



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 130 OF 2012**

1. ETHICS & ANTI-CORRUPTION COMMISSION
2. KENYA COMMERCIAL BANK LIMITED
3. ALTAM GROUP INTERNATIONAL (K) LTD
4. TILE & CARPET DEVELOPMENTS LTD..... PLAINTIFFS

**-V E R S U S-**

1. AFRICAN SAFARI CLUB LIMITED
2. ZUM ZUM INVESTMENTS LIMITED
3. COMMISSIONER OF LANDS ..... DEFENDANTS

**BY WAY OF COUNTER-CLAIM**

**ZUM ZUM INVESTMENTS LIMITED ..... PLAINTIFF/ORIGINAL 2<sup>ND</sup> DEFENDANT**

**V E R S U S**

**ALTAM GROUP INTERNATIONAL (K) LTD....1<sup>ST</sup> DEFENDANT/ORIGINAL 3<sup>RD</sup> PLAINTIFF**

**KENYA COMMERCIAL BANK LTD .....2<sup>ND</sup> DEFENDANT/ORIGINAL 1<sup>ST</sup> PLAINTIFF**

**AND**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL CASE NO. 70 OF 2013**

**(FAST TRACK)**

**ALTAM GROUP INTERNATIONAL (K) LTD ..... PLAINTIFF**

**V E R S U S**

**RULING**

1. By consent of all parties it was agreed that the Court would deliver a composite Ruling in respect of three separate applications in **Mbsa HCC 130 of 2012** and **HCC Comm. 70 of 2013**.
2. In HCC 130 of 2012 there are two applications being considered. Firstly is the one dated 18<sup>th</sup> March 2013. That one was made by Kenya Commercial Bank Ltd (KCB). In **HCC 130 of 2012** KCB seeks the dismissal of the suit filed by way of Counter claim by Zum Zum Investment Ltd (Zum Zum). The original suit in HCC 130 of 2012 was filed by Ethics & Anti-corruption Commission against three Defendants. One of those Defendants was Zum Zum. The Commission alleged that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had alienated a section of public road belonging to the government of Kenya. That public road had been reserved for use by members of the public. The Commission pleaded in its case that the alleged transfer of that land MN/1/5905 by the first Defendant to Zum Zum was null and void because it comprised part of public land.
3. That suit relating to the alleged alienation of a public road was settled by consent of 1st November 2012. By that consent the parties in that case who included Zum Zum and Altam Group International (K) Ltd consented to the effect that Zum Zum the owner of Parcel MN/1/5905 was to vacate 30metres of that land to give road access to the Beach in Shanzu. This would have been in compliant with the Shanzu's Physical Development Plan of 1998.
4. It is after that case was settled that ZumZum filed a counter claim naming Altam as the 1<sup>st</sup> Defendant and KCB the 2<sup>nd</sup> Defendant.
5. **Background:** It is not denied that ZumZum by a transfer dated 1st March 2011 transferred Parcel No. MN/1/1066 to Altam. Altam's title document in respect of that parcel shows that it is the owner of the entire land. It is not also denied that Altam obtained from KCB a loan facility of US Dollars 5 million which was to partly facilitate the payment of the balance of purchase price and partly to pay for the construction work to be carried on that parcel of land. As security for that facility KCB acquired a charge of the entire Parcel No. 1066.
6. Zum Zum in its Counter-claim in HCC 130 of 2012 alleges that Altam purchased a portion of parcel No. 1066 marked as 'A'. That Zum Zum after transferring the whole of Parcel No. 1066 were to have the part marked 'B' on that parcel transferred to its name. It will be helpful to reproduce some of the paragraphs of the Counter-claim for better understanding of the claim made by Zum Zum-

***“2. It was mutually understood by the terms of the aforesaid Agreement of 2<sup>nd</sup> June, 2010 that Plot No. MN/1/1066 was to be sub-divided into two [2] portions and that new deed plans and titles be acquired for the sub-division described therein as ‘A’ and ‘B’ of which portion ‘A’ was to be transferred to the 1<sup>st</sup> Defendant/original 3<sup>rd</sup> Plaintiff.*”**

3. ***A further term of the aforesaid sale agreement provided that notwithstanding the payment of the purchase price to the Vendor and the Purchaser taking possession of the property (sic). The agreement was to continue to remain in force until all the parties obligations are fully performed.***
4. ***The Plaintiff states that so as to enable the 1<sup>st</sup> Defendant obtain financial facility to cater for the purchase price and at the request of the 1<sup>st</sup> Defendant herein the title of the subject property was released to the Defendants joint Counsel for charging in favour of the Defendant/original 1<sup>st</sup> Plaintiff as hereunder on condition that the same was to be released at a later stage to the Plaintiff's counsel to sub-divide and cause the portion described as “A” in the said Agreement***

**to be transferred to the 1<sup>st</sup> Defendant herein and “B” to be Plaintiff/2<sup>nd</sup> original Defendant.**

**4. The Plaintiff aver that in breach of the said agreement and despite of demand the Defendants have jointly and severally failed to release the said title to the Plaintiffs to pave way for the sub-division process and transfer of the portions “A” and “B” as contemplated in the aforementioned agreement.**

**5. The Plaintiff aver that the Defendants are bound to surrender the Title for subject property MN/1/1066 and to facilitate the subdivision and transfer of Portion “B” stipulated in the Agreement to the Plaintiff.”**

7. Zum Zum prays for mandatory injunction directing Altam and KCB to surrender Title 1066 to it to enable Zum Zum to subdivide and transfer the portion marked 'B' to itself.

