



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE No. 478 OF 1998

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

FOURSOME DEVELOPERS LTD..... DEFENDANT

AND

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 258 OF 2010

DAVID KIHARA GITONGA &

SIMON PETER KIHARA

(Suing as the legal representatives of

JOHN GITONGA KIHARA, Deceased).....PLAINTIFFS

VERSUS

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

DOVE COURT LIMITED.....2ND DEFENDANT

SHABA INVESTMENTS LIMITED.....INTENDED 3RD DEFENDANT

KAMUTHI HOUSING

CO-OP SOCIETY LTD.....INTENDED 4TH DEFENDANT

RULING

INTRODUCTION

1. There are two applications before the Court for determination both brought by the Plaintiff. The first one (the first application) is dated **28th July 2014** and amended on **3rd September 2014** as filed in **HCCC 478 of 1998** while the second one (the second application) is dated **29th August, 2014** filed in **HCCC 258 of 2010**.

THE FIRST APPLICATION

2. The first application is expressed to be brought under the provisions of **Sections 1A, 1B, 3A and 80** of the **Civil Procedure Act** as well as **Order 1 Rule 10, Order 45 Rule 1 and Order 51 Rule 1-3** of the **Civil Procedure Rules**.
3. The application sought for several orders as follows:-

1. *That this Honourable Court be pleased to order that the said David Kihara Gitonga and Simon Peter Kihara, the legal representatives of the late John Gitonga Kihara (Deceased) be joined herein as the 2nd Defendant.*

1B That Dovecourt Ltd, Shaba Investments Ltd, Kamuthi Housing Cooperative Society and K-Rep Bank Ltd be joined herein as interested parties.

2. *That this Honourable Court be pleased to review and set aside the decree issued herein on 23rd October, 2003 pursuant to the consent order made herein on 7th May, 2003.*
3. *That this Honourable Court be pleased to review and set aside the order made herein on 15th July, 2004.*
4. *That this Honourable Court be pleased to declare that the late John Gitonga Kihara was the chargor of LR No. 280/3 at the time of his death.*
5. *That this Honourable Court be pleased to declare that the said David Gitonga Kihara and Simon Peter Kihara are the chargors in respect of the said LR No. 280/3.*
6. *That this Honourable Court be pleased to declare that the subdivision by the Plaintiff herein of LR No. 280/3 into LR No. 280/10, LR No. 280/11 and LR No. 280/12 was illegal, null and void.*
7. *That this Honourable Court be pleased to declare that the transfer of LR No. 280/11 and LR No. 280/12 to Foursome Developers Ltd on 12th October, 1995 was null and void.*
8. *That this suit be consolidated with Nairobi High Court, Commercial and Admiralty Division Civil Suit No. 258 of 2010; John Gitonga Kihara vs. National Bank of Kenya Ltd, Dove Court Ltd, Shaba Investments Ltd, Kamuthi Housing Cooperative Society and K-Rep Bank Ltd.*
9. *That the costs of this application be provided for.*

1. The application is based on the grounds set out therein and is supported by the affidavit of **SIMON PETER KIHARA** sworn on **3rd September, 2014**. According to the Applicant's submissions the application is also supported by the following affidavits:-
2. *a. That of David Kihara Gitonga and Simon Peter Kihara sworn on 28th July, 2014;*

- b. *The supplementary affidavit of David Kihara Gitonga sworn on 1st September, 2014, in reply to the affidavit of Samuel Wanjohi Mundia;*
- c. *The affidavit of Simon Peter Kihara sworn on 26th January 2015 in reply to the affidavits of Daisy Ajuma sworn on 18th December 2014;*
- d. *The supplementary affidavit of Simon Peter Kihara sworn on 26th January, 2015 in reply to the affidavit of Eliud Perminus Njoroje sworn on 15th January, 2015*

