REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 618 OF 2000

MUTHUMU FARM LIMITED…..…..1ST PLAINTIFF

JOSEPH NJOGU NJUGUNA.....2ND PLAINTIFF

- VERSUS -

NATIONAL BANK OF KENYA…….……..……....1ST DEFENDANT

JOSE ESTATES LIMITED……...…….2ND DEFENDANT

JUDGEMENT

1. The 1st Plaintiff, **MUTHUMU FARM LIMITED,** had charged the suit property, **L.R. No. 10551/3, RONGAI,** to the 1st Defendant, **NATIONAL BANK of KENYA LIMITED,** as security for financial facilities which the bank had accorded to the 2nd plaintiff, **JOSEPH NJOGU NJUGUNA.**
2. The financial facilities were provided to the 2nd plaintiff in the year 1988.
3. In the year 1999, the bank sold off the suit property to the 2nd defendant, **JOSE ESTATES LIMITED** for a sum of Kshs. 15,500,000/-.
4. The plaintiffs claim is that the sale of the suit property was fraudulent and irregular.
5. According to the plaintiffs, the sale which was by private treaty, was conducted secretly, without any notices to the plaintiffs.
6. Secondly, the plaintiffs contend that by the time when the bank sold the suit property, the money which the 2nd plaintiff had been loaned, had already been repaid in full.
7. Thirdly, the plaintiffs asserted that the property was sold at an undervalue.
8. And to make matters worse, the bank had rejected offers which were of higher amounts. Those offers had allegedly been made by other people, who were desirous of purchasing the suit property.
9. Therefore, when the bank rejected those offers and then proceeded secretively to accept lesser offers, the plaintiffs deem that to be proof of the collusion between the defendants, to benefit from the suit property, through irregular means.
10. The speed with which the suit property was transferred to the 2nd defendant was said to be very suspicious. In fact, the plaintiffs believe that the company was incorporated deliberately with a view to having it buy the suit property.
11. After the incorporation of the company, the property was quickly sold to it, at what the plaintiffs'

consider to be an under-value.

12. The other facts considered to demonstrate how conniving the defendants and their lawyers were, were the fact that there was no application by the bank for consent from the Land Control Board; nonetheless, a consent was given by the Land Control Board; but it was not the Board within Nakuru which gave its consent. The consent was given by the Molo Land Control Board.
13. The plaintiffs further case was that they used to make huge profits from the farming activities which they had been conducting on the suit property. Therefore, when the defendants forced out the plaintiffs, in an irregular manner, the plaintiffs contend that they were entitled to compensation for the loss of profits.
14. The plaintiffs also lay claim to further compensation because of the fraud and the irregular manner in which the defendants took away the suit property. In that respect, the plaintiffs reasoned that the charge Instrument had a provision that if the bank intended to vary interest from the 15% rate which was in the instrument, the bank had to give Notice to the chargor, of at least 30 days prior to the variation taking effect.
15. However, the bank is said to have failed to give any Notices of any intended variation of the rates of interest which it then charged on the facilities granted to the 2nd plaintiff.
16. The bank was also faulted for failing to give any Demand Notice and any Statutory Notice to the chargor.
17. As far as the plaintiffs were concerned **JOSE ESTATES LIMITED** were not innocent purchasers for value. They were said to have been active participants in the fraud and the irregularities perpetrated against the plaintiffs.
18. The purchase price was said to have been Kshs. 15,500,000/-. However, the only sum which the bank credited to the account of the 2nd plaintiff was Kshs. 14,000,000/-.
19. The sum of Kshs. 1,500,000/- was taken from the purchase price and was paid to **MEREKA & COMPANY ADVOCATES,** on account of *"finder's fees?.* According to the plaintiffs, that constituted an unlawful scheme and a fraud.
20. The participation of messrs Mereka & Company Advocates in the whole transaction was also seen as another indication of the deliberate scheme to defraud the plaintiffs, as those lawyers acted for the bank, and simultaneously witnessed the director of the company when he signed the Sale Agreement.
21. It was the plaintiffs' case that there was a clear conflict of interest when the same lawyers represented the bank, whilst also overseeing the purchaser's director when executing the Agreement for Sale.
22. Meanwhile, the purchaser also canvassed its counter-claim against the plaintiffs.
23. The purchaser contended that the sale in question was completely above-board.
24. Therefore, when the plaintiffs sought and obtained an injunction to restrain the purchaser from developing the suit property, the purchaser asserted that that deprived the purchaser of the right and opportunity to recoup its investment.
25. It was the purchaser's case that the plaintiffs should be compelled to compensate the company with the following amounts:

