REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO. 477 OF 2009

KAPLANA SHASHIKANT JAI ……..……..……..……. 1ST PLAINTIFF

SHAMIR KRISHNADESAI ……..……..……..…….……2ND PLAINTIFF

Versus

ECO BANK KENYA LIMITED ….……..……..……..….. 1ST DEFENDANT

LAXMI HOUSING COMPANY LIMITED …….…..…….....… 2ND DEFENDANT

RULING

Two Applications: injunction and security for costs

[1] The Court gave directions on 5th May, 2014 that the plaintiffs' application dated 3rd July, 2009 and the 2nd defendant's application dated 9th December, 2010 will be heard together. By way of directions, the plaintiffs' application for leave to amend its plaint will await the outcome of the application dated 3rd July, 2009 and the 2nd defendant's application dated 9th December, 2010. On the same day, the 2nd Defendant abandoned its application which had sought the review of the ruling by Muga Apondi J. Further directions were issued; that parties were to file appropriate submissions on these two applications. Parties complied and filed writes submissions as directed and also orally highlighted those submissions accordingly. I will deal with both applications together as ordered.

Submissions by the Plaintiff

[2] The Plaintiffs submitted that, contrary to the submissions by the 2nd defendant, they believed that they have satisfied the requirements for the grant of an injunction stated in the well-known case of **Giella -v- Cassman Brown;** they have established a prima facie case with the probability of success; that they will suffer irreparable damage if the injunction is not granted; and the balance of convenience lie in favour of grant of the injunction. The Plaintiff adopted its submissions as well as those it made before Hon. Juctice Muga Apondi.

[3] They started by giving a brief background of the matter. Which they said should be seen against

the following two maxims of equity. The first one; he who seeks equity must do equity; do what is right and fair. They promised to show that the conduct of the 2nd defendant is mostly reprehensible; it acted fraudulently, jointly with the 1st defendant. The latter purported to register a charge after it had placed in receivership Multi-Options Ltd and thereafter proceeded to sell the purportedly charged property to the 2nd defendant. This property was fraudulently sold and transferred. Therefore, according to the Plaintiffs, the 2nd defendant has not come to court with clean hands. It is seeking to consolidate a property which was illegally charged and fraudulently sold and transferred. The second; equity looks to the intent rather than to the form. An examination of the purported sale agreement and the purported charge which was used as a basis for selling the suit property shows clearly that the two documents are fraudulent. There is no property which was charged by the 1st defendant on 8th June, 2006 because of **three** reasons. **Firstly,** Multi-Options Ltd was placed in receivership on **25th May 2006** and since the powers of directors are suspended upon the appointment of receivers in law that company could not charge any property to the 1st defendant. **Secondly,** the only purported charge of a property to the 1st defendant in June, 2006 was purportedly registered on **28th June 2006,** when as seen above Multi-Options Ltd was already in receivership. **Lastly,** the property which was purportedly charged on **28th June, 2006** did not belong to Multi-Options Ltd as suggested by the 2nd defendant. It belonged to the 1st plaintiff. She could only charge it at the request of Multi-Options Ltd which was in liquidation and therefore could not request her. The Plaintiff relied on the following passage in the work by Kerr on ***The Law and Practice as to Receivers***, 16th Edition, where the law is stated as follows on page 292;

> ***The effect of the appointment out of court is as regards the crystallization of the floating charge into a fixed charge and the consequences as regards judgment creditors the same is as the case of an appointment by the court. The powers of a company and its directors to deal with the property comprised in the appointment, ... except subject to the charge are paralyzed***.

[4] The search on the title of the property made by the 2nd defendant appears to have been deficient. Since the 2nd defendant was seeking to buy the suit property from receivers and managers it was obliged to do a search at the Company's Registry and be satisfied that indeed the receivers were duly appointed. If it had done that it would have found the notice of appointment of P.V. Rao and K.V.S.K Sastry which is dated **25th May, 2006**. A copy of it and a notice to directors are to be found at pages 14 to 16 of the plaintiffs' bundle of documents filed in court on 26th March, 2012. Section 349 of the Companies Act requires the receiver and manager to state in every invoice or business letter issued on behalf of the company to contain a statement that a receiver or manager has been appointed. The 2nd defendant when dealing with the receivers and managers had notice of the fact that they were serving as such. They ought to have inquired from the receivers on their appointment; an act which would have revealed these facts of appointment and that the property which was being offered for sale was not made or registered by the company in receivership, but by somebody, which was legally impossible. The Plaintiffs submitted that the 2nd defendant elected to shut its eyes to the fact that the purported charge on which the receivers were acting was a nullity. The 2nd defendant had what Land Law calls ***"constructive notice of the fact that the charge on which the power to sell was based was null and void"*** but nonetheless decided to go ahead with it. See page 60 of the 16th Edition of Cheshire and Burns on ***Modern Law of Real Property*** that;

> ***Constructive notice is generally taken to include two different things:***
>
> 1. ***The notice which is implied when a purchaser omits to investigate the vendors title properly or to make reasonable inquires as to the deeds or facts which come to his knowledge***
> 2. ***The notice which is imputed to a purchaser by reason of the fact that his solicitor or other legal agent has actual or implied notice of some fact. This is generally called imputed notice.***

The plaintiffs, therefore, could not accept the allegation by the defendant to the effect that it established that the bank was entitled to sell the property by way of private treaty. For the bank to sell by auction or private treaty there must be a valid charge and there was none in this particular case.

