REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 606 of 2003

GIMALU ESTATES LTD……..…….…....1st PLAINTIFF

REDHILL FLOWERS (K) LTD……..……..2ND PLAINTIFF

JOAN NJOKI NDUNGI……..…….…..….3RD PLAINTIFF

SUSAN MUTHONI NDUNGI……..….4TH PLAINTIFF

FLORENCE WANJIRU NDUNGI…….5TH PLAINTIFF

-V E R S U S-

INTERNATIONAL FINANCE CORPORATION……1ST DEFENDANT

NATIONAL BANK OF KENYA LTD……..……2ND DEFENDANT

R U L I N G

By an Application brought by way of a Chamber Summons under a Certificate of Urgency both dated and filed on 26-09-2003, the Applicants sought the following orders:-

1. that service of the summons herein be dispensed with owing to the urgency of the matter;

2. that the Defendants be restrained by themselves, their agents, and or servants from disposing of, selling or transferring L.R. No. 167/9, 145 acres, and L.R. No. 168/9, 52.5 acres to any person until this suit is heard and determined,

3. that the Defendants be restrained by themselves, their agents and/or servants from placing the 1st and 2nd Plaintiffs in receivership or otherwise taking possession of the assets of the Plaintiff under the purported debenture dated 7th April, 1998 until this suit is heard and determined,

4. that the Defendants be restrained by themselves, their agents and/or servants from acting on their respective guarantees dated 24th June, 1997, and 22nd April, 1998 respectively, until this suit is heard and determined,

5. that the costs of this application be provided for-

Because of the highly contentious nature of these proceedings, I also set out in extenso the grounds upon which the application is based, and these are that-

(a) **the Defendants do not have valid mortgages over L.R. No. 168/9 and L.R. No. 168/9,**

(b) **the Defendants did not obtain valid consents of the Kiambu Land Control Board to the purported mortgages dated 10th February and 11th May, 1998 of L.R. No. 167/9 and L.R. No. 168/9 respectively,**

(c) **the Loan Agreements dated 24th June, 1997 and January, 1998 respectively on which the purported mortgages over L.R. No. 167/9 and L.R. No. 168/9, respectively are based were frustrated,**

(d) **As an alternative to (c) above, the contracts embodied in the Loan Agreements dated 24th June, 1997 and 19th January, 1998 respectively, have been modified and replaced by contracts which oblige the 1st and 2nd Plaintiffs to start repaying the loans after the rose farm has been extended by an additional 5 ha. and the operation of the purported mortgages and debenture has been suspended,**

(e) **the guarantees given to the Defendants by the 3rd and 4th Plaintiffs have been discharged by the material variations/modifications of contracts of borrowing,**

(f) **If, which is denied, the Defendants have valid mortgages of L.R. No. 167/9 and L.R. No. 168/9, the purported exercise of the statutory powers of sale over the same are premature in that no valid notices have been issued to the 1st and 2nd Plaintiffs within the meaning of Section 69 A (1) of the Transfer of Property Act 1882 of India;**

(g) **the suit properties L.R. No. 167/9 and L.R. No. 168/9 are of great sentimental value to the 3rd, 4th and 5th Plaintiffs because they (the suit premises) are inherited by them (3rd, 4th and 5th Plaintiff's) from the parents of the 4th and 5th Plaintiffs.**

(h) **The Plaintiffs will suffer irreparable damage if the injunctions sought are not granted.**

In support of the Application, the 3rd Plaintiff, swore an Affidavit on the same day, 26th September, 2003. The matters deponed to will appear in the body of this Ruling. The said Joan Njoki Ndungi also filed a Supplementary Affidavit, sworn on 27-10-2003 in response to the ***Replying Affidavits of Sheila Michuki*** sworn and filed on 9-10-2003, on behalf of the first Defendant, and by Zipporah Kinanga Mogaka also sworn and filed on 9-10-2003, on behalf of the second Defendant. Again the matters deponed to in the said Replying Affidavits will also become apparent in the course of this Ruling.

In addition to the Replying Affidavit of Sheila Michuki on behalf of the 1st Defendant, the First Defendant's Counsel (Kaplan & Stratton), also filed on 9-10-2003 ***Grounds of Opposition*** dated 9-10-2003. The first Defendant also relied on these grounds in opposition to the Plaintiff's Application. These grounds were:-

(1) **The Applicants failed to disclose material facts to the Court at the time of applying for and obtaining ex-parte orders being:-**

(i) that the consent of the Land Control Board was obtained upon application by the Applicants and the First Respondent and that no appeal was preferred from the decision of the Board by the applicants;

(ii) that the applicants were duly served with the statutory notice.

(2) ***the suit discloses no prima facie case with a probability of success;***

(3) ***the suit is an abuse of the court process;***

(4) ***the Applicants remedy (if any) lies in damages,***

(5) ***the application has no merits."***

The application was vigorously and meticulously argued by Dr. Kamau Kuria on behalf of the Applicants and by Mr. P.M. Gachuhi on behalf of the 1st Defendant/Respondent, and Mr. Rachuonyo on behalf of the second Defendant/Respondent. Both counsel drew support from the Affidavit of Joan Njoki Ndungi, and her Supplemental Affidavit on behalf of the Plaintiffs/Applicants to the Replying Affidavits of Sheila Michuki, and Zipporah Mogaka on behalf of respectively the First and Second Defendants/Respondents.

The issues raised by the application for injunction may be summarized as follows:-

(1) Do the Defendants have valid mortgages over L.R. No. 167/9 and L.R. No. 168/9.

(2) Did the Defendants obtain valid consents of the Kiambu Land Control Board to the purported mortgages dated 10th February, and 11th May, 1998 over L.R. No. 167/9 and L.R. No. 168/9 respectively;

(3) Were the Loan Agreement dated 24th June, 1997 and January, 1998 respectively on which the purported mortgages on L.R. No. 167/9 and L.R. No. 168/9 respectively, are based, frustrated?

(4) As an alternative to the issue (3) above, were the contracts embodied in the said Loan Agreements dated 24th June, 1997 and 19th January, 1998 respectively modified and replaced by contracts which oblige the 1st and 2nd Plaintiffs to start repaying the loans after the rose farm has been extended by an additional 5 ha. and the operation of the purported mortgages and debenture suspended.?

(5) Were the guarantees given to the Defendants by the 3rd and 4th Plaintiffs discharged by the material variations/modifications of the contracts of borrowing?

(6) If (which is denied by the Plaintiff's) the Defendants have valid mortgages of L.R. No. 167/9 and L.R. No. 168/9, whether the exercise by the Defendants of the statutory power of sale over the said properties, is premature and whether there were valid notices issued to the 1st and 2nd Plaintiffs within the meaning of Section 69 A (1) of the Transfer of Property Act 1882, of India.

(7) Whether the sentimental value of the suit premises L.R. No. 167/9 and L.R. 168/9 is a ground for granting an injunction?

(8) Whether the Plaintiffs will suffer irreparable damage and loss if the injunctions sought are not granted.

To answer all of the said issues, it is necessary to set out, even at length, the background to the antecedents which eventually gave rise to the present proceedings, and to the application the subject of this Ruling. The immediate starting points are both the Plaint and Chambers Summons dated and filed on 26-09-2003. The Affidavit is verified by the Verifying Affidavit of 3rd Plaintiff Joan Njoki Ndungi, who also swore the Supporting Affidavit to the Chamber Summons. This is the story as narrated both in the Plaint and Supporting Affidavit and only in so far as it is admitted by the Defendants.

The First Plaintiff, Gimalu Estates Limited, is the registered propriety of the suit premises. The beneficial owners of the company and their lands which it owned, were the late James Samuel Gichuru, a former Chairman of the then Ruling Party, Kenya National African Union (K.A.N.U), Independent Kenya's first Minister of Finance, and later Minister for Defence, who died in 1982. The late Minister's wife died in 1995. The suit premises were bought in 1965 by the 3rd Plaintiff's said parents through the 1st Plaintiff. At the material time, the 3rd and 4th Plaintiffs were majority shareholders in both the 1st and 2nd Plaintiff

companies, and also directors thereof.

