs. 10.5 million against a forced sale value

- of Kshs. 10.36 million. It was therefore contended that the 1<sup>st</sup> Plaintiff lost title and/or ownership of the suit property when sale was completed in accordance with the conditions of sale and title passed to the 3<sup>rd</sup> Defendant for valuable consideration.
46. According to the 3<sup>rd</sup> Defendant, upon registration of the transfer in its favour and issuance of the title document, it was entitled to exercise all the rights of an owner. It reiterated that the suit property was indeed put forward for sale by public auction by the 1<sup>st</sup> Defendant while exercising its statutory power of sale and the same was done well within the confines of the law hence it denied any illegality and/or fraud as pleaded in the plaint. It asserted the title having been lawfully transferred in its name, the same is protected by the Constitution of the Republic of Kenya and the **Registration of Titles Act**, chapter 281 Laws of Kenya and cannot be cancelled as per the Plaintiffs' demands.
47. Defendants' first witness was **Joseph Iringu Kariuki**, the 1<sup>st</sup> Defendant's Debt Recovery Officer who testified as DW1. According to him, he had worked for the 1<sup>st</sup> Defendant for the preceding 8 years.
48. According to him, initially Co-op Merchant Bank was an investment Bank but in 2002, the Co-operative Bank and Co-op Merchant Bank were merged to form Co-operative Bank Ltd which merger was approved by the Minister of Finance vide a Gazette Notice No. 6404.
49. According to him the Company was the Bank's customer which was advanced a loan facility hence between them was a lender/borrower relationship. This facility, it was stated was advanced by way of a letter of offer dated 23<sup>rd</sup> March, 1998 in the sum of Kshs 6 million. The same was secured by directors' guarantee, first charge for LR 209/12823/6 and 209/10722/91. According to him, the charges were perfected as shown in the plaintiff's bundle documents. However as the facility was not serviced, the Bank exercised its right to realise the same in order to recover its money. In the bundle he testified there were documents relating to the transfer from Co-op Merchant to Co-op Bank (K) Ltd of LR Nos. 209/10722/91 and 209/12823/6 which transfers according to him were registered.
50. He disclosed that the total amount advanced to the Company was Kshs 13,000,000.00 and upon default the 1<sup>st</sup> Defendant resorted to its rights under the charge and issued statutory notices on 4th November 2006 demanding for Kshs 70,149,400.50. However the facility was not settled prompting the 1<sup>st</sup> Defendant to instruct Wagly Auctioneers to proceed and issue a 14 days' redemption notice and thereafter advertise and sell the property by public auction. In May the auctioneers did issue the said 45 days' redemption notice. However these instructions were limited to LR No. 209/12823/6 and that LR No. NBI/72/964 was not subject of any auction and was returned back to the borrowers, the directors of the Company hence the 1<sup>st</sup> Defendant does not have the said title and it was incorrect to state that the Bank sold that property. According to him, after discussions the 1<sup>st</sup> Defendant agreed to give a discount and permitted the directors to pay Kshs 14.5 million out of which Kshs 10.5 million was recovered from the proceeds from LR No. 209/12823/6 while Kshs 4 million was recovered from the sale by private treaty of LR No. 205/10722/91. According to his evidence the parties to the private sale were **George Williams Omondi, Gertrude Atieno Omondi** and **Fredrick Fanuel Odhiambo** vide a transfer dated 2<sup>nd</sup> September, 2008. It was agreed that LR No. NBI/72/964 would be returned upon receipt of the sum of Kshs 14.5 Million which was duly returned. He confirmed that the directors of the Company were the two plaintiffs.
51. In cross-examination by **Mr Koceyo**, for the plaintiffs, the witness stated that a total of Kshs 13 million was advanced to the borrower, the Company. However according to the letter of offer the sum was Kshs 6 million. There is however a letter of offer dated 19th May, 1999 talking of Kshs 13 Million in which it was indicated that it had replaced the earlier letter of offer and in his view was the letter to be relied upon though the Plaintiffs refused to sign the same.
52. It was however revealed that later, the Plaintiffs issued a resolution to borrow which referred to the letter dated 19th May, 1999. It was therefore his view that the plaintiffs bound themselves to the said letter. The witness however was not aware of the letter on which reliance was placed in respect of the charge. He disclosed that at the time of the second letter of offer there were existing charges in respect of LR Nos. 209/12823/6 and 209/10722/91. As they had already charged the security, it was necessary to create a further charge on LR 209/12823/6. He was however unaware

