



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 318 OF 2009

JOHN MWENJA NGUMBA (Suing as the

Administrator of the Estate of the late

ANDREW KIMANI NGUMBA).....1ST PLAINTIFF

FARM FRESH COMMODITIES.....2ND PLAINTIFF

VERSUS

**NATIONAL INDUSTRIAL CREDIT BANK LIMITED (NIC).....1ST
DEFENDANT**

FALCON NEST LIMITED.....2ND DEFENDANT

RULING

1. The Plaintiff's Chamber Summons application dated 4th September 2009 and filed on 7th September 2009 was brought under the provisions of Order XXXIX (now replaced with Order 40 of the Civil Procedure Rules, 2010) Section 52 of the Indian Transfer of Property Act, 1882, as amended (now repealed) and all other enabling provisions of the law. Prayers Nos (i) and (ii) are spent and the court will therefore not deal with the same. The application sought the following prayers:-
 - i. **THAT the application be certified as urgent and be heard *ex parte* in the first instance.**
 - ii. **THAT pending *inter partes* hearing and determination of this application, this honourable court be pleased to issue a temporary injunction restraining the 2nd Defendant/Respondent, its servants, agents, advocates or auctioneers or any other person acting for and/or on its behalf from doing any of the following acts that is to say from advertising for sale, disposing of, selling whether by public auction or private treaty or otherwise howsoever charging, leasing, letting or otherwise howsoever interfering with all that parcel of land known as L.R. No 74/17 Njathaini, Nairobi and this order be registered and/or noted in the Land Registry.**
 - iii. **THAT this Honourable Court be pleased to grant orders in terms of prayer (2) above pending the hearing and determination of the suit.**

- iv. **THAT an order be made under Section 52 of the Indian Transfer of Property Act 1882 (as amended) that during the pendency of this suit all further registration or charge of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all that parcel of land known as L.R. No 74/17 Njathaini, Nairobi (hereinafter referred to as “the subject property”) with any Land registry, Government Department and all other registering authorities be and is hereby prohibited.**
 - v. **THAT the Plaintiff be at liberty to apply for such or other orders and/or directions as this Honourable Court may deem fit and just to grant.**
 - vi. **THAT costs of this application be provided for.**
2. The Plaintiffs listed twelve (12) grounds on which they relied upon in support of their application. The court will not set out the said grounds verbatim but will attempt to summarise the same as they appear to it.
 3. In broad and general grounds, the Plaintiffs relied on the following grounds:-
 - a. **THAT the late Andrew Kimani Ngumba (hereinafter referred to as “the deceased”) charged the subject property which was in his name in favour of African Mercantile Banking Company Limited (hereinafter referred to as “AM Bank”) for a financial accommodation facility of Kshs 12,000,000/=.**
 - b. **THAT the purported Charge document was null and void as the 1st Defendant did not obtain the requisite consent of the Land Control Board and there was no resolution showing that the 2nd Plaintiff had authority to borrow the monies.**
 - c. **THAT AM Bank purported to transfer and assign its business to the 1st Defendant without the Plaintiffs’ knowledge or consulting them.**
 - d. **THAT the 1st Respondent purported to sell the subject property to the 2nd Defendant for a sum of Kshs 8,000,000/= so as to recover a debt of Kshs 27,000,000/= from the 2nd Plaintiff.**
 - e. **THAT the 1st Defendant had not issued the Plaintiffs with the requisite Statutory Notice and the forty five (45) days redemption notice from the auctioneers.**
 - f. **THAT the 1st Defendant had failed to determine the date the loan advanced to the 2nd Plaintiff became non-performing and the principle amount and the interest accruing therefrom.**
 - g. **THAT the Plaintiffs had established a *prima facie* case with high chances of success and if no injunctive orders were granted, the Plaintiffs would suffer irreparable damage.**
 4. In addition to setting out the grounds in his Supporting Affidavit sworn on 4th September 2009, the 1st Plaintiff stated that the 2nd Defendant had started sub-dividing the parcel of land for sale to various third parties in an attempt to defeat the Plaintiffs’ claim, The Plaintiffs also indicated that they would be willing to abide by the just terms that may be imposed by the court so as to preserve the subject property.
 5. Pursuant to a court order granted on 28th January 2010, the 1st Plaintiff swore a Further Affidavit on 5th February 2010 in which he stated that the letters of administration that were issued in HCCC No 1850 of 2003 were limited to filing suit and it was therefore erroneous for the 1st Defendant to have averred that it sent the Statutory Notice to Margaret Muthoni Ngumba, an administrator to the deceased’s estate.
 6. He also stated that at the time the alleged Statutory Notice dated 25th November 1999 demanding payment of Kshs 19,239,291.29/= was issued, administrators to the deceased’s estate had not been appointed while the 2nd Plaintiff was under receivership. He contended that if any Statutory Notices were sent, which he denied had been sent, then the same could only have been received by the 2nd Plaintiff’s Receiver Managers.
 7. On 21st October 2009, George Mwangi swore a Replying Affidavit on behalf of the 1st Defendant herein. He deposed that the facilities granted to the deceased were secured by a legal, valid, enforceable and binding Mortgage which had conformed to all legal requirements. The Mortgage was duly prepared, attested and registered in accordance with the applicable laws.