8. Zum Zum claim is denied by KCB. Altam however has not yet filed its Defence. In its Defence KCB stated that Altam applied and was granted a loan facility by it of US Dollars 5 million and as security offered its title of parcel No. 1066. The charge of that parcel of land was registered on 1st March 2011. The Certificate of Title of parcel 1066 indicated that Altam were the owner of that parcel measuring 5.55acres. KCB further pleaded in its defence that Zum Zum had transferred its entire interest of that parcel by a transfer dated 1st March 2011. KCB pleaded that Zum Zum is not entitled to have the prayers sought in the Counter claim and the same ought to be struck out.

9. I will begin by considering the application by KCB dated 18th March 2013. I will consider it first because it seeks to strike out Zum Zum's counter claim and if it indeed does succeed there would be no basis for considering Zum Zum application for injunction.

10.The Notice of Motion dated 18th March 2013 seeks the prayer –

**“That the Plaintiffs (Zum Zum) counterclaim dated 30th November 2012 be struck out as against the 2nd Defendant (KCB) for being otherwise an abuse of the process of the Court.”**

11.The application is based on the following grounds-

1. **There is no privity of contract between the Plaintiff (Zum Zum) and the 2<sup>nd</sup> Defendant (KCB).**
2. **The Plaintiff is estopped by law from maintaining a claim for a portion of the suit property.**
3. **That by an instrument of Transfer dated 1<sup>st</sup> March 2011, the Plaintiff transferred all its rights, title and interest in the suit property to the 1<sup>st</sup> Defendant (Altam).**
4. **That upon the strength of the said instrument of Transfer and the transferred Certificate of Title, the 2<sup>nd</sup> Defendant advanced the 1<sup>st</sup> Defendant a financial facility of US Dollars 5,000,000. The suit property was used as the security for the financial facility.**
5. **That by a charge dated 1<sup>st</sup> March 2011, the 1<sup>st</sup> Defendant charged the entire suit property to secure the financial facility advanced to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant.**
6. **That the transfer and the charge were in respect of the entire suit property and they were duly registered against the Title to the suit property.**
7. **The Plaintiff's Counter-claim seeks to steal a march against the 2<sup>nd</sup> Defendant who has advanced huge amounts of money to the 1<sup>st</sup> Defendant secured by the suit property.**
8. **The 1<sup>st</sup> Defendant's Director has sworn an affidavit dated 9<sup>th</sup> August 2012 filed in this matter stating at inter alia paragraph 15 (y), (iv), (v) and (vi) that the Plaintiff herein and its directors forged his signatures on the alleged agreement for sale dated 2<sup>nd</sup> June 2010. The Plaintiff did not deny that allegation and indeed proceeded to grant consent orders in favour of the Defendants in the course of the proceedings in this matter.**
9. **The Plaintiff has no claim whatsoever against the 2<sup>nd</sup> Defendant in relation to the suit**

***property and the title documents thereto, the Plaintiff's counterclaim is an afterthought and it is otherwise an abuse of the process of Court and it should be struck out with costs.***

12. To bolster ground No. 8 above KCB attached an affidavit sworn by

Michael Melesse Damena (Damena) a Director of Altam which affidavit was in support of an application by Altam where Altam sought to be joined as co-Plaintiffs in the case **HCCC No. 130 of 2012** filed by Ethics & Anti-corruption Commission. In that affidavit dated 9th August 2012 Damena had this to say-

- iii. ***The 2<sup>nd</sup> Respondent sold MN/1/1066 to the Applicant without disclosing that EACC had obtained the foresaid Court orders in HC Misc. 505 of 2010 restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from selling or dealing in any way with MN/1/1066.***
- iv. ***Made a document purporting it to be the agreement of sale for the suit property purporting that the Applicant only bought a portion and not the whole of MN/1/1066. The document has been backdated to 2<sup>nd</sup> June 2010. Annexed and marked "M-12" purported agreement dated 2<sup>nd</sup> June 2010.***
- v. ***Forged the signature of one of the Directors of one Michael D. Melesse a Director of the Applicant company in the said documents and purported that the forged document is duly signed by the said Michael D. Melesse of the Applicant Company.***
- vi. ***I hereby swear that the signature appearing against my name was not appended thereto by myself and I had not authorized any one to so sign.***
- vii. ***By equally unlawful means caused the signature of one Awad Mohamed Al-Amin another Director of the Applicant Company to appear in the foresaid false document purporting to be the agreement of sale.***

13. In the replying affidavit the Director of Zum Zum namely Nedim

Mohamed referred to the agreement for sale dated 2nd June 2010 which was between Altam and Zum Zum. In paragraph 1.3 (b) & (c) the terms of that contract are as follows-

- b. ***The Vendor has caused the land to be sub-divided into two portions as more particularly delineated on the sub-division plan annexed hereto (hereinafter called the "Sub-Division Plan")***
- c. ***The Vendor has agreed to sell and the Purchaser has agreed to purchase the subdivided piece of land identified as Plot 1066 on the Sub-division Plan measuring approximately One decimal Nine Eight Six (1.986) hectares which parcel of land for purposes of identification only is bordered red thereon (hereinafter called the Property).***

14. Although paragraph 3 states that the vendor Zum Zum had

subdivided the Parcel No. 1066 into two there is no document before Court from the Lands Office indicating that such subdivision was there or has been carried out.

15. There are two letters that Zum Zum relies upon as proof of all parties

acknowledgement that parcel 1066 was to be subdivided with Zum Zum retaining part 'B' on that parcel. The first letter is dated 19th October 2010. It was a letter written by a firm of Advocate representing Zum Zum namely the firm of Nabhan Swaleh. That letter was addressed to the firm of Iseme, Kamau and Maema & Co. Advocates. Zum Zum alleges that Iseme, Kamau & Maema Advocates represented Altam and KCB. That allegation has not been denied either by KCB or Altam. The letter is in the following terms-

***"Our Ref: N/Z 0036***

Tuesday, 19<sup>th</sup> Oct. 2010

Iseme Kamau & Maema "By Email & Mail"

Advocates

P.O. Box 11866-00400

Nairobi

Attn: Beatrice Nyabira or Norah Mutuku

Dear Madam,

RE: Sale of MN/1/1066

Vendor: ZumZum Investments Ltd

Purchaser: Altam Group International (K) Ltd

We act for ZumZum Investments Ltd the Vendor in the above transaction and would inform you that in view of your clients need to expedite the transaction our clients have accepted to release the title of the above property before subdivision to you to be charged in favour of the bank on condition that the title will at a later stage be released to us for our client to do the subdivision after which the title of the portion sold to your client shall be sent to you for charging to secure the Bank Loan.

