REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1965 of 1991

NYANJA H OLDINGS LTD ....PLAINTIFF

VERSUS

CITY FINANCE BANK LTD ....DEFENDANT

RULING

From the record, the proceedings herein were initiated by the plaintiffs moving to court and filing this suit against the defendant vide a plaint dated 24th April 1991. Scouting through the plaint, reveals that the suit property subject of these proceedings was subject of a mortgage in favour of the defendant. The said mortgage is dated 8th December 1988. The mortgage covered both the land and the buildings on properly known as LR No. 7583/1 and LR No. 209/4796/3. The amount of the mortgage is indicated to have been Kshs.8,000,000.00 and Kshs.3,000,000.00 respectively.

During the subsistence of the said mortgage, the bank, moved to realize the security by issuing a statutory notice as well as advertising the property for sale. The plaintiffs disputed the accounts, the statutory notice as well as the advertisement for sale which facts prompted them to move to court and file the current proceedings. It is on record that the plaint was accompanied by an interim application for an interim application. The history of what became of the said application has been set out on the ruling of Hon. Justice Fred A. Ochieng delivered on 30th day of May 2006. At line 6 from the top on page 3 of the said ruling the learned judge observed thus:-

"*Having perused the record of the proceedings I was only able to confirm from the hand written notes of the Honourable Judge that the injunction which was granted on 1st February 1999 was only to remain in force until 5th February 1999, when the substantive application was scheduled to be heard.*

From the said court record, I also noted that on 5th February 1999, the court extended the interim orders up to 16th March 1999 when the trial of the suit was set to commence. In my view if the court had already granted an injunction which was to remain in force until the case was heard and determined, it would not have had to extend the orders on 5th February 1999.

The fact that on the following dates, the court expressly ordered that the status quo be maintained, upto the next date when the case was scheduled to come up in court further fortifies my belief that on 1st February 1999, the Hon. Onyango Otieno J, did not give an injunction that was to remain in force

pending the trial: 10th July 2000, 14th July 2000, 8th July 2000, 18th October 2000, 29th January 20001, and 15th February 2001."

However it would appear that the parties to this action did continue to treat the matter as if the interim injunction subsisted upto 12th October 2004. I say so because on that date the defendants advocate Mr. James Singh applied to the court for the injunction to be lifted. (At page 5 line 1 from the top) … in the mean time, Mr. Singh offered his undertaking "*not to do anything until the next hearing*". His reason for seeking to have the injunction lifted was that it would result in a "*seriousness of purpose*".

On the same page 5 line 7 from the bottom the learned Judge noted Kasango J. thus "*the court does hereby discharge the injunction granted herein … but the court does hereby note Mr. Singh's undertaking to this court that the defendant will not proceed with any sale until the next hearing date of this matter. This case is fixed for hearing on 29th and 30th November 2004*".

At page 7 line 3 from the top the learned Judge went on to state:-

"*On my part, but without making a definite finding on the issue, I am more inclined to believe that the learned Judge discharged the injunction because she felt that the plaintiffs did not deserve it. Why do I say so? It is because of the other orders which the court gave in particular the requirement that the plaintiffs should pay to the defendant getting up fees, prior to 29th November 2004, when the trial was scheduled to commence to my mind such an order connotes some element of "punishment" being meted out to the plaintiffs, and that could only be indicative of displeasure with the conduct of the plaintiffs in causing the trial adjourned.*

... it is note worthy that the undertaking by the defendants' advocate was only to remain in force until the next hearing date which was 29th November 2004. On that date the court ordered that the status quo be maintained until further orders of this court. That order was made by consent of the parties".

On page 8 of the said ruling the learned judge went on to note that status quo was ordered to be maintained on the 5th October 2005, 3rd November 2005. On 15th December 2005 the defence lawyer gave his undertaking not to sell the property, which status quo was to remain in force till 20th January 2006.

The concluding remarks of the learned judge are found at page 15, line 8 from the bottom up to page 16 end and these are:-

"*In any event as I stated earlier in this ruling, as at 10th December 2004 there was actually no injunction order in force. The only injunction order, which had been issued on 1st February 1999, had only been extended to 16th march 1999. Thereafter the court either ordered that the status quo be maintained or the defendants advocate gave an undertaking not to sell the suit property. In effect even if the order made on 10th December 2004 were to be reviewed, varied or set aside, that alone would not reinstate the injunction. For all those reasons I find no merit in the plaintiffs' application. Accordingly it is hereby dismissed.*

However not withstanding the said dismissal, and without any fear of contradiction, I find that there is need to safeguard the suit property from sale. If the property were to be sold now whilst the suit is scheduled to go to hearing with effect from 30th May 2006 that would defeat the ends of justice. But on the other hand I know that it is practically impossible for the property to be sold between now and the date of the trial. Nonetheless, I do symbolically order that pending the commencement of the trial on 30th May 2006 the status quo in relation to the property is to be maintained.

Dated and delivered at Nairobi this 30th day of May 2006".

It is against the foregoing background information that the plaintiff/applicant has once again approached

the seat of justice vide a chamber summon brought under Section 3 A (of the Civil Procedure Act) the inherent powers of the court, order 1 rules 3, 7, 10 (1), (2), (4) and order II rules 1 (3) 2 (1), (2), (3) and order VIA Rules 3 (1) 5 (1) 8 and order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 52 of the Transfer of Property Act Laws of Kenya and any other enabling provisions of the law.

The application seeks a total of 8 prayers:-

(1) That service of this application in relation to the prayers for interim injunctive orders herein be dispensed with in the first instance.

(2) The plaintiff be granted leave to amend the plaint herein and join Messers REDMARS Holdings Ltd as second defendant (or such other defendant as maybe suitable and the amended plaint to reflect such other amendments as maybe found suitable as concerns the new related cause of action and the additional particulars.

(3) The defendant City Finance Bank Ltd together with REDMARS Holdings Limited by itself, themselves, or their servants or agents, or advocates or auctioneers, employees or anyone of them taking title or authority or instructions from them or otherwise so described be restrained by an injunction and or other here of described orders until this suit is fully heard and determined or further orders of this Honourable court from interfering, alienating by way of sale, leasing, letting, advertising, subdividing, mortgaging, charging, demolishing, entering, assuming possession, or taking possession or evicting the plaintiffs and/or family members or others taking title from them from the suit property known as LR No. 209/4796/3 and LR No. 7583/1 situated in Karen within the city of Nairobi.

(4) The purported sale and/or transfer of the said aforesaid property and more particularly the transfer or conveyance dated 21/8/2007 and as entry no. 18 on 30/8.2007 of property LR No. 75/83/1 be and is hereby nullified, set aside and/or, suspended pending the hearing and determination of this suit and/or proceedings challenging the said sale and seeking to set the sale and transfer aside.

(5) The defendants including representatives and or officers of Messers Redmars Holdings Ltd whether by themselves or servants, agents, employees or advocates or auctioneers or any one of them or otherwise be restrained by injunction until this suit is heard and determined or further orders of this Honourable court from selling , alienating, and/or if sold which is disputed and under challenged herein from further alienation, advertisements, offering for sale, taking possession, charging, mortgaging completing any sale, evicting the plaintiffs family members or selling by private treaty or public auction, or otherwise howsoever of all those parcels of land/properties known as 7583/1 and 209/4796/3 situated in Karen, within the city of Nairobi.

(6) All further registration in the ownership, leasing, sub leasing, sub dividing allotment user, occupation or possession or in any kind of right title or interest in all those parcels of land known as LR No. 7583/1 and LR No. 209/4796/3 situated in Nairobi within any land registry, Government Department and all other registries be and is prohibited until further orders of this Honourable court.

(7) That pending the hearing of this application inter partes an interim order of orders in terms of prayers 1, 2, 3, 4 herein above be made and be served on the defendants REDMARS Holdings and the Registrar of Titles to ensure that the orders that may be made herein are not rendered nugatory.

(8) The costs of this application be costs in the cause.

The grounds in support are set out in the body of the application, supporting affidavit, written skeleton arguments and oral submissions in court as well as case law. The major ones are that:-

(1). Prayers 1, 3, 6 and 7 were granted at an interlocutory stage where as prayers 2, 4, 5 and 8 await inter partes determination.

(2). That the suit was filed way back in 1991 but has not been determined to date because it has been plagued by not only the crowded court diaries but other factors such as the lead counsel seized of the matters becoming indisposed and eventually died, one judge seized of the matter was elevated to the court of appeal, the second judge seized of the matter was transferred outside Nairobi and since then the matter has been pending direction by the Chief Justice as to whether the file is to be transferred to the said judge to complete the trial or to be taken over by another judge.

(3). That the defendant City Finance Bank Ltd and its advocates have purported to sell the suit property despite them having knowledge that the plaintiff had always enjoyed injunctive orders which had always been given and or extended culminating with the orders of 30th June 2006.