8. He averred that the 2nd Plaintiff was placed under receivership by the Industrial & Commercial Development Corporation (ICDC) and the East African Development Bank (EADB) which held debentures over its assets but that it had refused to regularise its overdraft account with AM Bank Ltd.
9. He contended that the 1st Defendant sent the relevant demand letters and Statutory Notice to John Mwenja Ngumba and Margaret Muthoni Ngumba, the then administrators of the estate of the deceased. Upon expiry of the said notice, the 1st Defendant authorised various auctioneers to scout for buyers but when it encountered difficulties in getting buyers, it proposed to sub-divide the plots into one (1) acre plots to facilitate easy disposal of the subject property.
10. Subsequently, the 1st Defendant received an offer to sell the subject property for the sum of Kshs 8,000,000/= from the 2nd Defendant and when the administrators of the deceased's estate did not respond to the Statutory Notice dated 17th February 2006, it entered into a sale by private treaty vide a Conveyance in favour of the 2nd Defendant which was booked for registration on 22nd July 2007 and registered in August 2007. The deponent on behalf of the 1st Defendant explained that the delay in finalising the transaction was as a result of the missing file at the Lands Registry. He dismissed the valuation of Kshs 63,000,000/= as had been given by the Plaintiffs because the subject premises comprised of a quarry, a dam and a residential house belonging to a stranger who claimed ownership of a part thereof.
11. The Complete Mortgage Instrument and copies of the Grant of Letters of Administration issued on 16th August 2005 in Nairobi Succession Cause No 539 of 1998 was annexed in a Supplementary Affidavit sworn by the said George Mwangi on 26th January 2010.
12. The 2nd Defendant's Replying Affidavit was sworn by Boniface Kihui Kamau on 5th October 2009 and filed on the same date. He deposed that the Plaintiffs had no *locus standi* to sue on behalf of the estate of the deceased's estate and that in any event, since he had acquired an indefeasible title for a valuable consideration, the Plaintiffs' relief for damages, if any, lay with the 1st Defendant. He annexed a copy of the consent from the Land Control Board. The same was marked as BKK (a).
13. The Plaintiffs filed written submissions and Further Submissions on 5th November 2009 and 5th February 2010 respectively. Parties highlighted their respective submissions orally in court.
14. The Plaintiffs submitted that Section 69A of the Indian Transfer of Property Act, 1882 (as amended)(now repealed) (hereinafter referred to as "ITPA") provided that a mortgagee could not exercise its Statutory Power of Sale unless and until:-
 - a. **Notice requiring payment of the mortgage money has been served to the mortgagor or one or two more mortgagors and default has been made in payment of the mortgage money or of part thereof, for three months after such service...**
15. It was the Plaintiffs' case that they did not have any relationship with the 1st Defendant. They further submitted that the Statutory Notice (Exhibit marked GM 11), the 1st Defendant purported to give them did not comply with the provisions of the law as it was addressed to an amorphous entity to wit, the Administrator of the Estate of the late Andrew Kimani Ngumba.
16. They pointed out that the address indicated in the certificate of postage (Exhibit marked GM 10) was P.O. Box 60776 00200 Nairobi whereas the address shown in the Charge was P.O. Box 65003 Nairobi. They argued that the 1st Defendant did not attempt any personal service on the administrators of the deceased's estate and consequently any purported Statutory Notice was irregular and invalid. They cited several authorities where the court held that a Statutory Notice had to be posted to the correct postal address.
17. In their Further Submissions, the Plaintiffs stated that Receivers were in charge of the 2nd Plaintiff's operations and were at all material times in possession of the post office box and they could therefore not have been deemed to have legally received the said Statutory Notices, if at all the same were sent as alleged by the 1st Defendant.
18. It was the Plaintiff's argument that the Grant of letters of administration *ad colligenda bona* issued on 11th May 1998 were limited to defending HCCC No 1850 of 1993 in which the

