



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL & ADMIRALTY DIVISION)
CIVIL CASE NO. 719 OF 2003
PETER KAMAU IKIGU.....PLAINTIFF
VERSUS
BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT
PETERSON OGINO ONGARO.....2ND DEFENDANT

JUDGEMENT

By his re-amended plaint dated 15th October 2010 and filed in this court on 27th October 2010, the plaintiff seeks the following orders:

- 1). **A declaration that the purported sale of L.R. No 2/653 is null and void.**
 - 1A) **The L.R. No 2/653 was sold at a throw away price (undervalued).**
- 2) **General damages.**
 - 2A)i **A declaration that the purported sale of L.R No. 2/653 by the 1st Defendant to the 2nd Defendant is illegal, null and void.**
 - 2A)ii **Cancellation of the transfer of L.R. No. 2/653 by the 1st Defendant to the 2nd Defendant.**
 - 2A)iii **A declaration that the forcible eviction of the plaintiff from the suit premises by the 2nd Defendant was illegal and unlawful.**
 - 2A)iv **Restitution of the Plaintiff to the suit premises by the Defendants.**
 - 2A)v **General damages for unlawful eviction.**
 - 2A)vi **In the alternative compensation for the items impounded.**
- 3) **Costs of the suit.**
- 4) **Interest on 2), 2A), 2A)v and 3).**

It is the plaintiff's case that the plaintiff a registered proprietor of LR No. 2/65 situated at **Hurlingham Area**, Nairobi (hereinafter referred to as the suit property) to the 1st defendant to secure repayment of a sum of Kshs 3,000,000.00 advanced to **Kanconsult Limited** (hereinafter referred to as the Company). However, despite the Company's default in repayment the repayment was rescheduled after meetings between the 1st defendant (hereinafter referred to as the Bank) and the plaintiff. Despite that fact on 10th March 2004, people purporting to be Auctioneers broke into the suit property and carted away certain a number of properties under the pretext of distress for rent in the process of which a number of properties and documents were also destroyed. These properties were eventually advertised for sale and during the pendency of the dispute in court, the 2nd defendant on 11th February 2005 through his agents stormed the suit premises and forcefully evicted the plaintiff and other occupants therefrom. According to the plaintiff the said action was unlawful since there was no tenancy relationship between the Plaintiff and the Defendants, no proclamation or notice was given and the plaintiff was not made aware of the existence of Civil Suit No. 6880 of 2004 between **Peterson Oginu Ongaro and Peter Kamau Ikigu** which was filed after issuance of summons and in which the 2nd defendant sought for an order of distress and eviction ex parte. That decree, according to the Plaintiff was the subject of HCCA No. 212 of 2005 which is still pending. The plaintiff was however shocked to learn on or about 19th September 2003 that the suit premises had been discreetly sold to the 2nd defendant which sale he contends was fraudulent, irregular and unlawful and therefore a nullity since neither the statutory notice nor the notification of sale were served; the sale was prearranged and was not by way of public auction to a person resident out of Kenya while the principal amount had been paid; no statement of account was rendered; and the suit premises were sold at thrown away price at an undervalue among other irregularities. As a result of the foregoing the plaintiff contends that he has suffered loss and damage hence the orders sought.

On the part of the Bank, it was contended vide an amended statement of defence dated 12th November 2010 and filed in court the same day that despite repayment arrangements and meetings the plaintiff defaulted in repaying the outstanding debt. According to the Bank, the plaintiff was the chargor in the transaction between the Bank and the Company which was the plaintiff's company. While conceding that the suit property was sold, the Bank denied that the sale was discreet but was lawful and in accordance with the terms of the mortgage contract between the parties. In the Bank's view the suit property was sold chargee by private treaty after observance of all the statutory provisions in the sum of Kshs 4,000,000.00 hence the allegations and particulars of illegality, irregularity, fraud and collusion are denied. In its view, the re-amended plaint discloses no reasonable cause of action against the Bank hence the suit ought to be dismissed.

From the record, by a Chamber Summons dated 9th August 2006, the 2nd defendant applied for the interlocutory judgement that had been entered against it to be set aside and that he be granted leave to file defence out of time and that the draft annexed be deemed duly filed and served subject to payment of relevant court fees. By his ruling dated 30th October 2007 **Warsame, J** (as he then was) allowed the said application and directed the 2nd defendant to file his defence within 10 days. Due to the failure by the 2nd defendant to comply with the said directions, **Kimaru, J** on 7th May 2008 struck out the 2nd defendant's defence and on 1st August 2002 an interlocutory judgement was once again entered against the 2nd defendant. By an application dated 29th June 2010, the Plaintiff sought leave to re-amend his amended plaint and for grant of corresponding leave to the defendants to re-amend their respective amended defences and that the draft re-amended plaint be deemed duly filed and served on payment of requisite court fees. That application was allowed by consent as prayed on 14th October 2010 hence paving way for the re-amended plaint mentioned hereinabove.

On 3rd May 2011, the 2nd defendant filed his defence dated the same day in which he contended that as a the registered owner of the property, he was entitled to possession, took possession and remained in lawful possession of the property hence the allegations of illegality, irregularity fraud and collusion and particulars thereof are denied. As a purchaser of the suit property, the 2nd defendant contends that he was not concerned to see or inquire whether a case had arisen to authorise the sale, or due notice had been given, or the power of sale was otherwise properly or regularly exercised by the Bank since the 2nd

defendant was not privy to the mortgage between the Plaintiff and the Bank and is therefore not liable for any irregularity or illegality in the sale of the property in which case the plaintiff's remedy only lies in damages against the Bank. In his view, no cause of action is disclosed against him hence the suit ought to be dismissed.