(4). That there is an alleged or purported sale and transfer to a Messers REDMARS Holdings ltd by a private treaty or secretively sourced and negotiated sale that is fraudulent, illegal, irregular and in breach of the mandatory and relevant provisions of the law. They contend the said purported sale is contrary to public policy, an under sale that smacks of dishonesty, collusion or and conspiracy to defeat the interests of justice. The sale is alleged to have been for Kshs.60,000,000.00 where as its market value is Kshs.200,000,000.00.

(ii) the said purported sale has ignored the fact that the property is a matrimonial home.

(iii) The suit property is subject of these proceedings and by allowing the sale to go through the suit will have been compromised. And the defendants counterclaim would have been determined even before adduction of evidence on the same.

(iv) They also contend that the defendants' power of sale had not crystallized and was therefore not exercisable.

(v) They contend that the sale was as a result of dishonest, collusion and conspiracy on those involved as it is evidenced by the fact that the transaction of registration was completed within 7 days. It was not advertised to invite competitive bids or prices for it, it was sold with the knowledge that there is a pending suit over it.

(5). They contend that in view of what has been stated in no. 4 above the said purported sale is a pretence and a façade which can not be protected by law, the same is malicious and it is intended to circumvent the course of justice herein.

(ii) the same was conducted in breach of the rules of natural justice.

(iii) The plaintiff risk suffering of substantial loss.

The defendant respondent has opposed the application on the grounds set out in the replying affidavit, written skeleton arguments, annextures and case law as well. The major ones are as follows:-

(i) That the relationship between the plaintiffs and the defendant is that of a client banker whereby the plaintiffs who were the customers of the defendant pledged several properties among them the suit properties subject of these proceedings as security for advancement of various loans.

(ii) The said plaintiffs defaulted in the repayment of the loans and when the defendant moved to realize the securities is when the plaintiffs moved to court and filed the current suit.

(iii) They plaintiffs filed an application for an injunction along side it which was prosecuted and granted to them.

(iv) They plaintiffs failed to prosecute the suit and in 1997 Kuloba J. (as he then was) discharged the

injunction prompting the plaintiffs to move to the court of appeal vide civil appeal number 306 of 1998 Nyanja Holdings and others versus City Finance Ltd. which appeal was allegedly dismissed by the court of appeal on 4th December 1998.

2. It is their stand that throughout these proceedings since their initiation, the plaintiffs conduct has always been to frustrate the sale of the securities pledged to the defendant by filing applications to restrain the sale after the dismissal of the court of appeal of their appeal against the order discharging the injunction made by Kuloba J. These applications are those that were filed on 25th January 1999, 6th July 2000, and 21st March 2006 annexture EK 1,2,2, 3

(ii) In the said numerous applications the plaintiffs have been obtaining exparte restraint orders on the false information to court that there are restraining orders which are being disobeyed.

(iii) The insistence on the plaintiffs part that there were orders which were being disobeyed led justice Ochieng to revisit the matter in the application presented by the plaintiffs on 21st March 2006, and in the resultant ruling of 30th May 2006 Justice Ochieng ruled that there were no such orders being enjoyed by the plaintiffs save for status quo orders which were not extended beyond 30th May 2006.

(iv) Since 30th May 2006 there have been no restraining orders in place and so the defendant was entitled to move in the manner he did to realize the security.

On case law and legal principles the plaintiffs counsel has relied on Section 52 of the Transfer of Property Act, Group 8 revised 1962. The section provides "(1) during the active prosecution. In any court having authority in British India, or established beyond the limits of British India by the Governor-General in council, of a contentious suit or proceedings 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 there in except under the authority of the court and or such terms as it may impose.

The celebrated case of **GIELLA VERSUS CASSMAN BROWN & CO. LTD [1973] EA 358** which laid down the cardinal principles governing the granting of injunctive reliefs. An applicant qualifies for the grant of such a relief if:-

(a) he has shown a prima facie case with a probability of success.

(b) He has shown that is not granted, he will suffer irreparable injury which cannot be compensated for by way of damages.

(c) When the court is in doubt, it will decide the application on the balance of convenience.

The case of **MARGARET NJERI MUIRURI SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH MUIRURI (DECEASED) VERSUS BANK OF BARODA (KENYA) LTD AND WILLIAM MUTHEE MUTHAMI NAIROBI HIGH COURT MILIMANI COMMERCIAL COURT CASE NUMBER 1857 OF 2000,** a high court decision by L. Njagi on the 30th November 2005. The brief facts of the case are that the applicant therein sought orders from the court to the effect that the registrar of Titles be directed to cancel the conveyance made between the first and second defendants dated 12th April 2002 in respect of LR No. 36/IV/14 (20A) registered in Government Lands Registry on 16th April 2002 and that the said registrar be directed to reinstate the position on the register in respect of the said parcel of land to the state it was in immediately before the 16th April 2002 and before the registration of the above conveyance to the second defendant.

(2) That the second defendants' sale agreement entered into with the first defendant dated 29th October, 2001 be preserved for completion.

The grounds advanced in support of the said application were that:-

§ *The conveyance dated 12th April 2002 and registered on16th April 2002 was in contravention of the court of appeal order made on 5th December 2001.*

§ *That for the quick determination of this case, it is vitally important that, that conveyance is canceled.*

§ *That the second defendant is not prejudiced at all in that the contract of sale dated 29th October 2001 is to be preserved for completion.*

§ *That the case will be heard expeditiously for the benefit of all the parties.*

At page 3 of the ruling line 4 from the bottom is found the argument of the second defendant which is to the effect that:-

§ *The application by the 1st defendant amounts to an admission by the bank that it did not have the authority to sell the subject properly.*

§ *Its statutory power of sale had not arisen.*

§ *The sale and transfer were illegal.*

§ *It duped the second defendant in to believing that it had the power to sell the property contrary to paragraphs 2, 3 and 4 of the agreement for sale.*

§ *Since the first defendant failed to give vacant possession he must suffer the consequences and pay damages to the second defendant.*

The replies of the applicants counsel are found at page 8 of the ruling line 8 from the bottom and these are:-

§ *Nowhere did the first defendant admit that it had no authority to sell.*

§ *The irregularity came after 5th December 2001 but not before because the injunction was issued on that day.*

§ *Otherwise the right to sell had been there, but he right to transfer was stopped by the court of appeal.*

At page 9 of the said ruling line 8 from the top the learned judge observed "the court shares Murugaras as sentiments that this case be heard so that it can be determined in a composite manner among all the parties. That goal and objective will not be achieved expeditiously by piecemeal applications. It does not pay to dismember a suit and then make each limb the subject matter of an application while the main suit remains un attended".

At page 10 line 7 from the top the learned judge observed thus "*on 5th April, 2002, while the hearing and determination of this case was still pending as it pends even today, and without any further Order of the Court of Appeal the second defendant paid the final installment of the purchase price in terms of the agreement after sale and the conveyance, duly signed together with all completion documents was handed over to him. The conveyance document was dated 12th April 200s and registered on 16th April, 2002. This was a good four months after the Court order was made restraining the first defendant from*

disposing the suit property. Against that background the transfer of the property by the first defendant to the second defendant was effected in flagrant disobedience of a valid order of the highest court in this land and therefore in contemptuous circumstances. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.

Consequent thereto the learned judge made the following orders.

(1) *The Registrar of Titles was directed to cancel the conveyance made between the first and second defendants dated 12th April, 2002 in respect of LR. No.36/IV/14 (20A) registered in the government lands Registry in volume N55 Folio 214/23 file 459 on 16th April 2002.*

(2) *To reinstate the position on the register in respect of LR. No. 36/IV/14(20a) to the state it was in immediately before 16th April, 2002 and before the registration of the above conveyance to the second defendant..*

The case of **PATRICK KARIU KI MUIRURI AND 2 OTHERS VERSUS NIC BANK LTD NAIROBI, HCCC MILIMANI COMMERCIAL COURT CASE NUMBER 187 OF 2004** in which the applicant sought an injunctive relief, seeking to restrain the defendant from executing a transfer as chargee in terms of the purported sale by public auction October 2005 pending the hearing and determination of the application and secondly that the court do set aside the said sale of land parcel number Kajiado/O/ChORO-ONYORE/4209.

At page 3 of the said ruling line 5from the top, it is noted that the plaintiffs argument was to the effect that, the defendants action was wrongful and had gone against the basic principle that once the parties had submitted themselves to the jurisdiction of the Court sale would not proceed and an act contrary to that would be contempto us and disrespectful to the court.

The defence on the other hand contended that:

§ Statutory notices and notifications of sale were served on the plaintiff.

§ That a dispute of amount was not sufficient reason for granting an injunction.

§ That such application for an injunction was an abuse of the Court process since the plaintiff had admitted owing some money, and since the Plaintiff had defaulted in payment, the defendant was entitled to exercise its rights under the charge to sell the property.