- deceased was a party and that the 1st Plaintiff only became an administrator to the deceased's estate on 18th August 2005. He submitted that the Grant of Letters of Administration was confirmed on 6th March 2007 as could be seen in Exhibit marked "GM 2" on page 30 of the 1st Defendant's Supplementary Affidavit.
19. The Plaintiffs contended that in view of the fact that the administrators to the deceased's estate were not informed on the sale in June 2007, the same was indicative that the 1st and 2nd Defendants colluded to deprive the deceased's estate of the subject property.
20. The Plaintiff relied on the cases of **Simiyu vs Housing Finance Company of Kenya Ltd [2001] 2 E.A.** and **HCCC No 1248 of 2002 Dhariwal Hotels Limited vs Southern Credit Banking Limited** (unreported). The 2nd Defendant distinguished the latter case as one where the property had not been transferred to any purchaser and argued that the same was not relevant in the circumstances of this case.
21. The second objection that the Plaintiff had was that there was no valid charge as the Mortgage was not executed as required under the Contract Act because it only had one (1) instead of two (2) witnesses. It cited several cases which found the validity of a Charge Instrument was a fundamental issue that could not be ignored in the case where a Chargee intended to exercise its Statutory Power of Sale.
22. In the case of **HCCC No 3190 of 2003 Anthony Athanas Ngotho t/a Ngotho Architects vs National Industrial Credit Bank Limited** (unreported) also relied upon by the Plaintiffs, the court had the following to say:-

" I am not satisfied that the validity of the Mortgage is beyond question, yet this mortgage forms the basis of the Respondent's Statutory Power of Sale...This apparent defect in the mortgage shows a *prima facie* case with a probability of success for the Applicant and damages would not be an adequate remedy for the Applicant."

23. The Plaintiffs also argued that the Court of Appeal had found the question of whether the Charge was properly executed and registered to have been an arguable point of appeal in the case of **Civil Appeal Nai No 209 of 2003 Wilfred Koinange vs Glad AK- Finance Limited & Another** (unreported) while in the case of **Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Limited [2005] eKLR**, the Court held that it could not make a definitive finding on whether the Charge was valid as it had not heard the evidence of the same.
24. The Valuation Report annexed in the 1st Defendant's Replying Affidavit and marked GM 17 showed an open market value of the property at Kshs 15,000,000/= and a forced market value of Kshs 10,000,000/=. It was therefore the Plaintiffs' submissions that the 1st Defendant's purported sale of the subject premises to the 2nd Defendant at a sum of Kshs 8,000,000/ was a gross undervalue. Being irregular, it amounted to a fraudulent sale.
25. To support its argument, the Plaintiffs relied on the cases of **Mbuthia vs Jimba Credit Limited, Keya Commercial Bank Limited vs Osebe, Industrial & Commercial Development Corporation vs Kariuki & Gathecha, Mchung vs Union Bank of Canada, Cuckmere Brick Co Limited vs Mutual Finance Limited** where in the said cases, the different courts established the following criteria:-
- a. **The sale at 2/5 of the market value was definitely fraudulent**
 - b. **The court would set aside a fraudulent or gross undersale irrespective of the transaction**
 - c. **The reasonable man's test was intended to establish whether or not if the bank, as the owner of the said subject premises, could sell the same at the price that it sold the same.**
 - d. **The need to obtain the true market value of the subject premises.**
26. In respect of Section 52 of the ITPA, the Plaintiffs submitted that they had made a good case for the court to grant an injunction pending the hearing and determination of the suit herein as the issues were too contested. It was their case that even if the said Act had been repealed, the common law doctrine of *lis pendens* had not been repealed. It was their case that it would complicate issues if the subject property moved to third parties who the 1st Defendant intended to sell the sub-divided parcels of land to. They relied on the cases of **HCCC No 430 of 2002 Ruaha**