The Second Plaintiff company is the vehicle through which the 3rd, 4th and 5th Plaintiffs carried out the business of floriculture on the 1st Plaintiff's land. Quite a sensible arrangement, ensuring one's eggs are not all lumped into one basket – risks are spread.

To expand the flori-culture business through the 2nd Plaintiff, their sponsors (the late Mary Gichuru (late sister to 3rd Plaintiff, Joan Njoki Ndungi, Mrs Joan Njoki Ndungi and Susan Muthoni Ndungi) approached the 1st Defendant who referred them to a Department or Section within but said to be independent of it, called the ***Africa Project Development Facility*** for advice and feasibility of the Sponsors' proposed expansion.

The Africa Project Development Facility (APDF) developed and prepared a Report (the APDF Report) date marked January, 1997 with this disclaimer-

"**This report was prepared for the sole purpose of assisting the project sponsors to seek finance for the investment program described in this report. This report is based on information provided by the project sponsors and obtained by the Africa Project Development Facility (APDF) from other sources. Although reasonable care was taken to ensure the reliability of the information in this report, no representation or warranty is made by APDF as to its accuracy and completeness. The prospective investor or lender is expected to conduct their own appraisal prior to making a commitment or provide finance. This report is confidential."**

The APDF Report was therefore the Plaintiff/Sponsors document, an aid to the Sponsors seeking either an investor or a financier. The Replying Affidavit of Sheila Michuki at paragraph 7 explains the difference between the 1st and the AFDF and their operations. The First Defendant conducted its own appraisal and did not rely upon the APDF Report, a document of the project sponsors. Sheila Michuki explains that the appraisal process includes, the release to the Public of the Environmental Review Summary (ERS) and Summary of Project Information (SPI), and that the 2nd Plaintiff consented to this arrangement.

Said deponent further avers that the APDF operates independently, is donor funded and provides a full range of services to the African Small and Medium Enterprise (SME) sector, in preparation of project proposals for entrepreneurs ***not*** financiers. The deponent also avers that the sponsors confirmed in correspondence that the AFDF Report was commissioned by them, it was not requested by the First Defendant nor was it incorporated in the first Defendant's Loan Agreement.

Having myself examined the said APDF Report and compared its relevant provisions such as project cost and financing, and in the absence of its incorporation either expressly or even by reference in the body of the first Defendant's Loan Agreement, I am satisfied that APDF is not the 1st Defendant's Document and its terms cannot be implied into either the Loan Agreements or other matters in relation thereto.

The documents of relevance to this matter are therefore:-

(i) The Loan Agreement **between Redhill_Flowers (Kenya) Ltd. and International Finance Corporation dated June, 24 1997, (“***the IFC Loan Agreement”),* **for the IFC Loan of US$ 340,000.00.**

(ii) The Loan Agreement between National Bank of Kenya Ltd. and Redhill Flowers (Kenya) Ltd *(for the NBK Loan US$ 340,000.00)*

(iii) Mortgage, Gimalu Estate to International Finance Corporation dated 10-02-1998 over L.R. No. 168/9 and L.R. No. 167/9 registered on 16-02-1998 securing the IFC Loan in the sum of Netherlands Guilders Six Hundred and Fifty Thousand (NLG. 650,000.00) *(“the IFC Mortgage”)*

(iv) Debenture dated 7th April, 1998, Redhill Flowers (Kenya) Limited and Gimalu Estates Limited (Joint and several) to National Bank of Kenya Limited registered at the Companies Registry under Certificate of Registration of a Mortgage dated 22-04-1998.

(v) Joint and Several Guarantee dated 22-04-1998, Mary Nyaguthi Gichuru (now deceased), Joan Njoki Ndungi and Susan Muthoni Ndungi in respect of the indebtedness of REDHILL FLOWERS (KENYA) LIMITED.

(vi) Mortgage dated 11-05-1998 Gimalu Estates Limited and International Finance Corporation

to National Bank of Kenya Limited

Over L.R. No. 167/9 and L.R. No. 168/9 (collateral to a Joint Debenture given by REDHILL FLOWERS (KENYA) LIMITED), declaring that this mortgage would rank pari passu with the IFC Mortgage. This mortgage was registered at the Registry of Companies on 20-05-1998.

(vii) Letter of Information by Redhill Flowers (Kenya) Ltd to IFC seeking and justifying an application for US$ 360,000.00 to the applicant, Redhill Flowers (Kenya) Ltd.

(viii) letter of Consent dated 17-04-1997 for sub-division of L.R. No. 167/9 into two portions of 134 acres and 18 acres.

(ix) Security Sharing Agreement dated 16-02-1998 International Finance Corporation and National Bank of Kenya Ltd. for the application of any "Distributions monies" as described therein.

(x) The Letter Agreement dated May 18, 1999 amending the Repayment Schedule under Article 3.05 of the Loan Agreement so that the Loan is rescheduled for payment in ten (10) equal semi-annual installments from the date and at the rates therein stated, commencing from January 15, 2001, and ending on July, 15, 2005, subject to its terms.

(xi) The Letter Agreement dated October 3, 2000 under which the Loan to the Company (Redhill Flowers (Kenya) Ltd. was reduced from Netherlands Guilders Six Hundred and Fifty Thousand (NLG 650,000.00) to four hundred and ninety thousand Netherlands Guilders (NLG. 490,000.00), and the repayment schedule and amounts were accordingly amended but to commence at the same period, January 15 2001, and end on July, 15, 2006, and payable at the rates therein provided.

(xii) A letter dated March 14, 2001 from IFC (the 1st Defendant) notifying the Borrower (Redhill Flowers (Kenya) Ltd, that, the Company had defaulted in payment of both Principal, interest and penalties in the sum of Euros eighty seven thousand seven hundred and fifty five and twenty five cents (E87,755.25) and demanded immediate payment thereof in terms of Article VI, Section 601 of the Loan Agreement and gave notice that in the event of default, IFC would accelerate the loan in terms of Section 6.01 of the Loan Agreement, and thereafter taking whatever action was necessary, including appointing Receivers over all the borrower's property and assets.

(xiii) A letter dated March 20, 2003 from IFC to the Directors of Redhill Flowers (Kenya) Ltd (borrower) notifying the company that it had defaulted in the payment of principal, interest and penalties which as at February, 17, 2003 amounted to one hundred and sixty two thousand, nine hundred and thirty-eight decimal seven six Euros and Cents (E162,938.76), and declared that the said amount was immediately due and payable, and that if the same was not paid the loan would be accelerated in terms of Section 6.01 of the Loan Agreement, and thereafter take whatever action was necessary to recover the same including but not limited to appointing Receivers over all the borrower's property and assets.

(xiv) A letter dated April 30, 2003 from IFC to the Directors of Gimalu Estates Limited, the 1st Plaintiff, giving three months notice in terms of the IFC mortgage, and demanding payment of the sum of two hundred and twenty one thousand, two hundred and seventeen decimal nine two Euros and

Cents (E221,217.92) being the principal amount outstanding as at February, 17, 2003 together with interest @10.94% per annum from February 17 2003 until payment in full together also with any additional costs, charges and monies payable,

(xv) A letter dated 8th April, 2003 by National Bank of Kenya Ltd addressed to Gimalu Estates Limited, giving notice to the said Mortgagor that the Borrower Redhill Flowers (Kenya) Ltd had defaulted in payment of US D. 419, 59029 as at 8th April, 2003 together with interest thereon, and giving Gimalu Estates Limited the 3 months under the provisions of the Transfer of Property Act, 1882 of India particularly Section 69 thereof and the provisions of the mortgage under the NBK Loan.