THE APPLICANTS' CASE

5. The Applicants aver that the Plaintiff (herein the National Bank) is the registered proprietor of the subdivision of LR No. 280/12 which is now known as LR No. 280/1728. They further aver that on 18th December, 2009, National Bank purported to transfer to Dove Court Ltd (the intended 1st interested Party) LR No. 280/11. Thereafter, their late father filed HCCC No. 258 of 2010 in April, 2010 and sought injunctions to preserve the said LR No. 280/11 and LR No. 280/12. Subsequent to the filing of the said suit and injunction applications, the Applicants aver that National Bank purported to transfer to Dove Court Ltd LR No. 280/12 on 2nd June, 2010. Further, on 21st July, 2011, when the said suit was still pending, Dove Court Ltd purported to transfer the two parcels of land to Shaba Investments Ltd (intended 2nd interested party). On 11th October, 2011, still during the pendency of the suit, Shaba Investments Ltd purported to transfer the two properties i.e LR No. 280/11 and LR No. 280/12 to Kamuthi Housing Cooperative Society. On the same day, the said Kamuthi Housing Co-operative Society purported to charge the suit properties to Shaba Investments Ltd and K-Rep Bank Ltd to secure payments of Kshs. 560,970,000/= and Kshs 200,000,000/=.
6. It is therefore the Applicants' case that at all material times, National Bank lacked capacity to be the owner of LR No. 280/11 and LR No. 280/12 in 2004 and further also lacked the capacity to sell them to any party including Dove Court Ltd. Further, by virtue of section 52 of the Indian Transfer of Property Act, 1882, Dove Court lacked a legal capacity, during the pendency of the said HCCC No. 258 of 2010, to sell or to transfer to anybody including Shaba Investments Ltd, the said LR No. 280/11 and LR No. 280/12. By virtue of the said section 52 of the Indian Transfer of Property Act, 1882, Shaba Investments Ltd also lacked legal capacity, during the pendency of the said HCCC No. 258 of 2010 to sell or to transfer to anybody including Kamuthi Housing Cooperative Society, the said LR No. 280/11 and LR No. 280/12. Consequently, Kamuthi Housing Cooperative Society also lacked legal capacity, during the pendency of the said HCCC No. 258 of 2010 to charge or mortgage to anybody the said LR No. 280/11 and LR No. 280/12. The Applicants contend that the purported transfers and charges in respect of the said LR No. 280/11 and LR No. 280/12 also known as LR No. 1728 during the pendency of the said HCCC No. 258 of 2010, are therefore null and void.
7. It is further averred by the Applicants that the said Dove Court Ltd, Shaba Investments Ltd and Kamuthi Housing Cooperative Society will be affected by any orders made by this Court on their application dated 28th July, 2014 and amended on 3rd September 2014. The Applicants' case is that the Rule of Law Doctrine requires that all those who are to be affected by a court's orders be made parties to the relevant proceedings.
8. It is also averred by the Applicants that on 12th October, 1995, LR No. 280/11 and L.R No. 280/12 were transferred to the Defendant, Foursome Ltd which had not paid the consideration of Kshs. 60 million. The Plaintiffs contend that although the suit properties belonged to their late father, he was not made a party to the suit. (The Bank avers that the sale of the suit properties was by their late father's consent.)

THE PLAINTIFF'S CASE

9. In response to the Applicant's application, the Plaintiff filed a Further affidavit sworn on 19th September, 2014 by **Samuel Wanjohi Mundia**, the head of commercial transactions and litigation

- in the Bank. This affidavit was in addition to a Replying affidavit sworn by the same person on 19th August, 2014 in response to the original application dated 28th July, 2014.
10. It is the Plaintiff's case that the Court is *functus officio* as there is no pending dispute between the proper parties hereto, being the Plaintiff and the Defendant following a binding consent judgment made on 7th July, 2003 which fully compromised the whole suit in all aspects. It is further their case that there is no dispute on the unconditional sale of the suit property which sale effectively extinguished any redemption rights and therefore the consolidation of this suit with HCCC 258 of 2010 will not lead to anything useful in the absence of any pending dispute and a surviving common cause of action.
 11. It is the Plaintiff's case that the Applicants are trying to wrongly challenge through the backdoor a valid and binding consent judgment made on 7th July, 2003 and the subsequent vesting order made on 15th July 2004. This is on the ground that they were not a necessary party to the consent and that they were not privy to the underlying valid sale transaction exclusively made between the Plaintiff and the Defendant.
 12. The Plaintiff's case therefore is that it is too late in the day to re-open a long concluded litigation between the parties hereto to accommodate and advance alleged interests of the Applicants which are statute barred.

THE 1ST INTERESTED PARTY

13. The intended 1st interested party, Dove Court Limited filed a Notice of Preliminary Objection dated 13th October, 2014.
14. It is the 1st interested party's objection that the amended Notice of Motion application dated 3rd September, 2014 is time barred and that the applicants do not have the locus to lodge the said application. According to the intended 1st interested party, the cause of action abated a year after the death of the deceased. It further contends that the Applicants are barred by Order 24 rule 3 (2) of the Civil Procedure Rules from reviving a cause of action that has abated.