- Concrete Limited vs Paramount Universal Bank Limited** (unreported), **Civil Appl No Nai 131 of 2005 Surinder Mediratta vs Kenya Commercial Bank Limited & 2 others** (unreported), **HCCC No 250 of 2008 Faith Wanjiru Kimeriah vs HFCK & Another** (unreported) and **HCCC No 512 of 2004 Manjit Singh Sethi & 2 others vs Paramount Universal Bank & 2 others** (unreported) to augment their contentions.
27. The Plaintiffs also argued that damages would not be an adequate remedy because the subject property was irreplaceable and that in view of the fact that the equity of redemption had not been extinguished, the balance of convenience for an injunction tilted in their favour. It was their further submission that a transfer could be set aside on the ground of irregularity. They relied on the cases of **Banana Hill Investment Ltd vs Pan African Bank Limited & 2 others [1987] KLR 351, Civil Appeal No 3 of 1997 Ihenya Agencies Limited vs Barclays Bank of Kenya Limited & 5 others** (unreported) and **Waithaka vs ICDC [2001] KLR** amongst other cases to support their case.
28. On 28th January 2010, the 1st Defendant filed its written submissions dated 27th January 2010. Its List of Authorities dated 27th January 2010 was filed on 28th January 2010.
29. It submitted that the Statutory Notice dated 25th October 1999 marked GM 23 was properly issued to the 1st Plaintiff and Margaret Muthoni Ngumba in their capacity as administrators of the deceased's estate. It referred the court to Exhibit GM 26 being a Limited Grant of Letters of Administration *ad colligenda bona* issued on 11th May 1998 showing the two (2) as the administrators to the deceased's estate. The Certificate of Postage marked GM 22 indicates that the said Statutory Notice was sent to P.O. Box 60776 Nairobi which it contended was the address in the Charge Instrument. It argued that the said Certificate of Postage was proof of service of the said Certificate of Postage.
30. In respect of the validity of the Statutory Notice, the 1st Defendant submitted as follows:-
- a. **Being an English Mortgage, it was sufficient that the Instrument bore a certificate by B.A Ochieng as was required by Section 69 (4) of the ITPA. The 2nd Defendant also submitted that this was the position in law.**
 - b. **The Mortgage Instrument was properly executed as in 1996, execution of the Charge was not a requirement under the Law of Contract. Further, in view of the fact that the Mortgage was created and governed by the provisions of ITPA and GLA, the provisions of the Law of Contract did not apply herein.**
 - c. **The notice did not contravene the provisions of Section 46 of the Registration of Titles Act (hereinafter referred to as "RTA" and now repealed) as the subject property was registered under the provisions of the Government Lands Act Cap 280 (laws of Kenya) (hereinafter referred to as "GLA" and now repealed).**
31. It also stated that the Plaintiffs had not demonstrated that the borrowing of the monies by the deceased and the 2nd Plaintiff from the 1st Defendant required a resolution as was envisaged under Section 143 (4) of the Companies Act Cap 486 (laws of Kenya). In any event, the 1st Defendant stated that it was under no obligation to establish that such a resolution had been obtained before it advanced the monies. It relied on the cases of **Majoria vs Kenya Batteries (1981) Ltd & others (2002) 2EA 475** and **HCCC No 478 of 2007 Kirinyaga Complex Academy Ltd vs Co-operative Bank Ltd & Another** (unreported) where the courts held that whether or not a company had complied with internal procedures regarding the borrowing of monies could not afford a defence to a third party dealing with such a company. This was a position that was also supported by the 2nd Defendant.
32. The 1st Defendant argued that specification of the rate of interest was not a requirement under the GLA or ITPA and that in any event, the rates charged were contained in the Mortgage Instrument which bound the parties contractually and that AM Bank could assign and transfer the Mortgage to its assigns and successors and there was no requirement to inform the Plaintiffs of the same.
33. It submitted that the Plaintiffs owed the 1st Defendant monies as was evidenced in the Statements of Accounts Exhibit marked "GM 12" at page 16 and that the courts could not re-write the parties' contracts. It relied on the cases of **Civil Appeal No 95 of 1999 National Bank of Kenya Limited vs Pipeplastic Samkolit & Another** (unreported), **Morris & Co Advocates vs Kenya Commercial Bank Ltd & others [2003] 2 EA 605**, **HCCC No 261 of 2006 Daniel K. Mugambi**

vs Housing Finance Company of Kenya Limited (unreported) and **HCCC No 233 of 2004 Rico Steel Fabricators Limited & Another vs Commercial Bank of Africa Limited & others** (unreported).

34. In this regard, the 1st Defendant therefore submitted that having come to court with unclean hands, the Plaintiffs were not entitled to the equitable relief that they had sought herein for the reason that their right of redemption was distinguished in view of the provisions of Section 60 of ITPA which was amended vide Act No 19 of 1985, a position that was also supported by the 2nd Defendant in its submissions.
35. The 1st Defendant also stated that the subject property was not suitable for agricultural use and due to the factors that it had raised in its Replying Affidavit, the value of the land was greatly reduced and could not have been Kshs 63,000,000/= as was alleged by the Plaintiffs. It contended that the value that should apply ought to be that in 2009 and not the current year.
36. The 1st Defendant further argued that the fact that the subject property was family land or there was sentimental value attached to it by the family were not considerations that this court could take into account when deciding whether or not to grant injunctive orders as it became a commodity for sale immediately it was charged. The Conveyance that the 1st Defendant averred gave title to the 2nd Defendant was annexed to the 1st Defendant's Replying Affidavit and was marked "GM 13."
37. On the issue of *lis pendens*, the 1st Defendant averred that it was not applicable herein because Section 52 of the ITPA dealt with voluntary transfers and not in a relationship of Mortgagor-Mortgagee as was the case between it and the deceased. It relied on **HCCC No 316 of 2006 Vinette Dephine Okola vs Akich Okola & others** (unreported) and **HCCC No 296 of 2006 Church Road Development Co Limited vs Barclays Bank of Kenya Limited** (unreported) where the holding was to the effect that Section 52 of ITPA did not apply to a situation where the Mortgagee was exercising its Statutory Power of Sale as it would clog the commercial activities relating to land and the said section had to be read in the context of the whole ITPA.
38. It also submitted that as the loan became non-performing before Section 44A of the Banking Act, it did not touch on Section 52 of ITPA. The 1st Defendant also pointed out that the last credit was in April 2007 and that it was not correct as the Plaintiffs stated that it was not determined when the loan became non-performing.
39. It was its submission that Section 69 of the ITPA entitled it to sell the subject property either by way of public auction or private treaty but that as a sign of good faith, it did both. Section 69 (1) of the Indian Transfer of Property Act, 1882 (now repealed) provided as follows:-