[5] It was deposed by the 1st Plaintiff in the further affidavit the defendant knew the defect in title as revealed by the clause which stated that the purchase would become null and void if the 2nd defendant was not able to get possession of the suit property within 30 days of the purported purchase. As such, a party will not be allowed to base its claim on its own wrong. See **Nabro Properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299** Gicheru J.A when he stated the law as follows:

> ***It is a maxim of law recognized and established that no man shall take advantage of his own wrong.***

The 2nd defendant which decided to shut its eyes to the illegal charge is now purporting to rely on it to establish a right. The law does not allow it to do so. The plaintiffs submitted that the 2nd Defendant has distorted the facts and the background of the case, which are as set out by the Plaintiffs.

[6] According to the Plaintiffs, the submissions on the three matters by the Defendants are wholly lacking in merit. And in discussing the issue whether or not the plaintiffs have established a prima facie case, one has to take into account facts such as; 1) whether the 1st defendant which appointed the receivers had a valid charge which could found a statutory power of sale; in other words, whether in law Multi-Options Ltd charged its property on **28th June 2006**, when it was in receivership? They had submitted that the 1st defendant did not have a valid charge as the company was in receivership when the charge was purportedly registered; 2) even assuming that (*which is denied*), that the purported charge dated **28th June 2006,** created a statutory power of sale, whether the statutory notices were given before the purported sale took place. The Plaintiffs submitted that none was issued. Although the 2nd defendant in its submissions on fraud at pages 4 to 7 made accurate statements of law, however, they wrongly applied the correctly stated principles of law to the evidence which showed that; there was no valid charge; the 1st defendant did not follow the procedure pertaining to giving of notice; and the 2nd defendant was party to that fraud.

[7] The Plaintiffs also submitted that the 2nd defendant's submissions on consideration is equally lacking on merit because Multi-Options Ltd was in liquidation and could not therefore transact any business; it could not and did not in law receive any consideration from the 1st defendant in respect to the purported charge. Therefore, with these violations of law, the 1st plaintiff stands to suffer irreparable damage through the fraud of the 1st defendant and its receivers and managers. The fact that a bank is rich and can pay damages does not the bank to disregard the law governing creation of charges and serving of notices and sale of property. The balance of convenience in the circumstances of this case lies in granting the injunction for two reasons. The first reason is that according to the contract between the 2nd defendant and the 1st defendant, the purchase price was to be refunded if it did not get possession of the property within 30 days. It is now 8 years since the purported sale took place and yet the 2nd defendant has the temerity to ask that it retains the property which it agreed not to pursue if it did not get possession of within 30 days. The second reason is that whilst the 1st plaintiff stands to lose its investment if the injunction is not granted, the only loss which the 2nd defendant can suffer is the delay in receiving the purchase price of Kshs 38,000,000. According to the valuation report dated 20th March, 2013 the suit property was Kshs 120,000,000. The 2nd defendant has come to court with unclean hands has not and has not made out a case for the variation of orders which were made on 3rd July, 2009. Its complaint about the fact that the interim orders have been in existence for 5 years is another illustration of a party basing its claim on its own wrong. As Hon. Justice Muga Apondi observed in his ruling in which he declined an application to file a further affidavit that, it is the 2nd defendant's failure to comply with the court directions which has caused a delay in the disposal of the application dated 3rd July, 2009. It is now complaining of the injustice which it has created or inflicted on itself.

[8] According to the Plaintiffs, these are the true facts of the case: The 1st and 2nd Plaintiffs were the directors' of Multi-Options Ltd which started in 1993 and was operating an account with Prime Bank Ltd. The company opened a current account with the 1st defendant in 1998 and operated without overdraft

facilities until 2002. It was for the purposes of expanding its operations that Multi-Options Ltd applied for overdraft facilities in September, 2002. A year after the facilities were given in 2003, Multi-Options recorded the highest turnover as per the second schedule. In 2005, the company's performance started declining. The problem arose from the fact that business expanded and the customers were taking too long in paying for the goods supplied. The situation called for a second facility. The plaintiffs approached the 1st defendant for further funding. The 1st defendant accpted the company's request for an overdraft, but required the company to retain Mr. P.V. R. Rao, (***the 1st defendant's receiver-manager***), as a co-manager to assist with the restructuring of the company. Despite the charge having been prepared and executed at the beginning of the year 2006, the 1st defendant did not provide the funds as promised or any other money by the time the company was placed in receivership. The 1st defendant became a co-manager of the company in receivership in December, 2005 through Mr. P.V.R. Rao. Following the 1st defendant's commencement of management of the company in receivership, its financial situation deteriorated and as it persisted, the 1st defendant declined to permit servicing of the Bank of India loan with a result that the company's immovable property had to be sold in order to repay Bank of India loan. The 1st defendant acted in bad faith in placing the company in receivership.

[9] On 25th May, 2006, the 1st defendant decided to make official the de-facto receivership of Mr. P.V.R. Rao. Thereafter it purported to charge a property which could only be charged by the owners. When the directors were suspended, the 1st defendant purported to register a charge. The 1st defendant and its receiver manager purported to sell the fraudulently charged property to the 2nd defendant without following the procedures required. The purported sale was an under-value. The valuation of property sold in 2009 was done in 2007.

[10] The Plaintiffs stated that the 2nd defendant served the 1st plaintiff and her tenant on L.R. No. 1870/11/351 with a notice dated 22nd June 2009, to vacate the same within 14 (***fourteen days***) from the date of the notice on the grounds that it had acquired ownership of the same on **8th June, 2009.** The plaintiffs were unaware of such acquisition until 30th June, 2009 as the 90 days statutory notice served upon them by the 1st defendant on 17th March, 2009 had not expired. The 1st defendant did not disburse any money in respect of the charge over L.R. No. 1870/11/351 as it was registered on 28th June 2006, 31 days after the 1st defendant had recalled the earlier loan and placed Multi-Options Ltd under receivership. The 1st plaintiff had also complied with the requirements of the provisions of Section 351 of the Companies Act Cap 486; consequently the plaintiffs do not know what the receivers have recovered since 25th May 2006. The 1st defendant had by a letter dared **28th January 2009**; assured the plaintiffs that it would not sell the securities in the course of negotiations. The negotiations had not broken down when the 1st defendant transferred L.R. No. 1870/11/351 to the 2nd defendant. On the basis of these facts, an injunction is merited.