- whether the further charge was actually created but was aware of the existing charge of Kshs 3 million. Though he was not in possession of the charge it was his evidence that there was another charge for Kshs 7 million.
53. The witness asserted that there was no repayment prior to the realisation and that there was no grace period. The money according to him was for construction. Referred to the repayment moratorium when only interest was payable, he testified that he had no evidence that interest was not being repaid. He however asserted that the amount of Kshs 70 million plus demanded was the correct amount based on the principal sum and interest. However, the Kshs 14.5 million was an agreed sum between the plaintiffs and the 1<sup>st</sup> Defendant after the Bank wrote off the other sum. Though the request was not part of the bundle it was his evidence that he had the same. In his view, the Bank agreed to forego Kshs 60 million as they sought for Kshs 70 million.
54. The witness however admitted that he was not part of the negotiation process. However, he disclosed that there was a letter by which the plaintiffs were advised to pay Kshs 14.5 million. The property, he averred was sold by public auction. From the records of the auctioneers, he said that there were 7 bidders though the witness did not have the same in the bundle.
55. Since the transfer of the assets was contained in the Gazette Notice, it was the witnesses' evidence that the plaintiffs were duly notified of the same. While conceding that the Gazette Notice did not refer to the plaintiff's property, he said that the Notice covered assets and liabilities. He conceded that the charge was with Co-op Merchant Bank and the incorporation of the 1<sup>st</sup> Defendant was in the year 2008 and the charge was transferred from a limited liability to a Co-op Society.
56. In answer to cross-examination by **Mr Odoyo**, learned counsel for the 3<sup>rd</sup> Defendant, the witness stated that the 1<sup>st</sup> Defendant followed the procedures in realising LR 209/12823/6. He disclosed that there was valuation before the sale at open market value of Kshs 14.5 million and Kshs 10.6 million being the forced sale value. However the property was sold at Kshs 10.5 million based on professional opinion.
57. In re-examination by **Mr Echesa**, the witness stated that despite the moratorium, the principle amount was not paid after the 6 months and that there was a further advance after the initial Kshs 6 million of Kshs 7 million.
58. The second defence witness was **Elizabeth Wanjiku Muigai**, an auctioneer who testified as DW2. She testified that she received instruction from the 1<sup>st</sup> Defendant to issue a 45 days' notice in March, 2007 which she duly issued to the 1<sup>st</sup> Plaintiff. In her evidence an auction was held in accordance with the notice on 15th August, 2007. The auction, she averred was held at her office then situated at Posta Sacco Plaza.
59. However prior to the sale there were two advertisements on 14th May, 2007 on 30th May, 2007. However she was served with a Court injunction and the sale did not take place. After the injunction was lifted she again issued the 14 days' notice which was acknowledged by the 1<sup>st</sup> plaintiff whom she met personally and served him. The Notice was dated 6th July, 2007 and was received on 9th July, 2007. There was also a newspaper advert and a memorandum of sale requiring 25% deposit. According to her the auction proceeded on the same day and the highest bid was Kshs 10.5 million by a **Mr Mutai Paul**, a representative of Oyster Court Ltd, the 3<sup>rd</sup> Defendant. According to her there was no Court order served on her stopping the sale on the said date.
60. In cross-examination by **Mr Odoyo**, she reiterated that she was guided by a valuation report and that the reserve price was Kshs 10.36 million while the open market value was Kshs 14.8 million. The valuation report was dated 7th March, 2007 while the property was sold on 15th August, 2007 above the reserve price.
61. In cross-examination by **Mr Koceyo**, she stated that she received the instructions as Wagly Auctioneers at that time. She reiterated that she was a licensed auctioneer though she was not in possession of her licence at the time of her testimony. Referred to the 45 days' notice exhibited by the 1<sup>st</sup> defendant she said that the same was addressed to the Company and that she was given information on whom to address the same to by the 1<sup>st</sup> Defendant and served the 1<sup>st</sup> Plaintiff. She also conducted a search and found that the property was owned by the Company. However referred to the plaintiff's list she confirmed that the same was owned by the 1<sup>st</sup> plaintiff though the information she had was that it was owned by GEOM c/o **George Williams Omondi**.
62. The witness insisted that there was a list of bidders and that she relied on information given by the