A mortgagee or any person acting on his behalf where the mortgage is an English Mortgage...shall by virtue of this Act and without the intervention of the court shall have power ...to sell or concur to sell...by public auction or by private contract...without being answerable for any loss occasioned thereby.

40. The 1st Defendant contended that the 2nd Defendant had obtained a good and impeachable title and consequently, the only remedy which could avail to the Plaintiffs was damages as had been held by the Court in the case of **Civil Appeal No 150 of 1993 Patrick Kanyagia & Another vs Damaris Wangechi & 2 others** (unreported) and **HCCC No 707 of 2006 Elantra Properties Limited vs Paramount Universal Limited & 5 others** (unreported).
41. It was the 1st Defendant's case that the cases cited by the Plaintiffs were distinguishable from the facts of this case and thus were irrelevant herein. It therefore submitted that due to the reasons it had advanced and the fact that the 2nd Defendant had been in actual possession of the subject property since 2007, the balance of convenience tilted in favour of the 2nd Defendant not to grant injunctive orders as had been sought by the Plaintiff herein. It therefore prayed for the dismissal of the Plaintiffs' application.
42. The 2nd Defendant's written submissions and List of Authorities dated 19th November 2009 were filed on the same date. The 2nd Defendant supported the 1st Defendant's argument that its title was impeachable by virtue of Section 69B of ITPA and that the non-objection by the Plaintiffs when it took possession of the said property and fenced was a clear demonstration that the sale was proper

and regular.

43. Section 69B of the ITPA provided as follows:-

“Where a transfer is made in exercise of the Mortgagee’s Statutory Power of Sale, the title of the Purchaser shall not be impeachable on the ground:-

- a. **That no case had arisen to authorise the sale;**
- b. **That due notice was not given;**
- c. **That the power was improperly or irregularly exercise and a purchase is not, either before or on transfer concerned to see o inquire whether a case has arisen to authorise the sale or due notice has been given...**

But any person damnified by an unauthorised or improper, or irregular exercise of the power of sale shall have his remedy in damages against the person exercising the power.”

44. The 2nd Defendant submitted that the criteria of reasonable man’s test as had been argued by the Plaintiffs hereinabove was of no assistance to them. In this regard, the 2nd Defendant relied on the case of **Civil Appeal No 254 of 1999 Downhill Limited vs Harith Ali El- Busaidby & Another** (unreported), **Civil Appeal No 60 of 1997 Francis Mogaka Maranya vs National Bank of Kenya Limited & Another** (unreported) and **Civil Appeal No NAI 202 of 1994 (94/94 UR) Margaret Anyango vs National Bank of Kenya Limited & 3 others** (unreported) which were clear that the only remedy available to the Plaintiffs in case of improper or irregular sale in exercise of Statutory Power of Sale lay in damages and could not seek an order for cancellation of the transfer of the subject property to it.

45. It was the 2nd Defendant’s submission that the Plaintiffs had to prove a *prima facie* case before they could rely on Section 52 of ITPA. It submitted the Plaintiffs had failed to prove that damages were not an adequate remedy, that they would suffer irreparable loss or why the court could proceed to grant an interlocutory injunction, principles that were set out in the case of **Geilla vs Cassman Brown (1973) EA 358**.

46. The court has carefully considered the written and oral submissions of the parties herein and wishes to point out right at the outset that the application herein was filed before the repeal of the GLA, ITPA, RTA and other legislation relating to land and was replaced with a new regime of legislation of land which commenced on 2nd May 2012. The case law that was submitted by counsel was also before the advent of the new Land Laws. The ruling of Njagi J, who was seized of this matter, was to be delivered on 2nd December 2010 but unfortunately the same was not delivered.

