



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 520 OF 2011

MALEZI PREPARATORY SCHOOLS LTD. PLAINTIFF

VERSUS

ECOBANK KENYA LTD. DEFENDANT

J U D G E M E N T

1. The Plaintiff herein dated 21st November 2011 sought prayers firstly that in the absence of a valid Statutory Notice, the Auctioneers' Notification of Sale dated 2nd June 2011 be declared irregular, illegal and invalid. The Plaintiff also sought an order of permanent injunction restraining the Defendant from in any way selling, disposing of, offering for sale, alienating or in any way auctioning the property Title No. Nairobi/Block 72/2915 (hereinafter "the suit property") in exercise of its Statutory Power of Sale. The Plaintiff also claims general damages which had arisen as a result of the advertisement of the suit property being for sale, plus interest thereon at Court rates. The Plaintiff also sought a prayer for the costs of this suit.
2. The Defence was filed herein on 20th May 2013. It detailed that by a facility letter dated 1st July 2009 the Defendant offered to the Plaintiff a term loan facility of Shs. 30 million to finance the completion of the construction of 34 self-contained overnight rooms at the Plaintiff's school in Langata. The Defendant maintained that it was a term of the said facility that during a six months moratorium period, the Plaintiff would service the monthly interest accruing on the loan facility but after expiry of the moratorium period, the Plaintiff would pay principle and interest by way of monthly instalments. Thereafter the Plaintiff had approached the Defendant requesting for a restructuring of the existing facilities whose balance at the time stood at Shs. 33,638,275.20. The Plaintiff simultaneously requested for additional financing in the amount of Shs. 3 million. Eventually, by letter dated 3rd June 2010, the Defendant offered to the Plaintiff a revised term loan facility of Kenya Shs. 37,407,840/-. The Plaintiff had maintained that there was a variation of the term loan facility by letter dated 17th September 2010 but the Defendant maintained that the letter was only notifying the Plaintiff that its account had fallen into arrears.
3. The Defence went on to say that the amount credited to the Plaintiff's Account on 6th December 2010 of Shs. 6 million was applied towards the reduction of the Plaintiff's outstanding debt to the Defendant bank. The Plaintiff had been served with the statutory notice dated 29th November 2010 in accordance with the Charge instrument. The Defence went on to note that the Plaintiff had paid a sum of Shs. 150,000/- on 17th June 2011 but this amount was insufficient to clear the outstanding arrears and/or redeem the loan. The Defendant maintained that it had fully disclosed to the Plaintiff how it had utilised the said sum of Shs. 6 million. Any allegation that the sum of Shs. 2 million was not accounted for, was denied. In response to the averments in the Plaintiff, that there were discrepancies in the account statements forwarded to the Plaintiff, the Defendant agreed that there was a slight modification in the presentation of account statements but, so far as

the Plaintiff was concerned, the more recent statements were not in any way at variance with earlier statements forwarded to it. The Defendant summed up its position in paragraph 25 of the Defence detailing that the statutory notice was served in accordance with the law and as per the Charge instrument. At the time that the same was served, the Plaintiff's account was in arrears and the Defendant had rightly called up the payment of the entire outstanding loan. The Plaintiff had purported to pay a portion of the outstanding arrears but did not fully clear all of the same nor did it redeem the outstanding loan as called upon for the statutory notice.

