REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

HIGH COURT CIVIL CASE NO. 30 OF 2007.

1. MICHAEL ORINGO ALUSI]

2. PAULO BARASA ALUSI]

3. PHOBIANO WAFULA.]…….....…… PLAINTIFFS

=VERSUS=

JOBSON SALANO MULANDA…….……..….DEFENDANT

RULING

1. The amended Notice of Motion 1/7/2015 is a logical sequel to a judgment delivered herein on 29/5/2012. The applicants - **MICHAEL ORINYO ALUSI, PAUL BARASA ALUSI** and **PHOBIANO WAFULA -** had filed this suit against the 1st Respondent - JOBSON SALANO MULANDA - seeking to wrest ownership of land parcel **NO. SOUTH TESO/AMUKURA/428** from him by invoking the doctrine of a adverse possession. The applicants were successful. The judgment was in their favour.

2. But there was a charge attaching to the land. The 2nd Respondent — NATIONAL BANK OF KENYA LTD - had advanced a loan to the 1st Respondent and the land had been offered as security. The application herein relates to that charge and/or monies said to be arising and owing from the loan advanced.

3. The application is a Notice of Motion brought under Sections 3A, 34 and 63 of the Civil Procedure Act (cap 21) and Order 51 Rule 1 of Civil Procedure Rules. It is also expressed as falling under all enabling provisions of law. The prayers sought are four (4).

And they are as follows;

Prayer (a) That the charge registered on 13/5/1982 against the title to land parcel NO SOUTH TESO/AMUKURA /428 be discharged and/or removed to facilitate the execution of the judgment issued herein earlier in favour of the applicants.

Prayer (b) That M/S National Bank of Kenya Limited be ordered to pursue the person of JOBSON SALANO MULANDA separately to enforce settlement of any existing loan.

Prayer (bb) In the alternative, the 1st Respondent be ordered to pay the 2nd Respondent the sum of Kshs.165,000/= with or without interest or any other justifiable sum to facilitate removal of the existing

charge on parcel NO. SOUTH TESO/AMUKURA/428 and in default of payment the applicants or 2nd

Respondent be at liberty to take out execution against the 1st Respondent to enforce payment.

Prayer (c) That costs of this application be provided for.

4. It is posited in the grounds in support that land parcel NO. SOUTH TESO/AMUKARA/428(suit land in the alternative) was the applicants ancestral land occupied by them to the exclusion of first and succeeding proprietors from the period preceding land adjudication and registration to date; that the applicants therefore enjoy overriding interests arising from customary trust or rights of prescription; that the act of charging the land remained concealed from the applicants and only became known to them while seeking information to file succession proceedings; that the 2nd respondent did not exercise due diligence in charging the suit land; that the colossal sums now being demanded are unconscionable given that they arise from a mere 25,000/= given as a loan; that the sums are in any case time-barred, being based on an agreement entered into prior to 1988 ; and ultimately that the 2nd respondents (or bank) demand for 6 million shillings is unlawful and unjustified and should not be paid by the applicants.

5. The supporting affidavit amplifies the grounds explains the background, and gives a historical narrative. It was stated, interalia, that at the time of adjudication, the 1st applicant was away in Nairobi while his brother 2nd applicant was in Egypt. And their father had gone blind. The applicants assumed all along that the land was registered in the name of their father. They were later shocked to find that the land was registered first in the name of one **KORNEL SIKUKU SEME** and later in the name of the 1st respondent. All this, it was stated, was a fraudulent scheme by KORNEL, the first registered owner.

6. The registered owners however never showed up on the land. The applicants continued to live on the land and remained completely clueless as to the wrongful nature of its registration. But the true state of affairs later came to light and the applicants instituted this suit against 1st respondent. They won but then the title was burdened by the charge herein. That necessitated the filing of the present application.

7. The 1st respondent has never appeared in these proceedings. The 2nd respondent responded by way of replying affidavit and a supplementary affidavit .According to the 2nd respondent, the loan advanced was not just 25 000/= There were subsequent arrangements where tacking was agreed upon and other smaller sums advanced on the strength of different securities.