After due consideration of the rival arguments, the learned judge ruled at page 4 of the ruling line 10 "*that Section (78 R.L.A.) requires that such notice be served addressed and or copied to District Commissioner. Section 77 RLA provides in part" A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor ….".* On that basis the learned judge ruled thus "*It is clear that the chargee has to pay regard to the interest of the chargor in exercising, its powers of sale can it be said that the chargee did so in this matter; undoubtedly to. The defendant led the plaintiff up the garden path in adjourning hearing, to 12th October, knowing very well that sale was due on that day. In those circumstances I find that the law cannot, particularly Section 77RLA, allow litigant parties pending that litigation the right to sell the charge property while all along leading the plaintiff to believe that on a subsequent date there will still be property which is capable of being litigated upon. I find that the Plaintiffs application is merited and therefore hesitate not in granting the following orders:-*

(1) *That the sale by public auction on 12th October 2005 of parcel no. Kajiado/01/Choronyove/4209 is hereby set aside.*

(2) *The costs of the application dated 13th October 2005 shall be in the cause.*

(3) *That the order of inhibition granted hereof on 13th October is extended until interpartes hearing of the notice of motion dated 9th October 2005.*

Dated and delivered this 30th November 2005".

The defendants on the other hand relied on case law. Among them are the following:-

The case of Chal Limited and Others versus Trust Bank Ltd and another [1998] LLR 4409 (HCK) Case number 698/96).

On an application for an injunction Ole Keiwua J. as he then was (now JA) at page 2 of the ruling quoted Mulla on the Transfer of Property Act Sixth Edition page 501 thus "*An injunction will not issue restraining the mortgagee from exercising his power of sale because the amount is in dispute. The law in England is that the morgagee cannot be restrained from exercising his power of sale by the mortgagor filing suit for redemption. But he will be restrained if the mortgagor pays the amount in court. … a madras* ***CASE RAMAKRISHNA VERSUS OFFICIAL ASSIGNS*** *[1992] 45 Mad 774, decided under the Transfer of Property Act holds that a power of sale is not subject to the rule of lis pendens enacted in Section 52. The court said that the mortgagor who has given an express power of sale cannot by starting a suit, perhaps a perfectly hopeless suit, for redemption derogate from that which he has in express terms conferred upon the morgagee by instrument namely, a power of sale, and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties. A mortgagor however may obtain an injunction to restrain a sale if the mortgagee is acting in a fraudulent and improper manner contrary to the terms of the mortgage deed*".

At page 3 of the said ruling, the learned Judge went on to quote with approval from Halisburys Laws of England Fourth Edition Volume 32, paragraph 725 thus "the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortagor has began redemption action or because mortgagor objects to the manor in which the save is being arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is the amount which the mortgage claims to be due to him unless on terms of the mortgage the claim is excessive.

On the same page 3 quoted Kwach JA (a he then was) in the case of **JC LUVUNA AND OTHERS VERSUS CIVIL SERVANTS HOU SING COMPANY LTD CIVIL APPEAL NUMBER 14 OF 1995** where the holding is to the effect that the law is that "*a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to amount due under the mortgage.*

The case of **KENYA COMMERCIAL FINANCE CO LTD VERSUS AFRAHA EDUCATION SOCIETY [2001] 1 E.A. 86** where on an appeal against the grant of an injunctive relief, the Court of Appeal after due consideration of the facts held inter alia that "*the sequence of steps to be followed in the enquiry into whether an interlocutory injunction is to issue or not is:-*

(i) *whether the applicant has laid out a prima facie case with a probability of success.*

(ii) *Whether the applicant might suffer irreparable injury if the injunction is not granted and*

(iii) *(if there is doubt) whether the balance of convenience favours the applicant.*

The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the Court is in doubt, the 3rd one can be addressed.

The case of **ELANTRA PROPERTIES LTD VERSUS PARAMOUNT UNIVERSITY BANK LTD**

AND 5 OTHERS NAIROBI MILIMANI COMEMRCIAL COURT CASE NUMBER 707 OF 2006.

In this case F. Azangalala J faced with an application for an injunctive relief had the following facts to take into consideration running from line 9 from the bottom of page 3 to line 14 from the bottom of page 4. They bore similarity to the facts being inquired into here in and so there is no harm in setting them out herein thus:-

"*From the affidavit evidence it is clear to me that the indebtedness of the principal borrower as at the time of the statutory notice was served was obvious, indeed the principal borrower, indebtedness to the 1st defendant was not in my view seriously challenged by the Plaintiff. In the event the 1st defendant was entitled to serve the statutory notice. But was it entitled to sell the suit property by private treaty? The short answer is that the said Act permits such a sale. Section 69(1) of the said Act reads* "69 (1) A mortgagee or any person acting on his behalf where the mortgage is English mortgage to which this Section applies, shall by virtue of this Act and without the intervention of the Court have power when the mortgage money has become due subject to the provisions of this Section, to sell or to concur with any other person in selling the mortgaged property or any part thereof either subject to prior encumbrances or not and either together or in lots by public auction or by private treaty subject to such conditions respecting title or evidence of title or other matter as the mortgage then was fit with power to vary any contract for sale and to buy in at an auction or to rescind any contract for sale and to resell without being answerable for any loss occasioned thereby .

The first defendant admits that it indeed sold the suit property by private treaty as in its view that mode attracted the best price on the market to buttress that argument, the 1st defendant has exhibited valuation reports of all the first property. The reports indicate the open market value of each property to be Kshs.15,000.000.00 and the forced sale value as Kshs.10,000.000.00. The properties were in fact sold at the market value given in the valuation reports. ... I have detected no evidence of any attempt on the part of the valuer to misrepresent the items of the suit properties ...."

At the same page 4 line 8 from the bottom the learned judge set out paragraph 9 containing the main complaint against the sale subject of the inquiry therein. It reads

"*9. That there exists considerable legitimate concerns that the said purported sale and transfers were not done at arms length between the 1st defendant and the 2nd and 3rd, 4th and 5th defendants. Further the same is an exercise intended to blatantly defeat the ends of justice to the prejudice of the plaintiff*".

After due consideration of the aforesaid matters the learned judge made findings found at page 5 of the ruling at line 1 to line 6 from the top and then line 8 from the bottom to end of the ruling on page 6 as follows:-

"*No fraud is alleged in both the plaint and the affidavits filed by the plaintiff. No particulars of the suggested impropriety are furnished . ... on my part I have detected no blame worthiness on the 2nd to the 5th defendants from the affidavit evidence filed. The 2nd to 5th defendants are therefore protected by Section 69 B of the said Act.*

*... I have found on a prima facie basis that the plaintiff's right of redemption was extinguished upon the coming into existence of a binding contract for sale of the suit properties. (See **JAMES AMBERE OCKOTCH VERSUS EAST AFRICAN BUILDING SOCIEITY & OTHERS*** **CIVIL APPEAL NO. 202 of l996 (UR)** See also **GEORGE GIKUBU MBUTHIA VERSUS JIMBA CREDIT FINANCE CORPORATION AND ANOTHER, CIVIL APPEAL NO. 111 of 1996**. In that case MASIME AG. JA. (as he then was) observed as follows:- "*In this regard I respectively agree with Platt and Apaloo JJA that the effect of this long line of English authorities and decisions of this court in respect of mortgagee under the Indian Transfer Act is that the "equity of redemption extinguished the moment a valid contract is concluded in the exercise of the statutory power of sale".*

The case of **DANIEL KAMAU MUGAMBI VERSUS HOUSING FINANCE COMPANY OF**

KENYA LTD NAIROBI MILIMANI COMMERCIAL COURT CASE NO. 261 OF 2006. The Plaintiff sought an injunction relief on the basis that he had repaid the principal sum and had it not been that the defendant was charging interest outside the ambit of section 44 of the Banking Act he would not have been still owing money to the defendant; Fred Ochieng J. after making due consideration of the rival submissions made observations as follows. At page 20 of the ruling line 8 from the bottom stated thus

"*First, the charge instrument stipulates the rate of interest would be 19%. However it was also expressly provided that the rate of interest could be either increased or reduced "as the chargee shall determine" Thus not only was the rate of interest variable, but the charge instrument expressly stipulated that "The decision of the chargee in this behalf shall not be questioned on any account whatsoever".*

The learned judge then went on to review case law on alleged illegal interest and penalty discussed between pages 11-18 of the ruling then ruled at page 17 inter alia that "*until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the plaintiff to make presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account has been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it's only when the court makes an adjudication on the issues that the borrower would know whether or not his beliefs had gained judicial recognition".*

On the submission that the plaintiffs have come to court with unclean hands based on an allegation of lack of disclosure of material facts leading to the court being misled to grant an exparte injunctive relief, counsel relied on a text on commercial litigation pre-emptive remedies, 3rd Edition at page 63 line 4 from the top on failure to fully disclose material facts. It is stated that the principle of suppression of material fact may also taint the hands of an applicant for equitable relief. (See R. V KENSINGTON INCOME TAX COMMISSIONERS, EXP PRINCESS EDMOND DE POLIGNAC [1917] 1K.B 486 per Warrington LJ, in which it was held. "*It is perfectly well settled that a person who makes an exparte application to the court – that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure then he can not obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him*".

