



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**COMMERCIAL CAUSE NO. 37 OF 2015**  
**(FORMERLY MOMBASA HCCC NO. 177 OF 2006)**

**KANIKI KARISA KANIKI.....PLAINTIFF**

**VERSUS**

**COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**GIRO COMMERCIAL BANK LTD.....2<sup>ND</sup> DEFENDANT**

**MIATHENE-MALINDI ENTERPRISES LTD.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

The summary history of this matter begins with its commencement at the Mombasa High Court on 21st July, 2006. The Plaintiff subsequently applied for and was granted conservatory orders to preserve the subject matter L.R .No.2363 Malindi. The parties then engaged in applications ranging from dismissal for want of prosecution to extension of time in which to file statements and other documents. Finally when the matter was deemed ready for hearing, the parties consented to having the Plaintiff's evidence taken before the Judge sitting at Malindi. The succinct reason being that the now elderly Plaintiff was ailing and resided in Malindi. Upon the taking of his evidence, the parties orally applied to have the hearing concluded by myself. The application was allowed on grounds that the subject matter is situated within the jurisdiction of the Court and Lady Justice Mary Kassango, who was to hear the matter, had been transferred to another station.

The case in brief is that the Plaintiff took out a Kshs.2.5 million loan from the 1st Defendant guaranteed by a registered mortgage over the subject property. The loan fell into arrears and the 1st & 2nd Defendants sold the property to the 3rd Defendant. There now lies the issue of whether or not the loan was still owing at the time of sale and whether or not the sale was lawful. The Plaintiff prays for the following orders set out verbatim as against the Defendants jointly and severally:

1. *A declaration that the purported sale of Plot 2363 Malindi by the 1st and 2nd Defendants to the 3rd Defendant is a nullity*
2. *The interest charged was oppressive, unconscionable and totally unreasonable in the circumstances (sic)*
3. *An injunction to restrain the 3rd Defendant by itself, its servant, employees and/or agents from selling the suit premises to any third party, wasting, damaging, alienating, altering, disposing or in any other way dealing with the suit premises until the hearing and determination of this suit.*

4. An order directing the Government Lands Registrar to cancel the aforesaid transfer and restore the status quo prior to 3rd August, 2005
5. General Damages
6. Costs and interest
7. Any other relief this honourable court may deem just and fit to grant.

### **The facts**

The Plaintiff pleads that he was the registered proprietor of the subject property at all material times. He mortgaged his property in favour of the 1st Defendant and by way also of an indenture of mortgage in favour of the 2nd Defendant both executed on 6th June, 1995. Both Defendants secured the said property for repayment of the principal sum of Ksh. 2,500,000.00 together with interest. The charge and mortgage ranked *parri passu*.

He pleads that by the year 2000 he had fully repaid the principal sum and other bank charges but a dispute arose over the interest charged and bank charges. The 1st Defendant filed a recovery suit against the Plaintiff in Nairobi Milimani HCCC No. 359 of 2000 for a sum of Ksh. 6,070,398.96 inclusive of bank charges and interest, which interest was contrary to the spirit and letter of the *Donde Act*. That suit proceeded *ex parte* in January, 2004 and judgment was entered against the Plaintiff in the instant suit. The Plaintiff sought and was granted orders for setting aside the *ex parte* judgement on condition, amongst others, that he deposits Ksh. 1,000,000.00

Deeming that the required deposit by the Nairobi Court was such a colossal sum to meet, the Plaintiff in the month of March, 2005 filed an application to have the said figure reduced. The Application was heard on 24th June, 2005 and the ruling was to be delivered on notice. The 1st and 2nd Defendants herein made to sell the property to the 3rd Defendant in pursuant to the provisions of Section 69(1) of the Indian Transfer of Property Act (ITPA). The plaintiff contents that he was not served with a statutory notice as required.

The Plaintiff pleaded in the alternative that the property was sold in execution of the court decree of 28th January, 2004. He stated that as the 1st Defendant had filed suit, the Defendants were precluded from exercising the statutory power of sale. There were no warrants of sale and attachment issued neither were the terms of sale set nor the reserve price agreed upon or fixed by the court. The Plaintiff pleads no matter what methodology was engaged to dispose off the property, the sale was a nullity *ab initio*. He makes further claim that there was a possibility that the 3rd Defendant would dispose off the property as he was unencumbered.

The Plaintiff also pleaded that the suit property was sold at an undervalued sum of

Ksh.1,900,000.00. He pleaded that the property in the year 1995 was valued on various occasions at Ksh. 3,000,000.00 or Ksh. 6,500,000.00 thereby the sale occasioned a great loss and damage to him. He prays for general damages as a result. He allegedly notified the Defendants of his intention to commence this suit.

The 1st and 2nd Defendants filed a joint defence stating that the 1st Defendant secured repayment of Ksh. 2,500,000.00 via a mortgage and the 2nd Defendant via a legal charge secured repayment of Ksh. 1,000,000.00 Both facilities ranked *parri passu* and were dated 6th June, 1995. The interest in both instruments was set out and the loan was to be repaid on a reducing balance monthly in arrears.

The Plaintiff by the year 2000 had not repaid the loan hence the 1st Defendant filed the Nairobi suit and obtained judgement of Ksh.7,134,797.68 which was inclusive of the interest that had accrued. The 1st and 2nd Defendants however deny that the sum claimed in the Nairobi suit consisted of interest and bank charges. In the alternative, they state that the interest was lawfully charged and was neither oppressive nor unconscionable and that the Central Bank of Kenya (Amendment) Act (*Donde Act*) 2000 had no force of law and was repealed by the 2004 Act, the Central Bank of Kenya (Amendment) Act.

The 1st and 2nd Defendants state that as there was a judgement in place, the Plaintiff was estopped by the principle of *res judicata* from challenging or raising any issue regarding the decretal amount. In any case the judgement was set aside on conditions to be met within 45 days which the Plaintiff did not. Hence the order for setting aside stood vacated and discharged thereby reinstating the judgement of 19th December, 2004. The Plaintiff's application for review of the order to deposit a sum of

Ksh.1,000,000.00 was dismissed on 20th January, 2006.

The 1st and 2nd Defendants admit that they sold the property to the 3rd Defendant by private treaty pursuant to the statutory power of sale Section 69 (1) of the Transfer of Property Act, 1882 of India though they could have sold it in execution of the decree. The agreement for sale was executed on 11th July, 2005 and then registered on 3rd August, 2005. The property was valued before and the forced sale value estimated at Ksh. 1,600,000.00 hence the sale at Ksh. 1,900,000.00 was not an undervaluation.

The 1st and 2nd Defendants plead that their statutory power of sale was not extinguished by their filing of the Nairobi suit and that the requisite statutory notice dated 12th September, 1996 was issued upon the Plaintiff. According to them, there was no need for advertisement as the sale was by private treaty. Further as the sale was not due to an execution of a decree, there was therefore no requirement for warrants of sale and attachment, terms of sale of reserve price.

The 1st and 2nd Defendants state that the sale to the 3rd Defendant was not a nullity *ab initio* and that there is no basis for an award of general damages. They deny receiving a notice of intention to sue and state in light of Section 69(B) of the Transfer of Property Act of 1882 there is no cause of action disclosed against them.

The 3rd Defendant in his defence pleaded that he was stranger to the Plaintiff's allegations of ownership of the property, the mortgage facilities, the repayment and the suit in Nairobi stating that he was a *bona fide* purchaser for value without notice of any disputes. He bought the property via a private treaty between him and the other Defendants pursuant to an advertisement and followed due legal process.

The 3rd Defendant denies that the sale was in execution of a decree or that the property sale was undervalued as the Government valuer did a valuation for purposes of stamp duty. He states that he improved the building by rebuilding the 1st floor and putting up a 2nd floor now occupied by tenants. The said improvements were done in full view and knowledge of the Plaintiff hence a cancellation of the sale cannot be done at this stage. He further denies receiving a notice of intention to sue.

## **The Evidence**

### **• *The Plaintiff's Case***

The Plaintiff had three witnesses. He adopted his statement dated 29th November, 2014 as part of his evidence and produced his list of documents and the documents therein as his exhibits. He testified that he was 72 years of age and illiterate. He admitted that in the year 1995 he offered his property, the subject matter, as collateral when he took out a loan of Ksh.2, 500,000.00 from Credit & Commerce Finance Limited. Prior to his loan application, he had his property valued at Ksh.3,000,000.00. The property in question included a building erected upon it. In April 1996 the mortgagee, the 1st Defendant, changed its name to Commerce Bank Limited.

The letter of offer which he executed indicated the terms for repayment stating that he was to repay in installments of Ksh. 114, 330.00. He stated that he could not raise the deposit of Ksh.500,000.00 and the extra Ksh. 150,000.00 as required by the 1st Defendant and he instructed the 1st Defendant to withdraw the said amounts from the loan. He was therefore given Ksh. 1,850,000.00. The then manager of Credit & Commerce Finance Limited directed him to open an account at Giro Bank Limited for purposes of processing the loan amount as the money could not be wired directly to his account at Habib Bank, Malindi. The Plaintiff subsequently transferred Ksh. 1,820,000.00 to Habib Bank account and withdrew Ksh. 10,000.00 but stated that he did not borrow any money from Giro Bank Limited.

The Plaintiff admitted that he executed a mortgage document in favour of Giro Bank but the said document was never read to him. **Mr. Sulubu Ngala** and **Mr. Shadrak Angwenyi** witnessed the loan documents. He therefore expressed surprise that the loan document was later altered so as to delete **Ngala's** name. He also stated that at that time Ngala had unsuccessfully made an application to take out a Ksh. 1,000,000.00 loan.

The Plaintiff also testified that by the year 2000 he had repaid the full loan amount at the total sum of Ksh. 2,638,914.00. That he paid it in installments as follows: On 13th July, 1995 he paid Ksh. 114,580.00, on 16th August, 1995, 19th September, 1995, 3rd November, 1995 he paid Ksh. 114,630.00 on each date. In the year 1996 he paid Ksh. 114,630.00. On 26th January and on 2nd January. On 15th October, 1997 he paid Ksh. 200,000.00 in cash. In year 1998, on 12th June he paid Ksh. 500,000.00 in cash and on 2nd November paid Ksh. 200,000.00 via bank cheque. In the year 1999 on 24th August he paid Ksh. 100,000.00 via cheque and finally on 2nd March, 2000 he paid Ksh. 900,000.00 via cheque.

He further stated that he even sold his other property to pay off the loan. However, the banking slip generated indicated that it was banked at the 2nd Defendant's bank and it was credited to an account other than that held in his name.

He indicated that whilst he serviced the loan, the 1st Defendant instituted the Nairobi case, proceeded *ex parte* and obtained a judgement. The Plaintiff successfully set aside the judgement but could not meet the conditions set therein hence made an application for a review of the terms. However, the 1st and 2nd Defendants, whilst the outcome of the application for review was pending, sold off the property without issuing him the requisite 3 months' notice contrary to the Transfer of Property Act of India, 1882. The notice via letter dated 12th September, 1996 gave only 14 days.

It is the plaintiff's evidence that the sale violated the principles of *res subjudice* and *lis pendens* and stated that he was also not served with warrants of sale and attachment. Furthermore, the 1st Defendant had merged with Giro Bank and was incapable of independently instituting suit. The 1st Defendant failed to disclose this in the Nairobi suit. He was also unaware that both the 1st Defendant and Giro Bank had sold off the property. As a result of all these, the sale was illegal and therefore a nullity.

He further stated that the sale was just a charade as the loan arrangement itself was fraudulent as the property was overvalued and the funds to be granted to the borrower were withheld. The Plaintiff only borrowed Ksh. 2,500,000.00 from the 1st Defendant and did not borrow Ksh. 1,000,000.00 from Giro Bank Limited. The valuation of the subject property was Ksh. 3,000,000.00 which he provided hence the bank could not support two loans totaling Ksh. 3,500,000.00. Given his status of illiteracy, the banks concealed that they were advancing him Ksh. 3,500,000.00 as opposed to the Ksh. 2,500,000.00. In a nutshell the loan and the sale were tainted with illegalities and hence cannot stand.

The Plaintiff further testified that the 1st and 2nd Defendants' advocates responded to his demand letter vide letter dated 8th November, 2005 indicated that the sale was in execution of the decree in the Nairobi case as there was apparently no stay of execution hence fundamentally contradicting the contents of the transfer registered on 3rd August, 2005. He in addition testified further that the house already had two floors built up to the roof beam and that the 3rd Defendant only put up the roof.

The Plaintiff confirmed that he took out a Ksh. 2,500,000.00 loan and that he was not informed that he was signing a Giro Bank mortgage document. He admitted signing the documents but Giro Bank never gave him any money. Out of the loan amount borrowed he was only granted Ksh. 1,850,000.00 and the remaining amount was deducted so as to have an amount of Ksh. 500,000.00 set apart as the fixed deposit and the requisite amount of Ksh. 150,000.00 be catered for.

The Plaintiff admitted signing the letter of offer whose terms were the repayment of the loan in 30 monthly installments of Ksh. 114,330.00. He stated that he paid six instalments totaling Ksh. 2,600,000.00 but stalled payments when his business went at a loss as a result he skipped two months but paid Ksh. 200,000.00 on 17th April, 1997 and in November of 1997. The fixed deposit was also released into the loan account. He admitted that he signed the letter dated 18th November, 1998 forming part of

the 1st and 2nd Defendants' documents at p.71 but could not recall whether or not he received the letter dated 30th November, 1998 . He stated that he paid Ksh. 100,000.00 in November, 1998, Ksh. 100,000.00 in September, 1999 and Ksh.900,000.00 in March , 2000. He admitted that he did not pay the installments consecutively and that he did not appeal the Nairobi decision whose terms included a deposit. According to him, he only realised that the property had been sold in September, 2005 and the Nairobi case had not authorised the sale.

He further stated that he did not agree to the sale of his property and that he did not send **Mr. Sulubu Ngala**, his friend, who was like a brother to him, to purchase it. He denied knowledge of valuation of the property at Ksh. 6,500,000.00. But he admitted that he handed over the title documents to the bank and that he knew the consequences of not repaying the loan included sale of the property.

It is the Plaintiff's evidence that his property was occupied and he used to collect rent from the tenants. He discovered the change of hands when his child went to collect rent. The property had been constructed upto the roof beam of the 2nd floor, the 3rd Defendant may have put up the roof. He stated that he had been paying municipal rates. In his view there was a collusion between the Defendants as the bank never notified him of the sale. That he was unaware of the sale as there was no advertisement and if any posters were posted on the property he would have gotten wind of it.