The Plaintiff's Response to 2nd defendant's application

[11] The Plaintiff turned to the 2nd defendant's Notice of Motion dated **9th December 2010,** which they said is seeking for orders based on a gross misunderstanding of the breadth of section 52 of the Indian Transfer of Property Act, 1882. What it does is to preserve title to the suit property by preventing alienation. It does not deal with the way the suit property is used. They relied on **Mulla, *The Transfer of Property Act,* 9th Edition** at pages 367 and 368, where the author states as follows,

> ***The section enacts the doctrine of lis pendens which is expressed in the following maxim 'ul lite pendent nihil innovetur'. It imposes a prohibition on transfer or otherwise dealing of any property during the pendency of a suit, provided the conditions laid down in the section are satisfied. The scope of the section is discussed in the undernoted cases. The principle on which the doctrine rests is explained in the leading cases of Bellamy -v- Sabine, where Turner LJ. said,***
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> ***It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I***

apprehend, upon this foundation - that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendent lite were permitted to prevail….

[12] The complaints of the 2nd defendant are essentially on the use to which the premises have been put by the plaintiffs which does not touch title to the suit property. It is, therefore, clear that the application dated 9th December, 2010 lacks merit and the the 2nd defendant is using the expression used by Honourable Justice Ringera, i.e. "***playing lottery with the court"*** in the hope that the interim orders in force will be discharged and, thereby, render academic the plaintiffs' part-heard application dated 3rd July, 2009 and the suit as well. The 2nd defendant wants to turn this Honourable Court of justice into an instrument of oppression; the 2nd defendant wants the conservatory orders granted by this Honourable Court on 3rd July, 2009 to be vacated so that it may do what it wishes with the subject matter of the suit; the object, therefore, of the 2nd defendant is to defeat the objective of an injunction as formulated in **Assanand -v- Pettit (1989)KLR, 241** which is;

*"**to keep things in status quo so that if, at the hearing, the plaintiffs obtain a judgment in their favour, the defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual."***

[13] As per the Plaintiffs, the intention of the Defendants is to "abuse of process of the court". The term:

''…connotes that the process of the court, must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation.

The plaintiffs urged the Honourable court to allow their application dated 3rd July 2009**,** and to dismiss with costs the 2nd defendant's application dated 9th December 2010.

1st Defendant's Submissions

[14] The 1st defendant opposed plaintiffs' application dated 3rd July 2009. It filed a Supporting Affidavits of **KAPLANA SHASHIKANT JAI** sworn on July 2009, Grounds of Opposition dated 14th July 2009 and the Replying Affidavit of **WILFRED OROKO** sworn on 31st August 2009. It also filed submissions dated 16th September 2009. They first addressed **Estoppel** which they stated does not apply in this case as the agreements between the parties were embodied in writing in and terms of the agreements are well set out in the duly executed letter of offer and charges. The charge was on **L.R NO. 1870/11/351** and was procured neither by fraud nor misrepresentation. As stated in paragraph 9 of the Replying Affidavit, the consideration for the security was *forbearance* to call for immediate payment of existing debts, grant of credit facilities and other financial obligations. There was no obligation on the part of the bank to advance the company a further sum of Kshs. 20,000,000/00.

[15] They also addressed the statutory Notices and exercise of power of sale. They deposed in the Replying Affidavit at paragraph 12(ii) and (iii) that no agreement was reached on the exercise of the power of sale. The Plaintiff own letter of 20th January 2009 confirms that the Statutory Notices were **not** withdrawn. Annexure **WOB** show that the statutory notices were duly sent by registered post to the Chargors. The certificates of posting show that the letters were sent on **21st November 2009** hence the sale of LR No. 1870/11/351 was after the statutory power of sale had accrued. But in the event the notices are declared defective, the court may only issue an injunction for a limited time to enable the 1st Defendant issue a fresh notice on the sale of suit property known as **LR No. 209/8661/5.** See **National**

Bank of Kenya –vs- Shimmers Plaza Nairobi Civil Appeal No. 26 of 2009 *(unreported)* where the Court of Appeal held that,

> "***An injunction is an equitable and discretionary remedy. The duration of an order is at the sole discretion of the trial judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving such notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining the mortgagee from exercising its power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give fresh statutory notice in compliance with the law."***

[16] The Auctioneer Act and Rules 1997 did not apply in this case as the sale was by private treaty. There is no requirement such sale of the property to comply with the auctioneer rules. According to their understanding, a sale by private treaty is a sale between the bank and the third party hence the auctioneer need not be an intermediary and the Auctioneers Act and Rules do not apply in this instance. The sale was, therefore, not fraudulent at all. The Plaintiffs' allegations of fraud are totally devoid of merit and so the plaintiffs have not discharged the burden of proof place upon them to show that there is a prima facie case. Fraud is a very serious allegation and must be proved. The allegations set out in the plaint and supporting affidavit fall far short of the standard required in law and in fact. See the Court of Appeal decision in the case of **Maranya vs National Bank of Kenya Ltd & Another EALR [19995 – 1998] 1 EA 175 (CAK),** where the Court of Appeal considered the provisions of section 69 of the TPA and held that,