a) Consequential loss and damage due to the interim injunction – Kshs. 17,988.098/-.

b) Loss of Direct Profits in 2000 and 2001 – Kshs.84, 439,000/-.

c) Further loss of profits at the rate of Kshs. 42,000,000/- per year;

d) General Damages for Loss of Bargain;

e) Interest on the Special & General Damages;

f) Costs of the suit.

26. Finally, the purchaser urged the court not to revoke the title in its name. The reasons for that submission were that if the court took into account the fact that the purchaser was in occupation of the suit property, and the process attendant to the sale and transfer of the land, it would be

concluded that the balance of convenience was in favour of sustaining the sale to the purchaser.

27. If anything had gone wrong in the process of the sale and transfer, *(which the purchaser denied),* it was the opinion of the purchaser that the plaintiffs only remedy should be compensation, to be paid by the offending party.
28. Meanwhile, the bank believed that the plaintiffs claims were not motivated by the quest for justice. According to the bank, the plaintiffs motivation was simply bitterness because they had lost the suit property.
29. In the opinion of the bank, the intention of the plaintiffs was only to escape from their legal obligations which were founded upon the contract between the plaintiffs and the bank.
30. The bank's said view was said to be based upon the fact that the plaintiffs had each admitted having executed contracts with the bank.
31. Pursuant to the contracts, Joseph Njogu Njuguna was the borrower whilst National Bank of Kenya Limited was the lender. Muthumu Farm Limited charged the suit property in favour of the bank, as security for the loan which the bank gave to Joseph Njogu Njuguna.
32. The quantum of the loan amount mentioned in the Charge dated 15th November 1988 was Kshs. 5,000,000/-.
33. The Charge provided that the chargor would also be expected to pay interest on that sum, at the rate of 15% per annum, calculated on a reducing balance, in advance, on the principal sum then outstanding.
34. However, pursuant to clause 3 of the Charge, the bank reserved the right to vary the rate of interest. But before such variation to the rate of interest, the bank was required to give a one (1) month's notice to the borrower.
35. The borrower said that he was never given any Notice of the bank's intention to vary the rate of interest.
36. Notwithstanding the absence of the requisite Notices, the bank is said to have been increasing the applicable rate of interest.
37. In its Defence the bank stated that the interest charged on the debt was strictly applied according to the contract of lending and the security.
38. But the bank fell short of providing proof to the court that each and every time before it effected a variation to the applicable rate of interest, it had given an advance one month's notice to the borrower.
39. In my considered opinion, the fact that the plaintiffs appear to have expressly acknowledged being indebted to the bank does not exonerate the bank from the obligation to comply with the terms of the contract.
40. But it is also clear that there was another case which had been determined between the bank and Joseph Njogu. The case is **NATIONAL BANK of KENYA LIMITED Vs JOSEPH NJOGU, Hccc No. 3415 of 1994.**
41. In that case, the bank's claim was for Kshs. 18,821,716.25 plus interest at 40% per annum from 30th July 1994, until payment in full.
42. Judgement was granted in favour of the bank on 20th March 1995, by which time the interest sum was Kshs. 3,712,776.90. Therefore, the Decree issued on 27th March 1995 cited the decretal amount as being Kshs. 22,534,493.15.
43. Joseph Njogu, in his Witness Statement in this case, acknowledged that he was aware of that decretal sum and that he did enter into personal arrangements with the bank, with a view to settling the said decretal amount.
44. By virtue of that Decree, which has never been set aside or varied, I find that the sums payable by the borrower was already settled.
45. Therefore, even though the bank did not provide to this court, the proof required to show that it had given notices to the borrower before the rates of interest were increased, this court cannot now go behind the Decree which settled the quantum of the debt, as at March 1995.
46. When **Mr. WILFRED ONONO (PW3)** testified, he produced a report showing that his firm, **(IRAC)** had re-calculated the sums payable by the borrower.
47. He emphasized that in his calculations, he omitted Auctioneers Fees; Valuation; Legal Fees post redemption and penalty interest. His calculations show that by November 1996, the account was already in credit. It is because of that reason that **IRAC** decided to disregard the Legal Fees post redemption. In other words, from the date when **IRAC** deemed the borrower to have paid-off the