Before filing this defence, the 2nd defendant had filed a reply to the re-amended plaint on 11th November 2010 in which he averred that he purchased the suit premises from the Bank upon first establishing that there was a valid charge duly registered and that he is a bona fide purchaser for value with no fraud and that he has fully paid the purchase price and has had the property duly transferred to his name lawfully and hence denied that the plaintiff had suffered any loss.

On 20th May 2011 the plaintiff filed what was entitled a reply to the 2nd defendant's statement's statement of defence in which he reiterated that the sale of the suit premises and registration in the names of the of the 2nd defendant was fraudulent, highly irregular and unlawful and therefore a nullity and that there existed no tenancy relationship between the plaintiff and the 2nd defendant.

In his evidence, PW1, **Peter Kamau Ikigo**, the plaintiff herein after giving along introduction testified that the suit property was registered in his name before the fraudulent sale to the 2nd defendant. According to him the property measures 0.097 ha and is developed with one residential house and as at 13th October 2003 it was valued at Kshs 7.5 million and was rented out to the plaintiff's three companies. According to him the property was a source of income for himself and the said companies. On 7th May 1997 the Bank advanced to the Company an overdraft facility for its business to the tune of a maximum of Kshs 3 million. As a guarantee of the said facility the plaintiff offered the suit property in respect of account no. 151029 which the Company held with the Bank. Following the grant of the said facility, the said account was operated normally. In December 1997, the Bank without notice suspended the operation of the said overdraft with the result that the Company could not operate and the Bank demanded the repayment of the overdrawn amount. Following a meeting sought by the Company, it was agreed that the Company deposits Kshs 150,000.00 and continues with normal operations. Despite the deposit of the said agreed sum, the Bank declined to open the account while the interest continued to accrue up to a maximum of 35% per annum. On seeking a meeting with the Bank the plaintiff was given an option to sell the suit property in order to offset the debt. The plaintiff accordingly identified a buyer who offered Kshs 8 million and this information was conveyed to the Bank. On making a follow up on the issue with **Mr. Pius Okello** on telephone on 19th September 2003, the plaintiff was shocked to learn that the property had been sold off. On 21st September 2003, the plaintiff wrote a letter of protest and on failing to receive a response handed over the matter to his advocates who on 25th September 2003 sought for information which information was not forthcoming. On 29th September 2003 a **Mr Keengwe of Keengwe & Keengwe Advocates** visited the premises and on not being allowed access left a card with the caretaker while informing the caretaker that nothing should be removed from the premises and that the plaintiff should see him. According to the plaintiff he had never met Mr Keengwe and does not know him. On failing to get proper information the plaintiff instructed his advocates to institute these proceedings and summons were duly served. On 10th March 2004 at around 1.00 pm the plaintiff received a call from his caretaker that a group of people had invaded the premises and broken into the office and were taking things therefrom. On his way to the premises he passed through **Kilimani Police Station** where he reported the matter but his request for police officers was declined. On reaching the premises he found the gate opened and the locking mechanism broken and inside he found a group of people with a lorry Reg. No. KUZ 565 packed into which the group was removing the properties from the office and loading onto the lorry in the company of two police officers from Muthangari Police Station. On inquiring what was happening he was told that they were auctioneers distressing for rent. The letter which they had indicated that they were distressing for rent in respect of LR No. 2/653 Lavington was in respect to a matter between Keengwe & Keengwe Advocates and the plaintiff and yet according to him he did not owe Keengwe & Co. any rent or anybody else since he was not anybody's tenant. On 12th March 2004 the plaintiff's advocates wrote to **Keengwe & Co. Advocates** on the matter but the letter was not responded to. In the meantime the items that were carried away were not returned. On 15th March 2004 he went to **Muthangari Police Station** and recorded his statement. He assessed the damage, compiled a

list of the items and also took photographs showing the massive destruction of the office. The auctioneers eventually responded to his advocates letter and he received a call from his advocates to go and discuss a letter received from Keengwe & Company Advocates to which copies of letters purportedly written to him and his advocates were annexed which letters according to him never reached him because they were wrongly addressed. According to him the copy of the letter dated 25th August 2003 was addressed to a Box Number 57630 instead of 51630. However the Sale Agreement was purportedly entered into on 25th March 2003 between the 1st and the 2nd defendants and witnessed by Samuel B Keengwe for the purchaser, the 2nd defendant in which it was indicated that the purchase price was Kshs 4 million. It was then that the plaintiff established that the purchaser was the 2nd defendant and he instructed his advocates to join him in the suit. On 11th February 2005, the plaintiff received a call from his caretaker that a group of people in the company of police officers invaded the premises and evicted him therefrom. This action was confirmed by him after which he passed the information to his advocates. On investigation it transpired that a case had been filed against him being CMCC No. 6880 of 2004 by the 2nd defendant herein seeking eviction orders and payment of rent arrears in the sum of Kshs 228,250.00. He was, however, unaware of the existence of the suit which suit is the subject of Civil Appeal No. 212 of 2005 in which the High Court found that he had not been served and the decision was set aside. According to him the items listed in the advertisement for sale which appeared on 13th March 2004 for sale on 20th March 2004 were less than the actual items taken. At the time the items were being taken away he was not given any document despite him demanding for the same. Despite being told to go and collect the document from Wright Auctioneers to date he has not been furnished with the same inventory. The excuse that was given at the time was that there was no photocopier. The items taken according to him appears in the plaint as well as the particulars of collusion and fraud. On 23rd June 2006 3 years after institution of this suit, the plaintiff received a letter dated the same day addressed to the Company by the Collection Manager of the Bank in which the Bank offered a compromise. In his evidence he never received any notice and that the sale was discreetly and privately negotiated with the 2nd defendant who was outside the country. Despite requesting for statements none was furnished. In his view the property which was valued in the sum of Kshs 7.5 million was sold at Kshs 3 million which was the sum disclosed by the investigations carried out at the Lands Office. According to him apart from the letter that came 3 years after institution of this suit there was no notice and the sale was neither advertised nor sold by public auction or even by private treaty but as sold to a person outside the country without following the law. If the necessary legal procedures had been followed he would not have had any problem. Although the Bank had allowed him to sell the property, it did not wait for him to do that. He therefore claimed the prayers as particularised in the plaint and reiterated that the 2nd defendant was part of the conspiracy and the fraud.