On the same page there is also quoted the principle from the case of Beese versus wood House [1970] IWLR 586 Page 590 which states "*the second point is that it is fundamental to any exparte application for an injunction that the party applying for it should show the utmost good faith in making the application and that the doctrine of uberimae fidei in effect applies.*

The 3rd principle on the same page is from the case of COMMERCIAL BANK VERSUS A [1989] 2 LLOYDS REP 319; failure to disclose can only be excused, if it is not sufficiently grave to cause prejudice to the opposed party. The duty to disclose enjoins the plaintiff to make sufficient enquiries before making his application.

What amounts to a full and frank disclosure is found at page 64. The principle is extracted from the case of National Bank of Sharjah versus Deliboerg. The times December 24, 1992. In order to qualify to be described as such they have to meet the following criteria. "*The material facts at the exparte stage, were those which were necessary to enable the judge to exercise his discretion properly and fairly between the parties, bearing in mind that he had not and that stage, heard the defendants side of the case, and bearing also in mind, the hardship and inconvenience which such an injunction caused. The place to disclose the facts is mostly in the affidavit though a few say documents could be exhibited. It is therefore now trite law that no injunction obtained exparte shall stand if it has been obtained in circumstances in which there was a duty to make the fullest and frankest disclosure".*

In the case of **Lillians S versus Caltex Oil K Ltd [1989] LLR 1653 (CAK)** at page 20 paragraph 3, one of the issues for determination of the court was a challenge to the validity of the applicants affidavit which the respondent alleged that it failed to disclose in detail candidly material facts as a result of which

the court was misled into making an exparte order gravely prejudicial to the appellants which material facts if they had been disclosed, the court would not have made the order for the arrest of the ship.

At page 21 line 1 it is stated that "*it is axiomatic that in exparte proceedings, there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the exparte application even if though facts were such that with full disclosure an order would have been justified*."

At paragraph 2 it is further stated that "in considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure the principles relevant to the issues in these appeals appear to me to include the following:-

(i). *The duty of the applicant is to make a full and fair disclosure of the material facts.*

(ii). *The material facts are those which it is material for the judge to know in dealing with the application was made, materiality is to be decided by the court and not by the assessment of the application or his legal advisor.*

(iii). *The applicant must make proper inquires before making the application. The duty of disclosure therefore applies not only to any additional facts which he would have known if he had made such inquires.*

(iv). *The extend of the inquires which will be held to be proper and therefore necessary must depend on all the circumstance of the case including:-*

(a) *The nature of the case which the applicant is making when he makes the application.*

(b) *The order for which the application is made and the probable effect of the order on the defendant and*

(c) *The degree of legitimate urgency and the time available for the making of the inquires.*

(v). *If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an exparte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.*

(vi). *Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to issue which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent; in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but to decisive by reason of the duty on the application to make all proper inquires and to give careful consideration so the case being presented.*

(vii). *Finally, it is not for every commission that the injunction will be automatically discharged a locus poenitentiaee (chance of repentance) may sometimes be afforded. The court has a discretion not withstanding proof of material non-disclosure which justifies or requires the immediate discharge of the exparte order nevertheless to continue the order or to make another order on terms. … when the whole of the facts, including that of the original non-disclosure are before it (the court) may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed".*

The court of appeal continued at page 2 line from the top thus "*on any exparte application the fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of*

all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances.

The rule that exparte injunction will be discharged if it was obtained without full disclosure has a two fold purpose. It will deprive the wrong doer of an advantage improperly obtained.

………But it also serves as a deterrent to ensure that persons who make exparte application realize that they have this duty of disclosure and of the consequences (which may include a liability in costs, if they fail in that duty. However, this judge made rule can not be allowed to be an instrument of injustice and that is why there must be a discretion in the court to continue the injunction or to grant a fresh injunction in its place not withstanding that there may have been non disclosure when the original exparte injunction was distained.

The court has given due consideration to the nature of the entire proceedings subject of this ruling in the light of the rival arguments presented for and against the application subject of this ruling and considered the same in the light of principle of law gathered from both legal texts and case law referred to the court by either side as set out herein. The court noted that some aspects of the submissions go to the merits of the entire claim and defence and so the Court has to exercise care so that when evaluating the facts to determine whether any of the prayers sought are wanted or not to avoid discussing the merits of the entire claim. This means that where merits of the main suit are intertwined with the merits of the application under review the court will present them solely as evidence of existence of the ingredients for granting of the reliefs sought.

It is on record that Counsel for the Plaintiff at the start of his oral highlights as well as his written skeleton arguments submitted that prayers 1,3,6 and 7 have been dealt with at an interlocutory stage and what remains to be determined are prayers 2,4,5,and 8. These prayers with the exception of prayer 1 need to be revisited and determined alongside other prayers, since in the manner they are framed, they are sought to remain in force until further orders of the Court. This would mean that since they were granted exparte if not ruled upon, in the ruling on the inter parties hearing, it will mean that they will remain in force beyond delivery of the inter parties ruling till when further orders are made on the same.

Prayer 2 of the said application seeks leave of the Court to amend the plaint herein and join Messers REDMARS Holdings Limited as a second defendant or such other defendant as may be suitable and the amended plaint to reflect such other amendments as may be suitable as concerns the new related cause of action and the additional particulars.

By this prayer the plaintiff who already has a plaint on record is simply seeking to introduce fresh particulars into the pleading already on record. All that the plaintiff is required to do to earn the prayer is just for them to comply with the rules on amendments of pleadings. These are Order VII rule 6, 7 Civil Procedure Rules on the content of the plaint and order VIA rule 7 on the mode of amendment. Order 7 rule 6 & 7 read "*6 Every plaint shall state specifically the relief which the Plaintiff claims either singly or in the alternative and it shall not be necessary to ask for costs, interest or general or other relief, which may always be given as the court thinks just, whether or not it could have been asked for could have been granted when the suit was filed and this rule shall also apply to a defence.*

7 where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds they shall be stated as far as may be separately and distinctly".

Order VIA rule 7 Civil Procedure rules on the other hand provides:-

"*7(i) Every pleading and other document amended under this order shall be endorsed with the date of the amendment and either the date of the order allowing amendment or if no order has been made, the number of the rule in pursuance of which the amendment was made.*

(2) All amendments shall be shown by striking out in red ink all deleted words but in such a manner as to leave them legible and by underlining in red ink all added words

(3) Colours other than red shall be used for further amendments to the same document".

Applying these provisions to prayers 2 herein the court finds that the same is bound to fail for the following reasons:-

(1). In normal judicial practice and procedure, of which this court has judicial notice of, the party seeking to amend normally presents to the Court a draft of the pleading intended to be introduced to show the court what new issues are intended to be introduced that were not already catered for in the pleading already on record. The applicant herein has not exhibited such a draft plaint as required by the judicial practice.

(2). As per the rules of pleadings, the plaintiffs were required to state concisely and distinctively, the claim, they intend to raise against the incoming defendant. In the absence of such a statement this court is not in a position to make a determination as to whether the plaintiffs have a valid claim against the intended in coming defendant Red mars holding or not.

(3). By stating that the plaintiff be granted leave to join **M/S Red Mars holdings Ltd** to these proceedings or any other person claiming through them (REDMARS holding Ltd), is evidence that the Plaintiffs have not carried out research to establish from whom they intend to raise additional claims in this matter. They therefore intend to litigate in instalments with the help of the Court a function not bestowed on the court by rules of procedure.

For the reasons given, the Plaintiffs have not earned prayer 2 of their application and the same is disallowed.

*Prayer 3 seeks an injunctive relief against the incumbent defendant **CITY FINANCE BANK LTD** and the proposed incoming defendant RED MARS HOLIDNGS LTD. They are sought to be restrained either by itself (City Finance Bank Limited) themselves or their servants or agents or advocates or auctioneers employees or any one of them taking title or authority instructions from them or otherwise so described be restrained by an injunction and/or other hereof described orders until this suit is fully heard and determined or further orders of this Honourable Court. They are restrained from interfering by way of sale, leasing, letting, advertising, subdivision, mortgaging, charging, demolishing, entering, assuming possession or taking possession or evicting the plaintiffs and or their family members others taking title from them from the suit properties.*

Prayers 5 appear to be flawing directly from prayer 3 and so in this courts, opinion, it is proper to have it twined up with prayer 3 and considered together. Prayer 5 also seeks an injunctive relief's which is directed at the defendants, including representatives and or officers of Messers REDMARS HOLDINGS LTD whether by themselves or servants, agents employees or advocates or auctioneers, or any one of them or otherwise be restrained by injunction until this suit is heard and determined. They are to be restrained from selling, alienating (and/or if so which is disputed and under challenge here in) from further alienating, advertisement, offering for sale, taking possession, charging, mortgaging, completing any selling, evicting the plaintiffs family members or selling by private treaty or public auction or otherwise howsoever of all the said suit properly.