In re-examination he stated that he did not receive the letter dated 30th November, 1998 [*p.72 of the 1st and 2nd Defendants' documents*]. His advocates Messers. Mulwa & Mulwa received the letter dated 11th December, 1998. He stated that the property was sold in year 2005 while the suit was pending before court. He confirmed that he could not appeal against that decision as the ruling had not yet been delivered. According to him the injunction issued in January, 2006 is still in force. He clarified that **Mr. Ngala** was not his brother.

**Pw2, Maina Chege**, the Valuation Surveyor adopted his written statement as part of his evidence. He testified that the Plaintiff in April, 1995 engaged him to value the subject matter for purposes of a mortgage. He prepared the report dated 25th April, 1995 indicating that the market value of the property was Ksh.3,000,000.00 but did not prepare the report indicating the value at Ksh. 6,750,000.00. It was a forgery in his view. The forged report was sent to him by Credit & Commerce Finance Limited via a letter in June, 1997 for verification. It was alleged that he authored the report. He wrote back indicating that the said report was not generated by him. On 1st May, 2002 he received a letter from Giro Commercial Bank inviting him to act as their witness in the Nairobi case coming up for hearing on 22nd May, 2002 as the Ksh. 6,750,000.00 report was a forgery. However, he was eventually not summoned so he never testified. He never did another valuation on the said property.

At cross-examination he testified that the instructions for valuation came only from the Plaintiff and the report on p.56-61 of the 1st and 2nd Defendants' documents was not his. The letter dated 10th June, 1997 (*p.62 of the 1st and 2nd Defendants' documents*) informed him that the 1st Defendant was unable to recover the loan and sought his assistance to sell the said property. He talked with a **Mr. Nyingi** from the bank and sent his reply via letter dated 17th June, 1997(*p.63 of the 1st and 2nd Defendants' documents*). As a result of the fake report he was paid a visit by anti-banking fraud officers from the Central Bank of Kenya. He stated that during the valuation exercise, he visited the site upon which the subject property was and found.

**Pw3, Sulubu Ngala**, stated that he was semi illiterate. He had taken adult education and could write his name but not read. The Plaintiff is his brother-in-law and that he, together with his friend **Angwenyi** accompanied the Plaintiff to Nairobi during the period of processing the loan. He too was at the time seeking to take out a loan but was unsuccessful. **Pw3** testified that the Plaintiff had the requisite documents including a valuation report of Ksh. 3,000,000.00 done by **Pw2**.

**Pw3** further testified that the Plaintiff had no money to pay the required deposit and Plaintiff expressed the wish to transfer the loan amount to Habib Bank, Malindi Branch the person of Indian descent at the bank told them that the Plaintiff had to open an account with Giro Bank then have the money transferred to Habib Bank. **Pw3** denied signing the indenture of mortgage [*p.44 1st & 2nd Defendants' documents*]

stating that he used big {*capital?*} letters to sign his name.

According to **Pw3**, the Plaintiff sometime later intimated to him that his property was being put up for sale. The auction was to take place outside Barclays Bank of Kenya where there was a mango tree. He attended and a young man arrived at about 10.00 a.m then rang a bell but no auction took place. There was no buyer and he was not a buyer and did not place a bid at the auction. **Pw3** stated that his postal address was not number 31195 Malindi but 5464, Malindi.

At cross-examination he stated that he did not sign the said indenture nor any document in Nairobi but could not recall very well that perhaps he had signed. He also stated that there were some posters posted on buildings around the place the auction was to take place but he did not read them and that no one purchased the property. He affirmed that he knew the Plaintiff's property in question and that **Dw3** only added a few blocks and a roof.

- **The 1st and 2nd Defendants' Case**

The 1st and 2nd Defendant called, **Tilas Nthia Muringi**, the Risk Manager of Giro Commercial Bank as their sole witness. He produced the list of documents and the documents as exhibits. **Dw1**, testified that the 1st Defendant was formerly Credit & Commerce Finance Limited which converted to Commerce Bank in April of 1996. The 2nd Defendant was already registered as a bank when it took over the business of Commerce Bank. They wrote to all customers of the 1st Defendant and Giro Bank about the merger as per a letter dated 11th December, 1998 (at p.53 of the Plaintiff's bundle).

**Dw1** testified that the Plaintiff opened a loan account with Credit & Commerce Finance Limited and was issued with a letter of offer dated 14th June, 1995 [p.4 1st & 2nd Defendants' documents] which indicated that the loan was for Ksh. 2,500,000.00 repayable within 30 months with monthly installments of Ksh. 114,330.00. The interest was at 25% and the subject property was to act as the security. The Plaintiff was expected to deposit Ksh. 500,000.00 with them. **Dw1** admitted that there was a second charge document but the Plaintiff was only given Ksh. 2,500,000.00 and not Ksh. 3,500,000.00.

According to **Dw1**, the Plaintiff requested that the Ksh. 500,000.00 deposit and the commitment fee of Ksh. 150,000.00, which was 2% of the loan for three years and payable upfront be deducted from the loan amount. At the time Credit & Commerce Finance Limited was not involved in clearance of cheques hence the requirement of opening an account at Giro Bank then the money be transferred to his Habib Bank account. **Dw1** stated that the Plaintiff only paid up 6 installments as per the account statements [p.47-50 Defendants' documents]. The loan account was later transferred to Giro Commercial Bank.

**Dw1** testified that on 25th July, 1996 the bank informed the Plaintiff that he was six months in arrears and when he did not make the payments the matter was forwarded to their advocates, Messers Murgor & Murgor advocates. The advocates sent him a demand letter dated 12th September, 1996. By then the loan balance was Ksh.2, 805,440.00. The Plaintiff's advocates Messers Mulwa & Mulwa informed the bank that their client was in the process of disposing another property to meet the loan demand. The bank made an attempt to sell the property by auction on **1st April, 1997** with the reserve price at Ksh. 6,750,000.00 but it was unsuccessful due to a low bid as per the letter from Forefront Auctioneers [p.54]. They then approached **Pw2** to get a buyer and get the basis for his valuation. On 17th June, 1997 **Pw2** responded indicating that his valuation was for Ksh. 3,000,000.00. According to **Dw1**, it was the Plaintiff who had given them the valuation report for Ksh. 6, 675, 000.00. They therefore wrote to the anti-fraud banking unit to investigate but they were not given the outcome thereof.

It is the evidence of **Dw1** that the bank thereafter made a decision to dispose off the property and approached estate agents in the Coast Province region. One agent provided a buyer. The Plaintiff then paid Ksh. 200,000.00 in April, 1997 and November, 1997 and the bank converted the deposit of Ksh. 500,000.00 to the loan account. The deposit had already attracted an interest of Ksh.151,184.00. The bank then filed the Nairobi case and the Plaintiff indicated that Kenya Power and Lighting Company (KPLC) had committed itself to purchase another of his property and the proceeds would be used to offset the loan as per letters on p. 69-77. KPLC first paid Ksh. 100,000.00 then later in March, 2000 it paid

Ksh. 900,000.00 directly to the bank.

**Dw1** testified that when the two banks merged, the 1st Defendant was not dissolved and it pursued its stale loans. Hence a recovery suit was filed in 2000 but they later opted to sell the property. By then the Plaintiff had changed his legal representation. They approached Mwara Auctioneers to sell but they did not get a buyer. The Plaintiff stopped that sale via a court order. The Nairobi case was then heard and determined and judgement pronounced in their favour and a decree of Ksh. 13,205,196.64 was extracted. The Plaintiff then applied for and was granted orders for stay of that judgement but failed to abide with the conditions hence the order lapsed and the decree took effect.

He continued by stating that the bank had the subject property valued twice. First in June, 2001 and later in March, 2004. Ultimately they sold the property to the 3rd Defendant via a private treaty and executed an agreement to that effect. The valuation done in March, 2004 was at Ksh.2,600,000.00 and the forced sale value was Ksh. 2,400,000.00. The other valuation gave almost a similar figure. Hence the sale at Ksh. 1,900,000.00 was above the forced sale value of Kshs.1.6 million as per the 2<sup>nd</sup> valuation report. The judgement was for Ksh. 13,000,000.00 whose balance they have yet to be paid. The Plaintiff never appealed against the Decree and they never got the demand letter for the present case. He also stated that the Nairobi case proceeded *ex parte* and the Plaintiff was still liable to paying the 13 Million to the bank, he prayed that the suit be dismissed with costs.

On cross-examination by the Plaintiff's counsel **Dw1** stated that his employer was Giro Commercial Bank since 29th September, 1994 but he did not deal with the Plaintiff while the loan was being processed. He stated that Giro Bank acquired Commerce Bank in December, 1998 and the subject loan became part of Giro Bank business. Giro Bank became Giro Commercial Bank in January, 1999. The loan was transferred to Giro Commercial Bank. **Dw1** admitted that no cheque for Ksh. 2,500,000.00 was issued to the Plaintiff nor was the deposit and commitment fees paid. He offered an explanation on the commitment fee stating that it was 2% of the total loan amount charged per annum for the duration of the loan. It was payable upfront hence it was debited in the Plaintiff's account. It was, together with the deposit amount, deducted from the loan amount. According to **Dw1**, the Plaintiff wanted immediate access to the loan hence was requested to open the Giro Bank account. The interest was to be charged for the entire loan amount.

**Dw1** stated further that in April, 1996 the account was changed to Giro Bank but the changeover was not indicated. He indicated that the Credit & Commerce account continued up to June, 1996 and that there was no other bank account statement for the Plaintiff's account. The account entry of 30th June, 1996 was transferred to Giro Bank. He stated that at the time Giro Bank and Commerce Bank were separate entities. He admitted that the statement produced in evidence did not follow sequentially and that part of the statement is printed on Commerce Bank letter head while the other parts are on letter heads of Giro Bank and Giro Commercial Bank stating that they could have been printed out after the case was filed. He stated that he did not know the persons who generated the statements but he testified that the statements, though not certified, were originals.

**Dw1** in addition stated that Giro Commercial Bank came into being in January, 1999 and that the Commerce Bank business was transferred to Giro Bank by way of business assignment. He clarified that he was not involved in the filing of the Nairobi suit and that Mwara Investment Auctioneer was instructed by the Bank.

On further questioning he stated that there were two mortgage instruments registered. One for Ksh. 2,500,000.00 and the other for Ksh. 1,000,000.00, however, only

Ksh.2,500,000.00 was disbursed. He admitted that though the indenture of mortgage for Ksh. 1,000,000.00 was neither a subject of the Nairobi case nor of the instant case it features in their defence. There was no money owing under the second indenture as no money was disbursed hence no rights and liabilities accrued. He stated that Giro Bank was registered as the chargor and became the rightful owner of the debts.

According to **Dw1** the first valuation indicated the value of the property as

Ksh.2,600,000.00 and that there was a three year difference with the next valuation which gave the value as Ksh. 2,400,000.00. He stated that he was not involved in the valuation provided by the borrower indicating that the loan applicant normally provides that valuation. The bank relied on the valuation report presented by the Plaintiff but that there was no record that the bank did its own valuation before disbursing the loan.

The witness additionally stated that **Mr.Ngala's** One Million loan application was declined and that the indenture document did not refer to him. He stated that the Plaintiff had made to borrow Ksh. 2,500,000.00 and his letter of offer indicated that the charge was *pari passu*. According to **Dw1** the charge was by two banks. **Mr.Ngala** was a witness to the execution and he too applied for a loan but it was declined.

**Dw1** asserted that the 1st Defendant was still a legal entity when it pursued its issue in court though there was no resolution by Giro Bank allowing it to file the matter. He confirmed that in 2000 the 1st Defendant was not carrying out business as a bank however its licence was still in existence. He stated that he had the deed of assignment though it was not produced in evidence and also stated that there was no reserve for the 1st Defendant to pursue the Plaintiff for the debt. He informed the court that all customers had been duly notified of the merger.

According to **Dw1** there was a judgement in place in favour of the 1st Defendant against the Plaintiff and the property was sold in execution of the decree extracted therefrom. He stated that as there was a legal charge there was no need for the process of attachment of the property. He confirmed that there was a letter dated 8th November, 2005 from MessersHamilton Harrison & Mathews advocates to Messers.Asige Kaverenge & Anyanzwa advocates and agreed with its contents that there was no appeal or a stay in place. He was however unaware of any demand letter from the Plaintiff.

The witness confirmed that the bank was expected to issue a statutory notice of 90 days and he had not seen such a notice. The notice issued by Messers. Murgor & Murgor advocates was for 14days. By the time the indenture of conveyance of the property to the 3rd Defendant was done, which was on 29th July, 2005, the Plaintiff had already filed his application for review. The indenture of conveyance was registered on 3rd August, 2005 and the ruling on the Plaintiff's application was delivered in 2006. He stated that the indenture was done in exercise of the statutory power of sale.

On cross-examination by the 3rd Defendant's counsel, **Dw1** stated that Giro Bank in exercising its statutory power of sale sold the property measuring 0.0472 Ha to the 3rd Defendant and registered the document on 3rd August, 2005. He explained that they had suspected fraud in the valuation. They did subsequent valuations hence the sale price was not an undervaluation as the forced sale price was less.

At re-examination he confirmed that one of his duties is debt recovery and he acquires information from bank records which are in physical and electronic state. He stated that Credit & Commerce Finance Limited became Commerce Bank and merged with Giro Bank. The merged bank has common directors for the four institutions from which one can get records. He stated that the statements of accounts can be printed from different dates and that they are stored in the archives. He confirmed that the loan, deposit and commitment fees were all deposited on the same day.

He further stated that the Plaintiff's advocates Messers .Mulwa & Mulwa made a request for the stay of sale. He clarified that there was no order issued on 5th November, 2011, that it was just a consent. He stated that the Nairobi case was a debt recovery for the loan of Ksh.2,500,000.00 and that there was no appeal filed against the judgment. He stated that the bank never claimed the One Million indicated in the second mortgage instrument. **Dw1**, further stated that as the second charge was registered, the 1st Defendant would not have sold the property without the knowledge of Giro Bank. He indicated that the latter valuations were carried out for purposes of selling the property not for advancement of a loan.

- ***The 3rd Defendants' case***

The 3rd Defendant called one witness who he stated that he was a director of the 3rd Defendant and a businessman. He relied on his filed statement as part of his evidence. In May or August of 2005 the witness heard about and saw an advertisement of sale of the suit property. It was by Giro Bank. He then instructed an agent to apply for purchase of the same and offered Kshs.1,900,000.00. He made an offer in May, 2005 and got a response to deposit 10% of amount. Later in year 2005 he got a letter informing him to settle the balance which he did.

He stated that his advocates *Messers J .S Kaburu* advocates in June of 2005 showed him a letter dated 7th June, 2005 from *Messers Harrison, Hamilton & Mathews* the Defendants' advocates. It assured them that their client had a right to sell the property. The letter forwarded several documents including the indenture of mortgage dated 6th June, 1995 between the Plaintiff and Giro Bank which gave the bank the power to sell the property by way of public auction or private treaty. It also enclosed the statutory notice dated 12th September, 1996. He then executed the sale agreement on 11th July, 2005 and paid Ksh.1,710,000.00 by bankers cheque upon advise from his advocates.