THE 2ND INTERESTED PARTY

15. On 13th October, 2014, the proposed 2nd interested party filed a Notice of Preliminary objection dated 10th October, 2014. The 2nd interested party's objection was on the ground that the application was time barred as the subject suit properties had been transferred some time before 12th October 1995, 19 years before the present application. They further object to the application on the ground that the present suit was finally settled on 11th August, 2004 and as such the Court is *functus officio* as regards the suit and the application and therefore lacks jurisdiction to entertain the application.

THE 3RD INTERESTED PARTY

16. The 3rd interested party file a preliminary objection dated 9th October 2014. It is the 3rd interested Party's objection that the applicant's cause of action against the Plaintiff and the Defendant herein (HCCC 478 of 1998) is statutorily barred in accordance with the Limitation of Actions Act. It was also their case that the suit property known as L.R No. 280/3 registered in the name of John Gitonga Kihara was extinguished in the year 1995 and therefore this Court has no legal basis of entertaining the proceedings by the applicant.

THE 4TH INTERESTED PARTY

17. The intended 4th interested party, filed a Notice of preliminary objection dated 13th October, 2014. It objected to the application on grounds that the same was time barred having been instituted after the expiry of 12 years from the date the cause of action arose and that the Applicant lacked locus standi having failed to demonstrate an interest, right or claim in the subject matter of the suit

- herein. It was further its case that the subject dispute between the Plaintiff and the Defendant having been resolved vide a consent judgment, this Court was *functus officio* in the matter.
18. The 4th interested party in addition filed a Replying Affidavit sworn on **18th December, 2014** by **DAISY AJIMA**, its Legal Manager. She averred that the intended 4th interested party held a charge and further Charge over the properties known as Land Reference No. 280/11 and Land Reference No. 280/1728 both registered in the name of Kamuthi Housing Co-operative Society Limited as security for various loan facilities advanced to the said Kamuthi Housing Co-Operative Society. The said charge was registered on 11th October, 2011 while the Further Charge was registered on 7th October, 2013.
19. It is the 4th interested party's case that it has never been a party to any proceedings in which any right in the properties, L.R No. 280/11 and L.R No. 280/1728 was specifically and directly in question. It is further its case that it was not privy to any agreement for sale between the Plaintiff and the Defendant herein and had no interest whatsoever in the subject matter of the dispute between the Plaintiff and the Defendant and the suit.
20. It was also the 4th interested party's contention that the application herein did not disclose any legal nexus between the subject matter of the suit herein and the subject matter of HCCC 258 of 2010. Therefore, the 4th interested party was of the view that there was no need to consolidate the two suits.

ANALYSIS

21. I have considered the application, the preliminary objections as raised by the intended interested parties, the replying affidavit filed by the intended 4th interested party as well as the written and oral submissions by all parties. Having done so, I take the following view of the matter.
22. I will begin with the preliminary objections as raised by the Intended interested parties.

PRELIMINARY OBJECTIONS

23. The law on preliminary objections has been restated time and again by these Courts by referring to the well-known case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) E.A. 696** as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

24. All the intended interested parties have raised an objection of limitation to the effect that the present suit and application by the applicants is time barred having been instituted after the expiry of 12 years from the date the cause of action arose. According to the Applicants, the cause of action arose in 1995, when the late chargor consented to the sale of L.R No. 280/3 in order for National Bank to recover Kshs. 60 million that was due to it. On the issue of time limitation, Dr. Kuria, Counsel for the Applicants submitted that the same did not apply to this matter for the following reasons. The Contract for sale of the suit properties which fell through was entered into on 18th September 1995. HCCC No. 478/98 was filed four years later while HCCC No. 258 of 2010 was filed ten years after the said contract which fell through was entered into. Therefore, twelve years had not lapsed when the Plaintiff brought the suit.
25. I agree that HCCC No. 478 of 1998 was filed four years after the contract to sell the suit property was entered into. However, the said suit was between National Bank and Foursome Limited. The Applicants and the late chargor were not privy to it. With regard to HCCC No. 258 of 2010 which was brought by the late chargor and taken over by the Applicants, the same was brought fifteen (15) years after the aforesaid contract was entered into and not ten years. That notwithstanding, it cannot be said that the date when the cause of action arose is in 1995 when the late chargor and National Bank entered into an agreement to sell. I say so because the intended sale fell through. In

HCCC No. 478 of 1998 National Bank sued Foursome Limited for failing to pay the purchase price and in the year 2004, the Bank was granted a vesting order by this Court making them the title holders of the suit properties. In the circumstances, it is only safe to say that the cause of action arose in 2004 when the suit properties reverted back to the Bank. As to whether there was another proper sale of the suit properties thereafter to recover the debt is one of the issues hotly contested in this matter. It is clear that between the year 2004 and 2010 when the late chargor filed HCCC NO. 258 of 2010, twelve (12) years had not lapsed and therefore the issue of time limitation does not apply.