Prayer 3 and 5 being prayers seeking injunctive reliefs all that the applicants need to do is to bring themselves within the principles established by case law for granting the same and the ingredients for the relief set out in order 39 of the Civil Procedure Rules. It is the contention of the applicant's counsel that from the facts presented herein.

(a) They have demonstrated that the orders sought should be granted preserving the suit property in the condition in which it was as at the start of the hearing pending hearing and disposal of the suit.

(b) The defence Counsel was aware of the preservation orders and or status quo which moves to preserve the property pending hearing and determination of the suit and their action of going ahead to purport to sanction the sale should not be allowed to stand.

(c) Any purported sale is contrary to the doctrine of lis pendens and so it should not be allowed to stand.

The Response of the Defendant/Respondent is that the applicant cannot be accorded the said relief because they have come to Court with unclean hands.

(2). The sale has already taken place, which sale was properly conducted and within the law and it has already been effected and so there is nothing to be restrained.

(3). That the doctrine of lis pendens does not apply to these proceedings.

The settled principles of law that this court has to determine whether satisfied or not are:-

(a) Whether the Plaintiff has established a prima facie case with a probability of success.

(b) Whether if the injunctive relief is not granted the applicant will suffer irreparable harm which cannot be compensated for by way of damages.

(c) Or in the alternative although damages, may be adequate compensation, nonetheless circumstances displayed on record militate against an award of damages and instead favour an award of an injunctive relief.

(d) Where the court is in doubt it will decide the matter on a balance of convenient.

(e) Lastly and for purposes of these proceedings only and in addition to the traditional principles on the subject, a determination as to whether the doctrine of lis pendens either applies or it does not apply in the circumstances of this case

As pointed out herein, the ingredients warranting the granting of an injunction are set out in order 39 rule 1(a) Civil Procedure Rules. It reads in part *"39(1) a) where in any suit it is proved by affidavit or otherwise.*

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrong fully sold in execution of a decree or……

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purposes of staying and preventing the wasting, damaging, alienating, sale, removal, or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders".

The ingredients identified by this Court as needing satisfaction by the applicant are as follows:-

(i) There has to be in existence a suit.

(ii) Proof of wrongs complained of in to be done by either an affidavit or otherwise.

(iii) The property sought to be protected must be the properly in dispute in the said suit.

(iv) The wrongs recognized are waste, damage, and alienation.

(v) The wrongs must be as a result of an omissions or commissions by a party to the suit.

(vi) If the complaint is not about wasting, damaging and alienation, then it should be a threat relating to wrongful sale in execution of a decree.

The jurisdiction on the rights of the Court's intervention is limited to granting the restraint order and or any other order solely for the purpose of staying and or preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fitl until the disposal of the suit or until further orders.

It is on record that the reliefs being sought are being directed at the incumbent defendant **CITY FINANCE BANK LTD** and the intended incoming defendant Messers REDMARS Holdings Ltd. It therefore follows that in order for this relief to succeed against them the circumstances displayed herein in so far as they go to pin blame worthiness blame workings on them must satisfy the ingredients identified to be, the ones to be satisfied in accordance with the provisions of order 39 rule (1) (a) of the Civil Procedure Rules. This Court has duly considered the same and proceeds to make the following findings:-

(1). As regards the existence of a suit there is no disputed that HCCC 1965 of 1991 exists as between the Plaintiffs who are applicants and the incumbent defendant City Finance Bank Limited. There is no suit in existence as between the Plaintiffs and the intended incoming defendant namely RED MARS Holdings Ltd. In order for the said REDMARS Holding Ltd to be deemed to be parties in these proceedings there has to be an amendment of the plaint in order to have them included as parties. No such amendment had been effected before the presentation of the claims against them. It is therefore the finding of this Court that a suit is in existence for purpose of consideration of the injunctive reliefs sought herein only in so far as the plaintiffs and the incumbent defendant are concerned. There is no suit in existence in so far as RED MARS Holding Ltd are concerned. Amendment of the suit to include them should have come first and effected before presentation of the application seeking a reliefs from them is presented.

The ingredient on mode of proof of wrongs has been satisfied by virtue of presence of affidavits filed by the applicant written skeleton arguments as well as oral submissions in court and annextures exhibited.

The ingredient as regards the requirement that the property sought to be protected should be the property in dispute in the suit, has been satisfied, in that the property, which made the plaintiffs move to court to seek its protection in l991 is still the same property that is subject of this ruling. Save that in l991 the Plaintiffs sought to prevent the incumbent defendant from exercising its powers of sale. Whereas in the application subject to this ruling the complaint that the said incumbent defendant CITY FINANCE BANK LTD has wrongly exercised, the said disputed power of sale during the pendence of the suit. Which sale has purportedly fructfied in favour of M/S REDMARS Holdings Ltd.

Turning to the issue of satisfaction of the ingredients established by case law on injunctive relief, the first to be dealt with is the one dealing with establishment of a prima facie case with a probability of success. As stated earlier on in support of this the applicant relied on their allegation that no money is owed to the defendant even as at the time they moved to court save disputed illegal penalties and charges.

Case law on the subject both from the superior court as well as the Court of Appeal have now established the guiding principle that a dispute as regards accounts is not sufficient to earn a litigant an injunctive relief (see the case of **DANIEL KAME MUGAMBI VERSUS HOUSING FINANCE COMPANY OF KENYA LDTD MILIMANI COMMERCIAL COURT HCCC NO. 261 OF 2006** decided by Fred Ochieng J. decided on 12th day of July 2006.

Reliance has also been placed on their assertion that there had been injunctive orders in place protecting the property pending the trial. As set out earlier on in this ruling the history of the injunctive

orders is set out in the ruling of justice Fred Ochieng delivered on 30th May 2006 and annexed to the applicants supporting affidavit as annexture ENN 1(b). The history of what become of the injunctive orders granted earlier on herein as observed by the learned judge is already set out in this ruling. It is enough to say that the salient features of the same as hereunder:-

(i) Indeed injunctive orders were granted.

(ii) They were later on discharged

(iii) Thereafter the defence lawyer used to give an undertaking not to dispose of (the property) pending hearing. The last time the undertaking lasted was the date the subject ruling was given on 30th May 2006 on which the trial was to proceed but, the case failed to take off. Thereafter no further undertaking was given leaving the door open for the disposal of the property

After due consideration of this argument the Court finds that there is nothing gathered from the record to show that the defence lawyers undertaking was expected to last till hearing and final determination. For this reason since the undertaking was not a court order there is no way this court can fault the defence lawyer on his about turn. In judicial practice the law only recognizes a court order as the only mode of protection. In a matter such as this, an undertaking which was being given on the basis of the good will of Counsel cannot be sued upon in the absence of legal principle or rule of practice showing that it can be sued upon or enforced.

The next is the argument that the said sale is contrary to the doctrine of lis pendens. The applicants Counsels has relied on Section 52 of the transfer of property Act group 8 (Rev. l962). It reads "*During the Active prosecution in any Court…. …..of a contentious suit or proceedings 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 proceeding 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".*

The ingredients identified by this court to be satisfied are:-

(i) There must be active prosecution in a court.

(ii) Proceedings in the suit must be contentious.

(iii) A right to immovable property must be directly and specifically in question.

(iv) Transfer or otherwise dealing with any of the property 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.

(v) The only exception to the prohibition in dealing with the property subject of the suit is where the same is done under the authority of the Court".

The task of this court is now to determine whether this doctrine is available to the applicant. This court had occasion to explore this doctrine in own ruling delivered on the 4th day of May 2007. In the case of **NAIROBI HCCC NO.870 OF 2003 J.O. OSEKO AND ANOTHER VERSUS DAVID AWORI AND 2 OTHERS**. This is discussed at page 16 to 21. At page 16 this Court quoted with approval from the text of Mulla on the transfer of property Act l982 Ninth Edition Lexis Nexus Butterworth's page 366 paragraph 2. It is stated "*for the purposes of this Section the pendency of a suit or a proceedings shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction and to continue until the suit proceedings has been disposed of f by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained or has become un obtainable by reason of the expiration of any period of Limitation preferred for the*

execution thereof by any law for the time being in force."

At page 367 it is stated that the doctrine "*is intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court in which the dispute on rights or interests in immovable property is pending by private dealings that may remove the subject matter of litigation from the ambit of the power of the court to decide a pending dispute or which may frustrate its decree"*

At page 371 it continues.