47. In view of the passage of time, this court is of the considered view that it cannot therefore ignore the said new Land Laws while writing out the ruling herein as the said application was caught up in the wrap of the new regime. This of course does not mean that the provisions of the relevant Acts have no place because Section 162 of the Land Act No 6 of 2012 (hereinafter referred to as “the Land Act”) provides as follows:-

1. **Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it before the commencement of this Act.**
2. **Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of the Act.**

48. The court agrees with the submissions of all the parties that the criteria set out in the **Geilla case** is a good guide when deciding whether or not a party has established a *prima facie* case so as to enjoy interlocutory injunctive orders. However, certain facts have emerged from the affidavit

- evidence relied on by the parties herein. The court finds the question of transfer of the subject property and issuance of the statutory notice, amongst the other issues raised, to be pertinent for determination herein and it critical that the position be established.
49. The Plaintiffs submitted that they had demonstrated that they had a *prima facie* case with a probability of success as the Mortgage Instrument executed by the deceased and AM Bank Limited was not valid for the reasons that the said Instrument had not been executed in accordance with the Law of Contract.
50. The mortgage herein was an English Mortgage. This is borne by the fact that the certificate therein was issued pursuant to Section 69 (1) of ITPA and the provisions of the said section set out *extenso*. The court has looked at the Mortgage Instrument marked GM 13 and notes that the same was executed by the deceased in the presence of an advocate. The court finds that the said Mortgage Instrument was valid in accordance with Section 69 (4) of the ITPA as it was sufficiently attested only by an advocate who in this case was B.A. Achieng Advocate.
51. While the court agrees with the holding in the **Anthony Athanas Ngotho** case relied on by the Plaintiffs that the validity of a Mortgage Instrument is central to a Mortgagee exercising its Statutory Power of Sale, the court agrees with the 1st Defendant's submissions that the said case was distinguishable from this case.
52. The court therefore rejects the Plaintiffs' submissions that the Mortgage Instrument was invalid by virtue of the fact that it was not attested by two (2) witness and upholds the Defendants' submissions that the said Mortgage Instrument was valid for all purposes and intents. The court also finds that the provisions of the Law of Contract were not applicable in this case as was argued by the 1st Defendant.
53. As regards the contention that no resolution was obtained prior to the advancement of the facility herein, the court is persuaded by the 1st Defendant's submissions that there was no legal requirement for it to inquire into whether or not such a resolution had been sought and obtained. The cases of **Majoria** and **Kirinyaga Complex Academy Limited** it relied on were on all fours with the circumstances of the case herein.
54. The court is satisfied that if the 1st Defendant did not require a resolution before it could advance the facility to the 2nd Plaintiff, the Plaintiffs could not come and rely on it as a defence to the 1st Defendant's Statutory Power of Sale on the ground that the 1st Defendant had failed to seek and obtain the same. In any event, the Plaintiffs did not furnish the court with any proof to show that borrowing of money by the 2nd Plaintiff required a resolution as required by Section 143 of the Companies Act and that failure to obtain such a resolution could invalidate the 1st Defendant's Statutory Power of Sale.
55. A Mortgage Instrument would also not be invalidated due to failure by the 1st Defendant to have specified the rate of interest. The deceased did not object to the said Clause 1 (a) of the said Mortgage Instrument at the time the facility was being advanced to the 2nd Plaintiff. The same provided as follows:-

“ ...the Borrower shall become liable to pay the Lender ...together with commission and other usual bank charges legal and other costs charges and expenses together with interest at such rate or rates as the Lender shall in its sole discretion from time to time determine with full power to the Lender to charge different and penal rates for different accounts to be calculated on daily balances and debited monthly by way of compound interest... PROVIDED ALSO... nothing herein shall affect the right of a Lender or recover such higher rate of interest or (as the case may be) the difference between such higher rate and the rate payable herein. ”

56. Being a contractual relationship, the court cannot re-write the intentions of the deceased, the 2nd Plaintiff and the 1st Defendant. The contract must be interpreted in the way the parties intended it to be interpreted. According to copies of documents Exhibit marked GM 4 in the 1st Defendant's Replying Affidavit, the rate of interest was shown as 31% and 32% for the Overdraft and Loan facilities. The question of how much interest was charged herein would be a matter of evidence to be adduced during a full trial to establish whether indeed the loan had been fully repaid and

whether the 1st Defendant had acted in contravention of Section 44A of the Banking Act. The burden of proof on this issue squarely lies with the Plaintiffs. The burden cannot be shifted to the 1st Defendant.

57. Having found that the Mortgage Instrument was valid, it would be important to consider whether or not a sale took place. Section 54 of the ITPA which provides as follows:-

“Sale” is a transfer of ownership ...Such transfer of the value of one hundred rupees and upwards... can be made only by a registered instrument.”