26. The interested parties also raised an objection to the effect that the Applicants lacked locus standi to lodge the application dated 3rd September, 2014. It was the Applicants' position that this submission lacked merit as they were legal representatives of the chargor who at the time of his death had a cause of action against the Plaintiff and the other parties. It is not in dispute that the Applicants herein are the legal representatives of the late chargor having been granted letters of grant ad litem. Therefore the issue of locus standi is resolved.
27. There is also the objection that this Court is *functus officio* in HCCC No. 478 of 1998 on the ground that the same was settled by way of consent judgment. I will deal with this objection shortly when addressing the Applicants prayer for review of the consent order and Vesting order.

REVIEW

28. A Court has power to review its own orders as provided for under Order 45 rule 1 of the Civil Procedure Rules as follows:-

“(45) (1) Any person considering himself aggrieved-

- a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
- b. ***by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.*** *Emphasis supplied*

29. In their pleadings and submissions the Applicants were not categorical as to whether they had discovered any new important matter that was not within their knowledge or whether there was an error apparent on the face of the record. Perhaps their discovery of new evidence arises out of the fact that they were not aware that the sale fell through and their argument that the late chargor was not made a party to the suit in HCCC No. 478 of 1998. It is however debatable as to whether the late chargor really didn't know about the circumstances surrounding the said sale. This Court cannot ignore the submissions by the Bank to the effect that Foursome Ltd. attributed the delay on completion of the subdivision and sale of the suit property to unnecessary interference by the late chargor. This culminated in Foursome instituting a suit in **NAIROBI HCCC NO. 1103 OF 2003** wherein a mandatory injunction was obtained on **17th November 2003** restraining the late chargor and his representatives and successors from interfering with the suit properties. The Applicants did not offer any substantial rebuttal to these submissions. In the circumstances foregoing, in determining whether or not to grant the orders for review as sought for by the Applicants the Court will establish whether there are any sufficient reasons to grant the orders for review.

30. The Applicants are seeking for a review of the Consent order made on 7th May, 2003 and the subsequent decree as well as the Vesting Order made on 15th July, 2004. Their case is that the property comprised in LR No. 280/11 and LR No. 280/12 were purportedly taken away from their late father (the charger) in 2004, through secret proceedings involving the Plaintiff (National Bank) and the Defendant, a purported purchaser of the same under a sale by private treaty which fell through. The Applicants contend that the late chargor was never made a party to the suit.

31. It is also the Applicants' submissions that National Bank entered into a sale agreement over the suit properties for Kshs. 60 million, which sale the late chargor consented to. The buyer was able to pay only Kshs. 12,500,000/= out of the Kshs. 60 million and so the sale fell through. However, the late chargor was never informed that the sale fell through and was shocked to discover in 2009 that the National Bank was the registered proprietor of the 2 large parcels of land pursuant to a vesting order. This prompted the late chargor to file the suit in HCCC No. 258 of 2010.
32. It is also the Applicants' submission that according to the Banking Act, no Bank is allowed to deal in land. Therefore, the Applicants submit that they have been deprived of land by a series of illegal transactions which commenced in 1995 and that the said acts are still continuing. It is further submitted that the equity of redemption of the late chargor was never extinguished since the sale fell through.
33. On the other hand, National Bank submitted that the Applicants could not challenge the consent judgment dated 7th July 2003 in 478/1998 because the late chargor was not a party to the financing agreement between National Bank and Foursome Ltd, and the Chargor was also not a party to the sale. It was also their case that the Applicants could not challenge the aforesaid consent judgment and vesting order when they were not proper parties to the suit.
34. In setting aside a consent order the Court of appeal in the case of **FLORA N WASIKE vs DESTIMO WAMBOKO (1982 – 1988) 1 KAR page 625** held that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example, where there is fraud, mistake or misrepresentation.
35. The Applicants have not proved to this Court that there was any fraud, mistake or misrepresentation when the Bank and Foursome Limited entered into the Consent agreement of 7th May 2003. The only fraud as alleged by the Applicants is the transfer of the suit properties by the Bank to Foursome Limited when they had not paid the entire purchase price. I concur with the submissions on behalf of National Bank that the said fraud could only be taken up as between the Bank and the said Foursome Limited. The alleged fraud was not committed against the late chargor and there is no indication that the alleged infringed on his legal rights, if any.
36. On the issue of being condemned unheard and whether or not the late chargor should have been a party to the said suit, it is clear to this Court that the late chargor was not a necessary party to the suit. It is not in dispute that the late chargor had consented to the sale of L.R No. 280/11 and L.R No. 280/12 to Foursome Ltd for Kshs. 60 million in order to settle his indebtedness to the Bank. The Bank thereafter entered into a sale agreement with the said Foursome Ltd for the sale of the suit properties for Kshs. 60 million. The late chargor was not privy to this sale agreement and therefore he has no avenue to be involved in whatever disputes arose therein.
37. In HCCC No. 478 of 1998, it is clear that the parties therein resolved their dispute by way of the consent order made on 7th May 2003 and the consequent decree made on 7th July 2003. These orders remain unchallenged as the Applicants have not demonstrated satisfactory reasons before this Court to warrant a review or setting aside of the same. Subsequent to the said Consent and Decree, a vesting order was issued on 15th July 2004.