4. The point raised by the Reply to the Defence was that although the Defendant had agreed to advance a further sum of Shs. 7,407,870/- to the Plaintiff, it had, in fact, only received a sum of Shs. 4,007,290/-. The Plaintiff went on to say in its Reply, that after it had received the demand to make the loan repayment in 7 days, the Plaintiff had to make alternative arrangements by urgently disposing of one of its other property assets. The Shs. 6 million had been paid out of the proceeds of sale of the said property. The Plaintiff maintained that the said sum of Shs. 6 million was far above the amount that the Defendant had demanded as the loan repayment in its letter dated 17th September 2010 and its notice dated 29th November 2010. In any event, the Plaintiff had not been informed either by the demand notices, the statutory notice or the notification of sale issued by the auctioneers that there were any arrears and that it had defaulted in payment. In the Plaintiff's view, the money it had deposited in December 2010 covered not only the arrears of Shs. 2.9 million but also provided for advance instalments up to June 2011. In that particular month, there had been a meeting between the Plaintiff's principal director, Mr. Odera and the Defendants bank's officials where it was agreed that the Bank would withhold any further action provided the Plaintiff agreed to make immediate payments to the Defendant by depositing Shs. 150,000/- towards the Loan Account. The Plaintiff maintained that the payment of Shs. 150,000/- was after agreement had been reached that the Plaintiff would make immediate payments towards the Loan account while it waited full and detailed statements showing how the Shs. 6 million paid to the Defendant bank in December 2010 had been utilised. The Plaintiff maintained that even up to the present time, the Defendant had never showed how the Shs. 6 million had been utilised. Thereafter, the Plaintiff's Reply to Defence reiterated that the Statutory Notice was never served upon the Plaintiff by the Defendant prior to the letter from the auctioneers, Watts Enterprises, dated 2nd June 2011. Finally, the Reply to the Defence detailed that it had been confirmed that, indeed, there were discrepancies in the Statements of Account as a result of the change in the Defendant's bank software. The Plaintiff's efforts to have the Statements of account verified and reconciled had not yielded any positive results. The Plaintiff noted that a fresh set of statements had been provided to it in October 2011 showing further variances from those statements of accounts forwarded on 27th of July 2011. The revised figures showed a variance as regards the debit balance on the current account of Shs. 1,883,735.10 and the Loan Account showing arrears of Shs. 38,364,445.30 without any explanation.
5. A Statement of Agreed Issues dated 5th November 2013 was filed by the parties on 4th December 2013. Those issues detailed as follows:

“1. What were the terms upon which the Initial Loan/Facility by the Defendant to the Plaintiff in respect of the Charge over Title No. NAIROBI/BLOCK 72/2915 was granted as per the letter dated 01/07/2009?”

2. During the Six (6) months Moratorium period from the date of commencement of Disbursement of the Loan (first Draw down) was interest payable on the Principal Sum of the loan or the Amount's disbursed/utilized by the Plaintiff?

3. At what date was the Agreed fixed Loan repayment amount to commence by the Plaintiff to the Defendant?

4. Did the Plaintiff apply for a Further Loan Facility from the Defendant after the Initial Loan and if so, what were the Amounts and the Terms of repayment?

5. Was the initial Loan and the Further loan Facilities restructured after subsequent grant and/or negotiations and if so, what were the terms of the

Restructuring?

- 6. When and How was the Restructured Loan and Additional Loan Facility by the Defendant to the Plaintiff disbursed and when was repayment to begin?**
- 7. Did the Defendant breach the Terms of the Restructuring and disbursement of the Additional Facility at all or by realizing only Kshs. 4,007,290/= instead of Kshs. 7,407,870/=?**
- 8. What was the date of Commencement of repayment for the Restructured Loan and the Additional Loan Facility to the Plaintiff?**
- 9. what was the purpose for which the Loan Facility, Additional Facility and Restructured Loan was granted?**
- 10. What was the position of the entire Loan Facility between the Plaintiff and the Defendant as at December 2010? Alternative, were there Arrears in the Repayment of the Loan as at December 2010?**
- 11. Was there any valid Statutory Notice given to the Plaintiff by the Defendant pursuant to which the Auctioneers Notices dated 02/06/2011 were based?**
- 12. What is the Legal position of the alleged statutory Notice dated 29/11/2010 and was the same properly served, and if so, what was the effect of the payment of Kshs.6,000,000/= by the Plaintiff to the Defendant on 06/12/2010?**
- 13. What was the Legal effect of the Letters exchanged between the Plaintiff's Advocates and the Defendant's advocates together with all meetings and Communications between 08/06/2011 and the date of filing this suit on 21/11/2011?**
- 14. Were there discrepancies on the Statements of Account of the Plaintiff held by the Defendant Bank, and if so, how did the same affect the Facility herein?**
- 15. Was there a Valid Statutory Notice given by the Defendant to the Plaintiff in accordance with the provisions of all applicable Laws before Commencement of the Realization of the Charged Property Title No. NAIROBI/BLOCK 72/2915?**
- 16. Is the Plaintiff entitled to a Permanent Injunction and/or General damages as claimed in the Plaint?**