(xvi) A letter of August 7, 2003 by IFC advising the 3rd Plaintiff a Director of Redhill Flowers (Kenya) Ltd. that the IFC together with National Bank of Kenya Ltd whose notice was to expire in mid September, 2003 to make payment of the outstanding amounts as per the Acceleration Notice of March 28, 2003.

With that outline of the relevant documentation and correspondence and before I turn to the issues first outlined above. I wish to dispose one other issue. Whether other terms were implied in the IFC and NBK Loan Agreements and ancillary documents.

WERE OTHER TERMS IMPLIED

The Plaintiffs contend that there were other terms of contract which were implied. These were that:-

(i) that the commercial purpose of the project is supplied by both the report referred to in paragraph 9 (not 8) of the Plaint and the loan agreement. (ii) that all the moneys to fund phase I of the project had to be released on or before February, 1998,

(ii) that before the commencement of the repayment of the loan the two phases of the Project – would be completed and the Company (2nd Plaintiff) would be procuring 4.2 million rose stems per year,

(iii) time of the completion of the project was essence.

(iv) the two defendants would disburse the loans for the two phases simultaneously."

In answer to these issues perhaps again the commencement point is the Law of Contract Act (Chapter 23, Laws of Kenya) Section 2 (1) of which provides that the common law of England relating to contracts as modified by doctrines of equity subject to the modifications mentioned in the Schedule, shall extend and apply to Kenya.

Provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal. So English authors, and the cases decided by the superior Court of Justice in England are of very high persuasive authority to the courts of Kenya on matters of contract law.

In the very useful case of ***CAMPLING BROS & VANDERWAL LTD*** (supra) the Court of Appeal for Eastern Africa held that – a "***term can only be implied if it is necessary in the business sense to give efficacy to the contract***." Explaining this holding Sir Barclay Nihill (President of that Court) referred to the case of Rufate –Vs- Union Manufacturing Co. (***Ramsbottom***) (1918) L.R. I K.B. 592, where Scrutton L.J. said:-

'"***The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties,*** *"what will happen in such a case" they would have*

replied "of course so and so will happen, we did not trouble to say that; it is too clear." ***Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."***

I am satisfied firstly that the parties have expressed all they needed and wanted to say, and it would not make business efficacy to read and apply terms that did not occur in the parties minds at time of negotiation and signature of the Loan Agreement.

***1. Do the** Defendants have Valid Mortgages over L.R. No. 167/9 and L.R. No. 168/9?*

Dr. Kamau Kuria, learned Counsel for the Plaintiffs submitted that the Defendants did not have any valid mortgages over L.R. No. 167/9 and L.R. 168/9 the properties of Gimalu Estates Limited, the 1st Plaintiff herein.

The reasons or grounds for this contention are set out in ground (b) of the Grounds of the Application and reiterated in paragraphs 26, 27, 28 and 29 of the Supporting Affidavit of the 3rd Plaintiff, Joan Njoki Ndungi, and are averred on the advice of Messrs Kuria & Kiraitu Advocates-

26, (*a) Mortgaging of land is a dealing in land within the meaning of the Land Control Act, and no valid mortgage can be created in favour of a mortgagee unless the consent of the Land Control Board of the area in which the land is situate is obtained;*

(b) Under Section 9 of the said Land Control Act, the Board is obliged to refuse consent where the terms and conditions of the transaction including the entire bargain are markedly unfair or disadvantageous to one of the parties;

(c) where "consent" is obtained where it ought to have been refused but is wrongly granted no valid mortgage is created;

27. That the Kiambu Land Control Board purported to give consent to create mortgages on the suit properties in November, 1997 despite the fact that the terms were markedly unfair in that the land worth about Kshs.186 million was to be mortgaged securing payment of about Kshs.34 million

28. That no valid consent was obtained for the intended mortgage of the suit properties by the 1st Plaintiff

29. that the only Land Control Board Consent obtained was in respect of intended sub-division of 14th April, 1997 before loan agreements were entered into by the 1st and 2nd Plaintiffs and the Defendants herein…

On the factual plane, it is correct that the Kiambu Land Control Board granted consent to the sub-division of L.R. No. 167/9 into 134 acres, and 18 acres respectively. Certainly this consent for the sub-division is not for the issue of a mortgage to any lender, neither IFC nor National Bank of Kenya Ltd.

On the legal scale, Section 6 (1) (c) of the Land Control Act (***Chapter 302 Laws of Kenya***) provides that "***the issue sale***, transfer, mortgage or any other disposal of or dealing with any share in a private or cooperative society which for the time-being owns agricultural land situate within a Land Control area is void for all purposes unless the land control board for the land control area or division in which the land is situate has given its consent in respect of that transaction in accordance with the Act.

According to the Replying Affidavits of both Sheila M. Michuki and Zipporah Mogaka, the relevant consent for the creation of mortgage by the first Plaintiff to the First and Second Defendants over L.R. No. 167/9 and L.R. No. 168/9 was granted on 11-12-1997 (for a period of seven years). To state on oath, as the 3rd Plaintiff has done in paragraph 29 of her Affidavit has done is due either to forgetfulness or selective amnesia otherwise such falsehood on oath is perjury.

The answer to that leg of the issue whether there was no consent for the creation of the mortgage in issue, is that there was such consent, and the provisions of Section 6 (1) (c) were duly fulfilled.

There is however a second objection to the grant of the consent. It is that section 9 (1) (b) (iii) provides that:-

"***In deciding whether to grant or refuse consent in respect of a controlled transaction, a land control board shall:-***

(a)….. ***(not in issue)***

"*(b)* ***act on the principle that consent ought generally to be refused where:-***

(i)……..

(ii)……..

(iii) the terms and conditions of the transaction (including the price to be paid) are markedly unfair or disadvantageous to one of the parties to the transaction."

According to the Supporting Affidavit of the 3rd Plaintiff, Joan Njoki Ndungi, part of the markedly unfair or disadvantageous terms and conditions of the ***Loan Agreements for the IFC Loan and NBK Loan Agreement*** were that the mortgages for which the land control board consent were sought were to secure loans totaling U.S$ 680,000.00 equivalent then at the agreed exchange rate of Kshs.56 US$ 1, to Kshs.34 million whereas the first Plaintiff's land was worth Kshs.186 million, according to the valuation of **EPICONSULTS** made on 16-09-2003.

The answer to this second leg of the objection to the validity of the consent to mortgage given by the Kiambu Land Control Board or indeed any other land control board is in the Replying Affidavit of Sheila M. Michuki where at paragraph 11 she depones on advice from the First Defendant's Counsel that:-

(i) Section 8 of the Land Control Act states that subject to any right of appeal conferred by the Act, the decision of the Board shall be final and conclusive and shall not be questioned in any court.

(ii) Section 9 of the Land Control Act does not confer powers upon the Land Control Board to undertake technical and financial exercise of scrutinizing the legal documentation to an application for consent to confirm "that the entire bargain are markedly unfair or disadvantageous to one of the parties" but rather it is to look at the over all effect of the transaction. In the project Plaintiffs contended that it would be very beneficial to them on the income to be earned, it would enhance the land use and create employment. These are the factors that support the granting of consent.

(iii) If the role of the Land Control Boards is what Joan Njoki Ndungi has been advised, then Parliament should have said so in the Act, including the persons who would be qualified to sit in the Land Control Boards to undertake such professional evaluation of applications;

(iv) the application was for consent to charge the land and not on what** (sum) **the second Plaintiff had agreed to borrow or what the Plaintiffs now allege is the value of the charged property. The value of the land at the time of the application for consent was Kshs.85,000,000/= as per paragraph 67 of the Africa-Project Development Facility Report** (attached the Affidavit of Joan Njoki Ndungi**) as against the loan amount of Kshs.34,000,000/=."`

Paragraph 6 of the Replying Affidavit of Zipporah Kinanga Mogaka on behalf of the Second Defendant is to the same effect that a consent was granted by the Kiambu Land Control Board issued under its Reference ***No. 694/12/97 on 11th*** December, 1997 for a consideration of ECU 311,350=Q and Dutch Guilders 650,000=00.