The Applicants have also sought for a review and setting aside of the said Vesting Order. As earlier stated, the Applicants challenged the vesting order on the ground that the Bank never treated the suit properties as charged to it and ended up engaging in the buying and selling of the same contrary to section 12 (c) of the Banking Act. The said section provides as follows:-

“12. An institution shall not-

- a.
- b.
- c. ***purchase or acquire or hold any land or any interest or right therein except such land or interest as may be reasonably necessary for the purpose of conducting its business, or for housing or providing amenities for its staff, where the total amount of such investment does not exceed such proportion of its core capital as the Central Bank may prescribe:***

Provided that -

(i) this paragraph does not prevent an institution from-

(A) letting part of any building which is used for the purpose of conducting its business; or

(B) securing a debt on land and, in the event of default in payment of the debt, holding the land for so long as, in the opinion of the Central Bank, is needed for the realization of the debt; or

(C) acquiring land for the purpose of its own development; and . . .

38. The vesting of the suit properties to National Bank by the court in execution of the consent judgment therein in this Court's view did not amount to engaging in a sale or purchase of land within the strict confines of Section 12 (c) of the Banking Act. The properties had to revert to the Bank as Foursome Limited had defaulted on the consent judgment by failing to pay the purchase price. This does not mean the Bank 'purchased' the properties but it only got back its securities which it was entitled to in realization of the debt owed to it by the late chargor. In the circumstances, the Vesting Order of 15th July, 2004 is valid, being a remedy lawfully arising from specific performance of the sale agreement and the Consent entered into between the Bank and Foursome Ltd. This Court therefore has no reason to review or set aside the same.
39. Having found that there is no basis for setting aside the consent order and the vesting order as aforesaid, the position taken by this court is that the suit in HCCC No. 478 of 1998 between the Bank and Foursome Ltd stands settled pursuant to the Consent Order dated 7th May 2003. I therefore have no option but to agree with the Bank's and interested parties' submissions that this Court is *functus officio* in as far as the said suit is concerned. I will however still address the remaining prayers in the amended application.

PRAYERS NO. 4, 5, 6 AND 7

40. The Applicants also prayed for orders that this Court be pleased to declare that the late John Gitonga Kihara was the chargor of LR No. 280/3 at the time of his death. The late chargor passed on sometime in 2013. It is the said chargor who had consented to the sale of L.R No. 280/11 and 280/12 which were sub-divisions of L.R No. 280/3. In the circumstances, it is apparent that L.R No. 280/3 was already subdivided by the consent of the chargor. There is therefore no basis of declaring the late John Kihara as a chargor of L.R No. 280/3 which is no longer in existence. In that case prayer no. 5 in which the applicants were seeking for orders that this Court declare them as chargors in respect of the said LR No. 280/3 cannot stand. Having already established that the late chargor consented to the sale of LR No. 280/11 and LR No. 280/12 to offset his indebtedness to the bank, it is difficult to comprehend how the subdivision of LR No. 280/3 to the aforesaid parcels of land became illegal, null and void. Therefore this Court cannot grant prayer no. 6.
41. The Applicants also prayed for orders that this Court be pleased to declare that the transfer of LR No. 280/11 and LR No. 280/12 to Foursome Developers Ltd on 12th October, 1995 was null and void. As I have already stated earlier on in this ruling the allegations of fraud in the said suit properties could only be taken up between the Bank and Foursome Ltd. The dispute between them was eventually resolved by way of a Consent Judgment. In that case this Court has no mandate to re-open the said dispute and declare that the said transfer was null and void. In any case, the foregoing orders are final in nature and cannot be granted at an interlocutory stage.