Kindly let us have your confirmation of the above to enable our client instruct their bankers to release the aforesaid title to you.

Yours faithfully,

For: Nabhan Swaleh Advocates

Nabhan Swaleh

Cc. Client"

16. The 2nd letter is dated 28th November 2011. It is written by the firm of Iseme Kamau & Maema Advocates. It is in the following terms-

<b>YOUR REF:</b>	<b>OUR REF:</b>	<b>DATE:</b>
TBA	KCB-68/2010/06	28 <sup>th</sup> November, 2011

Nabhan Swaleh Advocate

Corporate Insurance House, 1<sup>st</sup> Floor Advance Copy by Email

P.O. Box 43235-80100

Original by Securicor

Mvita Road

MOMBASA

*Dear Sirs,*

**RE: SALE AND SUBDIVISION OF PROPERTY SUBDIVISION NUMBER 1066 SECTION NUMBER 1 MAINLAND NORTH (the "Property") BY ZUMZUM INVESTMENTS LIMITED (the "Vendor") TO ALTAM GROUP INTERNATIONAL (K) LIMITED (the "Purchaser")**

*We refer to the above matter wherein our client has informed us that the subdivision of the Property as agreed between the Vendor and the Purchaser is not yet complete.*

*Our instructions are to demand from your client (which we hereby do) for the subdivision to be completed within the next Thirty (30) days taking into account the following:-*

- i. provision of a Thirty (30) meter of surveyed and approved access through subdivision Number 9505 Section 1 Mainland North (MN/1/9505) in the South-North direction as well as in the East-West direction of the Property;*
- ii. provision of an Eighteen (18) meter of surveyed and approved beach access to the Indian Ocean between the Property and Subdivision Number 1067 Section 1 Mainland North (MN/1/1067) in the East-West direction connecting to the main public road through Subdivision Number 9505 Section 1 Mainland North (MN/1/9505);*
- iii. excise and amalgamation of an equivalent piece of land from property Subdivision Number 9505 Section 1 Mainland North to the Property as compensation for the former Coral Hotel buildings erected outside of the Property. The value of the said excised piece of land shall be agreed between the parties; and*
- iv. the said subdivision and amalgamation should conform with the Registration of Titles Act (Chapter 281 Laws of Kenya) and the Physical Planning Act (Chapter 286, Laws of Kenya).*

*Should the above exercise not be carried out within the Thirty (30) days' period, our client reserves the right to seek legal recourse for damages suffered due to the delay including but not limited to a refund of the costs related to financing, legal and professional services until such a time as the matter is fully settled.*

*Please acknowledge receipt.*

*Yours faithfully,*

**NORAH MUTUKU**

**FOR: ISEME, KAMAU & MAEMA ADVOCATES**

**[mmutuku@ikm.co.ke](mailto:mmutuku@ikm.co.ke)**

**cc: 1. Corporate Relationship Manager**

**Kenya Commercial Bank Limited**

**Moi Avenue Branch By Hand Delivery**

**Kencom House**

**P.O. Box 30081-00100**

**NAIROBI**

**Attention: Ms. Mary Mulili/Norma Maranga**

2. **Directors**

**Altam Group International (K) Ltd By Email**

**Attention: Mr. Michael Melesse**

17. In respect of those letters Zum Zum deponed through its Directors affidavit as follows-

***“5. THAT in the circumstances it is quite clear that it is within the full knowledge of the 2<sup>nd</sup> Plaintiff (KCB), 3<sup>rd</sup> Plaintiff (Altam) and the 2<sup>nd</sup> Defendant (Zum Zum) that the portion of the land marked ‘B’ belongs to the 2<sup>nd</sup> Defendant and is deemed to be so held in trust pending sub-division.***

***6. THAT fairness demands that the property marked ‘B’ in the schedule to the said agreement be preserved pending determination of the dispute as to ownership on merits as between the parties.”***

18. It is on that basis that Zum Zum defended the application by KCB

dated 18th March 2013. It is also on those grounds that Zum Zum sought to restrain KCB from exercising its power of sale of a Parcel No. 1066. That application of injunction shall be dealt with subsequently in this Ruling.

19. KCB in support of its application dated 18th March 2013 relied on the

case of **Mwangi -Vs- Braeburn Ltd (2004) 2 EA 196**. In that case the Court of Appeal upheld the High Courts finding that only parties to a contract could sue on alleged breach of the contract.

20. Zum Zum in opposition to the application dated 18th March 2013

relied on the case of **D. T. Dobie (K) Ltd -Vs- Joseph Mbaria Muchina & Another [1980]eKLR**. In that case the Court of Appeal considers how a Court should deal with an application for dismissal of a suit on its failure to disclose reasonable cause of action. The Court of Appeal stated thus-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”***

21. Order 2 rule 15(1)(d) provides-

***“At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that -***

***(a) ...***

***(b) ...***

***(c) ...***

***(d) It is otherwise an abuse of the process of the Court-and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.”***

22. In the book **Mulla** “*The Code of Civil Procedure*” 16th Edition the author had this to say on an application to struck out a suit on the basis that the suit is an abuse of the process of the Court.