According to the witness the transfer was registered on 3rd August, 2005. That through their advocates a letter dated 22nd August, 2005 was written to the Plaintiff informing him of the sale. The witness testified that he found the building on the suit property occupied with tenants. The lower floor of the building was complete however the upper floor had been affected by the weather. He then evicted the tenants for purposes of renovation and changed the rooms in the lower floor from single to self-contained rooms, he then added another floor, put up sewage and soakage pits thereby spending more than Ksh.6,000,000.00 . By the time he completed the works he got a letter informing him that the property had become a subject of a court matter. He stated that the sale was regular and that he had made an application to be expunged from the records.

On cross-examination he stated that he was the Managing Director of the 3rd Defendant and that he was the one who came to know about the sale of the property via a notice to the public. He also saw a letter dated 12th May, 2005 by Giro Bank with a tenant. He confirmed that letter was the only information that led to the knowledge of the sale. He affirmed that it was the bank and not him that did a search on the property. He stated that hitherto, he had not known the bank and learnt that the bank was selling off the property as the owner had failed to service his debt. He confirmed that he was not present when the Plaintiff testified and he further stated that he was unaware of the Plaintiff's indebtedness to Giro Bank nor the notice from *Messers Murgor & Murgor* advocates. Additionally he stated that he relied on the information presented by the bank and did not carry out a valuation of the property. He was aware that the sale was due to a bank debt. The witness testified that the building had been abandoned for over 10 years and trees had taken root at the top. He became aware of the court proceedings upon completion of the repairs on the building and stated that he would not have purchased the same had he had knowledge of the problems besetting the property.

**Dw2** stated that he knew that the sale was lawful, he obtained the title deed and his advocates dealt with the bank and he did not know what the bank and his advocates discussed.

### **The submissions**

- ***The Plaintiff's Submissions***

The parties filed written submissions which they then orally highlighted. Counsel for the Plaintiff submitted that the processes followed by the Defendants to sale the property was unlawful and the ensuing sale a nullity. One scenario was that if the sale was in execution of a decree, then it was illegal and a nullity for reasons that there was no execution process engaged. Further, the decree was issued in favour of Commerce Bank hence Giro Bank could not jointly convey the security to a third party in execution of the decree. In addition to this, the 1st Defendant having opted for a recovery suit to the exclusion of the other mortgagee it was not open for both mortgagees to simultaneously exercise their power of sale. Counsel relies on the case of **Aberdare Investments Limited v HFCK & another [1999] 2 EA 1** for the proposition that the choice of action lay with the mortgagee.

It is submitted that scenario two was that if the sale was in exercise of the statutory power of sale, then by dint of Section 52 of the I.T.P.A, it went contrary to the common law principle of *lis pendens*. Counsel relies on the finding in *Bellany v Sabine* (1857) 1De G & J 566,584 as adopted in *Mawji v US Interantional University & Another* [1977]KLR 185. There was also no statutory notice under Section 69A(1) of that Act had been issued counsel buttressed this point with the finding in *Trust Bank Limited v Eros Chemists Limited* [2002]EA 550 that the notice had to indicate that the sale would take place after 3 months of service of the notice. Furthermore, Giro Bank had offered no consideration as it had failed to disburse the loan amount hence could not exercise any such power. He urged the court to accept parole evidence on the second charge which indicated that no monies were disbursed under it. Reference was also made to the Ugandan case in *Vallabhas Pragji v Nasani Lugeba* [1964] EA 659. The Plaintiff claimed that he would not have commenced to challenge the sale in the Nairobi case as no warrants of attachment and sale had been issued nor was an appeal available to him as the 3rd Defendant was not a party to that suit.

The Plaintiff further submitted that as an assignment had effected the transfer of the 1st Defendant's banking business including the loan to Giro Bank or Giro Commercial Bank in 1998, then the 1st Defendant had no capacity to institute the Nairobi suit. The 1st & 2nd Defendant had knowledge of this and were better placed to reveal the same and having not done so, the Plaintiff urges the court to draw a negative inference from their conduct as per Section 112 and 119 of the Evidence Act. Counsel states that the ground of defence on *res judicata* is defeated by this fact.

Counsel for the Plaintiff took issue with **Dw1**'s lack of authority to take the witness stand arguing that he had no appointment resolution under seal. According to him it was a breach of law. He stated that a person who had never worked for the company could not pretend to have personal knowledge simply by perusing company historical records. Since **Dw1** had not worked for the 1st Defendant and was not involved in the loan leading to the instant suit his evidence was therefore hearsay. Counsel referred to the Ugandan High Court case of *Bugerere Coffee Growers Limited V Sebaduke & Another* [1970]EA 147 and *Danish Mercantile Co Ltd v Beumont* [1951]1 Ch. 680. Counsel contends that that failure to produce a resolution allowing **Dw1** to testify was not a mere technicality curable under Article 159 of the Constitution.

It is submitted that there was an admission that the 2nd Defendant had not disbursed any money hence the right to exercise the statutory powers of sale had not accrued to it. **Dw1** had admitted that there was no 90 day notice issued as required. The Plaintiff further stated that the statements of the loan account were not sequentially printed out and **Dw1** could not give an explanation on the anomaly in particular how the statements for the period of 1st April, 1996 to 30th September, 1997 got printed on letter heads belonging to the 2nd Defendant which only came into being on 11th January, 1999. He also did not explain the statement printed on the 1st Defendant's letter head though it had already assigned its business. **Dw1** believed that warrants of attachment were not required as the sale being in execution of the decree in the Nairobi case and there was a legal charge in favour of Giro Bank but he failed to explain how the charge could confer a right to dispose of the security when the chargee had not disbursed the consideration mentioned therein.

Counsel for the Plaintiff urged the Court to draw a negative inference under Section 119 of the Evidence Act from the conduct of the 1st & 2nd Defendants. In particular as they failed to disclose a document which the Plaintiff deemed to be crucial. This was the assignment deed referred to by the **Dw1** on cross-examination. This deed witnessed the transfer of all of the 1st Defendant's business to the 2nd Defendant. In the Plaintiff's view, this document would have proven that the Nairobi case had been filed by a party that no longer had a legal right or obligation under the indenture of the mortgage. Hence the proceedings and subsequent decree were a nullity. The defence of *res judicata* therefore had no place. The fact of the existence of that deed was within the knowledge of the 1st & 2nd Defendants and as per Section 112 of the Evidence Act. It was their onus to prove those facts.

On the 3rd Defendant's case, it is submitted for the Plaintiff that the defence of innocent purchaser for value without notice was a sham. The reasons given are that the 3rd Defendant's director stated that he purchased the subject property via a private treaty after viewing an advertisement for its sale provided by

a tenant at the suit premises. He then instructed his agents to make an offer of Ksh. 1.9 Million which was accepted, he deposited 10% of the purchase price, later paid the full purchase price and instructed his advocates to complete the conveyance. The same was conveyed in the name of the 3rd Defendant. The 3rd Defendant never carried out a search or sought valuation of the property. The director later learnt, after the registration of the indenture, that there were two banks named as vendors. That such a search would have yielded the results of whether or not the vendors had a right to sell and also to confirm any encumbrances. That the 3rd Defendant's director must have feared to know the truth and shut his eyes to it. The Plaintiff called the attention of the court on the case of **Westminster City Council v Croxallgrange Ltd [1986] 2 All ER 353, p.359** where Lord Bridge made a comment that knowledge of fact can be imputed upon a defendant by basing it on a finding of knowledge on evidence that the defendant deliberately shut his eyes to the obvious or refrained from making inquiry because he suspected the truth but wished not to have his suspicions confirmed.

Counsel contends that the tenant who allegedly had the advertisement for the auction was never summoned as a witness. The Plaintiff speculated that the purchaser had 'insider' information for he claimed that prior to the advertisement he had not known of Giro Bank. The Plaintiff went on to state that had the 3rd Defendant's director enquired further, he would have obtained information that Giro Bank had not advanced any consideration hence no right to sell had accrued, he would have confirmed the reason why the advertised sale was by only one bank in a Charge of *pari passu* status, or if the borrower was in default. He would also have gotten wind of the undetermined litigation in place. The Plaintiff submitted that the 3rd Defendant did not unburden its evidential duty of showing that its purchase was untainted so as to stand on the ground of an innocent purchase for value without notice thereby vitiating the sale.

The Plaintiff further submitted that the sale of the subject property was invalid for reasons that there was no consideration given by Giro Bank hence no power of sale accrued under the legal charge. In addition, the 1st Defendant had unreservedly assigned its rights and liabilities under the indenture of mortgage to the 2nd Defendant hence could not exercise any power of sale. Therefore the Indenture of Conveyance and Transfer was on its face false. In the Plaintiff's view, the 1st Defendant would not have concurred with a disinterested party to sell and convey the security yet it had a suit pending in the Nairobi Case. The Plaintiff submitted that the 1st Defendant could not have executed the decree in the Nairobi Case at the time of sale as it would have been in contravention of the common law of *lis pendens*. The Plaintiff also queried the reason as to why the 1st & 2nd Defendants' advocates, messers. Harrison, Hamilton & Mathews wrote to intimate that the sale of the property was in execution of the decree in the Nairobi case. That had they disclosed the correct nature and manner of sale, the Plaintiff could have sought pre-action disclosures opening a legal can of worms as a result.

In the view of the Plaintiff the Nairobi Case is voidable and incompetent and ought to be set aside. The 1st Defendant having unreservedly assigned its rights and liabilities would not have competently commenced the Nairobi suit. The same was not a misnomer and the decree obtained was therefore a nullity. The Plaintiff urged that if there was an amalgamation and that all the liabilities and rights of the 1st Defendant had been assigned to Giro Bank, then it was Giro Bank who would have filed the Nairobi Suit as per Section 8 of the Banking Act. That there was no resolution of the amalgamation as per Section 8 (4) &(5) of the Banking Act or endorsement or memoranda on the certificate of title as per Section 8 (8) of the Banking Act or gazette notice by the Central Bank to this effect. That the arrangement was not an amalgamation as the last entry on the title document before the Indenture of Conveyance was memorandum No.5 and the Indenture of Conveyance was registered as memorandum No. 6 on 3rd August, 2008. That if there was an amalgamation then the parties breached statute law as the 1st Defendant claimed that it was licenced to carry on banking business yet its license was canceled under Section 8 (6) (b) the Banking Act. The 1st Defendant could therefore not pass a resolution to go to Court .The Plaintiff urged further that even if the arrangement between the two banks was a reconstruction then the same rules would apply.

On the other hand according to the Plaintiff, the Nairobi Case was a debt recovery suit owing on the Indenture of Mortgage and the parties therein by consent entered on 15.11.2001 agreed to abandon issues raised in paragraphs 5 & 6 of the amended statement of defence. His argument is that the abandoned

issues and the collateral issues were not decided on merit and consequently the defence of *res judicata* cannot be available. This is compounded by the fact that neither Giro Bank nor the 2nd Defendant were party to the Nairobi case.

Mr. Kimani contends that whereas the defence of *res judicata* would have been available with regard to the specific claim in the Nairobi Case, the present claim cannot be defeated by the doctrine of *res judicata* as it accrued from the date of wrongful sale of security. It cannot bar the proving of the sale as wrongful. Counsel cited the finding of Sir William De Grey in the **Dutchess of Kingston Case 2 Smith's L.C 13th ed 644** where it was held that a judgment of a concurrent jurisdiction or exclusive jurisdiction is a plea, a bar or conclusive evidence between the same parties over the same matter directly in question before another court but not “***of any collateral matter in question or one that is incidentally cognizable, nor of any matter to be inferred by argument from the judgement.***”

Mr. Kimani pointed out that in the Nairobi Case the matter directly in issue was whether or not the Defendant owed the amount pleaded in the Plaintiff and the abandoned issues were not directly in issue and the court made no determination upon them. He urged that a court of law cannot assist an illegality, whatever the plea as observed in **Scott v Brown [1898] 2 Q.B 724**

Mr. Kimani further stated that the admitted facts were the loan of Ksh. 2.5 Million and a repayment of Kshs. 2.6 Million. He disputed the One Million loan stating that the legal charge was ineffectual hence the Plaintiff would not have defaulted on its repayment. A statutory notice would not have issued under that legal charge as no power of sale would have accrued. Leading to his conclusion that the instrument signed by all the defendants was incompetent and the sale therefore void and a nullity.

The Plaintiff capped his written submissions by stating that the Nairobi Claim was wrongfully filed as the 1st Defendant had before then assigned all its rights and liabilities under the Indenture of Mortgage to Giro Bank hence the judgment obtained by the 1st Defendant is not a bar to the present suit. He urged that the sale was illegal. Counsel contends that a court will not grant a remedy in contradiction of a statute even where parties do not take up the illegality. He has invited the court not to deny the plaintiff a remedy in light of the glaring contraventions of statute law. He relied upon the finding on **Philip v Copping [1935] 1 KB 15**

- ***The 1st & 2nd Defendants' Submissions***

Mrs. Mwangi counsel for the 1st & 2nd Defendants submitted that the Plaintiff's claim was barred by the application of the doctrine of *res judicata* as defined under Section 7 of the Civil Procedure Act. The Defendants premise their assertion on the alleged facts that the Nairobi Case was a recovery suit filed by the 1st Defendant against the Plaintiff in the instant case. It was heard and determined in favour of the 1st Defendant as per the prayers in its plaint. The Plaintiff in the instant case was granted prayers for setting aside the judgement therein but failed to meet the conditions set out hence the judgement was reinstated in December of 2004. Further, the amended defence admitted the loan and also raised an issue on the exorbitant, unconscionable, unilateral, illegal and/or outrageous interest rates. In addition to this, the judge took into account the evidence presented by the 1st Defendant and the defence of the Plaintiff in the instant suit.

According to the 1st & 2nd Defendants, the issue of the 1st Defendant's competence ought to have been raised in the Nairobi Case or in its review or in its appeal. They stated that the issue now is barred by *res judicata* as it was constructively in issue in the Nairobi Case. Counsel referred to the treatise of Mulla **on the Civil Procedure, 15th ed** stating that an issue constructively in issue is one which would have been raised as a ground of attack or defence. Reliance was placed on the case of **Andres Bruel t/a Queenscross Aviation v Nyambura Musyimi & 2 others [2014] eKLR** for the proposition that the phrase “*directly and substantially in issue*” encompasses all matters which ought to have been pleaded in the decided case but were never pleaded.