CONSOLIDATION

42. Finally, the Applicants sought for orders that this suit be consolidated with Nairobi High Court, Commercial and Admiralty Division Civil Suit No. 258 of 2010. In view of the findings above, it is inevitable that an order for consolidation cannot stand. This Court has already established that the suit in HCCC No. 478 of 1998 was conclusively determined by way of the consent order made on 7th May, 2003. The Consent order and the subsequent decree remain unchallenged and therefore the same cannot be re-opened for litigation. In that case there is no subsisting dispute in

the said suit and the order for consolidation cannot lie. It therefore follows that prayers no. 1 and 1B of the amended notice of motion seeking to join the Applicants as the 2nd Defendant as well as Dove Court Ltd, Shaba Investments Ltd, Kamuthi Housing Co-operative Society and K-rep Bank Ltd as interested parties cannot be allowed as there is no subsisting suit in HCCC No. 478 of 1998.

DISPOSITION OF THE 1ST APPLICATION

43. In view of the foregoing, the upshot of this Court's ruling is that the Applicant's Notice of Motion dated 28th July 2014 and amended on 3rd September, 2014 is hereby dismissed.

Injunction application and the doctrine of *lis pendens*

44. In HCCC 258 of 2010, the Plaintiff is seeking injunctive orders vide the application dated 29th August, 2014 to preserve the subject matter which is the suit property L.R No 280/3 and the subdivisions therein.

45. I will not reproduce most of the details of the said application and the responses therein as the same are almost similar to the pleadings in HCCC No. 478 of 1998.

46. The following are the orders sought for in the application:-

1. *Spent*
2. *Spent*
3. *That Shaba Investments Ltd, Kamuthi Housing Co – operative Society and K-Rep Bank Ltd be joined herein as the 3rd, 4th and 5th Defendants respectively.*
4. *That the 1st Defendant/Respondent be restrained whether by itself, its servants and or agents from transferring the following properties until further orders of the court –(the properties are as listed in the application from (a) to (o)*
5. *That the 1st Defendant/Respondent be restrained whether by itself, its servants and or agents from transferring the following properties pending the hearing and determination of this suit – (the properties are as listed from (a) to (o)*
6. *That the said Kamuthii Housing Co – operative Society Ltd be restrained by itself, its servants and or agents from transferring, selling, charging, subdividing or in any manner whatsoever dealing with LR No. 280/11 and LR No. 280/1728 formerly known as LR No. 280/12 until further orders of the court.*
7. *That the said Kamuthii Housing Co – operative Society Ltd be restrained by itself, its servants and or agents from transferring, selling, charging, subdividing or in any manner whatsoever dealing with LR No. 280/11 and LR No. 280/1728 formerly known as LR No. 280/12 pending the hearing and determination of this suit.*
8. *That the cost of this application be in the cause.*

47. The Applicants case is that since 1995, the 1st Defendant (herein the National Bank) in contravention of the Banking Act has been dealing with the charged property as an owner instead of as a chargee. The Applicants aver that as of today, the National Bank is registered as the proprietor of various parcels of land which are subdivisions of LR No. 280/12. All the properties are derived from the original property known as L.R No. 280/3 which the late chargor charged to the National Bank in 1977.

48. In addition, during the pendency of the suits, parties claim to have acquired interest in the charged properties. The Plaintiff contends that the relationship between the Chargor and the Chargee which commenced in 1977 subsists to date in respect of the 17 properties.

49. In support of the application the Applicants filed their written submissions dated 12th February 2015 on even date.

50. The Defendants and the intended Defendants opposed the injunction application as can be seen below.

The 1st Defendant

51. In opposition to the application, the 1st Defendant, National Bank of Kenya filed the Replying affidavit sworn by SAMUEL WANJOHI MUNDIA on 19th September, 2014 as well as its submissions dated 13th February, 2015 and filed on even date.
52. It is the Bank's case that the application fails to disclose any *prima facie* case capable of being ventilated at full trial. The Bank averred that in 1995, the late chargor approached them out of his own free will, to sell the suit property by private treaty to Foursome Developers Limited. The agreed purchase price was Kshs. 60 Million, in full redemption of the debt. It is the submission of the Bank that the said sale of the suit property was binding, unconditional and unchallenged having been consented to by the late chargor. According to the Bank, the said sale fully and effectively extinguished any redemption rights vested in the late chargor over the suit properties and brought to an end the chargee-chargor relationship between the Bank and the late chargor.

The 2nd Defendant

53. The 2nd Defendant (herein Dove Court) filed the Grounds of opposition dated 22nd September 2014 on even date as well as its written submissions dated 12th February 2015 on even date.
54. Dove Court's case is that it purchased the suit properties, that is, Land Reference No. 280/11 and Land Reference No. 280/12, in good faith, for valuable consideration and without notice as to any defects in the titles. It subsequently sold them to the Intended 3rd Defendant. It was also Dove Court's case that the late chargor's equity of redemption was extinguished when it consented to the sale of the suit properties.