- 1<sup>st</sup> Defendant. She was however sure that the balance was paid though she could not say when it was paid and whether it was paid within 30 days since her job was to receive the 25%. She disclosed that she was given the valuation report by the 1<sup>st</sup> Defendant.
63. In re-examination by **Mr Echesa**, the witness said that in the valuation report the name of the proprietor was given as the 1<sup>st</sup> plaintiff and that she tendered the notice to him. She asserted that she conducted the auction personally and that there was no higher bid than that of the 3<sup>rd</sup> defendant.
64. The third defence witness who testified as DW3 was **Paul Mutai Warigi**, a director of the 3<sup>rd</sup> Defendant. According to him, in 2007, LR 209/12823/6 came up for sale by auction in the daily newspapers through Wagly Auctioneers at their offices at Postal Sacco Plaza now called KEMU Plaza which auction was supposed to take place on 15th August, 2007. He accordingly participated in the auction and emerged as the highest bidder thereat at Kshs 10.5 million amongst about 8 to 9 bidders. He was required to pay 25% which amounted to Kshs 2.65 million but he paid Kshs 2.7 million in Bankers Cheque. The condition was that the balance be settled within 30 days which he did.
65. After making payment, he testified that they proceeded to complete the property and offered it for sale in the market. He stated that there was no one in occupation thereof since they carried out a site visit before the auction. He affirmed that they did not evict anyone therefrom. According to him, the sale was an open auction with many bidders from which the 3<sup>rd</sup> Defendant emerged the highest bidder and the property was transferred to it on 27th March, 2008 after complying with all the conditions.
66. In cross-examination by **Mr Echesa**, he stated that they sold the units in open market and that they were 7 units with a guard house on the ground floor. The rest were three bed-roomed and the 3<sup>rd</sup> defendant did not retain any of them.
67. In cross-examination by **Mr Koceyo**, the witness testified that he read the memorandum of sale and was declared the highest bidder. According to him they were 8-9 bidders and everyone shouted their bids. He reiterated that he paid the deposit immediately and paid the balance on 15th September, 2007 within 30 days to the 1<sup>st</sup> Defendant. He however was not sure of the exact transfer date. Referred to the transfer the witness was unable to explain why it was not signed by the Registrar as that could only be explained by the Registrar. He however confirmed that according to the title, it was transferred on 10th June, 2008 for Kshs 10.5 million. There were other discrepancies which he noted but which he said he could not explain as he was seeing the document for the first time.
68. He however asserted that he paid the deposit of Kshs 2.7 million and the cheque was drawn in favour of Co-operative Bank Account of George Omondi as was directed by the auctioneers. He however conceded that he did not conduct due diligence but just visited the property. He reiterated that he paid the balance within 30 days though he had no evidence of the same. All the apartments, he said, were sold though he did not plead the same in the defence.
69. Asked about the 2<sup>nd</sup> bidder, he said he could not remember how much the said bidder quoted. He was emphatic that they did not remove anyone from the property and did not send the auctioneers to do so as the place was in his words “a ghost place” with overgrown grass. Each unit, he said they sold at Kshs 6 million though they did not value the property before buying the same though according to him, the property was worth about Kshs 10 million and had the bid gone to Kshs 15 million he would not have bought the property. Referred to title produced by himself, he confirmed that the same was not signed.
70. In re-examination by **Mr Odoyo**, he said that he was not in charge of making entries and that transfers do delay.