The 1st & 2nd Defendants have advanced the argument that as parties are bound by their pleadings and that the issue of capacity of the 1st Defendant to sue was not raised in the Nairobi Case or in the plaint in

the instant case, the issue now cannot be the basis on which a determination can be made by this court. Counsel relied on the Court of Appeal decision in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others** [2014] eKLR specifically where the Court adopted with approval the Nigerian Supreme Court finding in **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries plc S.C 91/2002** for the proposition that parties are bound by their pleadings and any evidence led by the parties that does not support the averments in the pleadings are to no avail and must be disregarded. Counsel also relied upon the finding in **Dakianga Distributors (K) Ltd v Kenya Seed Company Ltd** [2015]eKLR where the Court of Appeal agreed with the finding in **Independent Electoral and Boundaries Commission** (*supra*) on this view.

According to the 1st & 2nd Defendants, they did not deliberately fail to disclose the deed of assignment, amalgamation or reconstruction instruments as it was not an issue raised in the pleadings. To them it is but a non-issue and had the Plaintiff intended it to be addressed he ought to have amended his pleadings.

Counsel for the 1st & 2nd Defendants submitted further that the judgement in the Nairobi case found that the Plaintiff had been advanced a loan of Kshs. 2.5 Million by the 1st Defendant, he defaulted in repayments and is now indebted to the 1st Defendant at the tune of Ksh. 13, 205,196.64 together with an interest of 30% per annum from 29th January, 2004 until payment in full. This finding was never challenged by the Plaintiff. The 1st and 2nd Defendants rely on **Mulla** on Civil Procedure (*supra*) at p.103 in keeping with the principle that a judicial decision remains binding whether right or wrong until set aside and the error of law or fact can only be impeached via an appeal. Counsel also relies on the Court of Appeal finding in **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others** [1998] eKLR that the erroneous order must be obeyed unless discharged by the Court.

It is submitted that that the Plaintiff is now estopped from challenging the amount owing as he never set aside or appealed against the judgement. In any event the Plaintiff has produced the 11th November, 1998 letter where the merger is confirmed and his letters to the 1st Defendant by admitting the debt owing. They also urge that with this admission the Plaintiff cannot claim that the Nairobi Case was a farce.

The 1st & 2nd Defendants in challenging the Plaintiff's case state that their advocates issued the Plaintiff with the statutory notice on **12th September, 1996**. On 1st April, 1997 the Plaintiff's advocate wrote to the 1st Defendant requesting for the scheduled sale of the property be put off to allow him time to meet his obligation but a sale was still unsuccessful attempted on that same date. On 28th February, 2000 the 1st Defendant filed the Nairobi case and succeeded but while it was still pending the 1st Defendant made another unsuccessful sale through Mwara Auctioneers. The auctioneers issued a notice on 30th August, 2001. The Plaintiff admitted in his application dated 18th September, 2001 that a notice, other than the 1996, notice was issued. Subsequently a consent not to execute pending the hearing and determination of the suit order was entered. The Nairobi suit was heard *ex parte* and thereafter its judgement set aside but the Plaintiff had failed to meet the conditions for the setting aside and the judgement was revived. Hence as there was no proper order stopping the sale of property. They sold it to the 3rd Defendant via a private treaty and an Indenture of Conveyance and Transfer registered on 3rd August, 2005.

It is further submitted that the statutory notice of 1996 was issued in accordance with the law. According to the finding of the Court of Appeal in **Russell Co ltd v Commercial Bank of Africa Limited & anor** [1991] LLR Section 69A (1) did not require that the 3 months had to be stated in the notice. In any case there was no requirement to issue a second notice since it was a valid notice. Counsel referred to **Mbuthia v Jimba Credit Fianace Corporation** [1986-1989] EA 340.

Mrs. Mwangi submitted that by the consent entered on 15th October, 2001 the Plaintiff abandoned his claim that the 1st Defendant's claim was not *bona fide* and that the security was yet to be enforced. The Plaintiff also abandoned the claim that the 1st Defendant had failed to follow the statutory prerequisites to realizing the security under a charge document. In the absence of fraud, mistake or undue influence the Plaintiff remains bound by the consent.

The 1st and 2nd Defendant fervently submitted that the sale of the property was in exercise of the

statutory power of sale though they would have done so by executing the decree in the Nairobi Case. The claim by the Plaintiff that Section 52 of the I.T.P.A on *lis pendens* applies is not watertight as the right to immovable property was not directly and specifically in issue in the Nairobi Case which was a debt recovery case.

Mrs. Mwangi submit that although a legal charge dated 6<sup>th</sup> June, 1996 was registered, no monies was disbursed thereunder. The banks having merged and as this legal charge existed, the two banks had to execute the agreement of sale and indenture of conveyance and transfer to pass proper title to the 3rd Defendant. They deemed that the Plaintiff's claim that no statutory power of sale arose from the legal charge was by and large just a red herring. Besides this, the Plaintiff did not plead this point. He had pleaded that both the indenture of mortgage and the legal charge had secured the sum of 2.5 Million.

On the prayers by the Plaintiff, counsel submit that once a transfer has taken place upon the exercise of the statutory power of sale, the title of the purchaser cannot be challenged on grounds that either no case authorised the sale or that the due notice was not issued or that the power was improperly or irregularly exercised as per Section 69B (2) of the I.T.P.A

Further, Mrs. Mwangi submitted that it was not in dispute that the right to exercise the power of statutory sale had accrued to the 1st Defendant when the plaintiff defaulted in the repayments. As per the *Aberdare Investments Limited case (supra)* the mortgagee would elect the methodology to use to recover the debt such as file suit as per Section 68 of the T.P.A.

On the prayer for the directing the Government Lands Registrar to cancel the transfer of the property and restore the status quo prior to 3rd August, 2005 counsel submit that that is not tenable as the only remedy available now to the plaintiff is that of damages. To buttress this point, counsel relies on the Court of Appeal case of *Nancy Kahoya Amadiva v Expert Credit Limited & another* [2015] eKLR. It is further stated that in any case the measure of damages would only be the difference between the value in which the property was sold and the actual value of the property. Counsel invited the court to consider the valuation reports and in particular the one dated 31st March, 2004 indicating that there was economic recession and the forced market value of the property would be at Ksh.1.6 Million. Counsel also relies on the finding of Fred Ochieng, J in *Nairobi Milimani HCCC No. 402 of 2002 Wandu Limited v African Banking Corporation (U.R)* to propose that a mortgagee is not entitled to sell the property at open market value. His duty is to take reasonable precaution to obtain the true market value of the property on the date on which he decides to sell it. Judge Ochieng calculated the damages as being the difference between the market price and the sale price. The Plaintiff was not to be credited for the same as he was still in arrears.

The 1st & 2nd Defendants challenged the Plaintiff's assertion that *Dw1* was not authorised under the seal of the company to give evidence on behalf of the company as there was no order requiring this save perhaps Order 5 Rule 1(4) of the Civil Procedure Rules, 2010 requiring the verifying affidavit to be executed by a person authorised under seal to execute it. That, under Section 125 of the Evidence Act *Dw1* was competent to be a witness and that the court cannot find him otherwise.

Counsel finally submitted that the hue and cry on the statements of the loan account being printed on different letter heads is hot air as the Plaintiff had admitted that they reflected all his payments and the entries therein are sequential corroborating the Plaintiff's evidence on the payments made. Counsel concluded that the suit ought to be dismissed with costs as the Plaintiff has failed to make his case and in the alternative, if the court finds otherwise, he is only entitled to damages as submitted before.

Mr. Kaburu, counsel for the 3<sup>rd</sup> defendant contends that the Plaintiff allowed his property to be charged and the subsequent registration of title as per Section 69 of the I.T. P.A is indefeasible notwithstanding any irregularities. Counsel submit that the suit was a veiled attempt to acquire the newly refurbished building with the paid up municipal rates. It is submitted that it was not the duty of the purchaser to value the property in order to purchase, rather it was the vendor's onus. That there was no collusion on the purchase price. The 3rd Defendant submitted that it took the Plaintiff a year after the sale to head to court in a manner to suggest that he was waiting for the construction work to end.

According to the 3rd Defendant, due diligence was carried out on its behalf and having dealt with the 1st Defendant's advocates who were a reputable firm, it saw no doubt in its genuineness. The 3rd Defendant claims that it carried out a search at the Mombasa Land registry to confirm the power to sell. That as a purchaser it had no business finding out before or on the transfer if a case had arisen authorising the sale or if due notice had been issued or that the power was being improperly used. This was in accordance with the provision under Section 69 B (1) of the T.P. A. Mr. Kaburu relies on the Court of Appeal finding in *Downhill Ltd v Harith Ali El -Busiady and City Finance Bank Ltd* [2000] eKLR for the proposition that the only remedy available to the Plaintiff was the specific relief of damages.

Counsel submit that since urged that as the property was offered as security, it became a commodity for sale whose loss can be compensated in damages as was held by *Ringera J*, (as he then was) in *Bii v Kenya Commercial Bank Ltd* [2001] KLR 458 which finding was followed by *E.K.O Ogola, J* in *Al-Jala Enterprises Limited v Gulf African Bank Limited* [2014]eKLR

### Issues for Determination

- *Is the matter barred by the doctrine of res judicata?*
  - *Is this court bound by res judicata due to the finding of a court of concurrent jurisdiction?*
  - *Whether or not the sale was a nullity?*
  - *Whether or not the power of sale had accrued to the 2nd Defendant.*
  - *Was the 3rd Defendant an innocent purchaser for value without notice?*
  - *The Doctrine of Lis pendens*
  - *What is the effect of the sale*
  - *Was the property undervalued?*
  - *On Admissibility of evidence.*
  - *Was the interest charged unconscionable?*
  - *The Nairobi Case*
  - *Final determination*
- 
- *Is the matter barred by the doctrine of res judicata?*

The 1st and 2nd Defendants have submitted that the suit is barred by application of *res judicata*. The doctrine of *res judicata* is substantive law more than it is procedural. Hence when a suit is caught up by its application, it might be hard to render a cure under **Sections 1A, 1B and 3A** of the Civil Procedure Act and overall under **Article 159 (2) (d)** of the Constitution.

The applicability of the doctrine of *res judicata* is as defined under **Section 7** of the **Civil Procedure Act** in these words that:

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

Under **Section 7** of the **Civil Procedure Act** six explanations are offered as to when the doctrine arises hereby reproduced as follows:

**Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit**

**Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

It is a fact that the 1st Defendant and the Plaintiff were parties in the Nairobi Case. The Nairobi Case made a debt recovery case, the present case drums into its pleadings about an illegal or unlawful sale of the subject matter. It also raises the incompetence of the 1st Defendant as a party in the suit and hence whether or not it was the *bona fide* litigant.

According to **Mulla on the Civil Procedure, 15th ed**, a treatise that gives an authoritative commentary on the civil procedure which our jurisprudence and law heavily borrows from, indicates that instances of *res judicata* include matters constructively in issue. At **page 113** the author explains that a matter is constructively in issue if it:

***“might or ought to have been made a ground of attack or defence in the former suit , but which has not been alleged as a ground of attack or defence, will be deemed to have been directly or substantially in issue in such a suit...: that is to say, though it has not been actually in issue directly or substantially, it will be regarded as having been constructively in issue directly and substantially....If the parties had an opportunity of controverting it, that is the same thing as if the matter had been actually controverted and decided.”***

The Plaintiff has submitted that as the 1st Defendant had assigned its obligations under the indenture of mortgage to the 2nd Defendant, it would not have legally commenced the Nairobi Case. **Dw1** revealed that there was indeed a deed of assignment sealing the transfer of business and obligations though he did not produce it. It emerged that out of the deed of assignment the 2nd Defendant came into being in January, 1999. The Nairobi case was commenced in 2000. The 1st Defendant pleaded in the Nairobi Case that it was duly licenced to operate as a bank. **Dw1** in the instant suit stated that the licence had not expired. According to the Plaintiff, the Defendants had an onus as per Section 112 of the Evidence Act to reveal the fact of the existence of the deed of assignment. **Section 112** of the **Evidence Act** provides that:

**In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

In the Plaintiff's bundle of documents (*at p.53*) there is a letter dated 11th December, 1998 from Giro Bank to the Plaintiff informing him of the merger between Giro Bank and Commerce Bank and the new bank named Giro Commercial Bank. In the Nairobi Case, the Plaintiff admitted the description of the 1st Defendant in his defence and in the amended defence [*p.92-93 Defendants bundle*]. Should the Plaintiff have raised this point in the Nairobi Case, if so would he be caught up by the application of constructive *res judicata*? I opine that he had the requisite knowledge via the letter dated 11th December, 1998, however to bar the current suit based on this knowledge would be perpetuating an illegality for reasons discussed in this judgement.

The letter dated 11th December, 1998 reveals that two banks had merged, the 1st Defendant and Giro Bank. A third entity was thereby constituted. This third entity became Giro Commercial Bank and though the letter indicated that the banking services available to the customers of the 1st Defendant and Giro

Bank were unaffected, legally speaking the new entity become a new legal person and the two banks ceased to exist. A merger is defined by the **Black's Law Dictionary 8th ed.** as “**The absorption of one organization (esp. a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former**”. Simply put, the 1st Defendant and Giro Bank ceased to exist whether or not their licences had not expired. Under what law did the 1st Defendant acquire its legal standing? There is no issue of constructive *res judicata* in the premises of this fact and the court cannot reproduce an illegality or be seen to perpetuate it. As a result, the case of Andres ***Bruel t/a Queenscross Aviation*** (*supra*) is distinguishable under the circumstances of this case. Holding that the matter of *locus standii* is directly and substantially in issue would defeat the ends of justice as the Court would in essence be compelled to carry on with a legal untruth and rubber stamp it.

The Plaintiff further raised the issue that the 1st Defendant had not proved the alleged amalgamation of two banks seeing that the deed of assignment was not produced. My research reveals from the website of the Central Bank of Kenya [www.centralbank.go.ke](http://www.centralbank.go.ke) that the merger of the banks had been approved as at 24th November, 1998 and further as per **Kenya Gazette Vol. 102 No. 16 Notice No. 1773 of 24th March, 2000 p.584**, Giro bank had indeed merged with Commercial Bank. *Dw1* was objectively clear that the Giro Commercial Bank came into existence in January of 1999 after the merger. The evidence of change of name from Giro Bank to Giro Commercial bank is via the certificate of change of name dated 11th January, 1999. The 1st Defendant ceased for all purposes from being a person known in law. How can the Court then turn a blind eye and declare them legal?