According to him the 2nd defendant cannot deny the action since he accepted the result of the action. While confirming that the goods were advertised for sale, he said that there were two firms of Auctioneers involved, Wright Auctioneers and Mumbo Auctioneers who came on 11th February 2005 both of whom were instructed by **Keengwe & Co. Advocates**. **Mumbo Auctioneers** wrote a letter to **Keengwe & Co Advocates** confirming that they had broken into the premises and evicted the plaintiff while requested to be paid. They however confirmed that nothing was attached since Wright Auctioneers had taken everything. In his evidence he was not a tenant at any stage of the visit since he was the owner of the property. The raids by the auctioneers were done secretly without notification and he was unaware of the suit in which it was alleged that summons were served and accepted by the plaintiff of P. O Box 576630 an address which he contends does not belong to him. According to him the 2nd defendant was not a bona fide purchaser for value since he colluded with the Bank and forcibly evicted the plaintiff from the premises under the pretext of distress for rent and forcibly took possession of the suit premises without a court order and underselling the plaintiff's suit property at an undervalue. For the past 10 years it is the plaintiff's case that for the past 10 years since the purported sale he has never seen the 2nd defendant. According to him the transfer was effected before the notice was sent to him which notice came 2 years after the registration. His opinion of sale at undervalue is based on the fact that there was no valuation of the property prior to the sale yet his valuation paced the value of the property at Kshs 7.5 million. Due to the forceful eviction, the plaintiff contends that he lost properties and investment. Since there was no notice the sale ought to be declared void and the sale was privately arranged. He claims general damages and interest at the rate of 30%.

Apart from his oral evidence, the plaintiff also relied on his statement and the documents filed in court which were produced as exhibits 1, 2 and 3. In his statement the plaintiff set out in details what he was claiming from the defendants.

In cross-examination by **Mr. Chacha Odera**, learned counsel for the Bank, the plaintiff stated that he guaranteed his company in respect of an overdraft in the sum of Kshs 3 million which guarantee was secured by his property, the suit property. The offer was made on or about 7th May 1997 and the facility was an annual facility renewable every year. He confirmed that he created a charge over the suit property and that the Bank reserved the right to recall the facility at any time. The address he gave in the mortgage was 51630, City Square, Nairobi which Box Number he still holds. All notices and communications between himself and the Bank were to be sent to that address. The consequence of default he conceded would be that the security would be sold. He, however, said that he did not understand the effect of sections 69 and 100A of the ITPA. He however understood that the Bank was allowed to sell by private treaty. He confirmed that there a certificate of fire and accident insurance for 2001 taken out by himself dated 14th March 2001 for the period between 9th January 2001 and 8th January 2002 as required by the Bank to ensure that the security was taken care of in the event of destruction. He agreed that he was supposed to insure the building to the full extent of the value. However, the value of the property was given as Kshs 3.5 million although he could not recall who gave this value. Under the terms of the lending, it was him who approached the Insurance Company. Referred to the valuation dated 12th November 2002 he said that although it placed the value at Kshs 4.5 million he did not agree that that valuation was comparative to the value of the property since according to him the cover was only with respect to the building which did not comprise of the value of the land as well. He, however, conceded that there was default in servicing the loan by virtue of which the Bank's right to sell had crystallised. Referred to the letter dated 18th February 2003 he confirmed that the same was correctly addressed and it was indicated to have been sent by both registered and ordinary post. He also confirmed that there was a stamp dated 19th February 2003 showing the registration number and his name indicating the address furnished by himself. He reiterated that he was in default and that in case of default the Bank had the option to either sell by private treaty or by public auction. He accordingly conceded that from his bundle of documents there was a statutory notice that was sent and that notification of sale is only sent when the sale is by public auction and it is sent by the auctioneers. His basis for contending that the sale was pre-arranged was due to the fact that it was done prior to the sale transaction. He however confirmed that the Notice is dated 18th February and there is a certificate of posting dated 19th February 2003. Referred to the 2nd defendant's list of documents he confirmed that the Sale Agreement is dated 25th August 2003 and that the statutory notice is dated 18th February 2003 stating that if after three months there is no compliance the property would be sold. According to the plaintiff the sale would probably have taken place by the end of May 2003 had he not complied by that time at which time he had not settled the sum. He, however, contended that they re-arranged with the Bank and he made certain proposals though the same were on without prejudice. By August when the agreement was entered into the three months had passed under the Notice. Referred to the Conveyance he confirmed that it was in respect of the suit property and that it was dated 4th December 2003 just under ten months from the date of issuance of the statutory notice. Referred to the charge document he confirmed that the redemption sum comprises of both the principal sum plus interests and other charges incurred. However there was no restriction that the property could only be sold to a person resident in Kenya. With respect to the statements he confirmed that the Company being the borrower was the one entitled to receive the same and the Bank did not bind itself under the charge document to send the statements to the guarantor. In between the letter of 17th February to the date of the Agreement he confirmed there was a period of 6 months and that the sale was not by public auction. He this time round denied that the Bank was at liberty to sell either by public or private treaty. Although according to him the property was valued at Kshs 7.5 million which would make his loss to be Kshs 4.5 million he conceded that in his re-amended plaint there was no specific prayer for Kshs 4.5 million. He also conceded that although the plaintiff in this suit is **Peter Kamau Ikigu** part of the claim in this suit is in respect to losses incurred by the Company which is a limited liability company with power to sue in its own name and which is not a party to these proceedings. His other companies also suffered losses which losses are part of his statement in the sum of Kshs 1,203,000.00 although he stated that if given time he would be able to come up with a bottom-line which figure he has not pleaded in his re-amended plaint.