### **Issues**

71. Having considered the foregoing, it is my view that the following issues fall for determination:

- 1. How much money was advanced to the 2<sup>nd</sup> Defendant?**
- 2. Whether the Plaintiffs were liable to the 1<sup>st</sup> Defendant.**
- 3. Whether the whole sum was advanced on the security of the plaintiffs' properties?**

4. **Whether the plaintiffs were liable to ensure the whole sum advanced was repaid and if not how much were the plaintiff's liable to pay?**
5. **Whether the sale of the plaintiffs' properties was lawful.**
6. **Whether the charged properties sold at an undervalue?**
7. **Whether the orders sought by the plaintiffs ought to be granted.**
8. **Who should bear the costs of the suit.**

### **Determinations**

72. Having considered the pleadings, the evidence adduced, the issues and the submissions made as well as the authorities relied upon by the parties herein, this is the view I form of the matter.
73. With respect to the 1st issue, the 2<sup>nd</sup> Defendant did not adduce evidence to contradict the sum claimed by the 1<sup>st</sup> Defendant from the 2<sup>nd</sup> Defendant. Accordingly no issue arises with respect to the amount of money that was due from the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant.
74. The next issue for determination is whether the Plaintiffs were liable to the 1<sup>st</sup> Defendant. The Plaintiffs contention was that since they were not notified of the merger between the Bank and the 1<sup>st</sup> Plaintiff the relationship between the two institutions was altered thus discharging them from liability. In support of this position the Plaintiffs relied on **Ben Mwangi Kihia vs. National Bank of Kenya Limited, Civil Suit No. 1302 of 2000.** In this case, **Kasango, J** found that since there was no evidence that there was a valid assignment, the takeover was not complete hence an order for injunction was merited. However in **Dileep Patel vs. Abraham Kiptanui Nairobi (Milimani) HCCS NO. 317 of 2002, Lesiit, J** expressed herself as follows:

**“The plaintiff has produced a Gazette Notice to prove that indeed the Minister for Finance Gazetted the merger as required under the Banking Act Cap 488 Laws of Kenya, section 9(1) thereof. The effect of the merger gave the power and authority to the Trust Bank Ltd to take over the assets and liabilities of the Trust Finance Ltd. That empowered the Trust Bank to deal with the suit property charged to Trust Finance as if it had been charged to it. The defendant's submission which challenges the capacity of the said bank to deal with the suit property, including the exercise of the statutory power of sale, the capacity to enter into the agreement of sale and to transfer the property to the plaintiff are all without merit.”**

75. Whereas I agree with the decision in **Ben Mwangi Kihia vs. National Bank of Kenya Limited** (supra) that for an assignment to be effective, the three requirements of absoluteness of assignment, formality in the sense that it must be in writing and notification against the person sought to be enforced must be satisfied, in case of a merger of two entities, the conditions may not necessarily be the same. It is not in doubt that by a gazette notice No. 6404 issued on the 4<sup>th</sup> October 2002 pursuant to the provision of section 9 of the **Banking Act**, the Minister for Finance authorized and sanctioned the said merger. The purpose for the gazettelement was explained in **Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)**, where it was held that the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.
76. Accordingly, the Plaintiffs were deemed to have notice of the merger and if they felt that the effect of the merger would prejudice their rights they ought to have taken remedial action before the merger took effect. I am therefore of the view that the Plaintiffs cannot escape liability by the mere fact of the said merger.
77. Even if I was wrong in the above finding, the next issue for determination takes care of the issue raised by the Plaintiffs. Was the whole sum advanced on the security of the Plaintiffs' properties? The Plaintiffs contend that their liability as guarantors was limited to Kshs 6,000,000/= and therefore they ought not to have been liable for any sum over and above the said sum. To them, by discharging the first charges and registering fresh charges and opening new accounts without their authority and consent the 1st Defendant had varied the contracts and hence discharged them from liability. The Plaintiffs relied on **Ellinger's Modern Banking Law, Kanyoro vs. Wakarwa**