"*the broad principle underlying the section is to maintain the status quo un affected by act of any party to the litigation pending its determination and the expression decree or order."*

At page 18 there is a quotation from the case of **BELLAMY VERSUS SABINE, THE ENGLISH REPORTS VOL. XLIV 842**, where it was held inter alia that "*the doctrine of lis pendens operates because the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute so as to prejudice the opposite party."*

This doctrine has been applied in local decisions. In the case of **METHI AND SWAN FARMERS CO-OPERATIVE SOCIETY LTD VERSUS THE CO-OP BANK OF KENYA LTD AND MAKINDI LTD, NIAROIB HCCC 2603/85** S.EO Bosire J as he then was (now JA) at page 8 of the ruling had this to say "*so whether or not to grant injunction S.52 TPA does itself prohibit dealing in property in dispute in civil proceedings. The income from the farm although not directly in dispute must be protected (preserved). It needs to be paid to the party which will be found to be deserving it … The management of LR No. 5991 must continue. he income must be invested to await the outcome of the suit*."

In the case of **GEROGE GIKUBU MBUTHIA VERSUS DORSILA AYUMA SHIRAKU AND 5 OTHERS NAIROBI HCCC 2169 OF 2000** P.J. Ransley J as (he then was) in a judgement delivered on 10th day of February 2006 at page 37, quoted with approval B.B. Mitra Transfer of Property Act, 13th Edition page 239 under the Rubric "*Effect of Transfer pendentelite" which states the following "the words "cannot be transferred so as to affect the rights of any other party thereto." Show that the transfer pendentelite is not ipso facto void, but is only voidable at the option of the party whose interests are affected thereby.*

(See Bennet on lis pendens p. 234). The rule is not that an alienation pendentelite is absolutely void, but that the transfer will not affect the rights of any party thereto under any decree or order that may be made in the suit. In other words, the transfer will be available and valid subject however to the result of the suit."

Ole Keiwua J as he then was (now JA) had occasion to consider the application of the doctrine in the case of **CHAI LIMITED AND OTHERS VERSUS TRUST BANK LIMITED AND ANOTHER [1998] LLR** 4409 (**HCK),** in a ruling delivered on 26th June 1998. At page 2 of the said ruling the learned Judge quoted with approval Mulla on the Transfer of Property Act Sixth Edition page 501 thus:-

"*Restraint on exercise of the power –*

An injunction will not issue restraining the mortgagee from exercising his power of sale because the amount is in dispute. The law in England is that the mortgagee cannot be restrained from exercising his power of sale by the mortgagor filing suit for redemption. But he will be restrained if the mortgagor pays the amount concerned into court.

A MADRAS CASE RAMAKRISHNA VERSUS OFFICIAL ASSIGNEE [1992] 45 MAD 774, DECIDED UNDER THE TRANSFER OF PROPERTY ACT holds that a power of sale is not subject to the rule of lis pendens enacted in Section 52. The court said that the mortgagor who has given an express power of sale cannot by starting a suit – perhaps a perfectly hopeless suit for redemption derogate from that which he has in express terms conferred upon the morgagee by instrument namely, a

power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties ….. A mortgagor however may obtain an injunction to restrain a sale if the mortgagee is acting in a fraudulent and improper manner contrary to the terms of the mortgage deed."

The learned Judge went further and quoted with approval Halisbuys Laws of England Fourth Edition Volume 32 paragraph 725 as follows "*The mortgagee will not be restrained form exercising his power of sale because the amount due is in dispute or because the mortagor has began redemption action or because mortgagor objects to the manner in which the sale is being arranged. He will be restrained however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him unless in terms of the mortgage, the claim is excessive"*.

Further down page 3 the learned judge quoted Kwach JA (as he then was in the case of **LUVUNA AND OTHERS VERSUS CIVIL SERVANTS HOUSING COMPANY LTD CIVIL APPEAL NUMBER 14/1995** that *"I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage"*.

The foregoing survey on the application of the doctrine of lis pendens, as gathered from case law, of decisions emanating from the superior court on the subject as well as the now judicially respected text of Mulla of which this Court has judicial notice, is that the said doctrine of lis pendens is not absolute. The rights and obligations arising from a mortgagor/mortgagee relationship can puncture holes into it of importance are the following:-

(a) It is a shield against any mortgagor/morgagee relationship created while the suit over the subject matter in question is still pending in court.

(b) Any sale which is transacted over the suit property during the pendance of the suit is not automatically void, but it is voidable.

(c) It does not operate to render nonsense the mortgagor/morgagee contract in that any injury suffered by the mortgagor as a result of the sale can be remedied in accordance with remedies available to such an aggrieved party i.e. recovery of damages or value of the property sold.

(d) It does not operate to shield the mortgagor where his only complaint is over a dispute on accounts.

(e) It is a good defence where it can be shown that the mortgagee has acted fraudulently and in disregard of the interests of the mortgagor.

Applying that to the facts herein it is clear that the sale is being attacked on two fronts namely:-

(a) That the defence ignored the Court order which required the property to be preserved pending hearing which has been ousted by the contend of Justice Fred Ochieng ruling (supra) which only gave a reprieve up to the date when the matter was to be heard last and was not extended after the matter was adjourned indefinitely.

The second argument touched on the allegation that the purchase price paid is an under value as the property went for only 60,000.00 when its current market value is over 200,000.00. As submitted by the defence Counsel, the sale price fetched was in line with the value stated in their valuation report and that the plaintiffs had nothing to show that the market price is more than 200,000.000.00. Failure to show the excess value as at the time the applicant came to court does not preclude the plaintiff from asking the court to determine the market value and then recover the loss accordingly.

The foregoing being the case the availability and applicability of the doctrine of lis pendences to the applicant does not operate to puncture holes into the mortgagor, mortgagee contract subject of these proceedings. Which contract's enforcement and or realization of its fruits can only be put on hold by an

injunctive relief in favour of the mortgagor which relief though earlier on given herein, had been discharged. And the good will undertaking on the part of the defence lawyer which had all along operated on the basis of good faith ended when the same was withheld by the giver.

Turning to the ingredient of damages being an adequate remedy, therein no doubt that the properly subject of these proceedings can be valued and paid for in damages should the applicant win ultimately at the end of the trial.

There are however exceptions developed by case law. In the case of **FILM ROVER INTERNATIONAL LTD AND OTHERS VERSUS COMMONFILM SALES LTD [1986] 3 AER 772**, of persuasive authority, the court held inter alia that:

"*in determining whether to grant an interlocutory injunction or not, the question for the court was whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction and later failed at the trial out weighed the injustice that would be caused to the Plaintiff if an injunction was refused and he succeed at the trial.*"

In the case of **ALKMAN VERSUS MICHUKI [1984] KLR 353** it was held inter alia that where the person sought to be injuncted is shown to have acted contrary to law, he ought to be injuncted or restrained as equity does not aid law breakers.

Where as in the case of **WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION [2001] KLR 374** the holding is that it is not a general rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant, this may move a court of equity to hold that one can not hold another citizen rights only at the pain of damages.

Applying these principles to the facts herein the findings of the court are that:-

(i) When the injustice that would be caused to the defendant if the plaintiff were to be given the injunction sought and the injustice likely to be caused to the plaintiff if the injunction were to be denied, and the plaintiff succeeded, that to be caused to the defendant in the circumstances of this case would be greater than that to be cause to the plaintiff because he defendant will be exposed to a claim of damages from REDMARS Holdings Ltd who are the current transferee of the said property. Whereas the Plaintiff is not under any threat of payment of damages to any 3rd party.

(ii) Should the defendant loose the claim at the end of the trial there are no damages recoverable by them from the Plaintiff save that which was lawfully and rightfully due to them under the mortgage contract. Whereas the plaintiff has a corresponding right to claim damages equivalent to the market value of the property less that which may be lawfully owed to the defendant.

As for denial or refusal to withhold an injunctive relief because the opponent is a law breaker, or has acted in a high handed and oppressive manner, these are not attributable to the defendant herein because:-

(i) The move to dispose off the suit property pending hearing of the suit cannot be faulted at this point in time because they stem from the defendants right under the mortgage contract, which legal principles of law, say cannot be withheld merely because there is a dispute on accounts.

(ii) There was no injunctive relief in force and nothing prevented him from moving so after he felt that he no longer needed to continue giving the undertaking not to sell the property pending trial.

(iii) When the matter failed to take off on 30th may 2006 the Plaintiff did not negotiate for a further

undertaking not to sell the property either from the defence lawyer or from the Court.