The composite answer to this issue is therefore that consent by the local area land control board was given. The local area land control board must have considered that to grant consent to the proposed transaction was to be very beneficial to the applicants on the income to be earned it would enhance the land use and create employment in the area. These would be the same or similar grounds upon which the Applicants sought the loans from the Defendants.

Besides under section 8 (4) of the Land Control Act, an application for land control consent made under subsection (1) of the said section 8 is valid notwithstanding that the agreement for the controlled transaction is reduced to writing, or drawn up in the form of a legal document, only after the application has been made. The decision of the Land Control Board is subject to the Provincial Land Control Board, or the Central Land Control Appeals Board established under Sections 10 and 13 of the Land Control Act, the decision of the local area Land Control Board is said to be final and conclusive and not subject to question in any court, (except in any event on matters of law), ***GATERE NJAMUNYU –VS- JOSEK NJUE NYAGA*** (Civil Appeal No. 20 of 1982 – unreported per Madan J.A. at page 82 of his judgment.

Under Section 11 (1) of the Land Control an appeal only lies to the Provincial Land Control Appeals Board, and by implication thereafter to the Central Land Control Appeals Board, in cases only where a land control board refused to grant consent in respect of a controlled transaction. As the transaction (in lending) was subject to an execution of a valid mortgage, and a mortgage over agricultural land would only be granted after the grant of a consent by the area land control board, any refusal to grant such consent would only have been appealed against the applicant Gimalu Estates Ltd.

The consents having been granted, there was no ground of appeal (for an appeal only lies where there has been refusal to grant the consent) even the Applicants here, and in particular the First Plaintiff/Applicant cannot be heard to say that the consents were either invalid or ought not to have been granted and issued.

The argument regarding the value of the mortgaged property cannot really be maintained. The Plaintiff's own study commissioned by it, under the African Project Development Facility gave the value of the mortgaged property as US$ 1.5 million or Kshs.85.0 million at the exchange rate established in 1997. The Consent is not given, on the basis of the valuation of the charged property, but rather on the basis of the overall effect of the proposed transaction, and that is why the Act allows the grant of such consent before the necessary agreements and documentation relating to a proposed project are even drawn and executed.

Under the Schedule to the Land Control Act a land control board is comprised of the District Commissioner who is the Chairman, or a District Officer, who is deputed by him, not more than two public officers, two persons nominated by the County Council having jurisdiction within the area of jurisdiction of the board, and not less than three and not more than seven persons resident within the area of jurisdiction of the Board. Neither Section 5, nor Section 10 and Section 12 of the Land Control Act under which the Land Control Board, the Provincial Land Control and the Central Land Control Board are established prescribe the technical or other qualifications of members of those boards to be able to determine "***that the entire bargain are markedly unfair or disadvantageous as to one of the parties***."

In the instant case, the Second Plaintiff's Managing Director **Susan Muthoni Ndungi** is a holder of a B.A. and L.L.B. Degrees, and was certainly in a position to say charging or granting a mortgage over a property whose value then was US$ 1.5 million, or Kshs.85 million equivalent, for a loan of Kshs.34.00 million was markedly unfair and disadvantageous, and ought not to have entertained or entered into it, advised others not to do so let alone to have allowed the transaction to proceed and obtained a consent to charge such land. It is in my thinking rather a poor afterthought to raise the issue of the value of the land vis-à-vis the mortgage at this later hour, or to say, on those grounds that the consent ought not to have been granted.

For those reasons, I would conclude that the Respondents did obtain valid consents under the Land Control Act from the area land control board, that is to say, the Kiambu Land Control Board to secure the repayment of the loans advanced to the 2nd Plaintiff under the Loan Agreement dated January 24, 1997 between the Plaintiff and the 1st Defendant, and the Loan Agreement between the National Bank of

Kenya Ltd and Redhill Flowers ***(Kenya***) Ltd. dated 19th January, 1998 for the creation and grant of mortgages over L.R. No. 167/9 and 168/9 respectively.

The next issue was **WERE THE *LOAN AGREEMENTS DATED JUNE 24, 1997 AND 19TH JANUARY, 1998 ON WHICH THE MORTGAGES ON L.R. NO. 167/9 AND L.R. NO. 168/9 RESPECTIVELY ARE BASED FRUSTRATED and the Law of Restitution they became Ineffective Contracts? When does a Contract become frustrated and when does the Law of Restitution apply?*** Dr. Kamau Kuria, learned Counsel for the Plaintiffs/Applicants submitted at length on why the Plaintiffs contend that the said Loan Agreements were frustrated:-

1. ***On the part of the 1st Defendant the IFC Loan Agreement was frustrated because the 1st Defendant released the first loan from namely NG. 490,000=00 in February, 1999 when the cost of the project had so greatly escalated as to render the attainment of the commercial purpose or substratum of the loan agreement unattainable. The Plaintiffs therefore claim that the delay frustrated the said contract on 24th June, 1998 and that the same is unenforceable.***

2. On the part of the 2nd Defendant, and in breach of its obligations under the Loan Agreement dated 19th January, 1998, the 2nd Defendant, like the 1st Defendant released the entire loan at once on 17th July, 1998 so late as to render the attainment of the commercial purpose of the loan unattainable and unilaterally fundamentally altered the project agreed upon.

3. In addition to the contentions of delay, and release of the loan in one tranche **as stated in** ***sub-paragraphs 1 and 2 above, the Plaintiffs also contended that the contracts were frustrated because, the 2nd Plaintiff and the 1st Defendant in writing, varied the loan agreement made on 24th June, 1997, on 19th May, 1999 and 3rd October, 2003 respectively in which-***

(a) the commercial purpose of the loan agreement of 24th June, 1997 was to be replaced by another commercial purpose,

(b) *the 2nd Plaintiff was to abandon phase 2 of the project defined by Section 2 of the Loan Agreement dated 24th June, 1997,*

(c) the 2nd Plaintiff was, with its own resources, to increase the area of the rose farm from 2 ha. to 7 ha.,

(d) the 1st Plaintiff was at liberty to sell 18 acres from L.R. No. 168/9 and raise, a part of the capital for expansion;

(e) Consequently the 1st Defendant was to lend the 2nd Plaintiff NG.490,000=00 instead of the formerly agreed NG. 650,000=00;

(f) assuming that the expansion of the rose farm from 2ha to 7 ha took place as planned by the 2nd Plaintiff, the loan repayments were to begin on 15th January, 2001 instead of 15th November, 1999.

(4) ***The abandonment of the establishment of the agreed 3 ha. rose farm was the joint purpose of the 2nd Plaintiff and the Defendants and that any variation agreed by the 2nd Plaintiff and the 1st Defendant bound the 2nd Defendant and vice versa.***

(5) The acquiescence to the abandonment of the project by the 2nd Plaintiff and the 1st Defendant, the 2nd Defendant frustrated the contract and cannot rely on the original loan agreement, mortgage personal guarantees and the purported debenture;

In support of this contentions of frustration of the contracts contained in the Loan Agreement and NBK Loan Agreement, Dr. Kamau Kuria relied upon the following decided cases-

(1) CAMPLING BROS & VANDERWAL LTD. –VS-UNITED AIR SERVICES LTD [1952] XIX 155.

(2) (JAMBO BISQUITS (K) LTD –Vs- BARCLAYS BANK

OF KENYA LTD. & OTHERS [2003] 2 E.A. 443.

(3) CHEMILIL SISAL ESTATES LTD –VS- MAKONGI

LTD [1967] E.R. 166, 168

(4) KENYA COMMERCIAL BANK LTD –VS- OSEBE

[1982] K.L.R. 297, 303,

(5) TRUST BANK LTD –VS- EROS CHEMISTS LTD

[2000] 2 E.A. 550, 554.