17. What Orders as to Costs?"

- 6. In his Witness Statement dated 21st November 2011, PW 1 **Abok James Odera** adopted his Supporting Affidavit as well as the grounds set out in the Plaintiff's Notice of Motion dated 21st November 2011. He reiterated that at no time was the Plaintiff ever served with any Statutory Notice. All he had ever received was the Auctioneer's Notification of Sale dated 2nd June 2011. That Supporting Affidavit had detailed the whole story of the loan taken by the Plaintiff from the Defendant which I dwelt upon in detail when considering the Plaintiff's Notice of Motion dated 21st November 2011. At page 17 of my Ruling dated 23rd January 2013, I considered that the rights of the Plaintiff herein may have been infringed by the Defendant. As a result, I allowed the said Notice of Motion and granted the Plaintiff's prayer that the Defendant be restrained by way of interlocutory injunction from any dealing with the suit property pending the hearing and determination of the suit. When PW 1 appeared before Court on 23rd June 2014, he maintained that he was dealing directly with the Defendant bank in relation to the Plaintiff's accounts therewith. He reiterated that the Defendant had advanced to the Plaintiff a loan to complete a building within the School premises located in Langata. Mr. Odera informed the Court that the**

- School stood on three pieces of the land of which the suit property was only one. Erected on the suit property was a hostel and it also contained a playing field. The original timetable was to complete the building for which the funds were advanced by the Defendant bank in six months. However, due to a downturn in the market, the Plaintiff had to find a further Shs. 7 million, being Shs. 4 million for building materials and Shs. 3 million for working capital. However, the Defendant bank had only granted increased facilities of Shs. 4 million.
7. DW 1 continued by saying that by 1st December 2010, the loan amount stood at Shs. 2,027,617.51 in arrears. Shs. 6 million was paid into the Plaintiff's accounts with the Defendant bank on 6th December 2010 of which Shs. 5,990,000/- was transferred to the Loan Account. PW 1 detailed that the Plaintiff was to pay Shs. 750,000/-per month by way of loan repayments. By paying in the amount of Shs. 6 million, the Loan Account would have been in credit in the amount of Shs. 3.9 million. That amount would have covered instalments at least until April 2011. The Plaintiff had never withdrawn any monies from the Loan Account, it had been set up purely for loan repayment purposes. As a result, PW 1 expressed surprise that the Plaintiff had received a notice from the auctioneer detailing that regular payments had not been made to the Loan Account. PW 1 emphasised that prior to the issuance of the Notification of Sale by the auctioneer, no statutory notice was ever received by the Plaintiff. In fact, he had never received the notice until the exchange of documents in the Plaintiff's advocates' office relating to this suit. The issue of the statutory notice had not been raised in correspondence and the statutory notice from the Defendant's advocates was forwarded under cover of their letter dated 22nd July 2011. PW 1 emphasised that the payment to the Defendant bank of Shs. 6 million would have been enough to clear the amount demanded in the statutory notice. PW 1 noted that the Plaintiff had paid a further amount of Shs. 150,000/- on 6th June 2011.
 8. On 8th November 2011, the Plaintiff had seen an advertisement in the Daily Nation put in by the auctioneers advertising for sale:

“a prime property in Langata”.