As for the balance of convenience ingredient, the prime consideration is the position of the parties in proximity to the property sought to be protected. From the Plaintiffs' stand view there is an admitted mortgage contract between him and the defendant annexture SK5. The current proceedings were sparked off by the defendants move to exercise its rights under the said charge. It is on record the temporary injunctive relief that had given reprieve to the Plaintiff was discharged. The defence lawyers undertaking not to sell which had also been given in good faith was withheld. This paved the way for the disposal of the property to a 3rd party It is on record from the Plaintiffs deponement and exhibits annexture EMN2, that transfer has been swiftly effected in favour of REDMARS Holdings Ltd. Though the Plaintiff is attacking both the sale and transfer the position in law is that the transfer stands until rescinded voluntarily or through a court order. As long as that transfer stands the defendant has divested itself of the title to the property which is now vested in a 3rd party. It therefore follows that the only balance of convenience that can exist or flow from the defendant to the Plaintiff is that which will arise after the sale and transfer are faulted. But as regards the preservation of the title and any activities that may flow from it to the detriment of the plaintiff, that balance of convenience can only flow from the 3rd party M/S RED MARS Holdings Ltd who have not yet been joined to these proceedings. The net result of the above assessment on the ingredient of the balance of convenience in that it does not tilt in favour of the Plaintiff.

Prayers 4 and 6 which aim at faulting the sale and transfer are inter related and will be dealt with together prayer 4 seeks the nullification, setting aside and or suspending the transfer and conveyance dated 21.8.2007 and entry No.18 on 30.8.2007.

Prayers 6 on the other hand moves to prevent further registration of charges, mortgage or change of registration in the ownership leasing, subleasing, subdividing, allotment user, occupation or in any kind of the suit titles.

The court was asked to be persuaded by the stand taken by L. Njagi in the case of Margaret Njeri Muiruri suing as the administrator of **the ESTATE OF JOSEPH MUIRURI VERSUS BANK OF BARODA KENYA LTD AND ANTOEHR NAIROBI MILIMANI COMMERCIAL COURT HCC NO. 1857 of 2000** decided on 26th January 2004. This court has already set out the facts and holding earlier on in this ruling. A reading of it reveals that it is a ruling on an interlocutory application. The reasons for the courts intervention to halt a sale and transfer of property subject of a pending suit are set out by L. Njagi J. as from pages 9-11 of the ruling. At page 10 line 2 from the top the learned judge made observation that "*on 5th December, 2001, the Court of Appeal issued an injunction restraining the first defendant either by itself, its agents, assigns or otherwise from disposing the suit property pending the hearing and determination of this or case until further order of that Court*".

On the same page 10 line 5 from the bottom the learned judge continued"

"*Against that background the transfer of the property by the first defendant to the second defendant was effected in flagrant disobedience of a valid order of the highest court in this land and therefore in contemptuous circumstances. It is the plain and unqualified obligation of every person against whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.*"

As for the case of PATRICK KARIUKI MUIRURI AND 2 OTHERS VERSUS NIC BANK LTD decided by Kasango J. on 30th November 2005. At page 2 the learned judge observed that "*the plaintiff had filed an application on 12th September 2005 which sought among other prayers that the defendant be injuncted from selling the charged property. That on the same 12th September, the Court granted, exparte interim orders of injunction*".

It is noted that the injunction was granted, then the matter adjourned for inter parties hearing when next fixed for inter parties hearing, it was not heard because there was a change of advocates for the

defendants. The matter was fixed for hearing inter parties on another. In the intervening period the property was advertised for sale. The applicant put in another application to stop the sale, but by the time the matter reached the duty judge, the property had already been sold. The applicant was forced to make an application to have the said sale set aside arguing that the defendants' action was wrongful and had gone against the basic principle that once the parties had submitted themselves to the jurisdiction of the Court, sale would not proceed, the defendant's conduct was therefore described as being contemptuous and disrespectful to the court. Further the property which was 100 acres had been sold for a dispute involving 2 Million Kenya Shillings.

The defence on the other hand argued that statutory notices and notification of sale had been served on the plaintiff. That a dispute of amount was not sufficient reason for granting an injunction which application was an abuse of the Court process, since the plaintiff had admitted owing some money and that the plaintiff had defaulted on payment, the bank was entitled to exercise its right under the charge to sell the property. The learned Judge's reasoning as to why the court intervened are set out at page 4 of the ruling line 7 from the top as follows. "*I find that the defendant served the plaintiff thro ugh its advocate, a statutory notice dated 22nd July 2002. The notice was not addressed or copied to the District Commissioner as required by Section 78 RLA. That section requires that such notice be served. But over and above that section 77 RLA provides in part A chargee exercising his power of sale shall ac tin good faith and have regard to the interests of the charger…..*

It is clear that the chargee has to pay regard to the interest of the chargor in exercising its power of sale. Can it be said that the chargee did so in this matter. Undoubtedly no, the defendant led the plaintiff up the garden path in adjourning a matter to a further hearing, on 12th October, knowing very well that sale was due on that day. In those circumstances I find that the law cannot, particularly Section 77 RLA allow litigant parties pending that litigation the right to sell the charged properly while all along leading the plaintiff to believe that on a subsequent date there will still be property which is capable of being litigated upon".

On the basis of that reasoning the learned judge set aside the sale and extended the inhibition order to remain in force pending the inter partes hearing.

This court has given due consideration to the reasoning that led to the intervention orders and compared them to the scenario of the facts displayed herein, under consideration and find that the circumstances prevailing in those cases are distinguishable from those prevailing herein.

In the case of **MARGARET NJERI MUIRURI (SUPRA)** there had been a clear disobedience of the Court of Appeal orders which had restrained the sale pending disposal of the suit or further orders of the court. And the sale had taken place without further order from the Court of Appeal authorizing the same. Herein there are no such orders capable of being disobeyed, this court having been informed that an attempt to seek protection from the Court of appeal upon discharge of the injunctive orders by the superior court had been declined.

As for the second authority of PARTICK KARIUKI MUIRURI the Court intervened because one party had misled another into adjourning the matter to another date hopefully to create an avenue for the sale of the said property. In other words the court was punishing mischief on the part of the litigant who had deliberately sought to take an unfair advantage over his colleague by deliberately misleading him.

Here in the defendant moved to sale because there was no injunction in place and the plaintiff had not sought further extension of the defence lawyers undertaking not to sell.

For the reasons given herein in the foregoing assessment the court makes the following conclusions:-

(1) Prayer 1 and 7 are spent and so they do not invite any findings on them.

(2) Prayer 2 which sought an amendment to join M/s REDMARS Holdings Ltd. to these proceedings has been declined because:-

(i). The plaintiff/applicant has not exhibited a draft intended plaint which seeks to include the said M/s REDMARS Holdings Ltd. as a second defendant, which draft contains and or demonstrates, the mentioned new related cause of action and additional particulars as required by law, which law requires the plaintiff applicant to state concisely and distinctively the claim they intend to raise against the incoming defendant. This would have enabled the court to determine whether the plaintiffs have a valid claim against the intended defendant or not before determining whether to allow them to be joined to the proceedings or not.

(ii). By stating that leave be granted to the plaintiff to join (REDMARS Holdings Ltd) as well as other persons claiming through them (REDMARS Holdings Ltd.) is evidence that the plaintiff have not carried out a thorough inquiry or research to establish or determine from whom they intend to raise additional claims in this matter. Such a move would be an infringement on a respected rule of judicial practice, that this court has judicial notice of, which is to the effect that, a court, of law, cannot and should not be seen to be making orders in vain. Asking this court to make an order to join parties who are unnamed and are unidentified will clearly amount to this court making an order which is in vain. Lastly in additional to being an order in vain, it will also open an avenue for speculation as to who to sue and not to be sued.

(iii). The attack on the grieving sale alleges that the same has been a candidate of fraud, illegality, irregularity, dishonesty, collusion, breach of the law, and conspiracy to defeat the cause of justice. All these required to be set out in the intended draft plaint to show how they have arisen and who are persons or parties involved as regards each of them.

The faulting of prayer 2 is therefore on technical grounds. It is simply incompetent by virtue of it failing to comply with the law. An incompetent prayer is a proper candidate for striking out. A struck out pleading or prayer can not take refuge under the doctrine of Resjudicata. The plaintiff can therefore put his house in order and then seek an amendment. For now prayer 2 is struck out.

3 (A) Prayer 3 and 5 which sought injunctive reliefs in the manner sought have also not succeeded for failure to satisfy the necessary ingredients for granting an injunctive relief. The same have been sought on two limbs. On the first limb, they are directed against the incumbent defendant M/S CITY FINANCE BANK LTD. While on the second limb they are directed at the intended second defendant M/s REDMARS Holdings Ltd. They have not succeeded because:-

(i) One of the requirements or ingredients for earning one an injunctive relief under order 39 rule (1) (a) of the Civil Procedure Rules, is that, an injunctive relief be anchored on a suit. It is the finding of this court that a suit is inexistence for purposes of consideration of the injunctive reliefs sought herein only in so far as the plaintiff and the incumbent defendant is concerned. There is no suit in existence yet, in so far as REDMARS Holdings Ltd are concerned. Amendment of the suit to include them as parties should have come first and effected before presentation of the application seeking the injunctive relief against them. It therefore follows that the plaintiffs seeking of the said injunctive relief as against the said intended second defendant is a non starter and void abinitio. This means that the court can only rightly move to consider the issue of the injunctive relief as between the plaintiffs and the incumbent defendants only.