In cross-examination by **Mr. Havi**, learned counsel for the 2nd defendant he stated that he filed the suit some times in 2003 in October or November and that at that time the 2nd defendant was not a party and at that time he did not seek to restrain the sale of the property. Later he amended his plaint and joined the 2nd defendant. He came to know of the transfer of the property after the auctioneers raided his property on 10th March 2004. However the property was transferred to the 2nd defendants on 6th January 2004. According to the Agreement it is dated 25th August 2003 while the suit was filed in November 2003 hence it is clear that by the time the 2nd defendant was joined in the suit the property had been transferred and presently the registered owner is the 2nd defendant who is in possession since 11th February 2005. Whereas there was an order in the lower court maintain the status quo there was none in this suit. His basis for contending that the sale was pre-arranged was due to the fact that it was a negotiation between the defendants themselves. Whereas he did not contend that he ought to have been involved or that the sale ought to have been by public auction his position was that there ought to have been an advertisement in order to secure the best price in order to take care of his interest. He stated that he lost goods, furniture and equipments in the premises whose value is computed in the prayers though he could not be specific on the same as the same is fragmented in the prayers. While blaming both defendants he confirmed that he had a contract with the Bank but the 2nd defendant using force destroyed his properties. He was aware that the consequence of failure to pay was that the property was to be sold using legal means. He however understood that the 2nd defendant was not a party to that contract. He admitted that Civil Appeal No. 212 which he filed from the lower court, matter in which the Court found that there had been no valid service of summons. However that appeal did not concern the validity of the sale of the suit property. He clarified that his contention was that the 2nd defendant was a non-resident in Kenya not that he was not a citizen and that there is nothing wrong with a non-resident buying a property being sold by a Bank. He insisted that the property was sold at a throw away price and that he would have preferred Kshs 7.5 million. His loss in respect of the said sale is the difference between the two which ought to be paid by both defendants due to their collusion despite the fact that the contract was between the plaintiff and the Bank.

In re-examination by his learned counsel **Mr. Khalwale**, the plaintiff stated that he understood the certificate he signed to mean that the property would be sold if there was a default under section 69A and that the 1st defendant would obtain the property under section 100(1). At the time of the sale he stated that he was in occupation and that his eviction was not in line with these provisions. With respect to the valuation by Metro Cosmos, he said that he neither saw the valuer nor heard of his visit to the site. Whereas the said report is dated 5th November 2002 the property was transferred on 6th January 2004 more than one year later hence the contents of the report are inaccurate since it reflects the valuation at the time of the loan and moreover the geographical position of the property is not properly and correctly defined which is south of Bangladesh High Commissioner's residence. He was unaware that the valuation was to be carried out and his permission was not sought contrary to the provisions in the mortgage. He reiterated that the certificate of insurance in the sum of Kshs 3.5 million only covered the building and not the land and other equipment in the building and hence the value of the entire premises was much higher and in his view it would be in the region of Kshs 4 million hence placing the value of the whole property in the sum of Kshs 7.5 million. He never received the Notice although he could not explain why the notice was not received by him. In his evidence he was not informed how the money was disbursed and has never been informed that the property was sold. In his view it is in the normal course of business to furnish statements. Whereas he was aware that the Bank had the power to sell either by private treaty or public auction the sale had to be within the law and his complaint is that the law was not adhered to and while not opposing the sale to anybody within or outside the country his only issue is with the illegality of the sale. According to him his loss is contained in the prayers and is not limited to the difference between the value and the sale price. In his view, the facility was annual facility renewable every year and once the bank demanded its money the facility was no longer an overdraft but became a loan.

After the close of the plaintiff's case, **Mr Chacha Odera** informed the Court that the Bank did not intend to call any evidence.

The 2nd defendant, **Peterson Ogino Ongaro**, however testified as DW1 called one witness. According to him, he relied on his statement filed on 11th May 2011. He also relied on his bundle of documents filed in

court and testified that he has been in possession of the suit premises.