8. The 1st respondent then defaulted in payment and was issued with a statutory notice of sale on 3/1/1994. At the time, the amount owing was Kshs.165, 558.80. The interest rate was put at 40%. Ultimately, there was an attempted sale, which failed due to lack of bidders. The 2nd respondent then instituted a suit at Kisumu - KISUMU HCC NO. 114 of 1998, NATIONAL BANK OF KENYA LTD VS JOBSON SALANO MULANDA - which is still pending.

9. In the meantime, the applicants approached the 2nd respondent vide a letter dated 15/8/2013 informing, interalia, that the 1st respondent had obtained title to the suit land in a fraudulent manner and proceeded to charge it to 2nd respondent . The letter also contained a request that the amount owing be disclosed with a view to having it paid by the applicants.

10. According to the 2nd respondent the financial arrangements between itself and 1st respondent were proper and above - board. Its hold on the title therefore is lawful had subsequent owners of the land have to reckon with the fact that there is a change subsisting. The applicants were faulted for proceeding with their suit without including the 2nd respondent while, to their knowledge, the land was already charged even at the time of instituting the suit. The court was urged to note that the applicants suit as filed was a recognition, and not a challenge, of the validity of 1st respondent's title, the endeavor being to overturn that valid title through invocation of the doctrine of adverse possession.

11. Further, it was averred that the 2nd respondent was not a party to the suit herein. The orders issued therefore do not bind it and the applicants in any case, acquired the suit land subject to the liabilities

existing on it.

12.Noting that the amount due and the interests charged are disputed, the 2nd respondent asserted that the smaller sum of Kshs.165,558.80 was the amount owing as at 3/1/1994 and the interests charged were a matter of contractual agreement between the parties. It seems to be the 2nd respondents position that default in payment and the subsequent passage of time led to increase in both the amount owing and the interests charged.

13. The applicants were said to have no right to try and interfere with or enforce rights concerning an agreement to which they were not parties. If anything they can only be allowed in equity and under statute to assume the position of the 1st respondent and redeem the property much the same way that the 1st respondent would be expected to redeem it. The 1st Respondent is said to owe Kshs.6,181,264 as at 6/6/2013. The application herein is said to be an attempt to circumvent the law and an abuse of the court process.

14. The application was canvassed by way of written submissions. The applicants' submissions were filed on 19/11/2015. According to the applicants, the application seeks to actualize the fruits of the judgment given in this suit. They pointed out that the 2nd Respondent is opposed to the application because it has a charge on the land title. Having regard to the prayers in the application, the court was asked to consider the following:

1. Whether the applicants had overriding interest capable of displacing the ownership of the first respondent and his predecessor in title even though not noted on the register.

2. Whether the 2nd respondent carried ,out a diligent inspection to establish the rights of the applicants in occupation prior to its option to charge the title.

3. Whether the registration of the charge that was undisclosed to the applicants in occupation would stop the statutory time from running in favour of the applicants.

4. Whether the canceled accrual of the banks right to realize the security under a charge instrument upon default in 1994 would affect the applicants acquisition of the suit land by adverse possession.

5. Whether the 2nd respondent upon its clear notification that a cause of action for recovery of the loan or sale of the security in 1994 should be allowed to call on the applicants to pay the obscene rates of interests and undisclosed penalties that had never been notified to them and whether the 2nd respondent's claim of money in excess of Kshs.165,558.60 first demanded in 1994 is statutorily time-barred under the Limitation of actions act

6. Whether the sum of Kshs.165,588. 60 claimed in 1994 would at the rate of 14% p.a swell to the colossal sum of Kshs.6,181,264.

7. Whether the interest rate of 40% p.a flatly charged for decades is reasonable ,consented to, and authorized in law.

8. In the event the prayer for removal of the charge is declined, what would be the fair sum to be paid by the applicants to gain removal of the offending charge.