(6) CHASE INTERNATIONAL INVESTMENTS

CORPORATION and ANOTHER –vs- LAXMAN KESHRA & OTHERS [1978] K.L.R 143, 153 -4.

(6) CHITTY ON CONTRACTS 26th Edition Vol. 1 paragraphs 1599-16000, and Chapter23 paragraphs 1631-1682.

(7) STANLEY MUNGA GITHUNGURI –VS- JIMBA CREDIT CORPORATION LTD (Civil Appeal No. 144 of 1988), at page 3,

(8) WILLIAMS & GLYNN'S BANK LTD –VS- BOLAND AND ANOTHER AND WILLIAMS & GLNN'S BANK LTD. –VS- BROWN [1980] 2 ALL ER. 408, 415.

(9) The Law of Restitution by Lord Goff of Chieveley and Gareth Jones, 4th Edition Chapter 11, 17, & 18.`

Perhaps before I attempt to examine any of these cases, in support of the Plaintiff's case for frustration of the IFC Loan Agreement and NBK Loan Agreements, it is necessary to examine the terms of the said Loan Agreements and see what terms were prescribed and in what way, if at all, they were breached and frustrated as submitted by learned Counsel for the Plaintiffs. It is also necessary to establish what project was agreed upon and what alterations were effected to cause a breach of the Loan Agreements. It is also necessary to inquire as to whether the establishment of the rose farm was a joint project for the 2nd Plaintiff and the Defendants.

As already alluded to in the earlier passages of this Ruling, the terms of disbursement of the IFC Loan and NBK Loan were set out in Article IV, Section 4.01 (a) (j) of the IFC Loan, and Article IV (1) – (6) and Article VII of the NBK Agreement. In various ways the conditions in both the IFC Loan Agreement, and the NBK Loan Agreement complemented each other as conditions precedent to any disbursement of either the IFC Loan or the NBK Loan. These conditions precedent included completion of the agreements referred to therein and the provision of the securities to secure the repayment of the loans. Those securities included

(a) a charge by way of mortgage by the 1st Plaintiff to

secure its obligations to IFC under the Guarantee Agreement,

(b) a floating charge by way of mortgage by the

Company (Redhill Flowers *(Kenya Ltd*) **over its moveable and immoveable assets, to secure all amounts owing by the company IFC under the Loan Agreement and that security to be held on** *pari passu* **basis by virtue of the Security Sharing Agreement.**

Of interest also is Article III, Section 3.03, ***Disbursements*** – these were to be made from time to time ….. upon request in writing by the Company in the form prescribed in Schedule 1 of the Loan IFC Agreement to the credit of the company at such bank in such place as the company shall designate with the agreement of IFC. Each disbursement shall be acknowledged by a receipt in the form of Schedule 2 to the Agreement.

Article 1 (2) of the NBK Loan Agreement has similar provisions, that withdrawals will be in such amount as shall be required to finance the cost of the project proposed to be met out of the proceeds of the loan. In addition thereto the Second Schedule sets out in paragraphs 1-17 Further Terms and Conditions Applicable to then NBK Loan, including again the amount to be provided under the NBK Loan Agreement (ECU – 311, 350), or equivalent US dollars; the estimated cost of the project Kshs.72,201,573/= equivalent in US Dollars, all broken down into components to be contributed in the form of Equity, the Sponsor's Contribution and the NBK Loan. The other conditions set out in the Third Schedule relate to interest rates, payment of Interest and Loan repayments, security documents under the schedule and the form of Board Resolution at the Sixth Schedule.

The Guarantee Agreement dated 24th June, 1997, (regarding Redhill Flowers (Kenya) Ltd. between Gimalu Estates Ltd (Mrs Mary Gichuru – deceased), Mrs Joan Njoki Ndungi and Susan Muthoni Ndungi the guarantors and International Finance Corporation bound the Guarantors, irrevocably, absolutely and unconditionally as primary obligors and not as surety merely to guarantee, the due and punctual payment of the principal of, interest, commitment and front-end fees, and all other amounts payable on and in respect of the Loan all sums payable by the company (Redhill Flowers (Kenya) Ltd under the Loan Agreement, whether at stated maturity or upon prematuring, all as set forth in the Loan Agreement, and that the guarantee would be a continuing guarantee, and would remain in full force and effect until all the principal of, interest and commitment charges on it would have been paid.

According to Halsbury's Laws of England (3rd Edition) Volume 8, pages 1856 (ii) The Doctrine of Frustration paragraph 320-

"….***the doctrine of frustration operates to excuse further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and (2) before breach performance becomes impossible, or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of the parties. The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration."***

Similar language was used by Lord Loreburn in ***TAMPLIN STEAMSHIP COMPANY LTD –VS- ANGLO-AMERICAN PETROLEUM PRODUCTS COMPANY LTD [1916]*** A.C. 397, 401, and Viscount Haldane at page 406-407.

According to ***Chitty on Contracts*** (op. cit) paragraph 16 the doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract has rendered it physically or commercially impossible to fulfill the contract or has transformed performance into a radically different obligation from that undertaken in the contract. The doctrine is not concerned with the initial impossibility, which may render a contract void "***ab initio"*** as where a party to a contract undertakes to perform an act which at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.

This was a change from the "absolute" rule laid down in the case of ***PARADINE –VS- JANE (1646) Aleyn 26*** and subsequent decisions to ***Banker –vs- Hod….. 1884 (*** until later held to be wrongly decided

by Scrutton L.J. in the case of **RALLI BROS –VS- COMPAGNA NAVIERA SOTA /AZNAR (1920)** ***2 K.B. 287, 303*** where it was held that a man was strictly bound by his contract, and that, in the absence of an express limitation of his liability, he must take the consequences of being unable to perform his obligation in changed circumstances. So the "***rule"*** laid down that an "***absolute"*** contract admits of no exception of the promisor, who was liable for a breach of his promise notwithstanding the subsequent occurrence of an accident or other contingency which prevented him from performing it.

Today, frustration of contract may be comprised in the physical destruction of the subject matter for instance the destruction of a hall lined for performance (***Taylor –Vs- Caldwell*** (1863) E.B. & E. 746, 789, the court implied a term that the parties were all the time aware that performance of the contract dependent upon the continued existence of the subject matter. This principle was made into law under the Sale of Goods Act 1993.

Frustration was also recognized in a commercial sense where a ship chartered to carry goods run aground, for a voyage taken after the ship was repaired would be a new and different adventure. (***TAMPLING STEAMSHIP CO. LTD –VS- ANGLO-AMERICAN PETROLEUM PRODUCTS CO. LTD*** *(supra)*

The modern the text of frustration was first formulated by Lord Radcliffe in the case of ***DAVIS CONTRACTORS LTD -VS- FAREHAM U.D.C*** [1956] A.C. 696 test of a radical change in the obligation at page 729-

"**….. frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performances is called for would render it a thing** radically different **from that which was undertaken by the contract.** Non haec in foedera veni**."** *"It was not this that I promised to do…"* **There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."**

This statement was explicitly approved by the House Lords in ***NATIONAL CARRIERS LTD –VS- PANALPINA (NORTHERN***) Ltd [1981] A.C. 675, 700, "***frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature*** *(not merely the expense or onerousness****) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution*** **that it would be unjust to hold them** ***to the literal sense of its stipulations in the circumstances; in such case the law declares both parties to be discharged from further performances" per*** Lord Simon of Glaisdale) ***or again at page 702***

*….. a number of theories have been advanced to clothe the doctrine of frustration in juristic respectability, the two most in favour being the "****implied theory****" (which was potent in the development of the doctrine and which still provides a satisfactory explanation of many cases) and the "theory of a* ***radical change in*** **obligatio***n or "****construction theory"*** *(which appears to be the one most generally accepted today).*

If we are to apply these principles as the law of frustration of contracts in Kenya, the Plaintiff's case seems to me a long way from a case of frustration. Here are two Loan Agreements entered into by the 2nd Plaintiff, guaranteed by the 1st, 3rd and 4th Plaintiffs, and in respect of which the 1st Plaintiff charged its property by way of a mortgage to secure the loan debt incurred by its associate company. The Plaintiffs' rose farm project was an ongoing project. The land is still that of the 1st Plaintiff only subject to the Defendants' mortgage. The Plaintiffs have continued to look for additional financing to complete their project. They have continued to seek and obtain technical advice on varieties of rose plants to plant."