***“It is true that such power of striking of the plaint from the record of the Court on the ground of abuse of process is to be exercised sparingly and with circumspection and in rarest of rare cases but when the conduct of litigation is so glaringly contumacious in intending to keep a matter alive in a Court having no jurisdiction, such litigation deserves to be dealt with sternly. ... The Court should also be satisfied that there is no chance of the suit succeeding.”***

23. Having in mind the care with which the Court should consider such an application for dismissal of a suit I ask myself a rhetorical question; can this Court state that this case is devoid of any reasonable factual support or arguable legal basis? My answer is in the negative. This is because Zum Zum pleaded that the title was released to a Counsel acting both for KCB and Altam on condition that the title would be returned to Zum Zum for the purpose of having parcel 1066 subdivided into parcel A and B. In my view this court ought to give Zum Zum an opportunity to adduce oral evidence at the trial to support its allegation in its pleadings. This court cannot say that the allegation has no factual basis in the absence of the Court receiving oral evidence. The effect of the alleged undertaking to release the title for subdivision if any by the Counsel who acted for KCB and Altam can only be tested at a full hearing. I also cannot state that I am satisfied that there is no chance in Zum Zum suit succeeding. It is because of that that I will decline to dismiss the suit at the threshold and will dismiss the application dated 18th March 2013.

24. The other application in **HCCC No. 130 of 2012** for consideration is dated 13th June 2013. The movant of it is Zum Zum. The application seeks an order for temporary injunction to restrain KCB from disposing by auction or private treaty land marked 'B' on parcel No. 1066 pending the determination of the counter claim. KCB had scheduled to auction Parcel No. 1066 on 14th June 2013. Zum Zum's application is based on the following grounds-

- a. ***The 2<sup>nd</sup> Plaintiff has threatened to dispose off the whole property contained in the Title known as MN/1/1066.***
- b. ***The portion of the property that is fronted by the cliff and ocean in the said Title belongs to the 2<sup>nd</sup> Defendant/Applicant by virtue of the agreement between the 3<sup>rd</sup> Plaintiff which is fully within the knowledge of the 2<sup>nd</sup> Plaintiff.***
- c. ***The portion of land that belongs to the 2<sup>nd</sup> Defendant is deemed to be held in trust on their behalf pending sub-division and subsequent transfer to the 2<sup>nd</sup> Defendant;***
- d. ***The 2<sup>nd</sup> Defendant's portion of land and developments thereon is prime land which is fronted by a cliff and ocean hence irreparable loss is to be suffered as it is not possible to find a substitute thereto;***
- e. ***The auction is on account of a loan to the 3<sup>rd</sup> Plaintiff that is not guaranteed by the 2<sup>nd</sup> Defendant.***

25. KCB in their replying affidavit dated 24th June 2013 in opposition to the application by Zum Zum deponed that Zum Zum was precluded on claiming a portion Parcel No. 1066 as its own by virtue of the transfer signed by it dated 1st March 2011. It is by that transfer that Zum Zum transferred the entire parcel 1066 to Altam for a consideration of Kshs. 220 million. Following that transfer KCB deponed that it received the Title as security for the financial facility given to Altam.

26. Further KCB annexed a report of a handwriting examiner which determined that the alleged sale agreement between Zum Zum and Altam dated 2nd June 2010 was a forgery. KCB also relied on the deposition referred to above made by Damena where he deposed that the signature on that

agreement dated 2nd June 2010 which was next to his name and the signature next to his co-directors name were both forgeries. It is on that basis of a handwriting expert report and the depositions of Damena that KCB argued that Zum Zum cannot obtain equitable remedy in reliance on forged document.

27. Zum Zum submitted that it had established a prima facie case and was therefore deserving the orders that it sought. It relied on the case of **Mrao -Vs- First American Bank of Kenya Ltd [2005]KLR 125**. The Court of Appeal in that case held as follows-

***“(1) The power of a Court in an application for an interlocutory injunction is discretionary.***

***(2) ...***

***(3) ...***

***(4) A prima facie case in a Civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

28. The Case of **Thomas Nyakamba Okong'o -Vs- The Co-operative Bank of Kenya Ltd [2012]eKLR**. In respect of an application for an interlocutory injunction the Court expressed itself in that case as follows-

***“In determining this application, I am well aware that at this stage the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.”***

29. Zum Zum also relied on the case of **Rose Kaiza -Vs- Angelo Mpanju Kaiza [2009]eKLR**. It relied on this case to support its claim that the Court cannot rely on handwriting expert opinion made in a report in the absence of cross examination of the maker of it. The Court of Appeal in reference to two cases had this to say-

***“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty, to reject it.”***

30. Zum Zum seeks an injunction to restrain KCB from exercising its statutory power of sale. There is no dispute that KCB has a valid charge of Parcel No. 1066. There is also no dispute that Altam has defaulted in repaying the loan and thus KCB has become entitled to exercise its statutory power of sale. The principles of granting a injunction as stated in **Giella -Vs- Cassman Brown [1973]EA 358** are as follows-

- a. ***The Applicant must show a prima facie case with probability of success.***
- b. ***An interlocutory injunction will not normally be granted unless the Applicant might otherwise***

- suffer irreparable injury which would not be adequately compensated by an award of damages.*
- c. *If the Court is in doubt it will decide an application on the balance of convenience.*