9. Whether the failure to enjoin the bank to the adverse possession claim herein is fatal to the present application.

15. In answer to these issues, several arguments were put forward. On whether the applicants enjoyed overriding interests (issue No. 1), it was averred that the applicants were born and raised on the suit land; that they occupied it to the exclusion of successive proprietors including the 1st respondent: that several deceased members of families are already 'buried there; that the registered owners have never tried to

evict them or inform them of their ownership; and that given, all this the applicants were entitled to the land through adverse possession and also had a customary trust running in their favour.

16. On whether the 2nd respondent exercised due diligence (issue NO.2) the applicants argued that the first valuer failed to go deep enough. In particular he failed to establish the occupancy status. Had he done so, he would have given a report that would have made the 2nd respondent think twice before advancing the loan and/or accepting the land as security.

17. Issue No. 3 - Whether the registration of charge could stop time from running: According to the applicants, the valuation process prior to registration of the charge was faulty and never established whether the 1st respondent was in occupation, and who owned the houses on the land. The respondents are said to have proceeded secretly, with the 1st respondent ultimately registering a charge that was unknown to the applicants. The judgment obtained by the applicants was said to be valid and should supersede the charge, which was registered in a concealed environment. The 2nd respondent was urged to explore other options available to realize the sums owed by the 1st respondent.

18.On whether the banks accrued sums by 1994 when demand was made can defeat the applicants rights of adverse possession, the applicant argued, interalia, that by the time the accruals were being demanded they were already adverse possessors. Their right came first and the charge therefore should be removed.

19. Issue No. 5 concerns whether the sum demanded and the interests charge are conscionable. The 2nd respondent is said to have demanded a sum of Kshs.165,558.60 in 1994. Thereafter, it filed a suit in Kisumu -KISUMU HCC. NO. 114/1998. According to the applicant, after filing the suit, the rate of interest applicable was 12%, which is the rate charged by the courts. And the suit at Kisumu was never brought to the attention of the applicants. That being the case, the applicants should not be asked to pay a sum higher than the Kshs.165,558.60 which was being demanded. And this leads to issue No 6, which is whether the demanded sum of Kshs. 165,558.60 could later balloon to Kshs:6,181,184/=. And the applicant's answer is that the amount rose that high because of the 40% rate of interest charged. If the rate of 12 % deemed to be applicable by then is applied the figure would be much lower.

20. And the rate of 40% charged was illegal.The agreed rate was 14% and an increase required that the borrower fist be notified. According to the applicants this did not happen. This is what issue No.7 is about. According to the applicants, the the rate of the 40% remains unauthorized, un notified, un consented to and un backed by the letter of offer that constituted the lending agreement. And bearing all this in mind - which leads to issue No. 8- the applicants should only pay Kshs.165,558.60 if the charge is not removed. And this is because the rate of 40% is illegal and therefore unacceptable.

21. The final issue is whether failure to enjoin the 2nd respondent in the suit can defeat the applicants right of adverse possession. The applicants answer is that it cannot. The 2nd respondent has already been given a chance to explain itself in this application. And besides, Section 34 of Civil Procedure Act (cap 21,) gives the court a wide mandate, including hearing any unnamed affected parties at the execution stage if the situation so demands.

22.For guidance and exposition the law, the following decided cases were availed.

1) WILLIAM GATUHI MWRATHE VS GAKURU GAHIMBI: C.A NO. 49/1996, CST of APPEAL, Nairobi.

2) FRANCIS JOSEPH KAMAU ICHATHA VS HOUSING FINANCE COMPANY OF KENYA LTD (2014) eKLR .

3) MACHARIA MWANGI MAINA & 57 Others VS DAVIDSON MWANGI KAGIRI [2014] eKLR.

4)PUBLIC TRUSTEE VS WANDURU [1984] KLR 314.

5) CHAUHAN VS OMAGWA [1985] KLR 656

23. The 2nd respondent's submissions were a two - phase affair. The first phase, styled "skeleton submissions" consists of submissions filed on 19/4/2016. The submissions were filed on the presumed basis that parties would be allowed to make oral highlights in court. This however did not happen and the need for the second phase, which required a more detailed and incisive approach, became obvious. The second submissions were filed on 28/6/2016.