> *"In this regard the provisions of section 69 of the Act are clear and entitle the bank to effect sale by private treaty."*

In the present case the bank chose to exercise its right to sell the **LR NO. 1870/11/351** by private treaty as such the sale cannot be impeached for that reason. In view of the provisions of section 69(b) of the Transfer of Property Act, the plaintiffs remedy is for damages only. The sale has been completed and the 2nd defendant has acquired a clear and indefeasible title to the property. It was so held in **Sande Investment Limited vs KCB Civil Case No. 224 of 2005 (**unreported). Thus, they submitted that the sale and transfer of **L.R No. 1870/11/351** to the 2nd defendant is proper. Therefore, the Defendants submitted that prayer number 5 of the chamber summons for a declaration in an interim or interlocutory application is not grantable.

On Section 351(2) of the Companies Act

[17] The 1st Defendant stated that section 351(2) of the Companies Act, imposes obligations on the receiver of the company. The company under the receivership is **Multi Options Limited (In receivership).** But, neither the company nor the receivers are party in these proceedings. The obligations under the Act are not imposed on the debenture holder, in this case, the bank and as such the orders sought cannot be made against the 1st defendant or the 2nd defendant as sought in the application. Moreover, the issue of receivership has been the subject of litigation and a ruling in **Milimani High Court Civil Suit No. 718 Of 2008 Multi Options Ltd (In Receivership) Vs Kalpana Jai, Shamir Desai and Bhanoo Shashikant Jai** of as deposed in paragraph 16 of the Replying Affidavit.

[18] Therefore, it is contended that the Plaintiffs have not met the conditions for the grant of injunction set out in the case of ***Giella vs Cassman Brown*** for the following reasons;

a. **LR No. 1870/11/351** has already been sold and the 2nd defendant has acquired an indefeasible interest.
b. The 1st defendant's statutory power of sale has arisen in respect of **LR No. 209/8661/5** and the indebtedness of the plaintiff's and **Multi Options Limited (In receivership)** is not in dispute and an injunction cannot in law issue to restrain the exercise of the statutory power of sale.

c. Damages are an adequate remedy in the circumstances of this case.

The 2nd Defendant's Submissions

[19] They also reiterated the 2nd Defendant's Skeleton Submissions dated 1st March 2012 filed in support its Application dated 9th December 2010. They gave a brief background as follows: The 2nd Defendant was introduced to the Bank by an agent who had become aware of the impending sale of the suit premises. The 2nd Defendant instructed the firm of Robson Harris & Company Advocates which firm conducted due diligence and investigations on the title of the property before engaging the 1st Defendant in negotiations. In carrying out its due diligence the 2nd Defendant through its Advocates carried out a search on the title to the suit premises, reviewed the Statutory Notice issued to the Plaintiffs herein, and the Valuation report on the suit premises**.** A search on the title of the property revealed that the property had been charged to the 1st Defendant on **8th June, 2006.** Upon review of the Charge document dated 20th June, 2006 the 2nd Defendant established that the Bank was entitled to sell the property by way of private treaty. It was then that it engaged in negotiations with the Bank for the purchase of the suit property.

After protracted negotiations the purchase price of Kshs. 38,000,000/= was arrived at which the 2nd Defendant paid in two cheques issued in the names of the 1st Defendant. The 2nd Defendant duly paid the Stamp duty in relation to the suit property together with the Land Rent.

[20] The 2nd Defendant urged that, it was only after the payment of the full purchase price that the property was transferred to the 2nd Defendant. The 2nd Defendant was duly registered as the proprietor of the suit premises on **8th June, 2009.** On or about 22nd June, 2009, the 2nd Defendant issued a notice to vacate to the tenants in the suit premises. Upon receipt of the Notice to Vacate the Plaintiffs filed the suit herein together with the Application dated **3rd July, 2009** seeking Orders *inter alia* of *lis pendens* do issue under Section 52 of the Transfer of Property Act, 1982, restraining the sale of the suit property; of restraint of trespass to or eviction from suit property; The Honourable Lady Justice Khaminwa (late) granted the Plaintiffs interim reliefs in terms of prayer 2 and 3 of their application. Being aggrieved with the interim orders granted the 2nd Defendant filed an Application dated 9th December, 2010 seeking the discharge, variation and/or setting aside of the said interim injunction ex-parte orders, and for the provision of Security for Costs by the Plaintiffs in the sum of Kshs. 2,500,000/= (Two Million Five Hundred Thousand only).

[21] The Plaintiffs have not established prima facie case as defined in as described in the case of **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125.** The law on impeaching the title of a registered proprietor is set out in **Section 26 of the Land Registration Act, 2012** (hereinafter "the LRA") which states in part that:

> ***"the certificate of title issued by the registrar shall be taken by all courts as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner……and the title of that proprietor shall not be subject to challenge except:-***
>
> a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party***
> b. ***Where the certificate of title has been procured illegally, unprocedurally or through a corrupt scheme****."*

This provision of the LRA mirrors Section 23 in the repealed Registration of Titles Act which was in force at the time of the transaction herein and requires Court to hold that the production of a Certificate of Title by a registered proprietor as prima facie proof of ownership. See **Josephat Njoroge Mwangi & Another vs. David Omonge (2014) eKLR.**

The 2nd Defendant was of the view that for the Plaintiff to impeach the 2nd Defendant's title they must

prove that the 2nd Defendant was a party to the fraud and/or misrepresentation leading upto the registration of its title or that the certificate of title was procured illegally, un-procedurally or through a corrupt scheme . The Plaintiffs have not placed before this Honourable Court sufficient material to prove fraud on the part of the 2nd Defendant. Fraud is a serious matter and the standard of proof is higher than that in ordinary civil claims. See the case of **Gordhanbhai Patel versus lalji Makanji (1957) EA 314** that:-

> ***"allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required".***
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> See also **Chelimo Martim Kipserem v. Richard Tirop (2013) eKLR**, **Virani t/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Ltd (2004) eKLR** and **Bruce Joseph Bockle vs Coquero Limited (2014) eKLR.** It is trite law that particulars of fraud must be specifically pleaded or set out and not just generally stated.