31. Zum Zum relies on the agreement dated 2nd June 2010 as a basis of showing that it was entitled to the portion of land marked 'B' on Parcel No. 1066. Altam by the affidavit dated 9th August 2012 sworn by its Director Damena refuted the signatures appearing on that agreement. He termed the agreement as a forgery. Zum Zum admits that it surrendered the Title No. 1066 to an Advocate who was representing KCB and Altam. Zum Zum clearly states that the purpose of surrendering the title document was for the purpose of transferring it into the name of Altam and then having it charged to KCB. It was after that process had been undertaken that Zum Zum stated it was to receive back the title for purposes of subdividing it into two portions 'A' and 'B'.
32. There are two issues that I wish to highlight in regard to that allegation. The first is that the only official survey of Parcel No. 1066 that I could trace in the documents before me is represented by the Deed Plan dated 26th September 1967. That Deed Plan is attached to Grant of Parcel No. 1066. That Deed Plan shows Parcel No. 1066 as one parcel without any subdivision of 'A' and 'B'. Zum Zum attached a proposed Deed Plan which is dated October 2009 which reflects a portion marked 'A' and another marked 'B'. The important thing to note is that that Deed Plan of October 2009 was a proposal which was never put into effect before Parcel No. 1066 was transferred to Altam.
33. On a prima facie basis I find that Zum Zum has not established a prima facie case with a probability of success. The sequence of events show that the alleged agreement dated 2nd June 2010 cannot override the subsequent transaction that is the transfer in favour of Altam and the charge in favour of KCB. The law is certainly not in favour of Zum Zum. Section 107 of the Evidence Act Cap 80 provides as follows-

***“(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

34. The transfer executed by Zum Zum in favour of Altam speaks as a contract between the parties. No other evidence can be allowed to be given to prove the terms of it. Zum Zum cannot bring a previous alleged agreement of 2nd June 2010 to add to the terms of the transfer dated 1st March 2011. In the book entitled **Contract - Cases & Materials by H.G Beale, W. D. Bishop and M. P. Formston** the considered a scenario similar to the one in this case. He stated as follows-

***“Suppose the parties have signed a written contract (this may be a single document, or the part signed may refer expressly to another document, in which case the contract will include both documents read together). One party then alleges that the writings do not contain the whole contract: there is some other term which was expressly agreed, either orally or in a separate writing, but which is not stated or referred to in the signed writings.***

***Two points arise. Firstly, if the term was agreed to, why was it left out? Doesn't leaving it out show that it was not 'part of the final deal'? .... Secondly, to allow the party to rely on the unstated term may produce costly uncertainty – uncertainty in Court, where it will be more difficult to determine what the contract really was; uncertainty for third parties who may rely on the written contract (eg a bank which, after seeing a written contract its client has made, lends him money on the strength of it); and uncertainty for the parties, who later may not recollect just what was agreed.”***

That passage is very poignant because Zum Zum alleges that the previous alleged agreement of 2nd June 2010 although it did not specifically get mention in the transfer between Zum Zum and Altam or in the charge instrument between KCB and Altam it must have a bearing to the effect of nullifying the charge instrument. On prima facie basis that argument and sequence of events

stated by Zum Zum seem to me to be far-fetched. They are far-fetched because it seems strange that Zum Zum would release its title for a transfer to be effected in favour of Altam for the entire parcel No. 1066 with an understanding that Altam was proceeding to charge the entire parcel for a loan facility given by KCB and thereafter to expect that the charged Title would be returned to Zum Zum for Zum Zum to carry out subdivision of the same. If that was the agreement then KCB would be regarded as being most reckless in the running of its business. This is because KCB would be required to discharge the property to enable it to be sub-divided and then would have had a fresh charge executed for the portion that would be left in the name of Altam. In my view KCB by such action would expose itself to the danger of having a security which would not fully cover the loan facility. There would also be added danger that Altam having received the loan facility would probably be reluctant to execute the second charge.

35. It is not disputed that KCB was not a party to the agreement dated 2nd June 2010. It is however alleged by Zum Zum that KCB was a party to some undertaking about subdivision of Parcel No. 1066. That allegation however will be subject to proof at the trial. It is on the strength of the transfer signed by Zum Zum and Altam that KCB released to Altam US Dollars 5 million and in turn KCB accepted the entire Parcel No. 1066 as security. Zum Zum has failed in my view to establish a prima facie case.

36. It ought to be noted that Section 24 of the Land Registration Act, 2012 registration of a person as proprietor of title vests in that person absolute ownership. The rights of such a proprietor are stated in Sections 25 and 26. In the now deleted legislation, The Registration of Titles Act (Cap 281) Section 23 similar provisions were made about a registered proprietor of property. The Court of Appeal had occasion to decide the effects of that Section in the case of **Nairobi Permanent Market Society & Others -Vs- Salima Enterprises & Others [1995-1998]EA 232**. In that case the Court of Appeal stated as follows-

***“Under Section 23 of the Registration of Titles Act, a Certificate of Title issued by the Registrar to any purchaser of land was to be taken by the Courts as conclusive evidence that the person named therein was the absolute and indefeasible owner thereof. That title was not subject to challenge except on the ground of fraud or misrepresentation to which the purchaser was a party. In this instance, it was not disputed that the first Respondent had purchased the land for valuable consideration and that the land had been duly registered in its favour. There was no allegation that the company was a party to any fraud or misrepresentation perpetrated on the Appellants. The order of 20<sup>th</sup> December 1995 was thus an interference in the first Respondent’s rights and the Judge was justified in vacating it.”***

Similarly in this case Zum Zum has not alleged fraud or misrepresentation by Altam or KCB. I do find on prima facie basis that the title to Altam is conclusive evidence of ownership by Altam of parcel 1066. It is for that added reason that I find that Zum Zum has not shown a prima facie case with probability of success.

37. The fact I have reached the decision that Zum Zum has not shown a prima facie case for the granting of an injunction is not contradictory to the earlier finding that Zum Zum’s counter-claim showed reasonable cause of action. This is because the level of proof for striking out a case is much higher than in the case for an application for injunction. This is because of the very drastic nature of the prayers for striking out an action. In the case of an injunction application the Judge is entitled to make determination on the evidence presented to determine if a prima facie case is made out.