I cannot say that performance in these circumstances by the Plaintiffs of their obligations is radically different from that undertaken under the contract. I do not find that the contract under the IFC Loan Agreement and the NBK Loan Agreement were frustrated in any way whatsoever.

INEFFECTIVE TRANSACTIONS

Having arrived at that conclusion it is strictly not necessary for me to look at or consider the other connected limb of the Plaintiffs/Applicants' contention that the project having failed the contracts became ***ineffective transactions,*** the Defendants could not therefore found any action on the securities granted under those contracts; the Defendants had lost the right to exercise any statutory power of sale or appoint a receiver conferred upon them under the mortgage deeds; the Defendants' sole remedy would be an action at law, not for money had and received but under the law of restitution and arising under the failed and ineffective transaction.

In cases of ineffective contracts (according to the authors of "***the Law of Restitution***" (op. cit), the applicable restitutionary principles may depend on whether the benefit conferred takes the form of money, or of services or goods…. The receipt of money is an enrichment; the receipt of services may or may not be so. In a money claim the payer claims the payment of a sum paid under the ineffective contract; in a claim for services rendered, which cannot be restored, he claims not for the return of the benefit but for the payment for it….. The nature of the benefit may also determine the ground of the restitutionary claim.

So if money has been paid under a contract which is or becomes ineffective, the recipient is evidently enriched. It is a distinct question whether that enrichment is an unjust enrichment. Sometimes the basis of the restitutionary claim is that money has been paid under a mistake, for instance, that both the payer and the recipient mistakenly thinking that a valid contract was in existence.

In most situations, the ground of recovery is that the expected return for the payment, or consideration, as it is confusingly called, has failed. The rule at common law is that the Plaintiff can only recover his money if the consideration for his payment has totally failed. In this context, "***when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is generally speaking, not the promise which is referred to as the consideration, but the performance of the promise****….*. Where the payment is made under a contract, therefore, a distinction must be drawn between the contractual promise and the consideration which the Plaintiff's contractual promise, and the consideration which the Plaintiff expected to receive for his contractual performance though these may coincide in the case of a contract founded upon an executed consideration.

The Court therefore looks to the terms of the contract to determine whether a party has or has not received from the other party any part of the bargained for performance.

The terms of the contract under the IFC Loan Agreement and the NBK Loan Agreement were such that the Defendants would release funds to the 2nd Plaintiff once the Plaintiffs had fulfilled all the conditions precedent to the disbursements. The Plaintiffs were to utilize the funds advanced for the purposes declared by the Plaintiffs, and incorporated into those Loan agreements. The management was that of the Plaintiffs, and so were the benefits and income accruing from the successful implementation. There was no failure under the contracts, but even if there were, the Plaintiffs received a benefit in respect of which they failed to perform, that is, develop their own flower project. Under the principles of the law of restitution, the Plaintiffs would be found to pay these moneys to the Defendants.

"***Restitutio in integrum"*** is a Latin phrase, and therefore, a roman law expression which literally means "***restoration to the original position."*** In common law tradition, the phrase refers to a remedy administered by the Courts of equity in rescinding a contract or otherwise placing parties in the position they occupied before entering into the transaction.

Lord Goff of Chievely in his book, "***the Law of Restitution"*** (op. cit) Chapter II page 287, argues that the basis of equity's intervention in these cases is similar to that underlying the relief granted in cases of undue influence, but that it is a distinct equitable jurisdiction which does not depend upon the existence of any relationship of confidence and trust between the parties or on any proof that the dominant party actually induced payment through the influence he had unfairly obtained.

A bargain may therefore be set aside as unconscionable even though there is no presumed or actual abuse of an existing relationship of confidence. The line between pure inequality of bargaining power and relationship of confidence, which has been abused may be there (***Mutual Finance Ltd –Vs. John Wetton & Sons Ltd] 1937] 2 K.B. 389.***

Lord Goff also argues in his said book (***the Law of Restitution)*** that in unconscionable bargains, there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or advantage taken of weakness. There has always been an appearance of fraud from the nature of the bargain."

"Fraud" ***in an equitable context does not mean, or is not confined to deceit, it means an unconscientious use of the power arising out of these circumstances and conditions of the contracting parties. It is a victimization which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscious circumstances.'***

For example equity presumes bargains with ***expectants*** to be unconscionable. Expectants include not only heirs apparent and presumptive, but those who have either a vested or a contingent remainder or any reversionary interest. Relief has been granted against usurious loans (as in Benyon V Cooke (1875) L.R. 10 ch. 382, 391, per Jessel M.R.). The person claiming the benefit of the bargain can rebut the presumption by showing that it ***is fair***, ***just*** and ***reasonable***.

It is not however only bargains with expectants that equity may presume to be unconscionable. Equity will intervene to prevent any "***unconscientious use of power,"*** when there is weakness on the one side and extortion on the other, and will set aside improvident bargains, made with a "***poor*** or ignorant person acting ***without*** independent advice which cannot be shown to be a fair and reasonable transaction, (per Lord Brightman, P.C. in Harman – Vs- O'Connor [1985] A.C. 1000, 1023 – 1024.

In the case of ***ALEC LOBB LTD –VS- TOTAL OIL GB LTD*** [***1983] I W.L.R. 87, 94-95 Peter*** millet Q.C. sitting as Deputy Judge of the High Court concluded –

… ***If the cases are examined it is almost that three elements have invariably been present before the court has interfered:-***

First *one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise so that circumstances existed of which unfair advantage to the other could be taken e.g. in Blomley –Vs- Ryan (1954) 99 C.L. R. 362, where to the knowledge of one party, the other was by reason of his intoxication in no condition to negotiate intelligently.*

Secondly *this weakness_by the other party has been exploited by the other party in some morally culpable manner, for example in Clark –Vs- Malpas (1862) 25 E.R. 1238, where a poor illiterate man was induced to enter into a transaction of unusual nature, without proper independent advice, and in great haste.*

Third *the resulting transaction has been not merely hard or improvident, but overreacting and oppressive.*

For instance, where there has been a sale at an undervalue, as so often happens in the mortgage market in this country, the undervalue has almost always been substantial, so that it calls for an explanation, and is itself indicative of the presence of fraud, undue influence, or other such feature. In short there must …..be some impropriety, both in the conduct of the stronger party and in terms of the transaction itself…… "***which shocks the conscience of the court,"*** and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained.

In conclusion, the authors of ***The Law of Restitution***, say at pages 290-291-

"***In our opinion it is undesirable for the courts to enjoy an unfettered power to rewrite contracts***

simply because the substantive terms appear unfair *(SAILOH (SPINNDERS LTD –VS- VARDING [1973] A.C. 691, 723****, per Lord Wilberforce). To create and exercise such power will involve the courts in the solution of problems which litigation inter partes is not equipped to solve. Unconscionability and inequality of bargaining power are elusive and mercurial concepts which mean different things to different people. It is*** *"seldom in any negotiations that the bargaining powers of the parties are absolutely equal."* ***It should not be enough to show that a contractual provision "is objectively unreasonable (Mr. Lobb Ltd. –Vs-*** *Total Oil G.B. Ltd [1985****} I.W.L.R. 173, 183 per Ditton L.J.). It is a distinct question whether there has been impropriety or unfairness in the bargaining process (so called procedural unconscionability) although a conclusion that the bargaining process was unfair may conceal a conclusion that the contractual terms are substantively unconscionable."***

If the court sets aside a bargain as unconscionable, it will do so on equitable terms. Generally the principal sum must be repaid with interest and costs may be awarded to the Defendant. (Only in exceptional circumstances repayment of the principal sum (eg. Morison –vs- Coast Finance Ltd (1966) 54 W.W.R. 257, 262, per Davey J.A. where the lender was in collusion with a third party, to whom the borrower had in turn lent the loan money; the loan money was used to repay the third party's debt to the lender).