[22] Based on the material before the court, there is no prima facie case established on fraud. There are no actual facts or circumstances which taken together imply, or at least very strongly suggest that a fraud must have been committed. See also the decision by the Court of Appeal in **Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996.** The 2nd defendant's title cannot be impeached on no evidence of fraud. They also submitted on the statutory notices which they stated were duly served. It was on them to prove they were not served. See **Maithya vs Housing Finance Corporation HCCC No. 1129 of 2002** where Court held that:-

> ***"it is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that "he who asserts must prove".....it is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on a prima facie basis do this".***

[23] Although the Plaintiffs allege that the Statutory Notice was served upon them on **17th March, 2009** yet in their Advocates letter dated **26th January, 2009** to Eco Bank their Advocate states in part that *" Our clients were served with a Statutory Notice sometime in December last year in regard to certain properties charged to EABS Bank Limited"* . These are contradictory statements by the Plaintiffs and casts doubt on the veracity of the Plaintiffs averment that the Statutory Notice was received on 17th March, 2009. The foregoing notwithstanding the 2nd Defendant is protected by the provisions of **Section 99 (1) (c) of the Land Act** which states inter alia that a purchaser is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular. Again, Kenya's land registration regime is based on the Torrens system and its prime principle is the sanctity of the register. The 2nd Defendant relied on the register and acted accordingly and with diligence. It was not expected to do otherwise. The Court should find the 2nd Defendant relied on the sanctity of register, as to hold otherwise will bring to doubt the entire foundation of our registration system wherein the public relies on the register of titles.

[24] In sum, the 2nd Defendant is convinced that the Plaintiffs will not suffer any irreparable damage. Section 69B (2) of the Transfer of Property Act (now repealed) provided that

> ***"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 have 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"

This provision has been carried onto Section 99 of the Land Act 2012 which stipulates in similar terms that:-

99. (1) This section applies to—

(*a*) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(*b*) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(*a*) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(*b*) is not obliged to see to the application of the purchase price;

(*c*) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

[25] The remedy for the Plaintiffs lie only in damages. See **Simon Njoroge Mburu vs Consolidated Bank of Kenya (2014) eKLR.** Accordingly, the balance of convenience tilts in favor of the 2nd Defendant who is the registered proprietor of the suit property. The 2nd Defendant's right to property is protected and guaranteed under the provisions of Article 40 of the Constitution.

[26] The 2nd Defendant submitted ultimately that there is every reason for the court to vary the *ex parte* orders which were granted on 3rd July 2009. These interim orders have been in place for the last 5 years and 6 months and during this period, the Plaintiffs have continued to enjoy possession of the suit premises and collect monthly rent from the tenant therein at the rate of **Kshs. 150,000/=** (Kenya Shillings One Hundred and Fifty Thousand) per month. The Plaintiffs have received a total of Kshs. 9,600,000/= in rent which amount to date remains unaccounted for. Yet the 2nd Defendant is the registered proprietor since 8th June 2009. Also, the court should order that the Plaintiffs deposit the sum of Kshs. 9,750,000/= together with all future rents received from the suit premises in a joint interest earning account in the names of the Plaintiffs and 2nd Defendant's Advocates until the suit is heard.

Security for Costs

[27] The 2nd Defendant urged the Court to order the Plaintiffs, jointly and severally to furnish security for costs based on the exceptional circumstances of this case. The 2nd Defendant is the registered proprietor absolute of the suit property for value; a purchaser for value without notice; has paid over Kshs. 38,000,000 towards purchase price; the plaintiffs have materially breached the *Lis Pendens* order issued by Hon. Justice Khaminwa as they continue to construct on the suit premises without leave of court; the Plaintiffs are in possession of and receiving rent from suit premises; the 2nd Defendant obtained approval for construction of residential houses on the suit premises; yet they cannot have access thereof. All these things continue to affect the rights of the 2nd Defendants contrary to the lis pendens order. This huge investment has lain idle yielding no return. The 2nd Defendant has been occasioned grave hardship and prejudice. The Plaintiffs are wasting, depleting and destroying the suit property from its original condition thus defeating the rights, interests, estate and rightful entitlements of the 2nd Defendant. Further, the 2nd Defendant is reasonably apprehensive that the Plaintiffs will be unable to settle its costs upon the eventual dismissal of this suit.