loan, **IRAC** was of the view that the bank was no longer entitled to debit to the loan account such legal fees as they may have had to pay.

48. Whether or not **IRAC** was right in their re-calculation, the fact is that their Report ignored the Decree issued in **Hccc No. 3415 of 1994.**
49. **IRAC** told the court that they could have ignored the Decree even if it had been brought to their attention.
50. That is tragic!
51. A Decree is the formal embodiment of the court's determination of matters which were in issue between the parties in the case which is before that court. The contents of a Decree must include the clear and specific relief which the court had granted.
52. In the Decree issued in **Hccc No. 3415 of 1994,** the borrower was held to be liable to pay to the bank the sum of Kshs. 22,534,493.15 plus interest and costs.
53. Unless the borrower proved that he had satisfied that Decree or that it had been set aside or varied, it was wrong for **IRAC** to choose to ignore it.
54. As **IRAC** ignored the Decree when they were conducting the recalculation of the sums which they deemed payable by the borrower, I hold that that report cannot be accurate because it failed to take into consideration something material which they ought to have given due consideration.
55. As between the bank and the borrower, the sums due are calculable in terms of the Decree.
56. But as between the company and the bank, the sums due were calculable based on the terms of the charge.
57. The charge expressly stated that it was security for the loan or other financial accommodation which National Bank of Kenya Limited would grant to Joseph Njuguna from time to time, provided that the aggregate amount would not exceed Kshs. 5,000,000/-.
58. The chargor bound himself to pay to the bank;

> ***"such sum not exceeding Kenya Shillings Five Million (Kshs. 5,000,000/-) as may then be due and owing by the Borrower to the Lender together with interest thereon calculated at the rate and in the manner hereinafter mentioned…?***

59. The specified interest rate was 15%. But the Charge Instrument also specifically reserved unto the Lender, the right to vary the rate of interest, after giving one month's notice to the Borrower.
60. At paragraph 33 of its submissions, the bank recognized that the charge;

> ***"was security for the indebtedness of the 2nd plaintiff, upon demand, to the agreed limit of Kshs. 5 million with interest thereon?.***

61. By seeking to have the court declare that its liability under the charge was limited as specified in the charge, the chargor cannot be accused of *"cunningly availing a front with which to stitch a garment of fraud?,* as the bank has asserted. The chargor was simply asking the court to acknowledge the express terms of the contract, and to hold the bank to the same.
62. As regards the Sale by Private Treaty, the bank asserted that it was justified because prior to the said sale, there had been numerous attempts to sell the property by Public Auction.
63. The sales were either unsuccessful or were called-off at the request of the plaintiffs.
64. It is also correct that the plaintiffs sought and were allowed opportunities to try and sell-off the property.
65. The fact that the bank negotiated with the borrower about how the loan would be repaid, did not excuse the chargor just because the chargor was not involved in those negotiations.
66. In the same vein, if the bank and the borrower were to purport to vary the terms of the charge without involving the chargor, their agreement in that respect would not be binding on the chargor.
67. The borrower had every right to hold negotiations with the bank, so as to try and secure the best possible arrangements for the repayment of the loans and other financial accommodation which had been granted to him.
68. When negotiations did not yield positive results and the bank decided to sue the borrower alone, that fact could not exonerate the chargor from liability. As I have already held herein, the Decree obtained in the suit between the bank and the borrower is not binding on the chargor on the