It was that advertisement which led to the Plaintiff in coming to Court. As above, the Plaintiff's school stood on three separate plots of which only the suit property was charged to the Defendant bank. The suit property was, in fact, the smallest of the 3 plots. PW 1 detailed that for the Defendant to put up a notice like that with no discrimination as to the three pieces of land was extremely unfair to the Plaintiff. In two years, all the School's parents had left and there was a substantial reduction in fees and admissions. The Plaintiff's finances crashed and the Plaintiff was forced to sell two further properties in order to pay taxes in the following year (2012). DW 1 concluded his evidence in chief by detailing that in the absence of a valid statutory notice under section 74 of the Registration of Titles Act, the Plaintiff was seeking a declaration that the proposed sale of the suit property was illegal. The Plaintiff also sought general damages on account of its loss of reputation. In his view, the sale advertisement caused the Plaintiff's business to collapse. PW 1 confirmed that the Plaintiff was still in arrears in respect of its loan repayments But at the time that the sale advertisement was placed in the newspaper, the Plaintiff was not in arrears.

9. Under cross examination, PW 1 was only able to confirm the two payments of Shs. 6 million and Shs. 150,000/-. He knew that the Plaintiff had made several repayments but it had experienced difficulties with its records of statements from the Defendant bank. On being pressed, PW 1 then admitted that there had been no other payments. He then contradicted himself by saying that since the temporary injunction was granted herein, the Plaintiff had made further payments to the Defendant. However, PW 1 confirmed that the payment of Shs. 6 million had been made after the alleged date of issue of the statutory notice. He further agreed that the withdrawal of parents from the Plaintiff's school had neither been detailed in the Plaintiff's complaint nor in his witness statement. The withdrawal had taken place since the filing of this suit. He further agreed with counsel for the Defendant that there was no documentary evidence to support the Plaintiff's claim for general damages. Further in cross-examination, PW 1 admitted that he knew that the Ruling of this Court dated 23rd January 2013 had found that the statutory notice had been duly served. He agreed that it appeared that the Court had found that the Plaintiff could not deny that it was served with the statutory notice. He did not know whether the advocates had either appealed that Ruling or sought