In cross-examination by **Mr Khalwale**, the 2nd defendant admitted that he stays in the United Kingdom where he has been for the last 18 years and at the time of buying the property he was a resident of the same country where he works with National Health Service. Referred to the affidavit sworn on 18th September 2007, he said that on the day it was sworn he could not remember where he was although the address he used therein was 68330 Nairobi. In his passport the names are **Peterson Ogino Amos Ongaro** and he explained that Amos is his father's name and confirmed that the expiry date is 27th May 2005. However, he stated that the same has always been renewed and is valid till 2014. In his evidence the names **Ongaro Peterson Ogino Amos** are his names. He has two addresses and recently acquired another address. According to him he learned from his Bank Barclays Bank that there were properties which were being sold when he was in the country looking for property to buy. The information was relayed to him by his friend although he declined to disclose the name. The property was, however, advertised within the Bank. He then handed over the details to one of his lawyers by the name of **Sammy Keengwe** who handled the transaction. When he visited the property it looked empty to him as there were no activities therein though he never got access thereto but just viewed it from the outside. According to him he left the entire process in the hands of his lawyers who took over the process and whom he advised to do everything including getting a tenant. He however did not sign any tenancy. Referred to the address on the mortgage he confirmed that it was not the address used by his lawyers. He confirmed that the property mentioned was however the suit property and the figure mentioned is Kshs 50,000.00 and the landlord is indicated as Keengwe & Co Advocates who were his advocates. However in the letter dated 25th August 2003 the figure indicated is Kshs 20,000.00. He could not explain the discrepancy since the matter was being handled by his lawyers though both referred to the suit premises. He confirmed that Keengwe & Co Advocates acted for him in the conveyancing and that at the time of the filing of the plaint he had taken possession. The sale agreement is dated 25th August 2003 and as at that date he had already assumed possession though he could not remember when he took possession. He however used to receive the proceeds from the property and it was rented at various amounts. The plaintiff however never paid any money to him directly as his advocate was dealing with whoever was the tenant. According to the plaint filed the arrears was Kshs 228,000.00 and the monthly rent was Kshs 25,000.00. He said that he paid the Bank through his lawyers and though he could not remember the total sum paid he paid the total sum that the Bank wanted and he put a new roof to the property.

At the close of the defence case the parties filed written submissions.

According to the plaintiff, it is not disputed that the plaintiff was the registered proprietor of the suit property which he charged to the 2nd defendant as security for Kshs 3,000,000.00. Towards the repayment of the same he made several deposits. However, the 2nd defendant by private treaty and without attempting a public auction sold the same to the 2nd defendant, a resident of the United Kingdom who forcibly evicted the plaintiff and took possession thereof and got himself registered as the proprietor on 4th December 2003. At the time of the said transfer this suit was already pending before the Court. While reiterating the plaintiff's evidence, it was submitted that the defendants colluded to deprive the plaintiff of his property and evicted him therefrom without a court order as provided in the mortgage document. Further the 1st defendant failed to account for the proceeds of the sale hence acted recklessly and oppressively and did not take into account the plaintiff's best interests. It was further highlighted that there were discrepancies in the 2nd defendant's names and addresses while the 2nd defendant instructed two firms of auctioneers to distress and evict the plaintiff. With respect to legal representation, it was submitted that the 2nd defendant was represented by five law firms. Apart from that the 2nd defendant neither disclosed the person from whom he obtained instructions relating to the sale of the property nor the total purchase price paid. The totality of the evidence, it is submitted, disclosed a scheme to defraud the Plaintiff of the suit premises.

It is submitted that the mortgagee is required to exercise its statutory power of sale in good faith and not in a capricious and oppressive manner. And relying on **Trust Bank Limited vs. Eros Chemist [2000] EA 550**, it is submitted that without service of the statutory notice the sale did not accrue. Since there was no

tenancy relationship in existence between the plaintiff the plaintiff could not be evicted without an order for possession. The Bank's decision of selling the property without considering the interest of the plaintiff, it I submitted was reckless and oppressive and the plaintiff relies on **Kenya Commercial Bank Limited vs. James Osebe [1982-88] 1 KAR 48 at 53.**

It is submitted that the right of redemption cannot be lost even though the loan is not repaid on the date fixed for its payment since the essence of a mortgage is that it is a security for the payment of a loan and so long as the loan is not repaid the property remains a security even though the date for payment has passed and the right of redemption can be exercised at any time after the principal money has become due. The mortgagor, therefore, has an indefeasible right of redemption exercisable even after the date of default.

On the pleadings, it is submitted that the 1st defendant amended and filed its defence without leave while the 2nd defendant's statement of defence dated 7th November 2007 was struck out. Therefore the 2nd defendant's defence dated 3rd March 2011 and filed the same date was filed out of time and without leave.

In conclusion, it was submitted that the mere fact that the 2nd defendant is registered as the proprietor of the suit property does not provide fool proof protection to him if the process leading up to the sale and transfer was illegal and fraudulent. In the present case, it is the plaintiff's position that the statutory notice exhibited is ineffective and illegal and it follows that the sale transaction was conducted in a manner contrary to law and equity, is unconscionable and oppressive hence the purported exercise of the power of sale, the eviction and or auction ought to be nullified and the plaintiff awarded damages.