24. The 2nd respondent's submissions generally rehashed or restated what the affidavits sworn in response to the application contained. But there is more elaborate reasoning and a clearer exposition of the law in the submissions. The first submissions saw only one issue raised determination.

> ***Whether the charge registered against the suit premises in favour of the 2nd respondent need to be discharged to facilitate execution of the award for adverse possession to the applicants in this suit***

25. The answer to this was stated to be that the title to the land can only be taken by the applicants together with all cumbrous arrangements attaching to it. And those arrangements include the contested charge. The 2nd respondent was clear that this is the position that emerges from a clear reading of sections 24 and 25 of Land Registration Act.

26. The second submissions raised and articulated more issues. Among them was whether the 1st respondent was actually advanced the monies; whether the money was repaid in full, whether the registration the charge was valid and enforceable; whether the 2nd respondent carried out the due diligence prior to accepting the charge; whether there was fraud in acquisition of title by 1st respondent; whether that title was indefeasible, whether the charge should be discharged as demanded, the applicable interest rates and accounts; and whether failure to enjoin the 2nd respondent as a party initially in these proceedings is fatal to the present application.

27. The answers to all these issues were wide and varied. The monies were advanced, it was argued, with the charge dated 10/5/1982 being executed. And other monies were advanced later on the basis issue. Then as to the repayment of money (issue NO. 2) the 1st respondent is said to have defaulted leading to issuance of the requisite demand and statutory notices. This was argued in reference to issue No. 2.

28. As to the validity of the charge, the 2nd respondent averred that the registered owner of the suit land,who was also the borrower, duly executed the charge, which was then registered. This was said in address to issue No. 3 And due diligence (issue No. 4) was followed as a professional firm was hired to handle the issue and the necessary search was also carried out.

29. And fraud on the part of 1st respondent (issue No. 5) was said not to be demonstrated. The 2nd respondent averred that nothing was availed to show that the 1st respondent misrepresented to the Land Registrar that he owned the suit land. And the title of first respondent was indefeasible (issue No. 6) because the register of titles is conclusive evidence of purchaser's right of ownership. Besides, the process invoked by the applicants, that of adverse possession, starts with recognition of the validity of the registered owner's title before seeking to defeat it by dint of adverse possession.

30. And the charge should not be discharged (issue No. 9) as the first title to which the charge is subject must in law, be taken with the encumbrances attaching to it. The applicants option according to the 2nd respondent lies in making the outstanding payments so that the charge can be discharged.

31. As regards the applicable interests rates (issue No. 8), what was charged was contractual and therefore legal. The charge document clearly mandated it and the 2nd respondent charged the interests having regarding to the base lending interest rate at the time and the prevailing market conditions. And the applicants were faulted for joining the second respondent as a party (issue No 9) though knowing well

that it hard a charge over the suit land . And this knowledge is attested to by some of the very documents availed by applicants.

32. Some of the cases availed by the 2nd , respondent are

a) FINA BANK LTD VS RONAK LTD (2001 IEA 64 (CAK)

b) Gudka vs Dhodhia: civil Appeal No. 21/1980

c) Maathai & 2 others Vs City Council of Nairobi & 2 others: HCC.NO. 72/1994, NAIROBI.

33. I have given consideration to the application, the responses made, the rival submissions, and the entire suit as filed and decided prior to the filing of this application. A casual glance at the issues raised by both sides show that adverse possession is still being treated as an issue requiring further consideration. The applicants would like to know whether the alleged concealed accrual of the banks rights to realize the security can affect their right to acquire the same property by adverse possession. Their position is that it can't. They averred that the judgment obtained by them was valid and superseded the charge surreptitiously placed on the title by the respondents. The 2nd respondent on the other hand wants the court to view the decision as one arrived at exparte.

34. I am constrained to say that I find it churlish to revisit an issue decided by a judge of equal or concurrent jurisdiction. The law does not allow me to do it and the stage at which it is raised militate against a re-consideration. The judgment still stands. It has not been challenged and therefore must be taken as a proper decision for all practical and legal purposes. To revisit it when it is not an appeal or a review before me is to go against established procedural and jurisdictional norms. I therefore decline to consider any issue raised about adverse possession except as its inevitable in this ruling. The tussle is about the charge not adverse possession.