**Printers Ltd & Another [2005] eKLR** and the Uganda High Court case of **Patel & Ors vs. National & Grindlays Bank Ltd Civil Appeal No. 33 of 1969.**

78. That the 1st and 2nd Defendants did alter the terms of the contract is not disputed. In **Harilal & Co. & Another vs. The Standard Bank Ltd. [1967] EA 512** the East African Court of Appeal expressed itself as follows:

**“If there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration.”**

79. Similarly in, **Abraham K. Kiptanui vs. Delphis Bank Ltd. & Another Nairobi (Milimani Commercial Courts) HCCC No. 1864 of 1999** it was held that:

**“The act of a banker in requiring the second account to be opened without the consent of the guarantor discharges the guarantor from his liability...The true rule is that if there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and that if he had not consented to the alteration, although in cases where it is without inquiry evidence that the alteration is insubstantial, in that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet that if it is not self evident that the alteration is insubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration...A guarantor will be discharged unless the guarantor’s liability has been preserved with words in the guarantee which cover the conduct relied on by the guarantor to discharge him.”**

80. It would follow that the Plaintiffs ought to have been discharged from liability in respect of any liability that was incurred by the Company resulting from the variation in the contract. The discharge, however, will not occur where the variation is insubstantial in the sense that it is not prejudicial to the surety. In other words where the variation is not prejudicial to the surety such as where it reduces the surety’s liability the surety will not be discharged by the mere fact of the variation. However, in this case the variation had the effect of increasing the Plaintiff’s liabilities and hence ordinarily would have had the effect of discharging the Plaintiffs. That discharge, however it is my view ought to only discharge the Plaintiff to the extent of the liability they did not secure.

81. To this rule there is however an exception. Where there is a variation and the surety continues to relate with the Bank as if there was no variation after the surety has had knowledge of the variation, the surety will be deemed to have waived the right to be discharged from the transaction. This was the position adopted in **Riverside Farm Nursery School Ltd & Another vs. The Cooperative Bank of Kenya Limited Nairobi (MILIMANI) HCCC No. 255 of 2008** a case in which the merger between the 1st Defendant and the Bank herein was in issue, where it was held that:

**“After the merger between Cooperative Merchant Bank Limited with the defendant, the plaintiffs acknowledged that the defendant had taken over the operations of the Cooperative Merchant Bank. The plaintiffs could not have agreed to negotiate with the defendant if they were of the view that they had no privity of contract with the said bank. Therefore the plaintiffs’ argument that there existed no privity of contract between themselves and the defendant is not persuasive.”**

82. In my view the said acknowledgement can either be express or by conduct. In this case there is no evidence of the express acknowledgement. However the facts of this case are intriguing. The sureties herein, who are the plaintiffs were also the directors and the shareholders of the Company.

The said variation of the terms was done with the knowledge and authority of the Plaintiffs who were parties to the renegotiated terms. The plaintiffs have not denied having executed the documents leading to the said variations. It is however their position that the said execution was done by the Company and not in their capacities as sureties. This Court was not informed that apart from the Plaintiffs there other directors and/or shareholders of the Company.