It was improbable that the 1st Defendant had a valid licence by dint of **Section 3(1)** of the Banking Act which states as follows: -

**No person shall in Kenya-**

- a. **transact any banking business or financial business or the business of a mortgage finance company unless it is an institution or a duly approved agency conducting banking business on behalf of an institution which holds a valid licence;**
- b. **unless it is a bank and has obtained the consent of the Central Bank, use the word “bank” or any of its derivatives or any other word indicating the transaction of banking business, or the equivalent of the foregoing in any other language, in the name, description or title under which it transacts business in Kenya or make any representation whatsoever that it transacts banking business;**
- c. **unless it is a financial institution or mortgage finance company and has obtained the consent of the Central Bank, use the word “finance” or any of its derivatives or any other word indicating the transaction of financial business or the business of a mortgage finance company, or the equivalent of the foregoing in any other language, in the name, description or title under which it transacts business in Kenya or make any representation whatsoever that it transacts financial business:**

**Provided that—**

- d. **the provisions of paragraphs (b) and (c) of this subsection shall not apply to investment banks licensed under [section 11](#) (3) of the Capital Markets Act and microfinance banks licensed under [section 6\(1\)](#) of the Microfinance Act, 2006; and**
- e. **a person granted consent by the Central Bank under paragraph (b) or (c) and who does not obtain a licence within twelve months of such grant shall forthwith cease the use of those words.**

Now the Plaintiff urges the court to draw a negative inference as per **Section 119** of the Evidence Act which provides that:

**The court may presume the existence of any fact which it thinks likely to have happened,**

**regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.**

I have made observations after perusing the Nairobi Case judgment that the 1st Defendant produced as part of its evidence a legal charge dated 6th June, 1995 (*p. 3 &4 of the judgment – at p.106-109 of the Defendants' documents*) to prove security registered in its favour, the Court in the Nairobi Case found that monies were lent and that legal instruments, *in plurality*, were executed. The Court never referred to the amended statement of defence but concentrated on the statement of defence.

It is a fact that there was no legal charge made in favour of the 1st Defendant as admitted by **Dw1**. The registered legal charge was a nullity for having no consideration issued under it. That was the evidence the 1st Defendant produced in the Nairobi case which the 1st & 2nd Defendant now claim the learned Judge considered. In my view, even supposing the 1st Defendant had a legal standing, it still would not have been said to have proved its claim in the Nairobi Case as it appears that the Indenture of Mortgage that was said to be owing was never produced in evidence.

At this point, as per **Section 119** of the **Evidence Act**, this Court may make the presumption that the 1st Defendant was out to curtail the Plaintiff's equity of redemption by deliberately leaving out crucial information that would have challenged its *locus standii* even in *ex parte* proceedings. In my considered view, the 1st Defendant and its successor in title was guilty of material non-disclosure. This non-disclosure goes against the spirit of the **I.T.P.A, 1882 Act** which gives an equitable opportunity for a mortgagor to exercise his equity of redemption. See **Section 69** of the **I.T.P.A.** The application of the doctrine of *res judicata* has exceptions and this situation is one of them, notwithstanding the fact that the Plaintiff admitted the 1st Defendant's claim of *locus standi*, and his indebtedness.

The reason for this is that, had the status of the 1st Defendant touching on its lack of *locus standii* been revealed to the Honourable Court in the Nairobi Case an issue of jurisdiction would have arisen. After all, the proceedings in Nairobi were carried out *ex parte* and the 1st Defendant having full knowledge of its status in accordance with **Section 112** of the **Evidence Act** was expected in that court of law to demonstrate that they were the proper party wielding the right to sue regardless of whether or not the Plaintiff had admitted the claimed status.

Furthermore, the Court in the Nairobi case never made a determination on the amended statement of defence (*p.4 of Judgement, p. 109 of the bundle of documents*). The issues in the judgment therefore cannot under the circumstances be presented as a bar to the proceedings before this court.

It does not always follow that a matter becomes *res judicata*. The Supreme Court of India in ***Ram Sewak vs Munna Lal* [1988] AIR 452, [1988] SCR (2) 416** approved the finding in the matter of ***Hazi Abdul Karim v. Mohd. Ismail. [1978] U.P. Rent Cases 691*** P where it was held that:

***"A finding merely on a collateral fact of jurisdiction cannot operate as res judicata in later proceedings between the same parties. It has been stated in Halsbury's Laws of England, Third Edition (Volume XV) paragraph 367 (at page 192). It is a fundamental rule that a judgment is not conclusive to anything but the point decided, or of any matter which came collaterally in question or of any matter incidentally cognizable."***

The Supreme Court of India held that:

***"The principle behind this rule seems to be that even though in the previous proceedings a decision on a collateral fact about jurisdiction, wrongly given may be binding on the parties for a limited purpose i.e., only so far as those proceedings are concerned, yet it would completely defeat the ends of justice, if such erroneous decision were allowed to become final and perpetuate itself. It would be conducive to the ends of justice that in later regular proceedings the parties should not be thwarted by an earlier wrong finding and should be afforded full opportunity of demonstrating that the condition precedent to the exercise of jurisdiction were absent."***

***It cannot, therefore, operate as res-judicata and the parties must be left free to agitate the same question again in a subsequent suit for ejectment or other appropriate proceedings.”***

Parties, even by consent, can never confer jurisdiction upon a court which lacks it in the first place. This is a timeless legal truth. It therefore needs not to be shouted from the roof tops that the principle on jurisdiction is clear that jurisdiction is the key thing; see case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1.

The Court of Appeal in Owners of the Motor Vessel “Lillian S” (*supra*) also held that:-

***“A question of jurisdiction may be raised by a party or by a Court on its own motion and must be decided forth with on the evidence before the Court”***

Therefore in a case where a party claims to be corporation and hence having a legal personality with the right to sue and that legal existence ceased to be with the very knowledge of that entity, then it is barred by the operation of the law from suing in its own name. A Court cannot under those circumstances make a final determination and if it does, the wrong determination does not act as bar in another suit for being *res judicata*.

A court never issues orders in vain and to confer a decree upon a non-legal entity, a non-person for that matter, would be making nonsense of the whole process. A court must zealously guard against abuse of its process. In Githunguri v Republic [1985] KLR 91 the Court of Appeal adopted the decision of **Lord Selbourne** in Metropolitan Bank Ltd v Pooley (1885) 10 App Cases, 210, p.214 stated that ***“The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure”***. In Tiwi Beach Hotels Limited versus Stamin [1991] KLR 658 the Court of Appeal held, inter alia, that material non-disclosure is an affront to the dignity and credibility of the Court. The 1st Defendant and for that matter its assignee the 2nd Defendant is not without fault for material non-disclosure which has clearly embarrassed the judgment and subsequent rulings in the Nairobi Case.

The 1st & 2nd Defendants are right to state that parties are bound by their pleadings. However when an issue of law that clearly touches on jurisdiction has been raised and the opposing party accorded an opportunity to respond, ought to be addressed even when it was neither raised by the Plaintiff nor the Defendant. The issue of *locus standii* was key to the Court proceeding in the Nairobi Case. This being a court of law cannot pretend that there was no irregularity that would have shaken the foundations of the Nairobi Case which the 1st & 2nd Defendants now seem intent on concealing. I speak boldly when I state that this Court would, as hereinbefore and after laid out, have held that the 1st Defendant had become non-existent and all its acts thereafter became a nullity even if the Plaintiff remained mum or perhaps sided with the 1st & 2nd Defendants' view on this point. It is too germane a point to let it just slide by.

• **Is this court bound by *res judicata* due to the finding of a court of concurrent jurisdiction?**

As held in the Indian Supreme Court case of Ram Sewak (*supra*) the doctrine of *res judicata* where a wrong judgment is made cannot avail a defence. The 1<sup>st</sup> defendant had no *locus standii* to pursue the case for reason of the merger. It was a legal non- entity, not a person known in law for purposes of pursuing its rights and any order of the Court became inexecutable, a void order so to speak. Further under **Mulla** (*supra*) **p. 103** it is indicated that the erroneous judgment cannot be impeached ***“unless it relates to a matter of jurisdiction”***. *Locus standii* clearly touches on jurisdiction. To whom will the prayers be granted? The 1st Defendant instituted the suit while it was non-existent, it cannot be argued that the successor in title would inherit it as there was in essence no legal suit to inherit. There were no directors of the 1st Defendant to make a resolution or seal the verifying affidavit when the 1st Defendant become non-existent after the merger and the Nairobi suit was not a derivative suit by a shareholder. In the circumstances where a mortgage was registered in favour of a particular person, the issue of competency to sue is not a non-issue nor a mere technicality. Even if the directors of the two defendants are the same that does not make any difference.

The Court of Appeal decision in Omega Enterprises (Kenya) Limited case (*supra*) that adopted with

approval the finding of **Lord Diplock** in *Isaacs v Robertson* [1984] All E.R 140 at p.143 where in referring to orders made by a court in error, he rendered himself thus that:

**“there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and to give the judge a discretion as to the order he will make.”**

In my considered view no instance of *res judicata* has been demonstrated.

- **Whether or not the sale was a nullity?**

There were two securities registered on the same date against the property. One was a legal charge which had no legs to stand on for reasons that the purported loaned money was never disbursed. The other one was an English mortgage and for purposes of this judgment simply referred to as the mortgage. An English mortgage is defined by *Tudor Jackson, The Law of Kenya, 3rd ed. (Nairobi:Kenya Literature Bureau) p.293*: Is

**“one in which the borrower binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the lender, but subject to a provision that he will retransfer it to the borrower upon repayment of the mortgage money.”**

The applicable law on the mortgage was the Indian Transfer of Property Act (I.T.P.A), 1882 as amended and applied in Kenya by the 1959 amendment and codified under the Transfer of Property Act (TPA).

The Plaintiff has pleaded and submitted that if the sale of the subject property was pursuant to operation of Section 69 of the Indian Transfer of Property Act (I.T.P.A), it was to be in exercise of the statutory power of sale but the notice given was insufficient. Subsequently, the sale became a nullity as there was no statutory notice. The 1st and 2nd Defendants defended this claim admitting that the sale was in pursuance of the said statutory power of sale and presented a notice via a letter dated 12th September, 1996. The notice gave the Plaintiff a 14 day period within which he was expected to pay up the whole loan amount plus the accrued interest or else the property would be put up for sale by public auction. The Plaintiff received the said notice via his advocates. At cross-examination **Dw1** conceded that the statutory notice ought to have issued a period of 90 days.

Under the **TPA Section 69A. (1)** an equivalent of the **I.T.P.A, 1882** provides that:

**A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until-**

**(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage- money, or of part thereof, for three months after such service; or**

**(b)...**

**(c)...**

The 14 day period does not fit the bill of a statutory notice for the purposes of the exercise of the statutory power of sale. The said notice was in actual sense invalid for reason of not indicating that the sale would take place **after** three months of its service. The other notice the 1st & 2nd Defendants claim was issued by Mwara Auctioneer to the Plaintiff gave 45 days notice. It too does not fit the proper description of a statutory notice under Section 69 A of the T.P. A. The Court of Appeal in the *Trust Bank Case (supra)* [other ref: [2000] eKLR], unanimously found that a valid notice under **Section 69 A (1)** of the **I.T.P.A** is one that indicates that the security would be disposed off after three months of service of that notice. The court underscored what the object of such a notice was and departed from its earlier decision in *Russell (supra)* on the notice period when it rendered itself thus:

*“For these reasons we are satisfied that as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, while it will normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. The next question is whether the decision of this Court in the Russell case was a wrong decision. It is immaterial if the earlier decision had been by a majority (which it was not) although we must add that a dissenting judgment cannot but cast some doubt on the correctness of the decision of the majority. We have carefully studied the decision and it appears to us that the only reason why it was held that the three months' period stipulated in Section 69(A)(1) of the Transfer of Property Act need not be specifically referred to in the notice to sell is because this is not so stated in the statute. The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid. In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid.”*  
(Own emphasis)

A proper and valid statutory notice was never issued thereafter hence the finding in Mbuthia case (*supra*) cannot be applied under the circumstances. The sale became a nullity. It was vitiated by the legally unrecognisable stature of the 1st Defendant, the lack of a proper statutory notice by its successor in title and by the constructive fraud to be discussed further on.

**Section 69A (1) of the T.P.A** further provides that the right to exercise the statutory power of sale is also available if:

**(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or**

**(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.**

In the 1st & 2nd Defendants' defence it is not indicated why they elected to exercise the power of sale. That it is not indicated whether or not the interest was in arrears or whether or not there was a breach in a condition set in the mortgage. This anomaly was also noted in **Judge Maranga's** Ruling delivered on 25th May, 2007 granting injunctive orders against the suit property in this suit. In brief then, the Defendants have not demonstrated that the statutory power of sale had accrued.

It must be noted that the Plaintiff's angle of approach was that as the 2nd charge was a nullity for reasons that there was no disbursement of the loan amount, the 2nd Defendant ought not to have been part of the sale and could not exercise any statutory power of sale. As before explained the 2nd Defendant became the legal entity that came into existence and took over the liabilities hence, without addressing the other legal entanglements allegedly bedeviling the sale, could exercise the statutory power of sale on the 1st charge. Firstly, it did not do so in the name of Giro Bank and secondly where it is proven that the 1st charge could be pursued, then the clauses referring to the 2nd charge in the sale agreement made the sale voidable not void.

Referring back to the Indenture of Conveyance and Transfer, it includes in its contents the indenture or legal charge dated 6th June, 1995 in favour of Giro Bank. It is conceded by the 1st & 2nd Defendants that no consideration was given by Giro Bank so as to make that legal charge legally binding or perfect it as a proper security. Therefore the submission that it was therefore necessary to have the 2nd Defendant so as to pass proper title to the 3rd Defendant in light of the legal charge is unconvincing. Why muddle the indenture of conveyance and transfer by introducing a non-binding security. Why did the 2nd Defendant take that long to cause a discharge of the charge that they clearly knew was bad or at least presented its concerns before a court of law on its discharge before the purported sale. There is actually no indication that the 2nd Defendant made any efforts to remove this error or correct it before its directors executed the Indenture of Conveyance and Transfer.

- ***Whether or not the power of sale had accrued to the 2nd Defendant.***

The statutory power of sale did not accrue to the 2nd Defendant. **Dw1** stated that Giro Bank acquired the business of the 1st Defendant and the outfit became Giro Bank Commercial Bank in 1999. It was essentially a merger as defined by the **Black's Law Dictionary 8th ed.** as “**The absorption of one organization (esp. a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former**”. The new company then becomes the recognised legal person. Hence the 2nd Defendant, Giro Commercial Bank, to the extent that it was pursuing a debt under the first mortgage, had every right to pursue the same. However as there was no 3 month notice issued to the Plaintiff this right to exercise its statutory power of sale was premature. A statutory notice had to be issued first by the 2<sup>nd</sup> defendant.