58. The registration of such a conveyance, assignment, lease, a transfer of lease or other lease is mandatory as is also in Section 43 (2) of the Land Act which stipulates that:-

1. **In this part, “transfer” includes a conveyance, an assignment, a transfer of land, a transfer of lease or other lease or other instrument used in the disposition of an interest in land.**
2. ...
3. **The transfer shall be completed by the registration of the transferee as proprietor of the land, lease or charge...**

59. What comes out clearly is that for a property to be deemed have moved from one person to another, an Instrument of Transfer must be registered. The Conveyance from the 1st to the 2nd Defendant was dated 20th June 2007, marked as BKK 1 was attached to the 2nd Defendant's Replying Affidavit. The said Conveyance was received at the Central Registry of the Lands Office on 22nd June 2007 and duly stamped. It was registered as Vol N57 Folio 3/3/48 File 12231. The court is satisfied that, for all purposes and intents, the said Conveyance was duly registered in accordance with Section 54 of the ITPA.

60. As was rightly pointed out by the 1st Defendant, the ITPA cannot be read in isolation. A holistic approach must be adopted. Having found that there was a sale, it is important for the court to consider whether or not it could exercise its Statutory Power of Sale. Section 69A (1)(a) of the ITPA stipulated that:-

A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or part thereof, for three months after such service...”

61. The position has not changed even after the repeal of the previous land laws as Section 96 of the Land Act also provides that where a Chargor is in default, the Chargee is required to serve a notice on the Chargor or parties listed therein.

62. The Mortgage dated 27th August 1996 marked as Exhibit GM 18 shows the Mortgagor as Andrew Kimani Ngumba, the deceased herein while the 2nd Plaintiff was the Borrower. Their postal address was indicated as P.O. Box 60776 Nairobi. The Lender was AM Bank. The 1st Defendant transferred the Mortgage to the 2nd Defendant vide an instrument of Transfer of Mortgage dated 15th January 1998 marked as Exhibit JMN 2 in the 1st Plaintiff's Supporting Affidavit.

63. It appears from the documentation before the court that the deceased died on 31st May 1997. Subsequently, the Grant of Letters of Administration with Written Will Annexed marked as Exhibit GM 19 in the 1st Defendant's Supplementary Affidavit was issued to the 1st Plaintiff on 16th August 2005. In JMN 1 in the 1st Plaintiff's Supporting Affidavit, it is evident that the Certificate of Confirmation of Grant was issued to him on 6th March 2007 in Succession Cause No 539 of 1998.

64. Perusal of Statutory Notices marked as GM 5 in the 1st Defendant's Supporting Affidavit show that the same were sent to the 1st Plaintiff and Margaret Muthoni Ngumba as the deceased's administrators. The said Notices were dated 25th November 1999 and were sent by registered mail to P.O. Box 60776 Nairobi and P.O. Box 65003 Nairobi. The 1st Defendant issued the two with