83. The Court is however aware of the principle in ***Salomon vs. Salomon*** to the effect that a company has a distinct and separate personality from its shareholders and directors even where the directors happen to be the sole shareholders and the property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own and only the company has capacity to take action to enforce its legal rights. See ***Salomon vs. Salomon and Co. Ltd [1897] AC 22.***

84. Locally the position was expounded in ***Trackspa Limited vs. Industrial and Commercial Development Corporation Nairobi (Milimani) HCCC No. 21 of 2001***, where Ringera, J expressed himself as follows:

**“There is a distinction between a company and its shareholders whether those shareholders be directors of the company or not and a shareholder cannot be regarded as a partner-loose or otherwise of a company. A company does not trade with its shareholders for gain. The shareholders invest capital in the company and the company trades in its own distinct capacity.”**

85. That general position is however subject to certain exceptions. In ***H M B Kayondo vs. Somani Amirali Kampala HCCS No. 183 of 1994*** it was held that

**“There is no doubt that a Company duly registered is a legal entity distinct from the subscribers or those who formed it. Once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities, appropriate to itself. The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as before, and the same persons are managers, and the same hands receive the profits, the Company is not, in law, the agent of the subscribers or trustees for them. Nor are the subscribers as members like any shape or form except to the extent and the incidence of incorporated is the same whether the shares in the company are in the hands of one man or many... Courts are in general precluded from treating a company as the alias, agent, trustee or nominee of its members, but they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct and this is what is meant by lifting the veil of incorporation... Since the defendant was the sole proprietor of his company, he knew or ought to have known that the company did not have funds to meet the cheques on due dates. To permit the defendant to hide behind corporate personality will amount to allowing him to escape the consequences of his breach of fiduciary trust placed in him by the plaintiff... Accordingly, the corporate veil is lifted and the defendant held personally liable.”**  
[Emphasis added].

86. It is therefore clear that whereas it is a fundamental postulate of company law that a registered company is a legal person distinct and separate from its members and/or directors and, accordingly, a company's debts cannot normally be enforced against its shareholders and/or directors, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under the express statutory provisions (of which section 323 of the ***Companies Act*** is but one example) and under judicial interpretation or intervention in for example where the corporate personality is being used as a mask for fraud or improper conduct. The veil of incorporation may be lifted where it is shown that the company was incorporated with or was carrying on business as no more than a mask or sham, a devise or stratagem for enabling the directors to hide themselves from the eye of equity. See ***Ultimate Laboratories vs. Tasha Bioservice Ltd. Nairobi (Milimani) HCCC No. 1278 of 2000*** and ***Corporate Insurance Co. Ltd vs. Saveman Insurance Brokers Ltd [2002] 1 EA 41, 42.***

87. In ***Wahabe Tamari & Sons Ltd vs. Green House Ltd Kampala HCCS No. 780 of 1993***, the

High Court of Uganda expressed itself as hereunder:

**“The fundamental attribute of corporate personality is that the corporation is a legal entity distinct from its members. The complete separation of the company and its members has never been doubted...In some cases the Legislature has allowed the veil of the incorporation to be lifted. This is what section 33 of the Companies Act is all about. In others courts have also intervened and lifted the veil of incorporation. The courts have disregarded the corporate entity and instead paid regard to economic realities behind the legal façade. The law, as it were, either goes behind the corporate personality to the individual member or ignores the separate existence of a company where it is being used as an agent or trustee and in such cases courts have always insisted upon very strong evidence for this purpose. It must be proved that the company is a devise, a stratagem and a mere cloak or sham... For the court to ignore the separate existence of the company because it is alleged that it is being used as an agent, the court must get very strong evidence...A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such.”**