question regarding the quantum of its liability under the charge. In other words, the bank cannot use the Decree as a basis for determining the amount of money that is recoverable from the chargor. The Decree is only a foundation for determining the amount of money that is recoverable from the borrower.

69. As between the chargor and the bank, it is the Charge which is the foundation upon which calculations can be based, when seeking to establish the amount of money recoverable from the chargor.
70. As regards the speed with which the sale by Private Treaty was conducted, it can be said that it was so swift as to appear suspect. But speed alone does not render the transaction unlawful or irregular.
71. The purchaser, **JOSE ESTATES LIMITED,** submitted that it was the highest bidder. Bearing in mind the fact that this was a sale by private treaty, there was no forum at which potential purchasers put forward their respective bids. Therefore, I do not understand why the purchaser described itself as the highest bidder.
72. On 15th October 1998 and again on 22nd October 1998 the borrower wrote to the bank indicating that he had got a buyer for 200 acres, at a price of Kshs. 20 million. Considering that the suit property was over 400 acres, that offer of Kshs. 20 million for 200 acres was, by far, much higher than what the purchaser paid.
73. But the bank did not respond in writing to the borrower's request for facilitation in getting the land sub-divided, so that the 200 acres could be curved out from the suit property. The plaintiffs read mischief on the part of the bank.
74. However, the court is of the view that the offer by Aberdare Creameries Limited, to help the chargor sell-off 200 acres at Kshs. 25 million may not have been genuine. I say so because on 18th March 1999, Aberdare Creameries Limited wrote to the bank and offered to pay Kshs. 15,000,000/- for the whole property.
75. To my mind, it would defy logic to offer to sell 200 acres for Kshs. 20 million, but then offer only Kshs. 15 million for over 400 acres.
76. Meanwhile, on 16th February 1999, the law firm of **MBAYA, GITONGA MURIUKI & COMPANY ADVOCATES** wrote to the bank, giving its professional undertaking to ensure that the borrower met his proposal, which would have raised Kshs. 25 million from the sale of plots curved out from the suit property. There is no explanation from the bank as to why it did not respond to that proposal.
77. The least that the bank could have done, was to call the borrower's bluff, if the bank considered the proposal as anything but serious.
78. On the issue of the consent which was issued by **MOLO LAND CONTROL BOARD,** whereas the application had been made to the **NJORO LAND CONTROL BOARD,** the chargor described the same as a nullity. As far as the chargor was concerned, it was the Njoro Land Control Board which had the requisite jurisdiction over the suit property. That would imply that the Molo Land Control Board issued a consent without any legal capacity or authority.
79. In answer to the plaintiffs' contention concerning the consent, the purchaser said that its validity could only have been tested through a Judicial Review Application, which could have quashed it if it was not valid.
80. To my mind, the defendants have not responded properly to the question regarding the allegation that the consent was a nullity. I say so because something which is a nullity cannot be made valid simply because it had not been so declared by a court.
81. The purchaser explained that **NJORO** is a Location, whilst **MOLO** is a Division within Nakuru District. He also said that there were no 2 different Boards within that area. And he added that the District Commissioner for Nakuru was the chairman for the Board.
82. What he did not explain is why the consent was given by the Molo Land Control Board, when no application had been addressed to that Board.
83. The purchaser conceded that it did not play any role in the request for the Land Control Board consent. He certainly did not attend any meeting of the Board. But he went on to say that the Consent was given by the District Commissioner, Nakuru.
84. Even assuming that the signature on the Consent was that of the District Commissioner, Nakuru, there is no evidence as to how he came to append his signature on it.
85. According to the purchaser, it was Milano and Mereka & Company Advocates who handled the

issue of the consent. It would have been useful to have either the lawyer or the agent testify in court, to provide information concerning the actual process which led to the issuance of the consent. In the absence of those persons, it still remains a mystery about how the consent was obtained.