[28] The Plaintiffs have not furnished security for costs or otherwise tendered any undertaken as to damages in respect of their suit and application herein despite enjoying interim relief for 5 years. In the circumstances of this case, the court should utilize its discretion under O**rder 51 rule 15** of the Civil Procedure Rules and set aside the ex-parte order herein in the interest of justice for it is causing grave prejudice and hardship to the 2nd Defendant. Again, under **Order 40 rule 4(2)** of the Civil Procedure Rules ex-parte injunctions shall not be granted for more than 14 days and shall not be extended thereafter except by consent of parties or by order of court for more than 14 days. The 2nd Defendant has numerously objected to the extension of the interim orders herein but been forced to agree to extension to allow court to proceed with other matters due to paucity of time. **Oder 40 Rule 6** of the Civil Procedure rules is also relevant here as it states that where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of the grant the injunction shall lapse unless for an sufficient reason the court orders otherwise. It is undesirability for this injunction to continue being in force any longer. And under Order 40 rule 7 of the Civil Procedure Rules such injunction may be discharged or varied or set aside by the court on the application made thereto by any party dissatisfied with such order. The 2nd Defendant has filed a Notice of Motion application dated 9th December, 2010 and in the Affidavit in support thereof sworn by one Patel Ravji Lalji of the 9th of December, 2010 expressed its dissatisfaction and supplied ample reasons for the lifting of the Interim Injunctive Orders granted by Hon. J.N Khaminwa on 3rd of July, 2009. They urged the Court to grant their said application. The Court should consider the provisions of Order 40 Rule 2 which provides that "the court may by order grant such injunction on terms as to the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit". Order 26 rule 1of the Civil Procedure Rules provides that "in any suit, the court may order for security for the whole or any part of the costs of any defendant….be given by any other party". For those reasons they should give security.

DETERMINATION

[29] The two Applications, i.e. by Plaintiffs dated 3rd July, 2009, and by the 2nd Defendant dated 9th December, 2010 are two sides of the same coin. One is asking for an injunction while the other is asking the court to discharge the injunction granted by Khaminwa J (late). I will first determine the application for injunction and depending on the outcome thereof, I will determine the one for discharge of injunction and security for costs.

Issues

[30] The ultimate question is; whether injunctive relief sought is merited. But, in reaching there, I will need to ask: Have the Applicants established prima facie case with probability of success? If injunction is not granted, will they suffer irreparable injury not compensable in damages? And where does the balance of convenience lie?

Validity of charge

[31] The major arguments put forth by the Applicants are that the charge herein is invalid and cannot found a lawful exercise of statutory power to sell the charged property. The Applicant submitted that the charge herein was executed in favour of the Bank as a guarantee for a loan advanced to the borrower, the Company. But, before the charge was registered, the borrower was placed under receivership by the Bank. Therefore, according to the Applicant, the borrower was not in a position to register a charge or transact such business. And, they urged further that, the receiver manger cannot purport to register the charge which had been executed but not registered before the receivership.

[32] It is not in dispute that the borrower was indebted to the 1st Defendant and that the Plaintiffs who were directors of the borrower executed a guarantee to guarantee the indebtedness of the borrower by creating a charge over their property, the suit property herein. It is not in dispute also that, before the charge had been registered, the lender appointed a receiver manager over the assets of the Company. The lender, after the appointment of the receiver manager, registered the charge herein. The matter in issue is whether a charge registered after appointment of receiver manager is valid charge in law. This formulation throws me back to a need to establish two important legal matters. The first one is; the true position of the law on the status of a company where receiver manager is appointed by the lender. The second is; the validity and effect of a guarantee and charge given in favour of the company before the appointment of the receiver manager but which was registered after appointment of the receiver manager.

Appointment of receiver outside court

[33] A profitable discussion in this case should be one which first establishes the effect of appointment of receiver manager by the Bank. The effect of the appointment of receiver manager by the Bank crystalizes the floating charge created in a debenture over the assets of the Company into a fixed charge. The receiver is the agent of the company and the powers of the company are just delegated to the receiver so far as regards carrying on business or collecting the assets of the company. On appointment of a receiver, the powers of the directors to deal with the property of the company comprised in the appointment, except subject to the charge, are merely paralyzed. Dr. Kamau stopped there. That is just one part of the law. I will complete the full circle of the law on the point. The way I understand the law is that, despite the appointment of receiver by a bank, the corporate stature and structure of the company remains and the directors are not relieved of their normal statutory duties, although the discharge of those duties becomes extremely difficult or almost impossible without the cooperation of the receiver. Therefore, in law, the directors' statutory obligations are not displaced and they can even use company's name to file suit against the receiver or to challenge the validity of the instrument appointing the receiver or the debenture or mortgage. It should be noted that in some cases, the powers of a receiver manager appointed under a debenture differ from that of an appointment by the court as a receiver appointed out of court is not an agent of the court but of the company or of the debenture holders. On this see ***Kerr, on the law and practice to Receivers, sixteenth Edition.*** Therefore, other than the fact that powers of the company are delegated to the receiver, the status of the company in a receivership appointed outside court is not disfigured in the manner suggested by Dr. Kamau Kuria. The company will continue to operate under the receiver and cooperation of the directors on all matters which are necessary during the receivership. The receiver acts in the best interest of the debenture holders as well as the company. Any guarantees given for the company's debts prior to or during the receivership are not invalidated by the receivership as they are properly within the purview of carrying on business, collecting assets and repaying of debts of the company. Except, however, the receiver owes a duty to any guarantor of the indebtedness of the company since the guarantor will be liable only to the extent of the deficiency of the company's assets. This will become useful when I will be discussing the giving of accounts by the receiver to the directors and to the guarantor.