35. A few comments of legal and factual nature are necessary in order that the answers to the remaining issues can become clear. Adverse possession is the necessary fundament for the application filed by the applicant. But the applicants have also raised arguments about the fraudulent nature of the acquisition of title by the registered owners. Fraud then seems to be another consideration.

36. I h already observed that adverse possession is a settled issue. The question then to address is what kind of title the applicants herein defeated. Put another way, what kind of title did the suit herein decree to the applicants? Records show that at the time the applicants filed the suit, the charge being challenged now was already registered on the title. This in essence means that the title the applicants sought to defeat was, to their knowledge, already encumbered by the charge.

37. The applicants have tried to show that the applicable law entitles them to absolute proprietorship. They conveniently overlook or forget that that ownership is subject to meaning conditional upon, the encumbrances and other interest noted in the register and/or recognized by statue. The charge herein attached to the title even as the court declared the applicants as adverse possessors. The applicants cannot run away from that.

38. And as pointed out by 2nd respondent, adverse possession cases proceed on the basis that the paper title holder is the legitimate owner, with the adverse possessors coming in to defeat that title by virtue of having fulfilled all the requisite conditions for adverse possession. By necessary implication therefore, the applicants recognized the validity of the extant title with all that attached to it

39. But even if it is assumed that fraud attended the acquisition of the title, records show that the 1st respondent was not the first registered owner. He seems to have bought the land from a previous registered owner. And that previous registered owner seems also to be the first registered owner. It appears clear that the applicant's father never became a registered owner. The land was registered under Registered Land Act (cap 300). If regard is had to section 143 (1) of that Act, it is clear that the title of

first registered owner cannot be defeated even where, fraud is manifest. Infact the section seem to entitle the first registered owner to get away with fraud.

40. What is the import of all this? The import is that notwithstanding the alleged fraud, the title of first registered owner was possibly valid in law. And if that owner sold land to the 1st respondent, then he passed on a valid title. Besides, the applicants need to reckon that such second owner had the possible defence of being an innocent purchaser for value without notice even were fraud to be found to hold against the first registered owner.

41. I am point out all this to dispel the notion that the 2nd respondent dealt with a title that was not valid. So, when the 2nd respondent was approached for a loan, with the suit land as security, what was it supposed to do? To exercise due diligence of course. And that normally involves hiring of professional services and conducting a search at the relevant land office. A visit to the land could be necessary and that is done for valuation to establish the adequacy or viability of the security. It is not done to establish whether there are adverse possessors. And it is important to note that were that to be an objective of valuation too, an adverse possessor does not become such in law until and unless the court so declares. And the applicants had not become so at the time the land was charged.

42. It is then necessary to surmise that the bank was approached by a true legal owner, entered into a valid legal contract with him, and legally charged the land as security. This then settles the question as to whether the Charge was valid or whether the 2nd respondent was reckless in accepting suit and as security. I am in effect rejecting the applicants arguments about these issues.

43. There were also issues concerning the amount owing and the rate of interests charged. According to the applicants, the amount demanded in unconscionable. Unconscionable because it is an astronomical figure — Six million plus — arising from a paltry 25,000/= that the 1st respondent borrowed. The interest rate is viewed as oppressive and exploitative. And this is allegedly so because it is calculated at a whopping 40% rate, a clear departure from the 14% agreed at the time of lending.

44. I think the proper approach to this issue must have regard to the contents of the existing contract between the parties. According to the applicants, that contract is contained in the letter of offer. Records show that that is not entirely true. The letter of offer was just the beginning of it. The more crucial document is the charge document that followed. The document is in fact bedrock of the contract and at section 1 it gives the bank sole discretion to charge interest and other costs in case of default by the charger. The 14 % or so stated by to applicant was meant to apply as long as the charger kept his side the bargain. And even the letter of offer itself is clear at clause 3 that in case of default, ***"the bank reserved the right to demand the outstanding debt at its discretion without further notice,"***

45. The contract entered into between the parties was essentially a legal arrangement. The documents containing it are legal documents. The contents of the documents have legal force. The allegation that amount demanded is unconscionable at a glance appears to appeal to court's moral conscience. But the court is involved in a legal exercise, not a moral one. And when one looks at the contact documents, the bank did not go beyond what was agreed.