On behalf of the 1st defendant it is submitted that it is not in dispute that the plaintiff was a guarantor to a facility given by the 1st defendant to Kamconsult Limited and that the plaintiff guaranteed the said facility and offered the suit property as security in form of a mortgage over LR No. 2/653 and instrument of mortgage is found at page 9.21 of the plaintiff's bundle. At clause 9.2.26, it is submitted the plaintiff confirmed that it had been explained to him the effects of section 69(1) of the Transfer of Property Act of India to the effect that should there be default of payment of the money secured under the mortgage, the first defendant would be at liberty to realise the security by way of public or private treaty. By a letter dated 18th February 2003, the Plaintiff as mortgagor was advised of default by the principal debtor in repayment of the subject facility and was asked to pay the sums demanded and should he not do so, the 1st defendant would upon expiry of three months proceed and sell the security and the said demand was sent under certificate of posting to the plaintiff's furnished address. Default was admitted by the plaintiff though he alleged that discussions were underway. However, it is submitted that the notice was clear that any instalment received and any proposal made would not prejudice the 1st defendant's power of sale and that there was no evidence that the 1st defendant agreed to suspend the sale and there is no evidence that the plaintiff or the principal debtor made any payments pursuant to the statutory demand. By reason of the fact that the principal debtor was in default of its obligation to pay the facility, and by reason that interest had remained unpaid for a period exceeding two months and by reason that notice was served to the address furnished in the mortgage instrument, the 1st defendant submits that the power of sale had arisen both under the instrument and the statute.

By reason of the provisions of section 69(1) and 69B(1) of the Transfer of Property Act, it is submitted that the sale and transfer of the suit property was done legally and in accordance with the provisions of the mortgage instrument and statute.

It is also submitted that a notice was duly sent and that pursuant thereto the plaintiff engaged the 1st defendant in rescheduling the loan; that there was no evidence to show that the sale was pre-arranged; that as the sale was by private treaty the issue of notification of sale does not arise; that the sale by private treaty was permitted both by law and mortgage instrument; that under section 69A(1)(b) the power of sale is not extinguished merely because a sum equal to the sum advanced has been paid as long as some interest is in arrears; that nothing forbids the sale of a distressed property to a person residing out of

Kenya; that there is no obligation to furnish the mortgagor with the principal debtor's bank statements; that by the time of the sale the principal debtor was in arrears and notice was served and no remedy taken hence the 1st defendant was entitled to sell the property; that there was no evidence of collusion between the defendants; that the proceeds of the sale were credited towards the loan; that no expert witness was called to testify as to the value of the suit property hence the plaintiff's opinion was of no probative value with respect to the allegation of sale under value. With respect to the alleged loss suffered by the plaintiff from the said eviction, it is submitted that the 1st defendant played no role therein. In the 1st defendant's submissions there is no basis for nullifying the sale and transfer of the suit property and that by the time of the sale the right to do so had arisen. On the issue of tenancy, it is submitted that the 1st defendant had nothing to do with the same. In the 1st defendant's view, the alleged loss claimed can only be a cause of action available to the Company and not the plaintiff. In any case the alleged loss being in the nature of special damages had to be pleaded and specifically proved which was not done. The 1st defendant cites **Siree vs. Lake Turkana El Molo Lodges Ltd [2000] 2 EA 521** in support of its submissions and prays that the suit be dismissed with costs.

On the part of the 2nd defendant it was submitted that after the 2nd defendant's defence was struck out on 7th November, 2007, the plaintiff applied to re-amend his plaint but took no steps towards getting judgement on the then existing Amended Plaint. A re-amended plaint filed on 27th October 2010, it is submitted, superseded previous pleadings and became the operative plaint on which defences were filed in accordance with the decision in **Mutuku & 3 Others vs. United Insurance Co. Ltd [2002] KLR 1**. Further there was no time limited under the repealed Civil Procedure Rules for filing Statement of defence to the re-amended plaint filed on 27th October, 2010 more particularly Order IX rule 1 and that Order VIA rule 1(2)(a) and (b) rule 1(2)(a) aforesaid hence the defence that was filed was validly filed as stated in **Trust Bank Ltd vs. Amalo Company Ltd [2002] 2 KLR 627**.

On fraudulent sale, it is submitted that section 69B of the Transfer of Property Act, shields the 2nd Defendant from any claims of fraud, irregularity and illegality hence the claim that the 2nd defendant was non-resident in Kenya is without legal foundation. Relying on **Thugi River Estates Ltd & Another vs. National Bank of Kenya Ltd & Others HCCC No. 633 of 2004** it is submitted that the doctrine of *lis pendens* is not applicable where there is no prohibitory order issued by the Court preventing all dealings in the suit property at the time of the sale and transfer. In this case the prohibitory order was issued way after the property was sold and transferred. With respect to the allegation that the property was sold at undervalue it is submitted that there was no such evidence and in any event that would amount to an irregularity which is remedied by an award of damages and reliance is placed on **Grant vs. Kenya Commercial Finance Company Ltd & Others [1995] KLR 4098**. On the issue of eviction, it is submitted that the plaintiff became a trespasser on the sale and transfer of the property to the 2nd defendant and that in **East African Railways Corporation vs. Karangi [1988] KLR 108 and Sandalwood Hotel & Resorts Ltd vs. A D M Ltd & Another HCCC No. 286 of 2009**.

Accordingly the 2nd defendant submits that the case be dismissed with costs.