- a review thereof. He confirmed to counsel for the Defendants that on the suit property was the School hostel, a playing field, borehole, tennis court and playing equipment.
10. Upon further questioning from the Defendant's counsel, PW 1 confirmed that the building erected on the suit property contained the hostel on its fourth and fifth floors and that the first, second and third floors contained function rooms. He admitted that the advertisement detailed Malezi Preparatory School but did not refer to any other property only L. R. No. Nairobi/Block 72/2915. The advertisement also referred to classrooms, offices, library and a conference room. It did give a description of what was contained on the suit property. PW 1 also admitted that any part payment received by the Defendant bank would not prejudice the validity of the statutory notice and he agreed that the letter of demand dated 29th November 2010 detailed an amount owing of Shs. 40,351,270.40. Upon being shown the Defence, PW 1 agreed that the Loan Account showed a credit of Shs. 5,990,000/-. Prior to that, the account had a debit balance. After payment of the said amount, the account had a credit balance although some of the figures therein were rounded up. In answering questions from the Court, PW 1 confirmed that the Plaintiff did not receive regular statements and he relied upon paragraph 25 of the Plaint as to the irregularity of statements. He further went on to confirm that the instalments repayment of the initial loan of Shs. 30 million were initially Shs. 750,000/- per month. He further agreed that upon the further advance of Shs. 3 million by the Defendant with reference to its letter of 3rd June 2010, the revised instalments were detailed at Shs. 944,834/- per month.
 11. PW 1 thereafter agreed that in the statutory notice, the Defendant not only demanded payment of the arrears but the whole of the outstanding loan. As at the end of November 2010, PW1 admitted that the Plaintiff was in arrears as regards the said monthly instalments. The Plaintiff had not received any letter from the Defendant detailing that it waived its demand for the whole of the outstanding amount of the loan. It was correct that, by the time the auctioneers made their demand, the Plaintiff had not repaid the entire outstanding amount of the loan. He confirmed that he wished the Court, as regards issue No. 10, to determine how much was the amount of the outstanding loan as at December 2010. In the alternative, he would like the Court to determine what the arrears were as at December 2010. PW 1 confirmed to counsel that both the statutory notice and the advertisement caused damage to the Plaintiff's business. The issue of the auctioneer's notice was based on a contested statutory notice.
 12. Under re-examination, PW 1 confirmed that the payment of Shs. 6 million was to go towards clearing the arrears on the loan Account and the balance would cover instalments up until March 2011. However, it was not to go towards the reimbursement of the whole loan. The statements from the Defendant indicated that the monies went towards both the arrears and the instalments going forward. The Plaintiff's position was that the Loan Account went back into credit and it was expecting to receive statements detailing such, which didn't happen until July 2011. The Plaintiff had not received any other statements apart from those contained in the Plaintiff's bundle of documents before Court. As regards the advertisement in the newspaper, PW 1 felt that anybody reading the same would presume that the school was up for sale. As far as he could recollect, the Plaintiff had paid other amounts other than the two payments to which reference had been made in Court. Every time he had gone to the Defendant Bank, he had been told to come with some money. As regards the service of the statutory notice, PW 1 maintained that in this Court's said Ruling of 23rd January 2013, it had relied upon the Certificate of Posting in which one could not even read the date. He confirmed that the Plaintiff was indebted to the Defendant bank but he did not know the extent of the indebtedness as he had never received any statements. There was nothing in the documentation before Court to show what amounts were outstanding due to the Defendant bank. PW 1 detail that the Plaintiff was not in arrears as at 7th December 2010 and, as a result, it asked for prayers to be granted on the position that it stood in then.
 13. DW 1 was **Cornelius Parasi** the Customer Service Manager of the Industrial Area branch of the Defendant bank. He relied upon his witness statement dated 16th May 2013 as his evidence as regards the matter before Court. He also relied upon the Defence and the bundle of documents filed by the Defendant. Counsel took him through the documents and DW 1 commented thereupon. He noted that the initial loan advanced to the Plaintiff was Shs. 30 million. It had a moratorium on repayment of six months. At the time that the loan was restructured in June 2010, there was a balance owing of Shs. 33,638,279/29. Technically, DW 1 maintained that the Defendant bank had agreed to an extension of facilities of Shs. 7 million. The Plaintiff had given

to the Defendant a list of suppliers totalling Shs. 4 million. The suppliers were paid and this resulted in one of the Plaintiff's accounts (the main current account) being overdrawn in the amount of Shs. 1,882,735/10 as at 31st October 2010. The net effect of the restructuring took into account the overdrawn position of the account along with the Banker's cheques paid to suppliers.

14. Upon being referred to page 90 of the Plaintiff's bundle of documents, DW 1 noted that, as at the date of that letter from the Defendant to the Plaintiff being the 17th September 2010, the outstanding arrears on the current account totalled Shs. 1,832,168.30 and on the loan account, an amount of Shs. 1,889,668. No repayment was made and by November 2010, DW 1 noted that the Loan Account was five months in arrears and the current account was overdrawn by Shs. 1,900,000/-. As a result, the Defendant issued a statutory notice by letter dated 29th November 2010 demanding the amount of Shs. 40,351,270/40. He noted that the Plaintiff had paid in the amount of Shs. 6 million on 6th December 2010. That amount did not clear all the arrears and the Defendant bank did not waive its demand for repayment of the full amount. DW 1 maintained that the Plaintiff, upon receipt of the statutory notice, asked for a meeting but the same did not result in any acceptable settlement proposal as regards the outstanding arrears. DW 1 made the following points:

- a. That the statutory notice was served in accordance with the Law and as covenanted in the charge instrument.
- b. At the time, the statutory notice was served the Plaintiff's account was in arrears and the defendant rightly called up the payment of the entire outstanding loan.
- c. The Plaintiff purported to pay a portion of the outstanding arrears but did not fully clear the outstanding arrears nor redeem the outstanding loan as required by the statutory notice.
- d. In any event the Plaintiff's loan was still in arrears which the Plaintiff has refused and failed to pay.