If therefore I were to make an independent finding on the Plaintiff's claim that the contracts under the IFC Loan Agreement and the NBK Loan Agreement, were ineffective transactions, (which they were not as I have held already), the Plaintiffs would still be liable to the Defendants under the law of restitution; and they would be liable to pay not only the principal, but also the interest and costs, as these contracts were entered at arms – length with well educated and well advised parties comprising the Plaintiffs.

DID THE VARIATIONS DISCHARGE THE GUARANTORS FROM LIABILITY?

This issue is raised only because of the Letter Agreements dated May 18, 1999 from IFC (the First Defendant) to the Directors of Redhill Flowers (Kenya) Ltd. This Letter Agreement as already stated at the beginning of this Ruling amended Section 3.05 of the Loan Agreement and rescheduled the repayment period of the IFC Loan from January 2001 to July, 2005. This Letter Agreement was expressed to be subject to the amendment of the documents constituting the Security to account for the rescheduling of the Loan, and the company bearing the costs.

The Letter Agreement of October 3, 2000 also introduced two amendments to section 3.01 of the IFC Loan Agreement, reducing the loan amount from NLG 650,000=00 to NLG 490,000=00, and therefore to Section 3.05 to reschedule payments, reducing the repayment sum from NLG 65,000=00 semi-annually to NLG 45,000=00 but retaining the same repayment Schedule January 15, 2001 to July 15, 2005.

Both Letter Agreements reiterated that the two letters Agreements would not be construed or interpreted as having the effect of directly or indirectly modifying or affecting in any way the validity of any provision of the Loan Agreement other than Section 3.05 thereof, nor would anything in the Agreements be construed as operating as a novation with respect to the Agreement or the Loan.

Dr. Kamau Kuria, learned Counsel for the Plaintiffs suggested that these Letter Agreements had the effect of vitiating the documents constituting the Security between the first Plaintiff and the Defendants and that any liability by the Plaintiffs to the Defendants was thereby discharged. Now, that submission is only correct where there has been an unilateral and fundamental alteration or modification of the contract or there has been a novation.

A novation signifies that "***there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be), or between different parties, the consideration mutually being the discharge of the old contract'*** Scarf –Vs- Jardine (1882) 7 APP CAS. 345 and 357, It denotes the rescission of one contract and the substitution of another in which the same acts are to be performed by different parties. A novation cannot be forced on a new party without his agreement.

In this matter, the Letter Agreements apart from expressing that they are not novation agreements, do

not in the sense described above amount to novation agreements. No new parties have been introduced and there is no suggestion of the discharge of the obligations in the Loan Agreements. The Letter Agreements are no more than variations of the IFC Loan Agreement on reduction of the loan amount, and the subsequent rescheduling of the payments in conformity with the reduced sum advanced.

Parties to a contract (and the IFC Loan Agreement and NBK Loan Agreement were contracts) effect a variation of the contract by modifying or altering its terms by mutual agreement. Chitty on **Contracts (**op cit) paragraph 1599 gives the example of the case of ***BERRY –VS- BERRY [1925] 2 K.B. 316*** in which a husband and wife entered into a separation deed whereby the husband covenanted to pay to the wife a certain sum each year for her support. Later the husband's earnings proved insufficient to meet this obligation, so they agreed in writing to vary the financial provisions. On an action on the old deed by the wife, it was held that this Variation was valid and enforceable, and that it could be set up by the husband as a defence to an action against him on the original deed.

On the other hand a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. ***(Cowey –Vs- Liberation Operations Ltd, [1966} 2 Lloyds' Rep. 45***). So the form of variation is important to determine whether there has been a mere variation of terms or a rescission. The effect of a subsequent agreement – whether it constitutes a variation or a rescission depends upon the extent to which it alters the terms of the original contract. In the case of ***MORRIS -VS- BARON & CO. [1918] A.C. 1, 19***. Lord Haldane said that, for a rescission, there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which leave it still subsisting."

In the case of ***BRITISH AND BENINGTONS LTD –Vs- N.W. GOCHAR TEA CO. LTD [1923] A.C. 48***, ***68***, Lord Summer said ***inter alia –*** that if the changes do not go '***to the very root of the contract***" there is merely a variation of the manner of the performance of the original terms.

In the case of ***MORRIS –VS- BARON & Co***.(supra) the test for a variation or rescission was formulated by Lord Dunedin at page 26 as follows:-

"***In the first case, (variation), there are no executory clauses in the second arrangement as would enable you to sue upon that alone, if the first did not exist; in the second (rescission) you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with same subject matter as the first but in a different way, it is impossible that the two should be performed together."***

Lord Dunnedin hastens to add that when he says you could sue on the second alone, it does not exclude cases where the first is used for mere reference….

If Lord Dunedin test were to be applied to this case, there can be no question a suitor could sue on the variation at all. The suit would have to be built round the original contract (the IFC Loan Agreement or the NBK Loan Agreement) as amended modified or varied by the Letter Agreements. There were no unilateral documents. They were requested for and were in turn executed by the 2nd Plaintiff's authorized representative. There is no basis for the submission either on oath or from the Bar that the Letter of Agreement were unilateral variations by the 1st Defendant and that they vitiated the original contracts, or the guarantees by the 1st, 3rd and 4th Plaintiffs.

The answer to the issue whether the Variation by the Letter of Agreement vitiated the original contracts, and therefore discharged the guarantors under the Guarantee is that the Letter Agreements were merely variations and not rescissions of the IFC Loan Agreement and did not constitute new contracts among the 2nd Plaintiff and the 1st Defendant. The Guarantors are therefore bound by their respective obligations under the Guarantee Agreement.

Were the Contracts in the Loan Agreements of 24th June, 1997, and 19th January, 1998 respectively

modified and replaced by contracts which obliged the 1st and 2nd Plaintiffs to start Repaying the loans after the rose farm has been extended by an additional 5 ha. and operations of the purported mortgages and debentures suspended.?

The issue whether the contracts in the Loan Agreements of 24th June, 1997 and 19th January, 1998 respectively and replaced by contracts which obliged the 2nd Plaintiffs to start repaying the loans has been extended by an additional 5 ha. and operations of the purported mortgages and debentures suspended, has been partially answered in the immediate foregoing discussion on whether the Letter Agreements vitiated those contracts, and where I have stated that those contracts were not vitiated by the Letter Agreements.

On the collateral issue whether the Letter Agreements modified and replaced the original contracts to which they relate, I have held that the Letter Agreements only modified or varied the Original Contracts and it only remains to say differently, that they did not replace those contracts.

The Letter Agreement of May 18, 1999 recites in clause 3 thereof that the Company ***(Redhill flowers Kenya***) Ltd and IFC have agreed to amend the schedule of repayments of the Loan appearing in Section 3.05 of the Loan Agreement, so that the Loan is rescheduled for repayment in ten (10) equal semi-annual installments….." That letter Agreement does not say why the loan repayments were so rescheduled. If the reason was that "***so that rose farm was extended by an additional 5 ha. and operations of the purported mortgages and debentures are suspended"*** both Plaintiffs and indeed the 1st Defendant would have had the good sense to say so expressly. Such a fundamental term, a term that goes to the very root loan agreements transactions, cannot be merely implied. There is absolutely no basis for it, and I reject it.