[34] I must, however, confess that the argument by Dr. Kamau Kuria looks very powerful and formidable. But, fathom these facts. The record and the statements by the Plaintiffs reveal that the charged property in question belongs to the 1st Plaintiff. The property was given as a guarantee towards the company debt. The charge was negotiated and agreed between December 2005 and January 2006. It was, then properly executed by the guarantor and the Bank and was registered on 20th June 2006. From

the statements by the Plaintiff's witnesses the charge was executed before the receivership except it was registered after appointment of receiver. Even if it was transacted after appointment of receiver manager, the guarantor was well aware of the receivership and the charge was given in guarantee of the company's debt. Therefore, it would still be valid. The charge was not given to the company but to the bank to secure and guarantee the existing debts of the company. Also, the charge was registered by the Bank not some other unknown person or receiver as alleged by the Plaintiff. The parties to the charge are the guarantor and the lender. Therefore, the charge would still be valid and enforceable by the chargee. This distinction between guarantee and borrower's contract is important and makes a whole world of difference. The correct position of the law is that such charge given as guarantee, properly executed by parties and registered cannot be defeated by subsequent appointment of receiver of the company. See what I have just stated above that:-

> ***Any guarantees given for the company's debts prior to or during the receivership are not invalidated by the receivership as they are properly within the purview of carrying on business, collecting assets and repaying of debts of the company. Except, however, the receiver owes a duty to any guarantor of the indebtedness of the company since the guarantor will be liable only to the extent of the deficiency of the company's assets.***

My understanding of the law, therefore, is that liability of the guarantor does not cease for as long as the indebtedness of the company for which the guarantee was given remains after the assets of the company have been collected and realized. From the record, the company was clearly unable to repay its debts, hence sale of the guarantor's property. But issues have been raised about the sale on the basis that the chargee did not follow the law as it did not issue the requisite notices. I will discuss this aspect later. Ultimately, after the foregoing intense and careful scrutiny and dissection of the facts of the case and the applicable law, the arguments on invalidity of the charge only seemed quite attractive and powerful in appearance almost to a point of being mind-boggling at first, but I believe are feeble and weak to support an injunction in the circumstances of this case. I dismiss them.

How about the notices?

[34] As we talk of notices, be minded that the 2nd Defendant is a purchaser for value of the suit property which will bring into play other law on protection of purchasers of charged property. Therefore, arguments that statutory notices were not issued or that such failure made the sale illegal should be seen within the protections of law given to a purchaser of charged property. The earlier law, i.e. Section 69B (2) of the Transfer of Property Act (now repealed) provided that:-

> ***"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 have 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"***

[35] Provisions of similar purport were enacted in Section 99 of the Land Act 2012 in the following manner:-

> ***99. (1) This section applies to—***
>
> ***(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or***
>
> ***(b) a person claiming the charged land through the person who purchases charged***

land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies—

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

[36] The law as it stands is that only fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive knowledge will impeach a sale to a purchaser for value of the charged property. Similarly, I should think that, for an injunction to issue against such purchaser, a *prima facie* case must be made out based on one or more of the elements in section 99, to wit, fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive knowledge. The Applicant strived to establish fraud on the part of the 1st Defendant and its receivers. But worth of note is that the major ground of fraud is that the charge was invalid because the company was in receivership when it was registered. I have dealt with that ground and concluded that the charge was valid. The second ground for fraud is that the defendants were aware of the defect in title since the agreement of sale provided that the contract would be null and void if the 2nd Defendant will not have obtained possession of the suit property within 30 days of the purported sale. The Applicants stated that the Defendants by this provision in the contract were anticipating resistance from the Applicants because they knew the sale was illegal and fraudulent. First of all, I must state that sale by private treaty was provided for in the law applicable to this mortgage, that is ITPA. I wish to examine the argument that the Defendants anticipated resistance because they knew the sale was fraudulent. The argument is speculative and is not supported by the evidence adduced in court. Contrary to the submission by the Plaintiffs, they are the ones who caused circumstances which prevented the taking of vacant possession of the suit property. It is, therefore, wrong for the Plaintiffs to accuse the defendants of committing wrongs and attempting to reap benefit therefrom. To conclude this part, I wish to reiterate that the suit property belonged to the Applicants and had been given as a guarantee for the company debts. It was never the asset of the company. Therefore, it is incorrect to imagine that the company charged the property or that receiver sold the property. It was charged and sold by the bank as guarantee and in exercise of its power of sale. As I stated earlier, ***the receiver only owes a duty to any guarantor of the indebtedness of the company since the guarantor will be liable only to the extent of the deficiency of the company's assets.***

[37] In light of the foregoing, the search that the 2nd Defendant carried out on the suit property is sufficient and the fact that there was already a receiver appointed does not enlarge the burden of the purchaser in respect of establishing adverse circumstances to his title. There were no such adverse circumstances which constituted fraud as had been alleged by the Plaintiffs. Following this finding, it may not be necessary to discuss whether knowledge or otherwise of appointment of receiver affected his title.

In a receivership, the receiver only owes a duty of care to the guarantor but that fact does not invalidate any guarantee thereof. That is why the law remains; the remedy for damnified chargor unless there is fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive knowledge, is left to damages against the chargee which would even mean the value of the property and much more depending on the case at hand. There are legion judicial decisions on this except see **Simon Njoroge Mburu vs Consolidated Bank of Kenya (2014) eKLR.** As against the 2nd Defendant, the Plaintiffs have not met the test in **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** that:-

> ***"a prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter". Court went on to state "But as I earlier endeavored to show, and I cite ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard which is higher than an arguable case".***

[38] But this case presents certain issues and facts which will require much more intense inquiry at the hearing. I am persuaded that the receiver has not discharged the duty he owes to the guarantor herein to account and to establish the exact sum owing so that it can justify that the suit property was sold to cover only the deficiency of the company assets. The 1st Defendant is also accused of not discharging its duty of care in the valuation of the charged property as well as giving of accounts. These are important matters which impinge on the right of the Applicants. I would like to give them an opportunity to be canvassed fully before their right is finally foreclosed. But, I am still minded that the 2nd Defendant purchased the suit property and paid a huge amount of money in excess of Kshs. 38,000,000 which is not benefiting him at all. On the other hand, the Applicants are still in occupation of the suit property receiving rents and mesne profits from the suit property. These things require a delicate balancing of rights of the parties in a manner that will produce almost symmetrical bound.