88. In this case, the Plaintiffs cannot allege that they were unaware of the transactions which were taking place between the Company of which they were the directors and shareholders and the 1<sup>st</sup> Defendant. The only reason why they deny liability is based on corporate veil. In my view this is a case where the Court cannot permit the Plaintiffs to hide behind the veil of incorporation in order to avoid liability for debts which were incurred with their knowledge and for which they derived benefits as shareholders of the Company.
89. It is therefore my view that by their conduct the Plaintiffs must be deemed to have waived their right to seek discharge from the 2<sup>nd</sup> Defendant Company's liabilities to the 1<sup>st</sup> Defendant. In my view it would be inequitable in the circumstances of this case to permit the Plaintiffs to get away with a debt incurred by the Company, which debts were incurred by their authorisation by simply alleging that the debt was incurred by collusion between the 1<sup>st</sup> Defendant and the Company and which collusion they were part of in their capacities as directors and shareholders.
90. That brings me to the issue whether the plaintiffs were liable to ensure the whole sum advanced was repaid and if not how much were the plaintiff's liable to pay? In light of the findings hereinabove this issue is no longer alive. The Plaintiffs as guarantors of the Company were liable to settle the debts due from the Company to the 1<sup>st</sup> Defendant and as the Company has not contested the sum claimed by the 1<sup>st</sup> Defendant, the amount due is no longer an issue.
91. Was the sale of the plaintiffs' properties lawful? The plaintiffs exhibited a copy of the letter dated 6<sup>th</sup> November, 2006 from the 1<sup>st</sup> Defendant which was indicated to have been by registered post addressed to the PW1 which on the face of it constituted a valid statutory notice. It was admitted by the same witness that the Company was duly served with statutory notices. Attempts to halt the sale through the Court process seem to have hit a snag. Accordingly, there is no basis upon which I can find that the sale of the charged properties was unlawful. It was contended that the 1<sup>st</sup> Defendant ought to have pursued the guarantees first before realising the securities. However, unless it was specifically stated that the bank would follow a particular order in recovering the outstanding amount these were different transactions not entirely dependent on one another. In **Bala Holdings Ltd. vs. Delphis Bank Ltd. & Another Nairobi HCCC No. 812 of 1998**, **Ole Keiwua, J** (as he then was) stated that where the guarantee does not provide that recourse should first be made to the primary debtors before the surety can be called upon to pay, the issue that remedies against the borrowers should have been exhausted is not acceptable. Again in **Kenindia Assurance Company Limited vs. Commercial Bank of Africa Limited & Others Civil Appeal No. 11 of 2000** the Court of Appeal held that there were three distinct transactions and the transaction relating to Shs. 20 million was a separate one comprising two financial guarantees by the appellant and this fixed the appellant's liability at Shs. 20 million, and really had

nothing to do with the arrangements between the borrowing company and the lending bank. It follows that the issue that the 1st Defendant ought to have pursued the guarantees first does not hold any water.

92. Were the charged properties sold at an undervalue? Apart from bare allegations, the plaintiffs did not adduce any evidence to support the allegation of undervalued sale. There were no valuation reports exhibited by the plaintiffs to support their case. Whereas the mortgagee is expected to exercise the power of sale in a prudent way, with due regard to the interests of the mortgagor on the surplus sale moneys, he is not a trustee for the mortgagor as regards the exercise of the power of sale and has his own interest to consider as well as the mortgagor, and provided he keeps within the terms of the power, exercises the power *bona fide* for the purposes of realising the security and takes reasonable precautions to secure a proper price the Court will not interfere, nor will it inquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him provided the amount is fixed with regard to the value of the property. See **Eccon Construction and Engineering Ltd vs. Giro Commercial Bank Ltd And Another [2003] 2 EA 426.**

93. Accordingly, I am unable to find that the suit property was sold at an undervalue.

94. That brings me to the issue of whether the orders sought by the plaintiffs ought to be granted. Having made the foregoing findings it follows that the orders sought by the Plaintiffs are not merited. Even if the Plaintiffs' case was to be found merited, it is clear that the properties the subject of these proceedings were sold to a third party some of whom are not parties to these proceedings. LR No. 209/10722/91 for example was transferred to **Fredrick Fanuel Odhiambo** who is not a party to these proceedings. On the other hand there is evidence emanating from the 3<sup>rd</sup> Defendant through DW3 that the properties on Nairobi Block 72/964 were sold to third parties who similarly are not parties to this suit.