46. And one needs to appreciate that default in payment took place decades ago. The loan itself was given over 30 years ago. In 1982 the suit land was valued at Kshs. 45,000/=. In the year 2007, the same land was valued at Kshs.800,000/=. If were to do valuation this time (year 2016) the value would of course be much higher. Question is: If the value of the land could appreciate so much, what about a loan given over 30 years ago and is attracting interests and other costs arising from default? On this issue, both legal and factual considerations impel the court to disagree with the applicants on the averment that the amount charged is unconscionable. I would have agreed if the averment was based on assessment done by an independent body like interests Rates Advisory Centre (IRAC). Now what I have is a general averment devoid of expert's input. And the greater consideration for the court is whether the amount and the interests charged are within the law and the terms of the contract, not whether it is unconscionable.

47. I need now to view the matter from another angle namely: the applicants letter dated 15/4/2013. In that letter the applicants are asking the bank how much the 1st re dent owed so that they could pay. The letter is not written on a “without prejudice basis" and is not yet retracted. Question is: Why did the applicants turn around in apparent change of position? It is hard to reconcile the applicants position expressed in that letter with the position they now espoused in this application. It seems to me that the applicants are trying to play the clever — Dick. And the court should not play along.

48. An issue was also raised as to whether the bank is a proper party in this matter. The applicants position is that the bank is a proper party. According to them Section 34 of Civil Procedure Act (cap 21) is wide enough to allow for enjoining of the bank as a party. The position of the 2nd respondent is that it should not be a party, having not been one in the main suit.

49. Section 34 of the Civil Procedure Act (cap 21) states as follows:

> **S.34: (1) All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.**
>
> **(2)The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.**
>
> **(3)Where a question arises whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.**

50. It is clear from the provisions of section 34 (supra) that what is envisaged is a post —judgment scenario where issues relating to execution arises. Such issues, however weighty, do not require filing of a separate suit. And the persons envisaged by the provisions are the parties themselves or their representatives. A question then arises whether the bank is a representative of any party in the suit. And the simple answer is that it is not. And this being the position, was it proper to join the bank as a party? I think the applicants approached the issue in the wrong manner.

51. In the first place, the applicants just grafted the bank onto the suit. The normal practice is that the leave of the court should be sought particularly where the joinder is coming at an advanced age. No such leave was sought. There was no compliance with the applicable procedure.

52. But there is another consideration: The joinder is coming at the execution stage and for purposes of execution. Execution in a given suit normally relates to the parties in the suit or their recognized representatives. These are the people for or against whom a judgment or decision has been made. It is import to note here that no judgment or decision was made in this suit against the bank. How then can execution be directed at it? In my view, the applicants are wrong to handle the issue the way they did.

53. It seems to me also that the applicant would like the bank to be ordered to exercise the option of its remedies in a particular manner. The simple answer to this is that that cannot be. The remedies are granted by a statute. A court of law should think twice before ordering a party to opt for one and leave the other. The party should be given liberty to exercise its options to its best advantage. In this matter, the applicants would want the bank to leave the land and pursue the 1st respondent. That would be a harsh measure to the bank. It has to be realized that it took the land as security precisely to do what the law allows it to do with such security if default occurs.

54. It is clear that when all is considered, the applicants application is improper and lacking in merit. I hereby dismiss the application with costs.

A.K. KANI RU,

JUDGE.

DATED AND DELIVERED ON 31ST DAY OF AUGUST, 2016.

IN THE PRESENCE OF ;

1ST PLAINTIFF/APPLICANT ……

2ND PLAINTIFF/APPLICANT……

3RD PLAINTIFF/APPLICANT……..

DEFENDANT…….

COUNSEL……

A.K. KANI RU,

JUDGE.