38. On consideration of the second principle of granting an injunction I find that Zum Zum will not suffer irreparable injury. This is because it transferred the entire Parcel No. 1066 to Altam for the value of US Dollar 220 million. It therefore follows that if the Court does later find that Zum Zum's claim has a basis and that Zum Zum is entitled to get a portion of Parcel No. 1066 the value of that portion can be determined in other words the land is capable of being valued and KCB would undoubtedly be in a position to pay such an amount.

39. I do not entertain any doubt in respect of the first two principles of granting an injunction and I will therefore not proceed to consider where the balance of convenience lies.
40. It therefore follows that the Notice of Motion dated 13th June 2013 is dismissed with no orders as to costs.
41. The application dated 10th June 2013 made in Mbsa HCC No. 70 of 2013 is by Altam. The parties in that case are Altam as the Plaintiff and KCB as the Defendant. Altam seeks in its plaint two prayers. First that the Court do declare the advertisement of sale by public auction of parcel 1066 registered in the name of Altam is illegal null and void. Second prayer is for an injunction to restrain KCB from advertising or offering for sale selling, transferring or alienating Parcel No. 1066.
42. Altam has filed an interlocutory application dated 10th June 2013. By that application it seeks a temporary injunction pending the determination of this suit to restrain KCB from advertising offering for sale selling transferring or alienating parcel 1066. Altam was granted an interim injunction on 11th June 2013 and this ruling relates to inter partes hearing of that application.
43. Altam through its Director Damena deponed that it purchased parcel 1066 with the structures thereon that were part of a tourist hotel that was formerly known as Coral Beach Hotel. That the said purchase was enabled by the finance made by KCB. The object of purchasing the hotel was to renovate the structures and to operate a three star hotel. At the time that the Charge was created over the land Damena deposed that the property was freely accessible through a road. Damena stated that he is currently a resident in the USA and that he learnt from the advertisement by KCB of their intent to sell Parcel No. 1066 by public auction. Damena denied having received demand or a valid notice to exercise the power of sale from KCB. He stated that for that reason KCB's statutory power of sale had not accrued and that the advertisement of auction violated Altam's right to redeem the charged property.
44. It was further stated that KCB is estopped from advertising the property for sale because it is alleged that KCB made fraudulent representation and or made representation that was reckless not caring whether the representation were true or false. The basis of making that allegation was that
- 
- a. ***Altam Directors are foreign investors whilst KCB is a Kenyan Bank.***
- b. ***KCB obtained due diligence report***
- c. ***KCB after due diligence was carried out found out that there was a problem with access road to parcel 1066 and that there was a dispute in court involving that parcel.***
- d. ***That despite knowing that parcel 1066 had no access KCB released funds to the vendor***
- e. ***That Altam relying on the Bank's representation obtained financial facility from KCB and yet KCB knew that the representation were false and reckless and were meant to induce Altam.***
45. Altam stated that it became aware that parcel 1066 had no access of public road when Zum Zum erected a wall blocking the access it had been using. This according to Altam caused the renovations that was taking place on Parcel No. 1066 to halt and Altam stated that it was unable to commence its business or to undertake any renovation. It stated that KCB stopped releasing funds when this access was blocked. As a consequence of that action Altam stated that it was unable to complete the renovations and to generate income to be able to repay the loan.
46. It will be recalled that there was a settlement in the Case **HCC No. 130 of 2012** which related to the access road over parcel 1066 and other adjoining lands. By that consent a provision was made for there to be a public road.

47.KCB through its senior Manager of credit support responded to Altam's deposition by a replying affidavit dated 28th June 2013. KCB deposed that on obtaining a financial facility Altam was obligated to service it by making payments as stipulated in the charge instrument. That Altam had failed to service the facility and its accounts were in arrears of US Dollars 882,062 and US Dollars 609,000.89 and US Dollars 4,100,215.85 and Kshs. 35,634.60. That due to Altam's failure to service that loan KCB became entitled to exercise its statutory power of sale.

48.To that end KCB issued Altam with three months chargees statutory notice dated 26th October 2012 which was posted to Altam through P.O. Box 82667-80100, MOMBASA. KCB also sent to Altam forty days statutory notice by its letter dated 15th February 2013 through P.O. Box 82667-80100, MOMBASA.

49.On allegation that KCB made fraudulent or reckless representation it was deposed as follows-

**16.That at no time did the Defendant make any false or fraudulent representation to the Plaintiff on any matter relating to the transaction or at all.**

**17.That the Plaintiff is a business enterprise on its own right capable of making and executing its own investment decisions and at no time was the Defendant called upon to advise the Plaintiff on its business ventures. The Plaintiff called upon the Defendant to advance the Plaintiff money in order to execute its investment plans and the role of the Defendant was limited to that of a financier. As such, there has never been an occasion for the Plaintiff to make any fraudulent or false representation to the Plaintiff as alleged or at all.**

**18.That it is evident from the extracts of the minutes of the meetings of the Board of Directors of the Plaintiff annexed hereinabove that the Plaintiff was acting on its own accord. Further, I am aware that in February 2010 the Plaintiff did carry out a feasibility study for their project which outlined the great prospects for the project and highlighted the tremendous competence of the Directors of the Plaintiff and their consultants on the project. I annex hereto and mark JO – 7 a copy of the feasibility report submitted by the Plaintiff to the Defendant.**

**19.That the Defendant has a long standing tradition of carrying out due diligence checks on its customers and documents submitted as security. The same process was undertaken in respect of the Plaintiff, its directorship and the suit property. This is an industry wide practice which is carried out by the bank and conducting due diligence did not amount to any form of representation made to the Plaintiff.**

**20.That it is the duty of the Plaintiff to carry out feasibility studies and due diligence on their business ventures and the allegation that the Plaintiff's directors are foreigners does not bestow any burden on the Defendant to become the business advisers of the Plaintiff.**

**23.That the bank has therefore never represented to the Plaintiff in word or by conduct that the repayment of the debt would be tied to reactivation of the Plaintiff's project or opening of the access road.**