- ***Was the 3rd Defendant an innocent purchaser for value without notice?***

The circumstances of this case are as follows: **Dw1** testified that the 1st Defendant and Giro Bank notified their customers of their merger. The Plaintiff was notified by a letter dated 11th December, 1998. Giro Commercial Bank then came into existence in January, 1999 and all the business of Commerce Bank was by deed of assignment transferred to it. The effect of a merger is in no doubt known in law; in this case it did away with the legal existence of the 1st Defendant and that of Giro Bank. It is interesting therefore to note that notwithstanding this legal fact *Messers. Hamilton, Harrison & Mathews* forwarded to the 3rd Defendant's counsel documents which included a sale agreement and the disputed statutory notice via letter dated 7th June, 2005 stating they were acting for the 1st Defendant. To throw a spanner in the works, *Messers. Kipkorir, Titoo & Kiara Advocates* in 2000 filed the Nairobi Case in the name of the 1st Defendant. In my perception, the forwarded documents were intended to give the impression that the 1st Defendant had the authority or right or power to sell the subject property. This perpetuated a falsehood as the 1st Defendant was by law nonexistent yet the 2nd Defendant's directors must have been aware of the 1st Defendant's legal status. How then did the legally non-existent entity execute the Indenture of Conveyance and Transfer?

The Indenture of Conveyance and Transfer drawn by the 3rd Defendant's counsel indicating that the 1st Defendant was a vendor having the authority or right or power to sell the subject property. Was never amended. The directors of the 2nd Defendant having the knowledge that the 1st Defendant was nonexistent penned down their signatures in execution of the Indenture of Conveyance and Transfer. They did so both as directors of the 1st Defendant and of the 2nd Defendant. The falsehood was presented to the registrar of titles and the indenture registered on 3rd August, 2005.

Further to this, **Dw2** did state that the bank approached estate agents in the Coast Province region and one of them provided a buyer. The 3rd Defendant's witness stated that he got connected to the bank through his own agents and a private treaty was borne. That is very well and the court take judicial notice that use of agents is not out of the norm. However, what perplexes me is how the 3rd Defendant's witness got to learn of the intended sale. He testified that he saw an advertisement with a tenant at the suit premises before approaching his agents to pursue the sale. He never offers any explanation about how he got himself at the said premises during his ordinary business or why that particular tenant showed him or even had a need to show him an advertisement of that nature. To make the situation stickier, the document produced as the advertisement is actually a letter dated 12th May, 2005 written to **DealPlan Co**

(K) Ltd by Giro Commercial Bank, the 2nd Defendant. What piques my curiosity is that alleged advertisement is in actual sense a private letter specifically addressed to a company and copied to the branch manager of the bank at Mombasa. Why was it in the hands of an unknown person, the alleged tenant? Just too murky the water a little bit more, the said letter is also amended by hand on its intended physical destination and no explanations offered. The 3rd Defendant in its response to the Plaintiff's application dated 12th October, 2006 filed a replying affidavit dated 27th October, 2006 in which the 3rd Defendant's witness avers that he saw the advertisement in June, 2005 and in its further replying affidavit dated 3rd November, 2006, he avers that he saw it in May, 2006. It is quite doubtful based on his evidence that he was privy to an advertisement of sale of the suit property.

Another interesting observation is that the letter dated 7th June, 2005 from the 1st Defendant's advocates enclosed a copy of the mortgage dated 6th June, 1995 and of an indenture dated 1st July, 1980. **Dw1** never offered an explanation of which indenture dated 1st July, 1980 the advocates were referring to. As it were, both the Plaintiff and the 1st & 2nd Defendants were in agreement that a mortgage and a legal charge were registered but both were dated 6th June, 1995. There is no indication that the 3rd Defendant or its advocates made an enquiry about the indenture dated 1st July, 1980.

It is noteworthy that the Indenture of Conveyance and Transfer drawn by the 3rd Defendants' advocates includes the legal charge dated 6th June, 1995. However, the letter dated 7th June, 2005 from Messers .Harrison, Hamilton & Mathews to the 3rd Defendant's advocates did not enclose it. How did the 3rd Defendant or its advocates learn of it so as to have it included in the indenture that the 3rd Defendant's advocates drew? There is also no indication that the 3rd Defendant or its advocate made an enquiry on the legal charge dated 6th June, 1995 which was inserted in the Indenture of Conveyance and Transfer which they drew.

The letter dated 7th June, 2005 did enclose the certificate of change of name of the 1st Defendant at least offering an explanation why a mortgage was registered in the name of Credit & Commerce Finance Limited. However it did not enclose any certificate of change of name of the 2nd Defendant. It came out clearly in **Dw1**'s testimony that Giro Commercial Bank was as a result of a merger between the 1st Defendant and Giro Bank, making the three entities separate and infact extinguishing the existence of the 1st Defendant and Giro Bank. There was no explanation offered as to why the 1st Defendant was included as joint vendor for purposes of the sale of the suit property. There is no indication that the 3rd Defendant advocates sought an explanation or attempted to enquire from Central Bank of Kenya on whether or not Giro Bank was one and the same entity as Giro Commercial Bank as would be expected in due diligence of a purchaser's advocates.

The 3rd Defendant's witness testified that when he saw the alleged advertisement he instructed his agents to make the purchase and he made an offer of Ksh. 1.9 Million to which he was requested to deposit 10% of the purchase price. There is no indication that the vendors indicated the purchase price. The 3rd Defendant did not cause a valuation of the property before making the proposal to purchase it at that sum. Did the 3rd Defendant's director, a businessman, just guess a figure, which at that time was a colossal sum and for that matter without any valuation done? The last valuation carried out on the property as per **Dw1** was in March, 2004 and a valuation report dated 31st March, 2004 made. However this report was not included in the documents enclosed in the letter dated 7th June, 2005 from Messers .Harrison, Hamilton & Mathews. The acceptance of the offer to purchase at Ksh. 1.9 Million then becomes suspect, notwithstanding the valuation report dated 31st March, 2004, as the 3rd Defendant's witness had never, as per his testimony, known Giro Bank before that time. The valuer in the report dated 31st March, 2004 indicated that the present value free from encumbrances was Ksh.2.4 Million and at full market price at Ksh.2.6 Million. Assuming that the 3rd Defendant's witness was unaware of the forced sale value indicated as Ksh. 1.6 Million why did the vendors hesitate to ask for more seeing that they were intent on recovering the alleged loan owing? The intention is demonstrated by the fact that the 1st Defendant had previously occasioned an unsuccessful sale by auction and also instituted a court case. **Dw1** further testified that the estate agents found one buyer giving the impression that the bank did just gladly took the first offer that came along without attempting more. No counter offer was made.

In a nutshell, there is evidence of fraud and or collusion and the conduct of all the Defendants is a live one in this proceedings. It is a well-established principle that parties are bound by their pleadings and fraud or collusion was not been pleaded nor particularized. The Court of Appeal in Suleiman *Rahemtulla Omar & another v Musa Hersi Fahiyeh & 5 others* [2014] eKLR adopted with approval its own decision in *Chumo Arap Songok vs David Kibiego Rotich* (2006) eKLR that found that:

***“The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings.”***

However, justice though blind, does not turn a blind eye to obvious injustice and in this case constructive fraud is proved. The Court of Appeal in Suleiman *Rahemtulla Omar* (supra) went further to emphasise the rider on that principle where it was further held in *Chumo* (supra) that:

***“Unless a matter has been canvassed before it by the parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”***

The Court also *defined* constructive fraud when it held that:

***“It is our view that the issue of the appellants’ conduct in the entire process was a live one. Though not directly pleaded, evidence was adduced to the effect that the appellants even paid a substantial amount of the sale price in cash behind their advocate’s back. There was no receipt issued for the same or any other form of acknowledgment. The lack of proper due diligence on their part; among other things clearly shows that the transaction was not done above board and the appellants were part and parcel of the whole scam”*** (own emphasis)

The Suleiman *Rahemtulla Omar case* (supra) was a matter involving the sale of property that once belonged to the Government of the Somali Democratic Republic which was sold after it became an *etats sans government*, that is, a failed state. The Court of Appeal in finding that constructive fraud had been proved found that the seller had no legal authority to sell and that the buyer could not be considered an innocent purchaser for value without notice. It found that the counsels for the parties did not conduct due diligence on the authority to sell and on status of the property as was the case here. The 3rd Defendant’s postal search on the title was done on 22nd August, 2005 after the transfer in its favour. The Court in *Suleiman Rahemtulla Omar case* (supra) held *inter alia*, that:

***“It is true that practically speaking counsel for the purchaser carries the heavier burden when it comes to carrying out due diligence. This is so because it is his client who stands to lose if he commits his funds to purchase a property that later turns out to be problematic. This does not however, absolve the vendor’s counsel from the responsibility of confirming that his client has a good title to the property he seeks to dispose of and also that the property has a clear Title.”***

The court in finding fault on the part of the purported vendor's counsel held, *inter alia* , that:

***“In this case, all Mr. Kibunja did was to conclude that the former ambassador had authority to sell the suit property by looking at a document whose author he did not even authenticate. He also claimed that he checked the directory and confirmed that the ambassador’s name was still the one appearing as the duly accredited ambassador of the Somali Republic to Kenya.***

***What Mr. Kibunja nonetheless could not plausibly explain to the court is how he did not know that as at that time, there was no state known as the Democratic Republic of Somalia. His statement that there was ‘always a government’ in Somalia was fallacious to say the least since he must have been aware, like any other Kenyan of reasonable intelligence and exposure that the Somali Government had collapsed in 1991.***

***It is clear to us that Mr. Kibunja took his client’s instructions at face value and did not bother to do any serious background check to confirm if indeed he had capacity to dispose of the property. He also ought to have confirmed with the Ministry of foreign affairs what procedure needed to***

***be followed before such a property could be sold.”***

The Court in finding fault on the part of the purchaser's advocates, held, *inter alia*, that:

***“On the other hand, as stated earlier Mr. Brahmhatt, counsel acting for the purchaser had a heavier responsibility to his client when it came to conducting due diligence. All he did was to write the letter dated 4th August 1994 to Mr. Kibunja seeking confirmation on whether the former Ambassador had authority to sell the said property. Mr. Kibunja responded the very following day and confirmed the information sought.”***

And went on to hold that

***“...There is no evidence that Mr. Brahmhatt did any other due diligence whatsoever. He did not even attempt to confirm from the ministry of Foreign Affairs what needed to be done before a property which belonged to a foreign state could be sold. He did not even seek confirmation from the said ministry as to whether the former Ambassador had the requisite authority to transact on behalf of a Government which was no longer in existence.***

***It is our observation that the said counsel failed the diligence test and this is what landed his clients in the quagmire they now find themselves in.”***

In the instant case constructive fraud was proved: There was no due diligence on the part of the 3rd Defendant's directors or its counsel as the purchaser's advocates, material information on the status of the 1st Defendant was concealed by 2nd Defendant, the vendors advocates were not forthcoming either, the inclusion of Giro Bank legal charge in the Indenture of Conveyance and Transfer was misleading, there were unexplained gaps in all of the defendants' narratives which in my view are not coincidental. Finally, the legally dead 1st Defendant had no power of sale and ought not to have been a vendor. The 1st & 2nd Defendant spoke with both sides of the mouth when the bank pleaded that the sale was in execution of a decree and on the other hand in exercise of the statutory power of sale. The 1st & 2nd Defendant also misled the Plaintiff by indicating that the sale was in execution of the decree which was not the case. Their advocates *messers.* Harrison, Hamilton & Mathews wrote to inform the Plaintiff that the sale of the property was in pursuance of the decree of the Nairobi case. Yet it emerges that the sale took place before the decree came to play. The ruling denying the Plaintiff a downward review of the deposit was delivered on 20th January, 2006 several months later after the registration of the Indenture of Conveyance and Transfer.

In my view all the Defendants had some knowledge of the irregularity of the sale. I am in agreement with the Plaintiff's submissions based on **Lord Bridge's** obiter at **p. 359** in the **Westminster City Council** (*supra*) where he stated that:

***“...it is always open to the tribunal of fact, when knowledge on the part of a defendant is required to be proved, to base a finding of knowledge on evidence that the defendant had deliberately shut his eyes to the obvious or refrained from inquiry because he suspected the truth but did not want to have his suspicions confirmed.”***

- ***The Doctrine of Lis pendens***

The plaintiff also brought in the doctrine of *lis pendens*. To capture the import of the doctrine of *lis pendens*, I am guided by the finding of ***Nambye, J*** which I have extensively quoted. ***The learned judge held in Bernadette Muriu v National Social Security Fund Board of Trustees & 2 Ors(2012) eKLR*** that:

***“As for the doctrine of “Lis pendens”, this is enshrined in section 52 of the ITPA (Indian Transfer of Property Act). It provides:***

***“During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the governor-general in council of a contentional suit or proceedings***

in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party thereto under any decree or order which may be made therein except under the authority of the court and in such terms as it may impose .....

*This provision has been construed and crystallized by case law and legal texts. See Mulla on the Transfer of Property Act 1882 ninth Edition Lexis Nexus Butter-worth at page 366 pr.2, observations on this doctrine runs thus:*

*“Pendency of a suit or proceedings shall commence from the date of the presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction and to continue until the suit or proceedings has been disposed of by a final decree or order and complete satisfactory or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation preferred for the execution thereof by any law for the time being in force”.*

*At page 369 pr.3 of the same text of Mulla it is stated:*

*“It is intended to strike at attempts by parties to a litigation and prevent them from circumventing the jurisdiction of the court in which the dispute on rights or interests in immovable property is pending. To be prevented are private dealings that may remove the subject matter of litigation from the ambit of the power of the court and prevent the court from deciding a pending dispute or to frustrate its decree.*

*On case law, there is the case of METHI AND SWANI FARMERS CO. OP SOCIETY LTD VERSUS THE CO-OP BANK OF KENYA LTD & MAKINDI LTD NAIROBI HCCC 2603/95 wherein S.E. Bosire J as he then was held that:*

*“Section 52 ITPA prohibits dealing in property in dispute in civil proceedings ....”*

*The case of MAWJI VERSUS US INTERNAITONAL UNIVERSITY AND ANOTHER (1976) KLT 185 wherein it was held inter alia that:*

*“The court has power to prevent a breach of the provision of section 52 of the Transfer of Property Act in proceedings before it in which any right to immovable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in pending the final determination of the proceedings except under the authority of the court and upon such terms as it may impose”.*

*There is the case of FREDRICK JOSES KINYUA AND PETER KIPLANGAT KOECH VERSUS G. N. BAIRD NAIROBI HCCC NO. 4819 OF 1989 and Consolidated with Nairobi HCCC NO 6587 OF 1991 GEORGE NEIL BAIRD AND WANDIE BAIRD VERSUS FREDRICK JOSES KINYUA AND PERTER KIPLANGAT KOECH decided by g. S. Pall, on 10/12/1993. In this case the learned judge as he then was drew inspiration from the case of BELLAMY VERSUS SABINE IDEJ 566 and then ruled that:*

*“The doctrine of Lis pendens intends to prevent not only the defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suits so as to defeat the rights of the other party .....*

*The effect of the maxim is not to annul the conveyance but only to render it subsequent to the rights of the parties subject to litigation”.*

At page 15 line 8 from the top the learned Judge as he then was went on:

*“The doctrine of lis Pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interest of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other ....”.*

At page 16 line 14 from the bottom the learned judge quoted with approval the decision in the case of *MAWJI VERSUS INTERNATIONAL UNIVERSITY (SUPRA)* where it had been observed *inter alia* that:

*“Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit”.*

*This court has given due consideration to the afore assessed case law and in its opinion since the case law emanates from decisions of court of concurrent jurisdiction, they are not binding on this court. This Court is entitled to revisit the relevant sections, construe it on its own and then arrive at its own conclusion on the matter. The court has done so and in its opinion the afore assessed decisions made a correct construction of the said doctrine or maxim. The principles extracted therefrom by this court are as follows:*

*The applicability of the doctrine or maxim of Lis Pendens starts right from the time the proceedings are initiated and remains applicable until the initiated proceedings are finally determined and decree issued and executed.*

*It operates to prevent the initiated proceedings from being rendered null and void by protecting and preventing the subject of the proceedings from becoming extinct.*

*It binds not only parties to the litigation but 3rd parties who may acquire an interest in the subject matter of the proceedings during the pendency of the proceedings irrespective of whether they had notice of litigation or not.*

The 1st Defendant, regardless of its *locus standi*, was bound by the doctrine of *lis pendens* and so was its assignee, the 2nd Defendant which was equally bound. At the time of the sale of the property to the 3rd Defendant the stay order given on 5th April, 2004 and issued on 7th April, 2004 pending the hearing and determination of the Plaintiff's application for the review was still in force until they were discharged by that ruling of 20th January, 2006. It is therefore surprising that after the 1st & 2nd Defendant urged the Court to consider **Mulla** (*supra*) at **p.103** and ***Omega Enterprises (Kenya) Limited case*** (*supra*) on the principle of obedience of court orders, have with the same breath submitted that there was no proper order stopping the sale of the property hence giving them a free hand to sale the property at the time they sold it.