95. The Court of Appeal in **Housing Co-Operative Society Limited vs. Gachika Farmers Trading Company Limited Civil Appeal No. 308 of 1997** held that a non-party's role in a transaction cannot be condemned without giving him a hearing. To issue some of the orders sought herein would be in vain since as was held in **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995**, an order made against a non-party is not binding on him. It is trite that an order made in breach of the rules of natural justice is a nullity and being a nullity cannot be enforced as against that party. This position was emphasised by the Court of Appeal in **The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997** where it was held:

**“There is a factor which was not considered by the learned Judge. His order affects several parties who were not before the Court nor were they given an opportunity of showing cause why they should not vacate the suit property. The common law principle of *audi alteram partem* is of a fundamental importance. Parties not before the Court may not be bound by orders which affect them.”**

96. Apart from that it was upon the Plaintiffs to adduce evidence to show that the titles are still in the names of the defendants. The Plaintiff ought to have carried out the necessary searches with a view to joining the registered proprietors of the suit parcels to the suit in which case the Plaintiffs ought to have complied with the provision in Order 21 rule 6 of the ***Civil Procedure Rules*** which state:

***Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.***

97. It follows that even if the Plaintiffs were to succeed the only relief they would have been entitled to in the circumstances would have been damages. Although there was a claim for damages, the evidence relating thereto was very thin. The Plaintiffs did not adduce any credible evidence on the basis of which the value of the properties in question could be determined. Apart from pleadings and bare allegations there was no satisfactory evidence to prove the said pleadings and allegations. As was held by the Court of Appeal in **Banque Indosuez vs. D J Lowe & Company Limited**

**Civil Appeal No. 79 of 2002:**

**“It is simply not enough for the Respondent to pluck figures from the air and throw them in the face of the Court and expect them to be awarded as it is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and, may not be inferred from the act and the degree of certainty and particularity of proof depends on the circumstances and the nature of the acts themselves.”**

98. It has been held time and again that the special damages must be pleaded and strictly proved. Plaintiffs must understand that if they bring actions for damages it is for them to prove the damage and it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, “*this is what I have lost, I ask you to give me these damages*”. They have to prove it. See **David Bagine vs. Martin Bundi Civil Appeal No. 283 of 1996 (Ur); Mariam Maghema Ali vs. Jackson M Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990 (Ur); Idi Ayub Shabani vs. City Council of Nairobi [1982-88] 1 KAR 681 at 684; Bonham Carter vs. Hyde Park Hotel Ltd. [1948] 64 TLR 177.**
99. Before I conclude this judgement, I wish to express my gratitude to the parties and the counsel for their patience despite the delay in delivering this judgement which was occasioned partly by the misplacement of some pleadings due to the age and state of this suit as well as due to pressure of work in the Judicial Review Division.
100. Having said that it follows that the Plaintiffs’ case against the defendants must fail and is dismissed.
101. The only issue remaining for determination is who should bear the costs. Costs ordinary follow the event. However, the decision to award costs is an exercise of discretion. One of the factors to be taken into account in determining the award of costs is the conduct of the parties. Whereas ordinarily the defendants and in particular the 1<sup>st</sup> and 3<sup>rd</sup> Defendants ought to have been entitled to the costs, the manner in which the 1<sup>st</sup> Defendant conducted itself in the transaction the subject of these proceedings leaves a lot to be desired. The whole transaction was conducted in a very pedestrian manner not deserving of the stature of the financial institution of the 1<sup>st</sup> Defendant’s standing. Accordingly I decline to award the 1<sup>st</sup> Defendant the costs and order the 1<sup>st</sup> Defendant to pay the costs of the 3<sup>rd</sup> Defendant.

**Dated at Nairobi this 27<sup>th</sup> day of January, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Mayende for Mr Echesa for the 1<sup>st</sup> Defendant and Mr Odoyo for the 3<sup>rd</sup> Defendant**

**Cc Patricia**