**24.That as deposed by the Plaintiff in the supporting affidavit, the directors of the Plaintiff are foreigners and there is no work or investment taking place at the suit property. It is therefore evident that the Plaintiff have not only abandoned their accounts with the Defendant but the Plaintiffs have equally abandoned the project that was to be implemented on the suit property.**

**25.That it is evident that the Defendant provided the purchase price for the suit property and in addition provided funds for investment in the suit property, which has not happened, and the Defendant is the next loser in the current state of affairs.**

**27. That the interests of justice must serve both the Plaintiff and the Defendant herein. Such interests of justice in this matter will be served by allowing the Bank to realize the security rather than to shield the Plaintiff, a defaulting debtor, from discharging its contractual obligations.**

50.By a supplementary affidavit of Damena dated 5th July 2013 Altam raise an issue about the KCB failure to obtain a forced sale valuation. It is however important to note that this issue was not pleaded in Altam's plaint. This issue will therefore not be given further consideration in this

ruling but only to state that KCB did by its reply to the supplementary affidavit annexed copies of the Valuations carried out on its behalf prior to its schedule exercise power of sale.

51. Altam submitted that it had shown a prima facie case with a probability of success in conformity with the first principle of granting an injunction as set out in **Giella -Vs- Cassman Brown [1973]**. In support of that submission that it had made out a prima facie case Altam relied on the case **Delphis Bank Ltd -Vs- Praful Natwarlal Shavda & 2 Others [2005]e KLR-**

*“First, it is manifestly clear that the 2<sup>nd</sup> Respondent did not reside in Kenya at the material time and the Appellant knew this fact. Secondly, it knew that the 2<sup>nd</sup> Respondent would not receive the Notice. In the circumstances, we think that the Appellant was acting unreasonably in dispatching the Notice well knowing that the 2<sup>nd</sup> Respondent would not receive it. It must follow therefore that it cannot be held that the 2<sup>nd</sup> Respondent shall be deemed to have been served with the Notice under the Act. If it were held to the contrary it would mean that his property would be sold without his knowledge and this would constitute grave injustice to the 2<sup>nd</sup> Respondent. We are certain that the Section was not meant to be used unreasonably and to perpetrate injustice.”*

It also relied on the case of **Elizabeth Wambui Njuguna -Vs- Housing Finance Co. of Kenya Ltd [2006]eKLR** where it relied on the following portion-

*“The other issue under this rubric is whether non service of a valid statutory notice is fatal to the exercise of the statutory power of sale by the chargee or it is an irregularity which is remediable in damages under the provisions of Section 77(3) of R.L.A .... I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor’s equity of redemption.”*

Altam also relied on the case of **Muti -Vs- Kenya Finance Corporation & Another [2004]2EA 182**

*“If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act upon it in a particular way to his damage, the first is estopped from denying that the facts were as represented.”*

52. KCB on its part relied on the case **Musa & Sons Ltd & Another -Vs- First National Finance Bank & Another [2002]IKLR 581** and on the following portion-

*“The law is well settled that where the service is by registration the service is deemed to have been done if sent to the last known address of the mortgagor ...*

*I must accept that once the mortgagee proves that he served the mortgagor as is required by Section 153 of the Registered Land Act, the Court must accept that he has discharged the burden on him in respect of service. To accept otherwise would in my mind be playing in the hands of scrupulous debtors who may very well refuse to collect such registered letters on the knowledge or suspicion that such letters constitute important obstacle in their attempt to avoid facing responsibility over the loans they have with their financiers. It would provide the easiest way out and they would in that way avoid being pinned down to account for such loans. I will not lend a hand to such machinations. I do find that service here was proper and that it would have only been found to have been improper if the appellant had offered acceptable reason as to why he could not claim same letter.”*

53. There are three issues to determine in respect of Notice of Motion dated 10th June 2013. The first is whether Altam was served with a statutory notice of sale. Secondly is whether KCB made fraudulent or reckless representation. Thirdly is whether the statutory notice met the legal standards required under the Land Act 2012.

54. The Director of Altam namely Damena deponed that Altam Group International (K) Ltd was not served with statutory notice of sale because he as the Director did not receive the notice since he has been a residence of USA from 2012. It is on that basis that it was submitted on behalf of Altam that KCB could not exercise its statutory power of sale. As rightly submitted by KCB Altam is a legal entity which is distinct to its Directors. In this regard I refer to the book Gower's Principles of Modern Company Law 6th Edition by Paul L. Davies where it was stated-

***“As already emphasized, the fundamental attribute of corporate personality, from which indeed all the other consequences flow – is that the corporation is a legal entity distinct from its members. Hence it is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. In other words it has legal personality and is often described as an artificial person in contrast with a human being, a natural person.”***

55. It is important to note that Altam has described itself in the plaint as follows-

***“The Plaintiff is a limited liability company duly incorporated and registered pursuant to the provisions of the Companies Act Cap 486.”***

56. It follows that Altam is a company registered in Kenya and it is not a foreign company. Even if it was a foreign company and it intended to do business in Kenya the Companies Act required it to have a local registration under the Act. Since it was registered as a Kenyan Company and is a limited liability Company it has a separate entity to Damena. It also has an address in Kenya which address does not change when some of its directors are out of Kenya. The charge instrument dated 1st March 2011 clearly shows that Altam address is P. O. Box 82667-80100, MOMBASA. That was the very address that KCB used to serve statutory notice of sale. I do therefore reject the submission that Altam was not served with those notices simply because its directors were out of Kenya. It matters not whether KCB knew or did not know that those Directors were out of the country. Clause 33 of the charge instrument provides that service or demand of payment is deemed as served if served upon Altam's Directors, Secretary or if delivered by hand or registered post to the chargor that is Altam.