- the said Statutory Notices on the strength that they had been named as the administrators of the deceased's estate in the Limited Grant of Letters of Administration *ad colligenda bona* issued on 11th May 1998.
65. Perusal of the said Grant of Letters of Administration issued on 11th May 1998 clearly show that the same were limited to defending HCCC No 1850 of 1993. The court therefore agrees with the Plaintiffs' submissions that the said letters could not purport to give the 1st Plaintiff and Margaret Muthoni Ngumba authority or power to accept any Statutory Notice on behalf of the deceased's estate as they were not in any way, the administrators of the said estate.
 66. The court has also had due regard to the Statutory Notice dated 17th February 2006 that was sent to the Administrator of the deceased's estate to P. O. Box 60776 00200- Nairobi. No postal address was indicated therein and it would be a matter of evidence to be adduced in court to establish what the postal address of the administrators of the deceased's estate was.
 67. The court is in agreement with the Plaintiffs' submissions that the said Statutory Notice was sent to an amorphous entity because at the time the said Statutory Notice was being sent, there was no administrator to the deceased's estate. A person does not become an administrator until the Grant of Letters of Administrator or Probate is confirmed as there are possibilities before then of him not being confirmed to act as such an administrator.
 68. The 1st Plaintiff submitted that 2nd Plaintiff was placed under receivership by Industrial and Commercial Development Corporation (ICDC) and the East African Development Bank for a bank debt of Kshs 12,000,000/=. There was no evidence adduced by the Plaintiffs to support this fact and the court will therefore place much weight on this argument in the determination of the application herein.
 69. While the court is in agreement with the 2nd Defendant's submissions that the Plaintiffs relief could ideally have been by way of damages in accordance with Section 68B (2) of ITPA, this can only be so if the court was satisfied that the 1st Defendant's Statutory Power of Sale had arisen and that a Statutory Notice had been issued in accordance with the Act.
 70. The said Statutory Notices may have been sent to the postal address given in the Mortgage Instrument; However, the issue that arises is whether or not the said Statutory Notices were valid within the meaning of the ITPA. Additionally, the question whether or not the transactions relating to the sale or sub-division of the subject property were regular and/or had legal basis prior to the administrators of the deceased's estate having been served with a Statutory Notice, are relevant in the circumstances of this case.
 71. In this case, the court finds that the Statutory Notice was sent at a time the deceased's estate had no administrator and to this extent, the Plaintiffs have established a *prima facie case* with a probability of success. It would be necessary to establish in a full trial whether or not the deceased's administrators' equity of redemption had been extinguished by the time the said subject property was sold to the 2nd Defendant. In addition, whereas the Conveyance in favour of the 2nd Defendant has been registered, it had not been issued with the title deed. Consequently, the issue of non-impeachable of its title would not arise as it was premature.
 72. The issue of the undersale of the subject property was hotly contested by the parties. The Valuation Report by Landmark Realtors Exhibit marked GM 17 in the 1st Defendant's Replying Affidavit, shows an open market value of the subject property at Kshs 20,000,000/= and an estimated forced sale value of Kshs 14,000,000/=. The 1st Defendant stated that the sum of Kshs 8,000,000/= was the best price it could get as the said land was a quarry and infertile as a result of which the 2nd Defendant argued that it was a bona fide purchaser for valuable consideration for the sum of Kshs 8,000,000/=.
 73. Indeed, the new land regime recognises this duty of care by a Mortgagor to exercise a duty of care towards the Mortgagee. As the court observed hereinabove, the ruling in this matter has taken so long that the parties have found themselves obligated to comply with the new legislation on land matter. The Plaintiffs are entitled to enjoy provisions of the new laws as Article 27 (1) of the Constitution, 2010 protects every person from any type of discrimination. The same provides that:

“Every person is equal before the law and has the right of protection and equal benefit of the law”.

74. The court has considered the submissions of the parties on this issue and finds that as much as possible, the Mortgagor is under an obligation to dispose of the Mortgaged property at the highest price. The court is in agreement with the cases submitted by the Plaintiffs showing that the amount that a property is disposed of is a relevant issue. It would therefore be important that this issue is addressed in the full trial to establish whether indeed that was the best amount the 1st Defendant would have obtained from the sale of the subject property.

75. Section 97 of the Land Act provides as follows:-

1. **A chargee who exercises a power to sell the charged land...owes a duty of care to the chargor...to obtain the best price reasonably obtainable at the time of sale.**
2. **A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.**
3. **If the price at which the property is sold is twenty five per centum or below the market value at which comparable interests of land of the same character and quality are being sold in the open market-**

- a. **There shall be rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and**
- b. **The chargor whose charged land is being sold for the price may apply to a court for an order that the sale be declared void; but the fact that a plot of charged land is being sold by the chargee at an undervalue being less than twenty five per centum below the market value shall not be taken to mean that the chargee has complied with subsection (1).**

bx. The doctrine of *lis pendens* is applicable in this case as the title could be issued to the 2nd Defendant in the event injunctive orders are not issued thus negating the very purpose of hearing the matter herein on merit. Section 52 of the ITPA stipulates as follows:-

“During the active prosecution in any court...of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”

77. The court is therefore satisfied that from the facts before it, though there were objections that had been raised and which the court did not find to be good grounds to grant the injunctive orders sought, the Plaintiffs have essentially established that they have a *prima facie* case with probability of success. In view of the fact that the title had not passed to the 2nd Defendant, the court is of the considered view that it would be prudent also to grant an interlocutory injunction despite the fact that the 2nd Defendant had fenced off the subject property. In view of the fact that the Plaintiffs have established a *prima facie case* and the court further finds that the balance of convenience to issue interlocutory injunctive orders tilts in their favour as set out in **Geilla vs Cassman** (Supra), the argument that the 1st Defendant is a financial institution would be able to compensate the Plaintiffs herein, though valid, would not be feasible in the circumstances of the case herein.

78. Accordingly, the upshot of my ruling is that the Plaintiffs' Chamber Summons application dated 4th September 2009 and filed on 7th September 2009 is merited. Accordingly, the court hereby grants the Plaintiffs prayer no (3) and (4) therein on condition that the Plaintiffs shall file within seven (7) days from the date of this ruling, a letter of undertaking to pay damages to the Defendants in the event they were not to succeed at the conclusion of the suit herein. Costs in the costs.

79. Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of August 2013

J. KAMAU

JUDGE