Before the Ruling was delivered on 20th January, 2006, the 2nd Defendant had already looked for a buyer; it had written a letter to DealPlan Company dated 12th May, 2005 indicating that the suit property was “*ready for sale*”. The 2nd Defendant then purportedly made to sell the property together with the 1st Defendant to the 3rd Defendant. The 1st Defendant's advocates also purportedly made to seal the deal by sending the documents they deemed necessary to the 3rd Defendant's advocates. I deliberately cite the acts as purportedly done as the 1st Defendant as before discussed did not at that time exist. An indenture of Conveyance and Transfer was eventually registered in favour of the 3rd Defendant on 3rd August, 2005. **Dw1** clearly indicated that the directors of the 1st and 2nd Defendants were common.

They therefore knew of the pending Nairobi suit and about the legal existence or rather its nonexistence of the 1st Defendant, they had no right to dispose of the property in light of all these. The sale became bad having taken place *lis pendens*.

The failure accorded to the Plaintiff by the Defendants, namely, that he failed to set aside, appeal or raise the issue of locus before cannot purge the illegality of the sale as it was done *lis pendens* and the elements of fraud that cannot be wished away. Even if the Court had found the plaintiff owing, the sale would not have overtaken the determination of the Nairobi suit hence it being a nullity. Anticipating a favourable decision cannot accede the decision itself.

The 1st and 2nd Defendants argue that the claim by the Plaintiff that Section 52 of the T.P.A on *lis pendens* applies is not watertight. They argued this is as they claimed that the right to immovable property was not directly and specifically in question in the Nairobi Case as it was a debt recovery case. However, this debt was based on a registered security whose subject matter included acquisition of a right in immovable property. Hence it was actually directly and specifically in question for the court had to consider how the Plaintiff became indebted and any rights if any of the 1st Defendant which as per the mortgage document included a proprietary right over the subject matter. This was not a civil debt case.

- ***What is the effect of the sale:***

The evidence before this court clearly indicates that the sale was irregularly done. However, the 1st & 2nd Defendants have submitted that the title acquired upon transfer of the property via exercise of the power of sale could not be impeached. **Section 69B (2)** of the T.P.A provides that:

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

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

**(b) that due notice was not given; or**

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

In Captain *Patrick Kanyagia & another v Damaris Wangechi & 2 others* [1995] eKLR, A.B. Shah, J. A in a case where the purchaser for value without notice, in a public auction, found that the purchaser possessed a good title. The mortgagor could then only revert to damages for the irregular sale in accordance with Section 69B (2) of the T.P. A. The learned judge also found that he saw “**...no duty cast, in law on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell.**” He further held that “**The buyer's duty is to check the register and see if the title of the vendor or the mortgagee exercising its/his power of sale is clear**” The Judge also stated that it was only prudent for such a purchaser to make inquiries so as to put him on guard not to buy a law suit.

The learned judge emphasised that in his view “**... a purchaser for value without notice and not being involved in any fraud stands on a different footing.**” In answer to the question whether or not a registration under the G.L.A. forecloses an inquiry into the legality of the processes preceding the registration? To which he stated that, “**Yes, if fraud is discovered, the court can go into the process preceding registration.**”

The circumstances that lead to the sale and the process of the sale have revealed that indeed there was subtle fraud by the Defendants severally and jointly. This subtle fraud is defined as constructive fraud as before discussed. Hence as per the *Captain Patrick Kanyagia case* (*supra*) the process preceding

registration ought to be taken through a fine-tooth comb and as before demonstrated as it was not without fraudulent flaws. The end result is that the Defendants cannot shield themselves with the provisions of **Section 69B (2) of the T.P.A.** It cannot be an accurate statement to state that the law sanctions fraud. The subject property was registered under the G.L.A? **Section 101 (i) and (ii)** of the Act gives the court jurisdiction to remedy a claim of fraud on the registration of the title. It provides that:

**Every document executed, and every will of a person dying, creating, assigning, limiting or extinguishing any right, or interest to or in or over land registered under this Part shall, unless registered under this Part, be deemed void against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent document which has been duly registered:**

**Provided that—**

**(i) fraud or collusion in obtaining the last-mentioned document, or in securing such prior registration, shall defeat the priority of the person claiming thereunder;**

**(ii) priority shall not be lost merely in consequence of the person claiming under the registration having been affected with actual or constructive notice of the document first executed, except in the case of actual fraud; (own emphasis)**

The Court of Appeal in *Elijah Kipngeno Arap Bii v Samwel Mwehia Gitau & another* [2014] eKLR pronounced that

*“...it can be stated generally that the duty of the mortgagee is to act in good faith and to see that the sale is not tainted by some kind of impropriety. The duties of the mortgagee in the context of Section 104 (2) of the Law of Property Act, 1925 of England which is in pari materia to Section 69B (2) of TPA were comprehensively discussed in Corbett vs. Hatifax PLC [2003] 4 All ER 180. In earlier case, Lord Waring vs. London and Manchester Co. Ltd. [1935] ch 310 at 318 Crossman J said of purpose of Section 104 (2) of Transfer of Property Act, 1925 of England which as we have already observed is in pari materia to the entire Section 69B (2) of TPA:*

*“Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course if the purchaser becomes aware, during that period of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance”.*

***That decision of Crossman J was approved by the English Court of Appeal in Property and Bloodstock Ltd. vs. Emerton [1967] 3 All ER 321.***

Guided by this thoughts of the Court of Appeal and juxtaposing the conduct of the 3rd Defendant in particular, the unexplained private letter which the 3rd Defendant's director christened an advertisement, the lack of due diligence on its part, the acceptance of the purchase price without much a do , failing to make inquiry on the presence of the 2nd Defendant in the indenture of conveyance and transfer which its advocates crafted hints on the 3rd Defendant's knowledge, even if it was only in part, that the sale was not straight forward. Further as discussed at length, the 1st Defendant had no legal capacity to exercise the statutory power of sale, hence the sale was bad. In a nutshell the sale did not confer the much needed legal protection. The title can be challenged on grounds of constructive fraud which is evident.

***Judge L. Kimaru in Gabriel Ndung'u Githua V National Bank Of Kenya & 2 Others [2009] eKLR held that***

***“The only remedy available to the plaintiff, if he was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regard whether the plaintiff's equity of redemption is still in existence, I need not look further than to cite with approval the***

*decision of Nyamu J (as he was then) in Nairobi HCCC No.9 of 2003 Ze Yu Yang vs Nova Industrial Products Ltd (unreported) where at page 9 of his ruling he held as follows:*

***“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with celebrated case of GEORGE MBUTHIA & JUMBA CREDIT CORPORATION CIVIL APPEAL 111 OF 1986. In that case the decision of Chief Justice Apaloo at pg. 5 clearly states that the equity of redemption is extinguished by a valid contract under S.60 of the Transfer of Property Act...”***

Should the Plaintiff be comforted with an award of damages? In my view that is too simplistic in view of the fact that there is glaring fraud. The 3rd Defendant has made claims that he built another floor and renovated the property at the tune of over six (6) millions. The 3rd Defendant did not prove this assertion. The valuation report dated 31st March, 2004 also indicates that a figure of Ksh. 35,000.00 was rates in arrears of the suit premises owing to the Municipal Council. It is not proved that the 3rd Defendant settled it. The last valuation report in March of 2004 only indicates that the facade of the building and the stairwell was wanting the first report by Burn & Fawcett confirm that there was the ground and first floor. The sale ought to be set aside.

In the event that my opinion is not convincing, I am guided by **J. M. Khamoni , J** (as he then was) in **Republic v Chairman, Lands Disputes Tribunal Kirinyaga District & another Ex- parte Peter Maru Kariuki [2005] eKLR** where he adopted **Lord Denning's** finding in who had rendered himself thus in **Macfoy –vs – United Africa Ltd. (1961) 3 ALL E.R. 1169**

***“If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”***

The act of sale when no statutory power had accrued, the concealing of legal status, the lack of legal capacity, the inclusion of a non-binding legal charge, sale without recent valuation, the quick sale of the property in private made the whole sale a nullity.

In order to answer another of the Plaintiff's concern, the sale of the property cannot be termed as *res sub judice* as it did not fall under the definition in **Section 6 of the Civil Procedure Act** which provides that:

**No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

The Plaintiff was of the view that the institution of the Nairobi suit extinguished the power of sale. The institution of the suit in my view put the Defendants in the purview of the doctrine of *lis pendens* and had the court found their claim premature and the Plaintiff later on defaults in making repayments, the statutory power of sale would still accrue. Filing of a suit cannot extinguish a mortgagee's statutory power of sale.

- ***Was the property undervalued?***

The Plaintiff argued that his property was worth Ksh.3 Million. The 1st & 2nd Defendants provided the latest valuation report showing that the forced market sale would be at Ksh.1.6 Million hence by selling it at Ksh.1.9 Million was not an undervaluation. The Court of Appeal in the **Elijah Kipngeno Arap Bii case(supra)** adopted with approval the finding by the privy Council in **Tse Kwong Lam vs. Wong Chitsen [1983] 1 WLR 1349**, where it was stated at **page 1359 paragraph H – 1360 paragraph A** that:

“where a mortgagee fails to satisfy the court that he took all reasonable steps to obtain the best price reasonably obtainable and that his company bought at the best price, the court will, as a general rule set aside the sale and restore to the borrower the equity of redemption of which he has been unjustly deprived. But the borrower will be left to his remedy in damages against the mortgagee for the failure of the mortgagee to secure the best price if it will be inequitable as between the borrower and the purchaser for sale to be set aside”.

**Wandu Limited case** (*supra*) relied upon by the 1st & 2nd Defendants is in tandem with the **Elijah Kipngeno Arap Bii case** (*supra*) on the mortgagee's duty to obtain the true market value at the time of sale. Based on the above, when I considered the 2nd Defendant's quick acceptance of the purchase price offered by the 3rd Defendant's director, who it is to be presumed, but with a pinch of salt, knew nothing of the forced sale value beforehand, my antennae was raised. The 3rd Defendant submitted that it was the onus of the vendor to know the value of the property put up for sale but fails to explain how its director managed to just pluck a convenient figure from the air and inform the vendor without prior knowledge of any reserve prices or having done its own valuation. On the other hand the vendor accepting the offered purchase price without much ado demonstrates that the mortgagee did not take all reasonable steps to get the best price.

I also considered the 2nd Defendant's s pretentious act of presenting the 1st Defendant as though it still legally existed by 'partnering ' with it and quickly sealing a deal by private treaty and sell to the first buyer who came along . Its defence that the 1st Defendant would rightly commence suit in its name at a point when it was non-existent is legally incorrect. These are some of the things that ought to make the court feel dissatisfied on the mortgagee's effort to get the best price. The property in my view was more or less given at a thrown away price and the best prices not scouted for regardless of the wanning economy. The 3rd Defendant did not prove its claim of renovation of the suit property. The 3rd Defendant has enjoyed the property since 3rd August, 2008 and collecting rental income after the incorrect sale. Setting aside the sale would not injure the 3rd Defendant more than the loss and damage the Plaintiff has incurred by virtue of his equity of redemption being prematurely cut off. When the property was valued by **Pw2** way back in April, 1995, the valuation was Kshs.3 million. The 3<sup>rd</sup> defendant alleges that he completed the upper floor and put up a roof. This then must have either doubled or increased the value of the property.

- ***On Admissibility of evidence.***

***Was Dw1's evidence inadmissible?*** The answer to this may dramatically affect the 1st and 2nd Defendants' case as the Plaintiff calls for an expurgation of their evidence. I shall address it on two points as raised by the Plaintiff. Firstly, ***Whether Dw1 had the requisite authority:***

The Plaintiff filed a notice to produce dated 5th January, 2015 requesting for the production of the resolution of the 1st and 2nd Defendants authorising the staging of the defence. There was no such resolution in the bundle of documents of 1st and 2nd Defendants and **Dw1** did not produce it during the hearing. The Plaintiff in challenging the authority relied on the finding in the **Bugerere Coffee Growers Ltd Case** (*supra*). Which also referred to the finding in the English case **Danish Mercantile Case** (*supra*). In a nutshell, the courts found that a resolution to commence legal proceedings must be passed at the company or board of directors meeting and minuted failure to which as per the **Bugerere Coffee Growers Ltd Case** (*supra*) the advocate who had done so became personally liable to the Defendant for the costs of the action. Further, as per the **Danish Mercantile Case** (*supra*) the suit became a nullity unless the company ratified the act of the solicitor and adopted the proceedings. The Supreme Court of Uganda in **Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000** overruled the principle established in the **Bugerere Coffee Growers Ltd Case** (*supra*). It then endorsed the decision of the Court of Appeal of Uganda in **United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998** that **Bugerere case** was no longer good law. The Court of Appeal of Kenya in **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** adopted this 'new' position and took cognizance of its application in Kenya such as was in the case of **Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR**. The restated law by the Court of Appeal of Uganda was as follows:-

“... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The said notice to produce also requested for the presentation of the original resolution of the 1st and 2nd Defendants that lead to the execution of the instrument of transfer in favour of the third Defendant. The House of Lords found in the ***Bolton Co. Limited case*** (*supra*) that the Judge had taken the correct position in finding that the intention of the company could be inferred from the intention of its agents and officer, having regard to the nature of the matter under consideration, the relative position of the directors and the other relevant facts and circumstances of the case. In that matter, the particular company did not have any written resolution on its intention to occupy a building it had previously leased out. In the instant suit the intention to sell the property is manifest. First, while the 1st Defendant was still in existence, it sent a notice to the Plaintiff via letter dated 12th September, 1996 through its advocates. There is also a letter dated 12th May 2005 by the General Manager of the 2nd Defendant indicating as its subject “*properties for sale*” and enclosing the valuation report on the subject property [see *3rd Defendant's documents*]. There was the failed auction. Furthermore, **Pw2** testified that the bank approached him in 1997 to find a buyer as they were unable to recover their debt and **Dw1**, a Risk Manager confirmed this. In 2005 the 1st and 2nd Defendants subsequently entered into an agreement to sell and transfer the property to the 3rd Defendant and registered it. In my view the aforesaid would suffice in accordance with the finding in ***Bolton Co. Limited case*** (*supra*) to infer the intention to sell the property.