57. On whether or not service of those notices were served on Altam when served by Registered Post I respond that KCB annexed copies of the three months and forty days notices sent to Altam by registered post. There was also annexed a Certificate of Posting in respect of each one. Once KCB provided copies of those notices and Certificate of Posting the burden of proof shifted to Altam to disapprove service. Section 107(1) of the Evidence Act so provides. In this regard I make reference of the case quoted earlier of **Elizabeth -Vs- Housing Finance** where it was stated thus-

***“With regard to the burden which shifted to the Plaintiff to prove that she did not receive the letter, statutory notice, the Court’s finding gets support from Section 107(1) of the Evidence Act which provides:-***

***‘Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***The Plaintiff ought to have brought evidence to show that the letter sent by Defendant was not received by her and this could have been confirmed by the post master general. The Court’s finding therefore on prima facie basis, on the evidence presented before me at this interlocutory stage, is that that the Plaintiff was served with the statutory notice.”***

Altam's argument on service is therefore rejected.

58. On the second issue whether KCB made false representation to induce Altam to obtain financial facility I respond in the negative. Altam on a prima facie basis not only failed to give particulars of those representations but as stated by KCB there is no evidence that KCB and Altam were co-investors. The relationship between KCB and Altam was one of banker and customer. KCB through its replying affidavit put it very well and it is worth repeating here. KCB stated that Altam **“is a business enterprise on its own right capable of making and executing its own investments decisions ...”** To bolster this statement KCB annexed Altam's own feasibility report of the proposed Coral Palm Beach Hotel. That report was dated February 2010. That was a date before the transfer was effected by Zum Zum. The transfer was dated 1st March 2011. The fact that KCB by its letter dated 22nd September 2010 sought due diligence of a project to be carried out by its lawyers did not amount to representation. KCB was availing a colossal amount of money to the project and the inquiry it posed to its advocates seemed to have been directed and ensuring that the title that was being offered as security by Altam was valid and also at ensuring that Altam was registered with the Registrar of Companies. Even the KCB application seeking to be joined as parties in **Mbsa HCC 130 of 2012** is not indicative of representation on its part. The Directors of Altam themselves had a duty to ensure that they applied skills and care in investing in the hotel industry. In the book ‘*Company Law, 3rd Edition*’ by Chris Shepherd the duties of a Director were stated as thus-

**“If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience and if they act honestly for the benefit of the company they represent they discharge both their equitable as well as their legal duty to the Company.”**

Altam therefore on a prima facie basis has not proved any representation on the part of KCB.

59. The third and last issue relates to the adequacy or otherwise of the statutory notice of sale. Section 90(1)(2) of the Land Act 2012 provides for the remedy of a chargee. That Section because of its importance to my determination of this issue needs to be reproduced in this Ruling-

**“(1) If a charger is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the charger a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**

2. ***The notice required by subsection (1) shall adequately inform the recipient of the following matters-***
  - a. ***the nature and extent of the default by the charger;***
  - b. ***if the default consists of the non-payment of any money due under that charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;***
  - c. ***if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;***
  - d. ***the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this Section in accordance with the procedures provided for in this sub-part; and***
  - e. ***the right of the charger in respect of certain remedies to apply to the Court for relief against those remedies.”***

As rightly argued by Altam's learned Counsel for a three months notice to be valid it ought to follow

to the letter the provisions of the above Sections. It bears stating that chargees need to make a shift from the statutory notice they have in the past served and rewrite those notices so that they inform the chargor of his rights as stated in Subsection (2) (a) to (e). Most importantly the statutory notice will require to inform the chargor the extent of default and the amount that needs to be paid to rectify the default. It will be no longer satisfactory to demand the whole outstanding amount in the chargors account the moment the chargor defaults. In the case of the statutory notice served by KCB upon Altam there was no compliance with that Section and to that extent I find that the notice is inadequate and it fails to satisfy the law. The failure to satisfy the law is the only shortcoming that I find in the statutory notices. It is for that reason that I am very persuaded by the holding in the case of **Patrick Maguta Mwangi & Another -Vs- Consolidated Bank Ltd [2012]eKLR**. In that case Justice Azangalala (as he then was) having found the statutory notice wanting had this to say-

***“There is however, no doubt that the Defendants are owed a large sum of money and the only basis of granting a temporary injunction is the want of service of the statutory notice of sale. If that impediment is removed, the Defendant’s/Statutory power of sale will arise and will become exercisable. In the circumstances, I allow the application dated 5<sup>th</sup> July, 2012 to a limited extent. The injunction sought to restrain the defendant from selling the charge property is granted not until the suit is heard and determined but until the Defendant serves the Plaintiffs with the requisite statutory notice of sale. The Plaintiffs may use the period of the notice to present to the Defendant prospective purchasers of the suit property should they fail to redeem the charge before the expiry of the period of the notice to be served.”***

I too will order KCB to serve fresh statutory notice if it wishes to realize its security.

60. In the end, the orders of the Court are as follows-

- 1. In Mbsa HCC 130 of 2012 the Notice of Motion dated 18th March 2013 and dated 13th June 2013 are hereby dismissed with no orders as to costs.***
- 2. In respect of Notice of Motion dated 20th June 2013 in Mbsa High Court Commercial Case No. 70 of 2013 a limited injunction is allowed restraining Kenya Commercial Bank Limited from realizing its security of Parcel No. 1066 if the realization is made under the statutory notices served on Altam Group International (K) Ltd dated 26th October 2012 and 15th February 2013. For the avoidance of doubt Kenya Commercial Bank Ltd may serve other fresh statutory notices of sale which comply with the law and thereafter may proceed to exercise its statutory power of sale of parcel MN/1/1066. There shall be no order as to costs in respect to Notice of Motion dated 10th June 2013 since both parties have partially succeeded.***

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of August, 2013.**

**MARY KASANGO**

**JUDGE**