Having perused the pleadings herein the evidence adduced, the issues drafted by the parties herein as well as the submissions made these are, in my considered view the issues for determination:

1. **Whether the Company and the Plaintiff defaulted in the repayment of the loan secured by the mortgage dated 7th May, 1997 over the plaintiff's property LR No. 2/653 Nairobi.**
2. **Whether the Bank's statutory power of sale over property LR No. 2/653 Nairobi had arisen at the time of the sale thereof to the 2nd Defendant on 25th August 2003.**
3. **Whether the sale and transfer of property LR No. 2/653 Nairobi to the 2nd Defendant was undertaken as a result of collusion, fraudulently, irregularly, unlawfully and is null and void.**
4. **Whether the sale and transfer of property LR No. 2/653 Nairobi to the 2nd Defendant was done at an undervalue and if so, who is liable for the same?**

5. **Whether the sale Plaintiff has any enforceable legal or equitable right over property LR No. 2/653 Nairobi.**
6. **Whether the 2nd Defendant was entitled to vacant possession of property LR No. 2/653 Nairobi without notice to the plaintiff and an order, upon the sale and transfer of the property to him by the 1st Defendant.**
7. **What loss, if any, the plaintiff has suffered as a result of the said eviction?**
8. **Who should bear the costs of this suit?**

However before determining the foregoing issues, it is important to deal with the status of the pleadings. On 7th May 2008, **Kimaru, J** struck out the 2nd defendant's statement of defence dated 7th November, 2007 on the ground that it had been irregularly placed in the court file. On 1st August 2009, an interlocutory judgement was entered against the said defendant. Entry of default judgement is provided for under Order 10 rules 4, 5, 6 and 7 of the Civil Procedure Rules. It is important to set out the full text of the said provisions for the proper understanding of their scope, extent of application and relevance. The said provisions are as follows:

“4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.

6. Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Where the plaintiff is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.”

From the foregoing it is clear that a final judgement can only be entered where the suit is for a liquidated demand only. Where, however, the claim is for a liquidated demand and some other claim, a default judgement can only be entered in respect of the liquidated demand while the other claims proceed to hearing. Where, on the other hand, the claim is for pecuniary damages only or for detention of goods with or without pecuniary damages, the court is only entitled to enter interlocutory judgement and fix the matter for assessment of the quantum of damages or value of goods (a procedure that is popularly known, erroneously though, as formal proof). It is only in respect of the foregoing claims that a default judgement whether final or interlocutory can be entered. In all other claims the plaintiff must proceed under rule 9 of

Order 10 and set down the matter for hearing. What comes out clearly in this case is that the prayers in the plaint herein do not fall under any of the foregoing provisions. There is no doubt that the claims were not liquidated. Nor do they fall under the claims for detention of goods with or without pecuniary damages. However, on the plaintiff's application, the Deputy Registrar purported to enter judgement as prayed and paved the way for formal proof.

A similar situation arose before the Court of Appeal in the case of **Kenya Commercial Bank Ltd. vs. Joshua Aggrey Oburi & Another Civil Appeals Nos. 199, 200 & 201 of 1999**, in which the Court of Appeal was categorical that unless the matter falls within the provisions aforesaid the deputy registrar has no power to enter an interlocutory judgement and therefore judgement should be set aside *ex debito justitiae* since such judgement is a nullity. See also **Mint Holdings Ltd & Another Vs. Trust Bank Ltd Civil Appeal No. 249 of 1999 [2011] eKLR**.

In the result, the judgement purportedly entered herein is a nullity and to all intents and purposes the said judgement is not worth the paper it is written on. At the time of the entry of the said judgement, Order IX rule 1 of the old Civil Procedure Rules provided that a defendant may appear at any time before the final judgement and may file a defence at any time before interlocutory judgement is entered against him, or, if no interlocutory judgement is so entered, at any time before final judgement. As the interlocutory judgement was a nullity and required no court order to be set aside, legally as there was no judgement hence there was no bar to his filing of defence. Apart from the foregoing as correctly submitted on behalf of the 2nd defendant under Order VIA rule 1(2)(a) and (b) of the repealed Civil Procedure Rules, once a plaint was amended, the defendant was at liberty to amend his defence. In fact even after the entry of interlocutory judgement, the subsequent amendment of the plaint paved way for the defendant to file a defence.

It follows that the defence that was filed by the 2nd defendant is properly on record.

On whether the Company and the Plaintiff defaulted in the repayment of the loan secured by the mortgage dated 7th May, 1997 over the plaintiff's property LR No. 2/653 Nairobi, the plaintiff in cross-examination admitted that he was in default and that in case of default the Bank had the option to either sell by private treaty or by public auction. It follows that this issue must, on the evidence be answered in the affirmative.