(ii) Concerning the success of the plaintiffs injunctive relief as against the incumbent defendant, the court, makes findings that the same has not been earned for non satisfaction of the ingredients necessary for granting the same as shown hereunder:-

B Existence of a prima facie case with a probability of success has not been shown because:-

(i) The assertion by the plaintiffs that no money was owed to the incumbent defendant M/S CITY FINANCE BANK LTD. as at the time they came to court in 1991. And secondly that what has been in dispute all along has been over illegal penalties and or charges, case law principles derived from decisions both by the superior courts as well as the Court, of Appeal, all go to show that a dispute over accounts

does not qualify a litigant for an injunctive relief.

(ii) The plaintiffs assertion that the sale complained of was in flagrant disobedience of restraint court orders, which had been granted to protect the property pending trial, does not hold, because information gathered from the record reveals that indeed there were such injunctive orders, but for reasons recorded by the court they were discharged by Kuloba J. (as he then was and Kasango J). Thereafter parties operated on the good faith, undertaking not to sell the property pending hearing on the part of the defence lawyer. These were to last till 30th May 2006 when the matter was to proceed to hearing. When the hearing did not proceed the plaintiff did not ask either the court or the defence lawyer to extend the said status. In the absence of a court Order as a protective weapon, a lawyers' undertaking which was being given on the basis of good will or good faith cannot be enforced against the defence.

C. Allegations that the property is matrimonial property does not also hold as it is not an exception to the ingredients necessary for the granting of the injunctive relief.

D. ON THE OPERATION OF THE DOCTRINE OF LIS PENDENS TO AID THE APPLICANT, the court's opinion is that on the basis of principles gathered from case law, the doctrines of lis pendens does not operate to aid the applicant because:-

(a) The doctrine is a shield against any mortgagor/mortgagee relationship created during the pendence the suit over the subject matter in question. Herein, the mortgagor/mortgagee relationship was created before filing of the suit.

(b) Any sale which is transacted over the suit properly of the suit is not automatically void but it is voidable.

(c) It does not operate to render nonsense the mortgagor/mortgagee contracts, in that any injury suffered by the mortgagor as a result of the sale pendentelite can be remedied in accordance with remedies available to such an aggrieved party i.e. recovery of damages or value of the property sold.

(d) It does not operate to shield the mortgagor where his only complaint, as it is the case herein, is over a dispute on accounts.

(e) It is a good defence where it can be shown that the mortgagee has acted fraudulently and in disregard of the interests of the mortgagor. Though one of the complaints raised by the applicant is that the sale has been effected in disregard of the applicants interests this court is not in a position on the material before it, now to tell whether the mortgagee has acted fraudulently and in disregard of the mortgagors interest in disposing off the property at 60 million instead of 200 million as this is a matter which will be gone into at the trial.

E. <u>On the ingredient of whether damages is an adequate compensation as opposed to the granting of an injunctive relief,</u> the court's findings on this is that on the facts demonstrated herein damages are adequate compensation for the following reasons:-

(1) The injustice likely to be suffered by the defendant if an injunction were granted to the plaintiffs and they lost at the end of the trial, out weights the injustice that the plaintiff will suffer at the end of the trial if the plaintiffs were denied the injunctive relief at this interlocutory stage and then succeed at the end of the trial. The reason for saying so is because if an injunction is granted at this stage it will expose the defendant to a claim for damages from a 3rd party because of the contract of sale with the 3rd party RED MARS HOLDINGS LTD, the current transferees of the said suit property where as the plaintiff applicants do not face such threats from any 3rd party.

(i) Should the defendant loose at the end of the trial, no damages are recoverable from the plaintiff in their favour save that which was lawfully and rightfully due to then under the mortgage contract. Whereas the plaintiff has corresponding right to amend his claim and include a claim for recovery of damages to the tune of the market value of the property less that which may be lawfully owed to the

defendant.

(ii) The facts demonstrated herein do not come within the exceptional circumstances where by although damages can be an adequate compensation; nonetheless an injunctive relief will be granted. This occurs where the opponent has acted in a high handed, and oppressive manner or he is a law breaker as equity does not shield law breakers.

The foregoing is not attributable to the defendants herein, because the move to dispose of the suit property pending hearing of the suit by the defendant cannot be faulted because they stem from the defendants rights under the mortgage contract which, legal principles cited, say cannot be with held merely because there is a dispute on accounts firstly. Secondly there was no injunctive or status quo orders in place barring them from moving to realise the security in the manner they did. Thirdly when the matter failed to take off on 30th May 2006 the Plaintiff did not negotiate either with the court or the defence lawyer not to sell the suit property pending hearing of the suit.

F. **On balance of convenience**, the court is also satisfied that this does not tilt in favour of the applicant. This is because from the Plaintiffs own deponement and exhibits annexture EMN2 the transfer from the defendant to M/S RED MARS HOLDINGS LTD has been affected. Though the Plaintiff is attacking both the sale and transfer, the position in law, is that the transfer stands, until rescinded voluntarily or through a court order. As long as the transfer stands, the defendant has divested itself of the title to the property which is now vested in a 3rd party. It therefore follows that the only balance of convenience that exists can only be weighted as against the applicant and the 3rd party RED MARS HOLDINGS LTD who have not yet been joined to these proceedings. As such no order can be issued against them as the same cannot be issued in vain.

4. Prayer 4 which seeks the nullification, setting aside, and/or suspending the transfer and conveyance dated 21.8.2007 and entry no.18 on 30.8.2007. While prayer 6 on the other seeks to prevent further registration of charges, mortgages or change or registration in the ownership, leasing, subleasing, subdividing, allotment, user, occupation or in any kind of the suit titles.

It is the finding of this court that these, too have not succeeded because:-

(i) Since transfer has already been effected in favour of the 3rd party M/S REDMARS Holdings Ltd, there is no way the current defendant can obey the orders sought to restrain dealing over property, not under their control and held by persons not directly under their control as both went to the negotiating table as equal parties. More so when the said 3rd parties have not yet been joined to the proceedings.

(ii) There is no way the said M/S REDMARS Holdings Ltd can be compelled by the orders asked for herein unless and until they are joined to these proceedings.

(iii) Reversal of the sale and transfer from the 3rd party, back to the defendant can only be done if the said 3rd party is broad on board in these proceedings.

(iv) The authorities relied upon by the applicant to support their plea for reversal of the sale and transfer order, are not of help to the applicant, because they are distinguishable from the facts demonstrated herein. In the first case the transfer was reversed because there was proof of existence of flagrant disregard and or disobedience of Court of Appeal restraint orders. Where as in the second case, the Court intervened to punish mischief on the part of the litigant who had deliberately misled his colleague with a possibility of doing so in order to take an unfair advantage over him. Both of these circumstances and or factors are absent in the scenario herein.

5. There was also the issue of the applicant having earned the exparte interim orders this time round with unclean hands, in that they misled this court, into believing that there had been interim orders which had been flaunted by the defendant. This court has revisited the record herein and found that indeed on 06.09.07 when Counsel for the applicant first appeared before this court, exparte, learned Counsel indeed

informed the court that there had been in place orders preserving the property from sale pending trial which orders had been flauted and the property was now exposed to danger of disposal which would render the proceedings nugatory.

Indeed the observation of this court speaks for itself, that that information contributed immensely towards the issuance of the exparte order The court observed thus "*in view of the revelation of pending proceedings affecting the properties and proceedings which are threatened to be rendered nugatory, and in view that there are orders of status quo there is merit for interim orders. The court therefore makes the following orders:-*

Interim Orders in terms of prayer 3, 6 and 7 limited to service being effected on to the defendant and Registrar of Titles".

It is therefore clear from the above content, that the exparte orders, were earned on the strength that status quo had been upset by the defendant. It has now transpired that there was no such status quo in existence as at that time.

As per the rules set out herein on non-disclosure of material factors, this would have contributed to the disentitlement of a confirmation of the ex parte injunctive order had the applicant earned one, not withstanding the fact that the court still had the discretions either to confirm the injunctive relief or not. Since the court has already ruled that the injunctive relief is not available to the applicant for the reasons given, there is no need to belabour the issue as to whether the issue of non-disclosure would have operated to deny the applicant the injunctive relief or alternatively that the court would have exercised its discretion to rule otherwise.

6. For the reasons given above prayers 2, 3, 4, 5 and 6 of the applicants application dated 5th September, 2007 by way of Chamber summons be and are hereby refused.

7. The defendant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2008.

R.N. NAMBUYE

JUDGE