86. I now revert to the issue concerning the purchase price. The purchaser offered to pay Kshs.15,500,000/-. That sum was described as the highest bid. Perhaps that was because the person who offered Kshs. 15,000,000 was considered by the bank as the next serious *"bidder?*.

87. If the purchase price was Kshs. 15,500,000/-, that sum should have been reflected on the Application for the Land Control Board Consent, and also on the consent itself.

88. However, the 2 documents show that the purchase price was Kshs. 14,000,000/-.

89. First, that is a distortion of facts, if indeed the purchaser paid Kshs. 15,500,000/-.

90. Secondly, if the purchase price was Kshs. 14,000,000/- then it was lower than the sum offered by the person whom the bank had considered to be the next serious *"bidder?*. In the circumstances, there would be no justification why the bank accepted to sell the property to the purchaser, who is shown as having paid Kshs. 14,000,000/- as the purchase price.

91. On the other hand, if the purchaser paid Kshs. 15,500,000/-, there has been no explanation why the bank failed to give credit to the borrower for that whole amount.

92. The bank was obliged to pay its lawyer and the agent. But that did not mean that they were entitled to under-state the actual purchase price.

93. The Sale Agreement was drawn up by the bank's lawyers, Messrs Mereka & Company Advocates. They had known that the purchaser had offered to pay Kshs. 15,500,000/-, but decided to cite the purchase price of Kshs. 14,000,000/-.

94. The chargor was not involved in the decision to under-state the purchase price. It is only the bank and the purchaser who agreed to have Kshs. 1,500,000/- utilized as Advocates Fees; Finders Fees and Commission.

95. The defendants have not explained why they decided to saddle the chargor with those payments.

96. The Sale Agreement is dated 25th November 1999. However, the application to the Land Control Board was dated 23rd November 1999. In effect, by the time the bank was seeking Consent from the Board, there was no Sale Agreement in existence.

97. Whereas it may not be illegal to seek Consent before the formal Sale Agreement was executed, it is definitely odd that the bank found it necessary to rush to seek the consent before the Sale Agreement was executed.

98. I cannot help but wonder whether the motivation lay in the Ksh. 1,500,000/- which was to be sliced off the amount which the purchaser had offered to pay.

99. Of course, the purchaser was not prejudiced whether or not that sum was used to pay Advocates Fees, Finders Fees and Commission. But the plaintiffs were certainly prejudiced.

100. A look at the Sale Agreement shows that it was signed by one director of the purchaser. The said director, **JOSIAH NJOROGE NJUGUNA** testified in this case, as DW3.

101. He said that the directors of **JOSE ESTATES LIMITED** were two, being he and his wife. It was his testimony that he had the authority of his wife to sign the Sale Agreement on her behalf.

102. The Agreement bears only one signature, and it is the signature of Josiah N. Njuguna. There is no indication that he signed for and on behalf of his wife. Indeed, underneath his signature and name is written the word ***"DIRECTOR?.*** Presumably, therefore, he did sign the Sale Agreement in his capacity as a Director.

103. Although the plaintiffs suggested that the company could only execute a valid agreement through the signature of 2 directors, there was no basis, in fact, for that contention.

104. The purchaser testified that the number of directors who can sign a contract on behalf of the company was dependant upon the Memorandum and Articles of Association. That is the correct position in law. Therefore, unless the Memo and Articles of Association had stipulated that the company could only execute documents through the signatures of 2 directors, there was no error, in law, in the Agreement which was only signed by one director.