15. The Plaintiff's submissions herein detailed the background to the case as well as the pleadings and evidence of the witnesses. The Plaintiff's position was that the only facility given to it by the Defendant was for a fixed term loan repayable at a fixed rate inclusive of interest. The amount of the loan and the period of repayment were later restructured. The Plaintiff had no other facility or overdraft arrangement as regards its current account with the Defendant bank. It referred to PW 1's evidence that the only reason why the Plaintiff's current account was overdrawn was because the Defendant used monies to the credit of that account to repay itself the fixed monthly instalments from August/September 2010 until December 2010. There was no dispute as to the deposit of Shs. 6 million by the Plaintiff on 6th December 2010 and that sum was specifically transferred for the purposes of settling outstanding loan arrears, interest and instalments. The balance was to cover the instalments for the period December 2010 to March 2011. In fact, what the Defendant had done, was not only to reimburse itself the instalments due on the term loan account but also the outstanding amount on the current account. The Plaintiff submitted that the Defendant bank could not provide or generate a consistent statement of account to its customer. Even in the face of litigation before this Court, the Plaintiff pointed out that the Defendant was relying upon uncertified statements of account sent in July 2011. Despite the provision of those statements, the Plaintiff submitted that it had been impossible to establish what was and still was outstanding due from the Plaintiff to the Defendant bank. In finality, the Plaintiff confirmed the malice towards it by the Defendant with a view to destroying its entire business empire. The advertisement for the sale of the suit property by the Auctioneer was entitled:

“Prime Property in Langata - Malezi Preparatory School.”

PW 1 had stated before Court that the result of the advertisement ruined the school business in November 2011. When the year opened in 2012, PW 1 had noted that the enrolment of students was reduced by 50%.

16. The Plaintiff continued with its submissions by stating that no proper or valid statutory notice was served upon it so as to entitle the Defendant bank to exercise its statutory power of sale. Even if the Court found that the statutory notice was served, the Plaintiff maintained that the same was

overtaken by the payment of Shs. 6 million on 6th December 2010. This deposit, according to the Plaintiff, brought both the Loan and Current Accounts into credit. The Plaintiff detailed that the figures had changed, the loan period had changed and if the Defendant wished to execute its statutory power of sale, it ought to have served a fresh statutory notice. In this regard, the Plaintiff referred the Court to the cases of **Trust Bank Ltd v Eros Chemists Ltd & Anor Civil Appeal No. 133 of 1999 (unreported)**, **Russell Company Ltd v Commercial Bank of Africa & Anor Civil Appeal No. 80 of 1991 (unreported)**, **Trust Bank Ltd v George O. Okoth Civil Appeal No. 177 of 1998 (unreported)** and **Trust Bank Ltd v Kiran Ramji Kotedia Civil Appeal No. 61 of 2000 (unreported)**.

In conclusion the Plaintiff submitted that it was impossible to determine what amount was due from the Plaintiff to the Defendant after July 2011. The Plaintiff maintains that there were no certified copies of statements of accounts filed in Court contrary to the provisions of section 83 of the Evidence Act. The Plaintiff insisted that the purported statutory notice dated 29th November 2010 was overtaken by the subsequent repayments and servicing of the debt through to June 2011. It came to the conclusion that both the statutory notice and the auctioneers' advertisement for sale of the suit property were invalid. Finally, the Plaintiff detailed that this Court must not allow a bank which flouts the provisions of the Banking Act and the Central Bank of Kenya Regulations to punish a debtor who has shown interest in redeeming its Charge but could not do so due to the inability of the Defendant bank to answer queries as regards its own statements of account.