Whether the Bank's statutory power of sale over property LR No. 2/653 Nairobi had arisen at the time of the sale thereof to the 2nd Defendant on 25th August 2003, again the plaintiff admitted that there was default in servicing the loan by virtue of which the Bank's right to sell had crystallised. Referred to the letter dated 18th February 2003 he confirmed that the same was correctly addressed and it was indicated to have been sent by both registered and ordinary post. He also confirmed that there was a stamp dated 19th February 2003 showing the registration number and his name indicating the address furnished by himself. He reiterated that he was in default and that in case of default the Bank had the option to either sell by private treaty or by public auction. He accordingly conceded that from his bundle of documents there was a statutory notice that was sent and that notification of sale is only sent when the sale is by public auction and it is sent by the auctioneers. He confirmed that the Sale Agreement is dated 25th August 2003 and that the statutory notice is dated 18th February 2003 stating that if after three months there is no compliance the property would be sold. According to the plaintiff the sale would probably have taken place by the end of May 2003 had he not complied by that time at which time he had not settled the sum. He, however, contended that they re-arranged with the Bank and he made certain proposals though the same were on without prejudice. By August when the agreement was entered into the three months had passed under the Notice. Referred to the Conveyance he confirmed that it was in respect of the suit property and that it was dated 4th December 2003 just under ten months from the date of issuance of the statutory notice. Referred to the charge document he confirmed that the redemption sum comprised of both the principal sum plus interests and other charges incurred. However there was no restriction that the property could only be sold to a person resident in Kenya. With respect to the statements he confirmed that the Company being the borrower was the one entitled to receive the same and the Bank did not bind itself under the charge document to send the statements to the guarantor. The totality of the foregoing evidence is that Bank's statutory power of sale over property LR No. 2/653

Nairobi had arisen at the time of the sale thereof to the 2nd Defendant on 25th August 2003. It was not seriously contested that the 1st defendant had a right both under the instrument of mortgage and the statutory provisions to sale the security by private treaty. In the circumstances the issue of notification of sale does not arise. Moreover, there was no requirement that the mortgagor be furnished with statements as opposed to the principle borrower.

On whether the sale and transfer of property LR No. 2/653 Nairobi to the 2nd Defendant was undertaken as a result of collusion, fraudulently, irregularly, unlawfully and is null and void, the plaintiff's evidence was that his basis for contending that the sale was pre-arranged was due to the fact that it was done prior to the sale transaction. There was, however, no direct evidence on the allegations of collusion, fraud, irregularity or illegality. With respect to the fact that the sale was to a person non-resident, it was admitted by the plaintiff that there was nothing prima facie wrong with that. The plaintiff, however, pointed out certain features which according to him exposed loose ends which lent credence to his contentions. Whereas the conduct of the 2nd defendant in dealing with the sale transaction was rather nonchalant, I am unable to raise his attitude to the level where the same could be classified as amounting to fraud. In **Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd And Another [1979] KLR 76; [1976-80] 1 KLR 1168** it was held that allegations of fraud must be strictly proved and that 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. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned.

On whether the and transfer of property LR No. 2/653 Nairobi to the 2nd Defendant was done at an undervalue, there was no attempt to pin down the value of the suit land by way of opinion from an expert valuer. This was worsened by the fact that the insured value of the land was not the sum claimed. Even if the Court was to believe that the declared value was only the value of the land without the development or vice versa, there was no evidence in support of the balance. Valuation is a matter of opinion hence it is prudent that evidence touching on the valuation of properties be based on some empirical evidence or data in the absence of which the standard expected cannot be met. Whereas the mortgagee is expected to exercise the power of sale in a prudent way, with due regard to the interests of the mortgagor on the surplus sale moneys, he is not a trustee for the mortgagor as regards the exercise of the power of sale and has his own interest to consider as well as the mortgagor, and provided he keeps within the terms of the power, exercises the power bona fide for the purposes of realising the security and takes reasonable precautions to secure a proper price the Court will not interfere, nor will it inquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him provided the amount is fixed with regard to the value of the property. See **Eccon Construction and Engineering Ltd vs. Giro Commercial Bank Ltd And Another [2003] 2 EA 426**.

Accordingly, I am unable to find that the suit property was sold at an undervalue.

On whether the sale Plaintiff has any enforceable legal or equitable right over property LR No. 2/653 Nairobi, having found that the 1st defendant's statutory power of sale had arisen, it would follow that the plaintiff had no enforceable legal or equitable right over the property and in the absence of a Court order restraining his eviction, he was thereby rendered a trespasser in the suit premises hence not legally entitled to be compensated as long as the 2nd defendant used reasonable force. Accordingly I associate myself with the decision in **East African Railways Corporation vs. Karangi** (supra) that a trespasser can be evicted from the premises using no more than reasonable force and that an award of damages in those circumstances is erroneous.

It follows that the 2nd Defendant was entitled to vacant possession of property LR No. 2/653 Nairobi without an order, upon the sale and transfer of the property to him by the 1st Defendant.

The next issue for determination is what loss, if any, the plaintiff has suffered as a result of the said eviction? The suit premises were, from the evidence in possession of the Company. According to the plaintiff part of the claim in this suit is in respect to losses incurred by the Company which is a limited liability company with power to sue in its own name and which is not a party to these proceedings. There

was no evidence specifically dealing with the plaintiff's loss, if any, resulting from the said eviction. As the said Company was not joined as a party to these proceedings and as no claim was made by the said company, it is not possible for the Court to award the plaintiff the claimed loss. As was held in **Siree vs. Lake Turkana El Molo Lodges Ltd** (supra) such a claim ought to be specifically pleaded and proved.

It follows that the plaintiff has failed to prove his case to the standard required. In the result this suit fails and is dismissed with costs to the defendants.

Dated at Nairobi this 27th day of February 2013

G V ODUNGA

JUDGE

Delivered in the presence of: Mr. Khalwale for Plaintiff

Mr Hari and Miss Ngania for 2nd defendant

Mr Hari for Mr Chacha Odera for 1st Defendant