The second point being whether ***or not Dw1's evidence was hearsay?*** It is of importance to reflect on the unique character of a company not as a living person but an artificial person. See **Black's Law Dictionary, 9th ed.** While it is true that **Dw1** had previously not been employed by the 1st Defendant, he did state that he had been employed by Giro Bank since 1994 and that the two financial institutions, the 1st Defendant and Giro Bank by assignment became Giro Commercial Bank in 1999. **Section 145** of the Companies Act requires that companies keep minutes of their meetings and those of its directors and **Section 147** requires the keeping of records of accounts. Hence it is unsurprising that a person in the position of **Dw1** as risk manager can have access to the said records. Given the unique character of companies, that is, it's being considered a legal person operating through resolutions made by living persons, then unless the presented records can be proven to have been generated from a dubious source, the evidence of **Dw1** is not hearsay. It is a common law principle that he who asserts must prove. The Plaintiff having not proved that the historical records are a sham, that point cannot hold water.

The same arguments should be applied in the assertion that the 3rd Defendant witness had no authority to testify as it is clear that the 3rd Defendant was interested in the sale, without considering the constructive fraud, its directors executed the indenture of conveyance and sale, its director pursued the sale via an agent, the purchase amount was paid in full, they have entered appearance and filed a defence. They presented their witness to give evidence. The acts are enough to show that the 3rd Defendant's intention was to purchase the subject property and also to defend the suit.

- ***Was the interest charged unconscionable?***

The 1st and 2nd Defendants submitted that the *Donde* Act never came into force and was in any case repealed by the Central Bank of Kenya 2004 Act. The Central Bank of Kenya 2001 Act, by notoriety known as the *Donde* Act after the Minister who table it before Parliament, indicates that it commenced on 1st January, 2001. The parties never delved much deeper into the issue save to state that it was exorbitant with the other stating that it was not. The 1st and 2nd Defendant, the developers of the interest rate chargeable were at a better position to explain the facts as per **Section 112** of the **Evidence Act**.

**Section 39** of the **Central Bank Act** in 2000 when the Nairobi Suit was instituted provided that:

**The Bank may, from time to time, acting in consultation with the Minister, determine and publish the maximum and minimum rates of interest which specified banks or specified financial institutions may pay on deposits and charge for loans or advances:**

**Provided that the Bank may in consultation with the Minister determine different rates of interest—**

**(i) for different types of deposits and loans; and**

**(ii) for different types of specified banks and financial institutions**

And the **Banking Act, Section 44** provided that :

**No institution shall increase its rate of banking or other charges except with the prior approval of the Minister**

There is no indication that the Commerce Bank sought the Minister's approval so as to increase the interest or rates. The 1st Defendant via letter dated 30th November, 1998 informed the Plaintiff that the interest was at 40% due to default in repayments. It was payable as from 15th July, 1997. The Indenture of Mortgage page 2 paragraph 1(d) covenants with the mortgagor that he shall be liable to pay a 3% interest over and above variable 25 % interest stipulated in the letter of offer. The 3% penalty is also stipulated in the letter of offer paragraph 11 (a) as a minimum. However, in the registered document of mortgage, that is the executable document, this is not indicated as a minimum or a variable percentage. As for the variation of interest as per the letter of offer was a reserve of the mortgagee and no notice was needed to be given of a variation therein. Under the mortgage document paragraph 3(a) & (b) at page 12 and 13 there is further interest chargeable on expenses as defined in the document. It is stipulated to be higher or lower than the interest rate and it only becomes applicable upon service of notice. The Plaintiff had written to the 1st Defendant on 18th November, 1998 referring to the Defendant's letter dated 11th September, 1998 which showed that the outstanding balance was Ksh. 2,902,818.13 plus interest at 35% he enquired as to why the interest rate was @ 40 % on a statement that the bank had sent to him. He got a response via a letter dated 30th November, 1998.

**D.K. Maraga, J** in ***Ngengi Muigai & Another Vs East African Building & Another*** [2004] eKLR in a suit seeking injunctive prayers where the mortgagor contended that the interest charged was too high stated that:

***“The plaintiffs also contended that the interest charged by the first defendant is exorbitant and unconscionable. According to them the total amount due to the first defendant should not exceed Sh.10,000,000/=. That is to say the amount should not exceed twice the sum advanced. They want me to consider the Parliamentary debate on the Donde Bill. I cannot for the simple reason that the Donde Bill is not law. In Habib Bank A.C. Zurich Vs Pop in Kenya Ltd. and Others Civil Appeal No. 147 of 1989 (C.A.) (unreported) it was held that a dispute as to the exact amount owing under a mortgage is no ground upon which a mortgagee who has served a valid statutory notice can be restrained from exercising his statutory power of sale. In this case the power of sale has already been exercised and there no allegation of any irregularity in the sale. In my view a prima facie case for the grant of injunction has not been made out.***

Distinguishing the current suit, the Nairobi suit was instituted whilst Section 39 of the Central Bank Act subsisted, there was no valid statutory notice, the statutory power of sale had therefore not accrued hence the interest charged must at least be explained though a conflict on the amount owing is not a bar to the exercise of the power of sale only that in the instant suit it had not come to play as there was no valid statutory notice as before discussed. My view is that the correct interest rate to be charged is 25% per annum as per the mortgage document.

- ***The Nairobi Case***

This was a debt recovery case and the 1st & 2nd Defendants have argued was not a claim for the subject matter according to the plaint. The alleged mortgagee did not sue to foreclose or sell the property, it sued for the mortgage-money plus the accrued interest owing as from 31st December, 1999 until full payment. Section 68 of the TPA provides that: **The mortgagee has a right to sue the mortgagor for the**

**mortgage-money in the following cases only-**

- (a) where the mortgagor binds himself to repay the same;**
- (b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;**
- (c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person;**
- (d) in the case of every mortgage, not being a mortgage by conditional sale or an usufructuary mortgage, although the mortgagor does not expressly bind himself in the mortgage instrument to repay the same.**

Going abit back and forgetting momentarily about the issue of *locus standi*, I would argue that the 1st Defendant's cause of action had not arisen. Its plaint did not indicate any of the conditions set out under Section 68 of the TPA. In other words *res judicata* would still not have arisen as the cause of action herein is for recovery of the suit property. Further, the 3<sup>rd</sup> defendant was not a party to the Nairobi suit and the property had not been sold.

The 1st & 2nd Defendants' trump in justifying the sale is the ruling pronounced in 2006 .The effect of the Ruling in their view was to give effect to the judgement in the Nairobi Case. They submitted that the judgement was not appealed from nor reviewed and that there was no stay of execution. Though this Court is not sitting in its review jurisdiction nor does it have appellate jurisdiction over the Nairobi finding, it is important to state in this judgement that the 1st Defendant had no *locus standi* to file that case as hereinbefore explained. The 1st and 2nd Defendant's directors and their advocates were in want of relevant or material disclosure.

Had the learned judge in the Nairobi case been made aware of the 1st Defendant's status, in my considered view, he would not have pronounced himself over the matter. The 1st Defendant had a duty to reveal this fact to the learned judge and moreso as the proceedings were *ex parte*. In Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1995] eKLR *Akiwumi* , JA held that :

***“ ..Of course, if agreement B had been disclosed to Githinji J and had been told that the assets to be assigned and transferred by Pattni to the CBK had not taken place, he would, I am sure as Ole Keiwua J was, not have granted the ex parte injunction. The fact that some of these assets might have been in liquidation is immaterial. I also find it incredible as deponed in Mr. Vaya's second affidavit, that although he was aware of Mr. Choge's letter of 2nd November, 1994, he did not know, or cared to find out anything, about the replies to that letter and agreement B which was the subject matter of those replies.***

***The principle which is sometimes known as the principle of R V Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac [1917] 1 KB 486 is well known and has been consistently applied in this country. In this court's recent decision in the case of The owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited Civil Appeal No. 50 of 1989, Kwach JA in his judgment in that case, put it beyond doubt that the principle in the Kensington Income Tax Commissioners case (supra) applied with equal force here. I need only refer to the following passage from the judgment of Warrington LJ in that case at P.509 quoted with approval by Kwach JA, which sets out the principles:***

***it is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage may have***

*already obtained by him. That is perfectly plain and requires no authority to justify it."*

In my view, in light of Lord Diplock's legal sentiments in *Isaacs v Robertson* (*supra*), the Nairobi Case ought to be set aside as it has emerged rather clearly that the 1st Defendant was not a plaintiff for purposes of pursuing the repayment of the loan under the mortgage. The rights in the mortgage were not in *rem* but specifically endowed to the 1st Defendant and its assignees. The 1st Defendant at the time of the suit had already unreservedly handed over **all** its rights and liabilities to the 2nd Defendant. It cannot even be said that it was acting as an agent as it no longer existed. This court cannot set aside the judgement and orders issued in the Nairobi case. The much I can do is to express my views. It is upon the plaintiff to go back to the Nairobi file and seek the setting aside of the judgement, orders and decree.

The 1st & 2nd Defendants have propounded a further argument that as the judgment in the Nairobi Case was not set aside, the Plaintiff remains owing. But how would the inexistent person, the 1st Defendant, execute its right? The 2nd Defendant cannot execute the decree because it now stands challenged on the basis of jurisdiction.

The summary of all this judgement is that the first defendant lacked the capacity to file the Nairobi case as it had been merged with Giro Bank Ltd to create the 2<sup>nd</sup> defendant. Since the 1<sup>st</sup> defendant was the only plaintiff in the Nairobi case, it lacked the capacity to institute the suit. **Dw1**'s contention that by then the 1<sup>st</sup> defendant still had operating licence cannot be legally correct. If that were to be true, then there would be three banks operating at the same time instead of one merged bank – the 2<sup>nd</sup> defendant.

With regard to the exercise of the statutory power of sale, I do find and hold that there was no valid statutory notice issued to the plaintiff. What was issued was a 14 days demand notice. The 45 days' notice issued by the auctioneer only becomes valid if the statutory notice had been issued. There was no compliance with Section 69A (1) of the I.T.P.A. and therefore the sale to the 3<sup>rd</sup> party was invalid.

In relation to the status of the 3<sup>rd</sup> defendant, I do find and hold that the 3<sup>rd</sup> defendant is to an innocent purchaser for value without notice. The manner in which the 3<sup>rd</sup> defendant purchased the property is muddled with secrecy. A public auction properly held could have yielded different results. The earlier auctioneer alleged that **Pw3**, Sulubu Ngala had offered Kshs.2.5 million yet that was false. The offer by the 3<sup>rd</sup> defendant was not based on any valuation by the 3<sup>rd</sup> defendant and was quickly accepted. The 3<sup>rd</sup> defendant's contention that he got an advertisement from a tenant by chance is farfetched and cannot be true.

Is this suit *res judicata*? I have extensively dealt with this issue. The suit in Nairobi was instituted by an extinct person. The property had not been sold then. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not parties to the suit. The issues are also different. The plaintiff is seeking revocation of the sale of his property.

Is an award of damages the best relief for the plaintiff? I do not think so. A mortgagee should not be allowed to sell a mortgagor's property without following the correct procedure and fall back to the comfort of paying damages. If the sale is a nullity then it should be nullified and vacated. I cannot tell the plaintiff that **"although I have found that the mortgagee exercised its statutory power of sale without issuing a valid statutory notice, I am sorry the much I can do is to award you damages"**. That will be a hands off approach to the problem. The sale should be vacated. There is no proof that Kshs.6. million was used by the 3<sup>rd</sup> defendant on the property. This would then return a value of almost Kshs.10 million.

I have said enough and do proceed to make the following orders in conclusion:

- a. A declaratory order that the sale of Plot 2363 Malindi by the 1st and 2nd Defendants to the 3rd Defendant is a nullity and it is hereby set aside.
- b. An order directing the Government Lands Registrar to cancel the aforesaid transfer and restore the status quo prior to 3rd August, 2005.
- c. Order that the 2nd Defendant files with the court, within 45 days of the judgement, an audited

- report on the total amount owing before the commencement of the Nairobi Case at the interest rate of 25% per annum.*
- d. Suspend the period between the commencement of the Nairobi Case and this judgement in factoring in the calculation of payment of any loan balance or interest.*
  - e. Order the 3rd Defendant to render an audited report on the rent collected since 3rd, August, 2005 and file it with the Court within 45 days of the judgement and the said rent amount be taken to have offset any loan balance with any excess being granted to the Plaintiff. For the sake of clarity, the 3rd Defendant is not to pay the said rent amount to either the Plaintiff or the 2nd Defendant.*
  - f. An injunction to restrain the 3rd Defendant by itself, its servant, employees and/or agents from selling the suit premises to any third party, wasting, damaging, alienating, altering, disposing or in any other way dealing with the suit premises is hereby granted. However, this order shall take effect after the expiry of sixty (60) days hereof. In the meantime they property shall not be sold or damaged and the 3<sup>rd</sup> defendant shall continue to be in occupation.*
  - g. Upon the reports of the 2nd Defendant and the 3rd Defendant being filed, the court to make a further finding on the exact amount owing and payable by the Plaintiff.*
  - h. In view of the findings herein, I do hold that the plaintiff is entitled to damages. I assess damages at Kshs.500,000/=. This amount is payable by the 2<sup>nd</sup> defendant and can be netted off from the loan balance.*
  - i. Costs and interest of the suit to the Plaintiff.*

**Dated and delivered in Malindi this 30<sup>th</sup> day of June, 2016.**

**S.J. CHITEMBWE**

**JUDGE**