105. The purchaser submitted that its Memorandum of Association spelt out that its objectives included the purchase of land for agricultural purposes. In the absence of evidence of what the Memorandum of Association provided, this court is unable to determine whether or not the objectives of the company included the purchase of land for agricultural purposes.

106. But that is not an issue which is central to the suit before me. It had not been contended that the

purchaser lacked the requisite legal authority to purchase land for agricultural purposes.

107. My understanding was that the plaintiffs were only challenging the procedure utilized by the purchaser and the bank in the process which led to the acquisition of the suit property by **JOSE ESTATES LIMITED.**
108. As regards the alleged losses suffered by the chargor, I find that it did not provide the court with evidence to support its contention. Both the chargor and the plaintiffs' expert witness, **ERIC KIPKORIR CHEBII,** did not provide evidence to back the claims for the losses suffered when the chargor was evicted from the suit property or for the losses which the chargor suffered due to the eviction.
109. As Chebii said in his evidence, if the chargor had been earning Kshs. 62 million from its farming activities on the land, it could not have had any difficulty in servicing the bank loan of about Kshs. 6.0 million.
110. Meanwhile, the purchaser made available projections of what it believed it would have earned, if it was allowed to carry out farming activities on the farm.
111. The purchaser is on the farm. However, it has not demonstrated, through evidence, what it has managed to do on the land, with a view to transforming the theoretical projections into reality. It should have been possible to carry out some of the projects on, at least, a smaller scale than originally envisaged. That way, there would have been proof that the projections could have become a reality.
112. By showing, through action, that the proposals could be actualized, the purchaser would also have been mitigating the losses that it would otherwise have suffered.
113. In the final analysis, I hold the view that the purchaser has not proved the losses that he allegedly suffered due to actions attributable to the plaintiffs.
114. To the extent that the High Court granted an injunction to restrain the purchaser, it can only be said that such action was lawful.
115. Thereafter, the Court of Appeal also sustained the orders. Therefore, such action as the purchaser was stopped from doing was attributable to lawful orders issued by the courts.
116. As I move towards concluding this Judgement I hold that although the separate actions undertaken by the defendants may not have each been unlawful or illegal, in their totality they portrayed the defendants as persons who did not have due regard for the legal interests of the chargor.
117. Indeed, I go so far as to say that the purchaser does not appear to have been an innocent purchaser for value. The purchaser worked so closely with the bank to buy the suit property, shortly after the purchaser was incorporated.
118. It would be wrong to allow the defendants to remain beneficiaries of processes which do not inspire confidence in their transparency. Accordingly, I find that the sale and transfer of the suit property to **JOSE ESTATES LIMITED** was null and void. Therefore, I direct that the Transfer dated 21st February 2000, be cancelled or deleted from the Register of Titles.
119. In relation to the chargor, the bank is directed to provide a re-calculated statement of account, which is strictly in accordance with the terms and conditions embodied in the Charge Instrument.
120. For the avoidance of any doubt, the said calculations must commence on the premise that the original rate of interest was 15% per annum.
121. Any variations to that rate of interest would be given effect after the bank demonstrates, from the documents already made available to this court, that appropriate Notices were given to the borrower, at least a month before such variations took effect.
122. The plaintiffs' claims for General Damages are rejected.
123. I also reject the purchaser's counter-claim in its entirety.
124. The plaintiffs are awarded the costs of the suit together with thecosts of the counter-claim.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **22nd day** of **February** 2016.

FRED A. OCHIENG

JUDGE

<u>Judgement read in open court in the presence of:</u>

Wananda for the 1st Plaintiff

Walubengo for Odhiambo for the 2nd Plaintiff

Walubengo for Odhiambo for the 1st Defendant

Walubengo for Odhiambo for the 2nd Defendant

Collins Odhiambo – Court clerk.