17. Counsel for the Defendant opted to make oral submissions in respect of the suit. He informed the Court that the issues had been narrowed down to Nos. 10, 11, 12, 15 and 16. He maintained that the Plaintiff's suit was dependent and centered upon whether or not it had received the statutory notice dated 29th November 2010. He reminded the Court that in its Ruling delivered on 23rd January 2013, it had found that the statutory notice was proper and served. The Court had also narrowed down the issues for interpretation. As far as the Defendant was concerned the only issue was whether, at the time of service of the statutory notice, the Plaintiff was in arrears or otherwise. If that one issue was determined by the Court, then the other issues raised by the Plaintiff would be resolved. Counsel noted that the letter of offer dated 3rd June 2010 had detailed that the loan made to the Plaintiff was to be repaid in 60 monthly instalments commencing 30 days after disbursement of the loan monies to it. The facility was disbursed to the Plaintiff on 21st June 2010 and instalments would have commenced on or about 21st July 2010. No payments were made, as admitted by the Plaintiff, until December 2010. Counsel observed that when the statutory notice was issued on 29th November 2010, the Plaintiff had admitted that there were arrears. It made no difference whether these were cleared or otherwise when the Plaintiff paid Shs. 6 million into the account on 6th December 2010.
18. As regards the overdraft, counsel noted that there was no mention of the same in the Plaintiff and there was no challenge made by PW 1 in his evidence before Court. If the Plaintiff intended to challenge the figures in the bank statements nothing could have been easier than to detail such in the Plaintiff. Further, the Plaintiff seemed to be proceeding on the basis that those instalments were at Shs. 700,000/- per month whereas the said letter of offer quite clearly detailed instalments of Shs. 944,000/- per month. What was outstanding at the date of the statutory notice was the entire amount of the loan quite apart from the missed instalments. The communication between the Plaintiff and the Defendant bank after the issuance of the statutory notice did not affect its validity. There was no question of the same being withdrawn. Counsel for the Defendant referred the Court to its list of authorities being the two cases **Independent Electoral and Boundaries Commission & Anor. v Stephen M. Mule & 3 Ors (2014)eKLR** and the Ruling in this case delivered by Court on 23rd January 2013.
19. In a brief reply, learned counsel for the Plaintiff reminded the Court that the determination at an interlocutory stage was not conclusive. Such could only be conclusive after the Court had heard the parties' evidence. There was no basis for confirmation of the interlocutory finding. As regards the statutory notice, counsel was clear that what the Plaintiff had pleaded was that the statutory notice was of no validity – paragraphs 26 to 33 of the Plaintiff. In counsel's view the Court would have to analyse as to whether the statutory notice was properly served and the subsequent events which overtook it. Counsel maintained that the date of posting of the statutory notice in December

was clear and the same could not have been received by the Plaintiff by the date upon which the Shs. 6 million was paid. The Defendant bank should only have used the money to clear the instalment arrears leaving sufficient funds to go forward to cover further instalments. The Defendant had admitted that there was no overdraft facility granted. The Plaintiff's position was that the current account was used to pay the Loan account. Everything collapsed because of the inability of the Defendant to provide statements even at the press of a button. Queries as regards its accounts were raised by the Plaintiff but no answers were provided. On the balance of probabilities, the Court must tell the Defendant bank to put its house in order so that the mortgagor's right of redemption could be exercised. As per the authorities provided by the Plaintiff, three months' notice must be given along with details of the arrears to be paid. In the Plaintiff's opinion, whenever the situation changes, a fresh notice needs to be served not a notice given a year earlier. The Plaintiff disputed the charges detailed in the statements of account including interest and had been unable to access any statements to show the true position as to what it owed.