Intended 3rd Defendant

55. The intended 3rd Defendant (herein Shaba Investments) filed a Notice of Preliminary Objection dated 10th October, 2014 and Grounds of opposition dated as well as its written submissions dated 13th February 2015 and filed on 16th February, 2015.
56. Shaba investments objected to the application on the ground that it was time barred as the suit properties had been transferred sometime back in 1995. The Court has already addressed the issue of time limitation in HCCC No. 478 of 1998.
57. On the injunction orders, Shaba's submission was that it was a bona fide purchaser for value without notice as to any defect in title to the subject properties. It further submitted that its title would only be defeated if it was acquired by fraud or misrepresentation which was not the case herein.

The intended 4th Defendant

58. The intended 4th Defendant (herein Kamuthi Housing), filed the replying affidavit of ELIUD PERMINUS NJOROGE sworn on 15th January 2015 as well as its written submissions dated 17th February 2015.
59. It is Kamuthi Housing's submission that the Applicants herein have not established a *prima facie* case for the reason that the transaction which it purports to challenge, namely, the transfer of properties known as L.R. No.280/11 and L.R. No.280/12 was done lawfully and with the consent of the Chargor. It is also its submission that the Applicant's injunctive prayers against it was without basis as it was an innocent purchaser for value without notice of any defect in the title to the said suit properties which it purchased from the 3rd Intended Defendant.

The intended 5th Defendant

60. The intended 5th Defendant (herein K-rep Bank) filed the replying affidavit sworn by DAISY AJIMA on 18th December, 2014 as well as its submissions dated 12th February 2015.
61. K-rep Bank averred that it held a charge and Further Charge over the properties known as LR No. 280/11 and 280/1728 both registered in the name of Kamuthi Housing Co-operative society. It is

K-rep Bank's submissions that the late chargor's right of redemption was extinguished upon the transfer of the suit properties to Foursome Ltd in 1995. It is also K-rep Bank's case that the doctrine of *lis pendens* does not apply to the intended 3rd Defendants as they were not parties to the suit then. It is further their case that the 1st Defendant, National Bank was not the proprietor of L.R No. 280/11 and 280/1728 when the late chargor filed the present suit.

ANALYSIS

62. I have considered the application, the affidavits in support and opposition thereto, the written submissions filed by the parties as well as the oral submissions.
63. It is not in dispute that the sale of the properties to Foursome Ltd as agreed to by the parties in 1995 fell through leading to the vesting order in favour of the Bank in 2004. The Bank had the power to resell the suit properties. At this point it is not clear why it took the Bank so long to resell the said properties either by way of auction or sale by private treaty in exercising its statutory power of sale to recover the debt owed to it by the late chargor.
64. In fact it is not clear how much money the Bank obtained from disposing off the said properties and whether it recovered the Kshs. 60 million that was to offset the debt owed by the late chargor. It may be that whatever money obtained from the purported sale of the suit properties has surpassed the debt of Kshs. 60 million that the National Bank was to recover.
65. In the supporting affidavit of Simon Peter Kihara sworn on **3rd September, 2014** the deponent avers that searches at the land registry revealed that National Bank was the registered proprietor of L.R No. 280/12 and L.R No. 280/1728 as of 18th June 2009. It is further submitted by the Applicants that as of today, the National Bank of Kenya is still the registered proprietor of the fifteen (15) 4.8 acre plots. According to the Applicants, there is no way a chargee can acquire title in a charged property unless through a court order. How did National Bank of Kenya happen to be the registered proprietor of the 15 parcels of land? Has it satisfied the debt of Kshs. 60 million owed to it by the late chargor and if so how? I believe these are some of the questions the Applicant's seeks answers to. In essence they are challenging the legality of the Bank's exercise of statutory power of sale and also pursuing the right to equity of redemption, if any.
66. As to how National Bank became the registered owners of the suit properties, it is not in dispute that the same was through the Vesting order issued in 2004, which order has not been set aside. As stated in this Court's ruling in HCCC No. 478 of 1998, the issuing of the vesting order to the Bank cannot be deemed to be a purchase of the suit properties by the Bank. In the event that the subsequent dealings with the suit properties by the Bank was in contravention with section 12 of the Banking Act as alleged by the Applicants, I believe the said allegation can be effectively taken up by the regulatory authority being the Central Bank of Kenya. In essence, this allegation cannot negate the fact that the Bank's statutory power of sale had arisen as of 1995 and there was nothing stopping the Bank from exercising the said rights.
67. On the other hand, it is difficult to believe that between the year 1995 when the chargor consented to the sale of the properties and the year 2010 when he filed the suit, he was not aware that the sale had fallen through. It is only logical that he would have followed up to find out if the properties had been sold and the debt recovered. If he did not actively follow up this process, then how can it be established that his equity of redemption was clogged? If it turns out that the sale of the suit properties was irregular or improper then the remedy of the late chargor through the Applicants lies in damages. See section 69 B of the repealed ITPA. This is also replicated in section 99 of the Land Act, 2012.
68. If I were in doubt the balance of convenience would not favour the Applicants. This is because the late chargor consented to the disposal of L.R No. 280/11 and 280/12 to Foursome Limited to settle the debt of Kshs. 60 million and much as that sale fell through the Bank was entitled to resell the properties. Therefore, it cannot be said that the sale of the said suit properties has subjected the applicants to irreparable loss that cannot be compensated by way of damages.