[39] The 2nd Defendant submitted that it is the registered proprietor since 8th June 2009. Yet, it has never been in possession or enjoyed the yield of the suit property. The Plaintiffs have continued to enjoy possession of the suit premises and collecting monthly rent from the tenant therein at the rate of **Kshs. 150,000/=** (Kenya Shillings One Hundred and Fifty Thousand) per month. The Plaintiffs have received a total of Kshs. 9,600,000/= in rent which amount to date remains unaccounted for. The court should also order that the Plaintiffs deposit the sum of Kshs. 9,750,000/= together with all future rents received from the suit premises in a joint interest earning account in the names of the Plaintiffs and 2nd Defendant's Advocates until the suit is heard.

[40] The foregoing submissions portend that the 2nd Defendant is not really averse to issuance of some temporary relief except on conditions it has proposed. And therefore, although from the material before me preponderant weight tilts towards refusing an injunction against the 2nd Defendant, I will, however, grant an injunction to give an opportunity to the arguments raised herein in a trial, but on the following conditions:-

> ***a) The Plaintiffs shall, within 45 days of today, deposit all rent collected from the suit property since 8th of June, 2009 at the rate of Kshs. 150,000 per month to date; and***
>
> ***b) To continue depositing the said rent at the same rate at the end of each month with effect from 30th April, 2015 and at the end of each succeeding month into an interest earning account in the joint names of counsels for the 2nd Defendant and the Plaintiffs until this case is heard and determined;***

c) Parties to comply with all the practice directions of the division within 21 days and prepare the case for hearing;

d) Should the Plaintiffs default on any of the conditions herein, the injunction shall be automatically discharged without the necessity of applying in that behalf.

e) This case shall be mentioned on a date agreed among the parties to fix a date for hearing.

f) The Plaintiffs shall bear the cost of this application. It is so ordered.

[41] In light thereof, the application dated 9th December 2010 is accordingly determined. The order of injunction in force is the one granted in this ruling. In view of the decision of the court and the conditions I have attached to the injunction, it will not be necessary to require security for costs to be given. But I should put to rest the arguments on *lis pendens* under section 52 of the ITPA by citing a work of the court in the case of **Anthony Muthumbi Wachira & Another vs. Housing Finance Corporation of Kenya [2015] eKLR** as follows:

Lis pendens

[6] Lis pendens was codified as a statutory provision in section 52 of the Indian Transfer of Property Act (ITPA)-now repealed, and is a form of remedy. But when does it accrue? Lis pendens relates to acts which are done during the pendency of a suit. Pendency of a suit commences from the time suit is filed. See Mulla on Transfer of Property Act, 1182 Ninth edition, Lexis Nexus: Butter-worth. My own view, therefore, is that these proceedings arose after the ITPA was already repealed and lis pendens, unless it has been specifically provided for in a statute should apply as a common law principle within the current constitutional structure and land law regime of the nation. But the decision in the case of Aprotech Services Ltd v. Savings & Loan Kenya Ltd [2001] LLR 1498 (CCK) is conclusive on the application of lis pendens on mortgages as follows:

"The Applicantsefloated thesidea thatosection 52uITPA protectedrit andono salekof themsuit premisesswould gokon untiloand unlessethis courtsso ordered.iThe sectionr52 asrit appearedlin thei1992 copykof ITPAsavailable, reads.

"51oDuring themactive prosecutionkin anyoCourt havingsauthority iniBritish India,aor establishedebeyond theilimits ofrBritish Indiaiby thesGovernor - Generalain council,aof aecontentious suitror proceedinguin whichaany rightrto immovableeproperty iskdirectly andespecifically iniquestion, thelproperty cannotrbe transferredkor otherwisekdealt withuby anylparty touthe suitlor proceedingkso asoto affectethe rightsrof anyaother partyrthereto underoany decreelor ordermwhich mayebe madeotherein, exceptiunder thelauthority ofothe courtrand onusuch termssas itrmay impose"i

Although MroMachira invokedsthis sectionrto applyahere, andoMr. Bundotichadid notmso muchrallude tokit, thisecourt islnot persuadedethat Mr.aMachira's pointmshould belupheld inohis client'smfavour. Thisksection appearslto havelbeen intendeduto preservesany property,kparties areelitigating aboutoin court,rfor oneokind ofsrelief ormanother. Itldid notkmean toobe appliedoto situationsiof mortgages.oIf itiwere, itiwould bera greatmclog tolcommercial activitiesuinvolving landeas security.iIn anyucase sectione52 doesonot saysthat notwithstandingeany othersprovisions underoITPA, itishall

apply.eWithout moreamay thatepoint restlthere.

See also the literary writing of B. B Mitra on the Transfer of Property Act, 1882 on the application of lis pendens (section 52 ITPA):

> ***"This section does not apply to a suit for redemption brought by the mortgagor who has given to the mortgagee under the mortgage an express power of sale. Therefore, a private sale of the mortgaged property by the mortgagee in exercise of such power is not affected by the doctrine of lis pendens, and is valid though made during the pendency of a redemption suit filed by the mortgagor-Ramkrishna v. Official Assignee 45 Mad 774 (776), 43 MLJ 566, AIR 1922 Mad, 69 IC 407.***

That rendition settles the prayer for lis pendens order. I will not determine the request for an injunction on the basis of lis pendens.

[42] As I stated in the above quoted case, the rendition therein settles all the arguments on *lis pendens* presented by both parties.

Dated, signed and delivered in court at Nairobi this 24th day of April 2015

F. GIKONYO

JUDGE