20. Mr. K'Opere, learned counsel for the Plaintiff in his response to the Defendant's oral submissions herein did not dispute that the issues to be determined by this Court were Nos. 10, 11, 12, 15 and 16 of the Statement of Issues signed by the advocates of both parties dated 5th November 2013. Although DW 1 admitted that the Defendant bank had changed its system of accounting during the period of the loan made to the Plaintiff, I remain unconvinced as to the Plaintiff's arguments that it was not able to ascertain what the position was with regard to both its current and Loan accounts with the Defendant bank. The statements of the loan account commencing at page 106 to 110 of the Plaintiff's documents before Court as well as further copies of the statements at pages 121 to 134 forwarded under cover of Kale, Maina & Bundotich's letter of 19th October 2011 seem quite clear to me. Therefrom, the position as regards the loan facility between the Plaintiff and the Defendant as at the beginning of December 2010 shows arrears of missed instalments totalling Shs. 2,027,617.51. The statements also show the credit of Shs. 5,990,000/- paid in by the Plaintiff on 6th December 2010. Further, the loan repayment schedule as at 13th July 2011 at pages 111/112 of the Plaintiff's documents clearly shows the loan contract amount of Shs. 38,364,445.30 and the outstanding principal balance as at that date of Shs. 36,550,543.00. This Court noted, in its Ruling of 23rd January 2013, that the Defendant had repeatedly asked the Plaintiff's officers to attend at the Defendant's bank premises for clarification of accounts if it so required. If the Plaintiff was genuine in its desire to redeem the Charge over the suit property, I believe that it could have made greater effort to establish what monies it owed to the Defendant bank with regard to the facilities offered and taken up. As a consequence, and with regard to issue No. 10 as above, I find that as at 1st December 2010, the Loan account balance was Shs. 37,948,436.68 as per page 133 of the Plaintiff's documents. As at the 31st December 2010, the loan balance had come down to Shs. 37,489,045.53. The arrears of instalments as at 1st December 2010 was Shs. 2,027,618/-. However, as at the 31st December 2010, the loan account in respect of the instalments was in credit in the amount of Shs. 1,928,843/-. This, of course, took into account the payment of Shs. 5,990,000/- on 6th December 2010.
21. In this Court's said Ruling of 23rd January 2013, I found that the Plaintiff could not deny that it had been properly served with the statutory notice. Nothing has emerged from the *viva voce* evidence given before this Court for it to change its mind in that regard. I have also carefully perused the statutory notice dated 29th November 2010. Bearing in mind that the same was issued under section 74 of the Registered Land Act (which was in force at the time), I consider that the same is valid and I hold that the Plaintiff is not able to dispute the validity of the same. Even if it did not receive the same by registered mail in November/December 2010, it was provided with a copy thereof under cover of the Defendant's advocates' letter of 22nd July 2011 addressed to the Plaintiff's advocates. Further, the Plaintiff itself had been forwarded a copy of the statutory notice under cover of the Defendant bank's letter of 20th June 2011. As a result, I find that the Auctioneers' Notice of Sale which was based on that statutory notice, was also valid. Further, as at the date of the statutory notice, I find that the Plaintiff was in arrears in relation to its loan instalments in the amount of Shs. 2,027,618 as above. There is no doubt that the Shs. 6 million paid in by the Plaintiff on 6th December 2010 cleared the instalment arrears but such did not amount to justify the statutory notice being withdrawn and of no effect. This is particularly so when from the evidence before Court, the Plaintiff only paid a further sum of Shs. 150,000/- as

against its borrowings from the Defendant bank. As a result, I find that there was a valid statutory notice given by the Defendants to the Plaintiff in accordance with the provisions of the Registered Land Act before commencement of the realisation of the suit property. Finally and with regard to issue No. 16, I do not find that the Plaintiff is entitled to a permanent injunction as against the sale of the suit property nor do I find it entitled to general damages as claimed in the Plaint. It may be that the Plaintiff suffered loss and damage in relation to its school business as a result of the advertisement placed by the auctioneers on 8th November 2011 but I believe that it only brought that upon itself. By that date, it was well in arrears in relation to the instalments that it owed to the Defendant bank. In my view, it came before this Court with unclean hands which cannot entitle it to any such general damages as pleaded for.

22. In conclusion therefore, I dismiss the Plaint dated 21st November 2011 with costs to the Defendant.

DATED and delivered at Nairobi this 7th day of August, 2014.

J. B. HAVELOCK

JUDGE