Lis pendens

69. Kamuthi Housing acquired the suit properties during the pendency of this suit. It purchased the properties known as L.R. No. 280/11 and L. R. No. 280/1728 in the year 2011 upon successfully

and lawfully registering its interest in the above properties with the Lands Department. It is the Applicants' submission that by virtue of section 52 of the repealed ITPA, 1882, Kamuthi Housing could not acquire interest in the said suit properties which suit had not been determined. Kamuthi Housing claims to have bought the properties from the intended 3rd Defendant, Shaba investments. On the other hand Shaba Investments claims to have bought L.R No. 280/1728 during the pendency of this suit from the 2nd Defendant while the 2nd Defendant purports to have bought it from the 1st Defendant when the current suit was pending.

70. It is therefore the Applicant's case that the present application raises the issue of *lis pendens* under common law which forbids the sale of a property which is the subject matter of a suit. The intended 5th Defendant is a purported chargee in respect of L.R 280/1728 and 280/11.

71. The Court of Appeal in **Civil Appeal No 44 of 2014 Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another; (2015) eKLR**, had the following to say on the doctrine of *lis pendens*;

“Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of Mawji vs US International University & another [1976] KLR 185, Madan, J.A. stated thus:-

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

In the same case it was observed inter alia that:-

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

72. It is not in dispute that some of the suit properties were sold during the pendency of HCCC No. 258 of 2010. The intended Defendants' case is that they were bona fide purchasers for value without notice. However, from the above determination of the Court of Appeal it appears that *lis pendens* applies even to third parties who had no notice of the suit. Therefore the doctrine applies to the interested parties herein to whom the suit properties were transferred during the pendency of the suit though they were not parties to the suit.

73. The above notwithstanding, this Court having established that there was nothing stopping National Bank from exercising its statutory power of sale and that in the event that the sale of the suit properties were irregular the Applicant's remedy is in damages, the doctrine of *lis pendens* might not aid the applicant's case for an injunction. This Court did not also come across any orders stopping the National Bank from exercising its statutory power of sale or restraining them from selling the suit properties.

Joinder of parties

74. On the issue of joinder, the intended Defendants submitted that the Applicants' application was defective as it sought to join the intended Defendants without amending the Plaintiff. In its submission, Shaba Investments referred to Order 1 Rule 10 (4) of the Civil Procedure Rules, which states thus:-

“Where a defendant is added or substituted, the plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaintiff shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

75. The reading of the above provision does not infer that the amendment of the pleading must be done before an application to join the Defendant. This can actually be done after the Defendant has been added or substituted.

76. The above notwithstanding, the joinder of the parties will not serve any useful purpose in this suit, having established that the doctrine of *lis pendens* will not aid the Applicants' case and that the Bank was entitled to exercise its statutory power of sale as regards the suit properties. In essence, this Court's finding is that the Applicants' remedy if any, lies in damages against the National Bank of Kenya.

DISPOSITION OF THE 2ND APPLICATION

77. The upshot of the foregoing is that the Applicant's Notice of Motion dated 29th August 2014 and filed on even date is hereby dismissed.

78. The costs of the application shall be paid by the Applicants to the Respondents. The said costs shall be based only on one application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 29TH DAY OF SEPTEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Ndungu and Dr. Kuria for the Plaintiffs

Mr. Odhiambo for the 1st Defendant

Mr. Washe holding brief for Kethi for the 2nd Defendant

Mr. Otieno for the 3rd Defendant

Mr. Washe for the 4th Defendant

Mr. Muindi & M/s Ajiambo for the 5th Defendant