The other issue raised was - ***Were the guarantees given to the Defendants by the 3rd and 4th Plaintiffs Discharged by the material Variations or modifications of the Contracts of borrowing.***

This question has already been substantially answered in the preceding discussion on whether the Letter Agreements fundamentally altered the leading borrowing agreements. I have held that the said Letter Agreements did not fundamentally introduce new contracts, and were not novations either. The amendments introduced by the Letter Agreements were in effect for the benefit of the 2nd Plaintiff whose obligations were guaranteed by the 1st, 3rd and 4th Plaintiffs. The Letter Agreements did not therefore discharge the guarantees by either the first, or the 3rd and 4th Plaintiffs.

If (which is denied by the Plaintiffs) the Defendants have valid mortgages of L.R. No. 167/9 and L.R. 168/91 whether the exercise by the Defendants of the Statutory Power of Sale over the said properties is pre-mature, and whether there were Valid notices issued to the 1st and 2nd Plaintiff within the meaning of Section 69A (1) of the Transfer of Property Act 1882, of India.

This issue is really two issues rolled into one. The first issue is whether the exercise of the Defendants' statutory power of sale over the charged properties was pre-mature. The second issue is whether there were valid notices issued to 1st and 2nd Plaintiff within the meaning of Section 69 A (1) of the Transfer of Property Act, 1882 of India as modified by the Act of the same name of 1959.

The first limb of the issue whether the exercise of the Defendants' statutory power is pre-mature can only be answered upon consideration of the second issue namely, whether there were valid notices issued to the 1st and 2nd Defendants in terms of Section 69A (1) of the said Transfer of Property Act. To answer that question we need to consider the provisions of the said Section 69A (1) and any decided cases on the interpretation of that Section:-

"***69A (1) A mortgage shall not exercise the mortgagee's statutory powers of sale unless and until-***

(a) notice requiring payment of the mortgage – money has been served on the mortgagors and default has been made in payment of the mortgage – money, or part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage instrument or in this Act and on the part of the mortgagor, or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.

(d) in the case of agricultural land, notice of the exercise of the statutory power of sale has been served on the District Commissioner of the area in which the mortgaged land is situate at least one month before the sale and the period specified by the court pursuant to subsection (2) has expired;

(2) **The District Commissioner shall within fourteen**

days of the service on him of the notice under paragraph (d) of sub-section (1) by originating summons to the High Court for an order that the sale be post-poned, and the court may, if it is satisfied that the sale would result in persons *(other than the mortgagor and his family***) being evicted from the land and cause undue social difficulties or cause public disorder in the neighborhood, order that the sale be postponed for such period not exceeding six months as it shall think fit."**

The above section clearly provides that a mortgagee intending to exercise its statutory power of sale must give written notice of not less than three months upon the expiration of which, if no payment is made, the mortgagee may sell the mortgaged property. If the land is agricultural land, the mortgagee is in addition required by subsection 1 (1) (d) of the said Section to also give notice to the District Commissioner in which the land is situate, notice of at least one month before the sale and the period not exceeding six months which may be specified by the court under subsection (2) of the said Section 69A. if an application is made by the D.C. to postpone the sale.

However, according to the Affidavit of Joan Njoki Ndungi, on advice of the Plaintiffs' Advocates, and indeed the submissions of Dr. Kuria learned counsel for the Plaintiffs, in addition to the three months statutory notice to the mortgagor, a mortgagee is also required to exercise its statutory power of sale in good faith and fairly, and that a mortgagee is not allowed to exercise the statutory power of sale capriciously, and concluded that the purported notices issued by the Defendants are null and void.

In this submission Dr. Kuria relied upon the five judge bench Court of Appeal decision in the case of ***TRUST BANK LTD –VS- EROS CHEMISTS LTD [2002] E.R. 550.***

In that case, the crucial issue before the court was what constituted a valid notice under Section 69A (1) of the Transfer of Property Act, 1882 of India. The Court noted that the existence of conflicting decisions of the Court of Appeal on the issue in ***RUSSEL CO. LTD. –VS- COMMERCIAL BANK OF AFRICA Ltd & another [1991]LLR 1415*** (CAK) and ***Trust Bank Limited –Vs- Okoth [2000] I E.A. 224 (CAK)*** raised difficult questions because the court, as a matter of judicial policy and being the final Court of Appeal for Kenya would normally regard a previous decision of its own as binding. However the court was free in both civil and criminal cases to depart from a previous decision when it appeared right to do so.

At page 54, the Court expressed itself:-

*"…. **The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of the notice is. In our judgment the object of the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warning of an intended right of sale,"***

For that right to accrue the statute provided for a three month's period to lapse after service of notice. In our judgement a notice seeking to sell the charged property must expressly state that the

sale shall take place after ***three month's period.*** *To omit* ***to say so, or to state a period of less than three months for sale (as in the Russel Case) is to deny the mortgagor a right conferred upon him by statute. That must*** *clearly render the notice void.*

*"…. **In our judgement…. there is a mandatory requirement that a statutory right to sell will not arise** unless **and until three months notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one, failing obedience to it a notice is not valid….."***

If the letter dated April 30, 2003 attached to the Replying Affidavit of Sheila M. Michuki sworn on 9.10.2003 is the ***Notice*** said to be given under the provisions of Sections 69A and 69F of the Transfer of Property Act, 1882 of India as applied to Kenya, then, with great respect to the 1st Defendant and its legal advisers, it does not meet the test laid down by the Court of Appeal in the cited case.

After reciting that the borrower had defaulted in payment of interest for another two (2) months (probably in fulfillment of the requirements of Section 69 A (1) (b) (relating to non-payment of interest for 2 months) the letter (signed by one Saleem Karimjee, the 1st Defendant's Regional Manager, Eastern African, Sub-Saharan African Department) then purports to give Notice in these terms:-

*"**WE FURTHER HEREBY DEMAND THAT YOU PAY TO US WITHIN THREE (3) MONTHS FROM THE DATE OF SERVICE OF THIS NOTICE** **the** sum of two hundred and twenty one thousand two hundred and seventeen decimal nine two Euros and cents (E 221,217.92)…. **AND FAILING WHICH WE WILL SELL** the properties and/or appoint a receiver on the income of the propertiers," and concludes that "the Notice is given under the provisions of Sections 69A and 69 F of the Transfer of Property Act, 1882 of India as applied to Kenya."*

The Court of Appeal refers to Mulla on the Transfer of Property Act (8th edition at page 602 where he states "***No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning."***

There may be no form of notice prescribed under the Act the Court of Appeal, and quite correctly in my humble view, held that for the right to sell to accrue the statute provided for a three months' period to ***lapse*** after service of notice. The notice given by the 1st Defendant's Regional Manager, in his letter of 30.04.2003 is no such notice, it is by its terms, demand for payment ***within*** three months. There is no notice that the 1st Defendant would sell ***after*** the lapse of three months., A statement or averment that the notice is given in terms of Section 69A and 69F is not a statutory notice envisaged under the said 69A (1) of the Transfer of Property Act 1882 of India as applied to Kenya. The 1st Defendant's notice is therefore of no avail to it, it is invalid and void. It has no effect.

This is not so far as the 2nd Defendant's Notice is concerned. It is dated 8th April, 2003, and is attached to the Replying Affidavit of Zipporah Kinanga Mogaka sworn on 9-10-2003. It is distinctly clear and to the point.

"***The Bank as the Chargee shall,*** *after* ***the expiry of THREE (3) MONTHS from the*** *date of service* ***of this notice , sell the charged property in realization of the security conferred, and thereafter, if necessary, institute appropriate proceedings against you under the guarantee for the recovery of any balance remaining unpaid on realization of the security aforementioned unless the stated amount (US$419,540.29) together with interest thereon plus costs shall have been received in full by or before expiry of the period of this notice."***

This Notice by the 2nd Defendant is in accord with the Court of Appeal's decision in ***Trust Bank Ltd – Vs***. ***Eros Chemists Ltd*** (supra), and the only issue is whether there is any reason for granting an ***injunction*** to the Plaintiffs to stop the 2nd Defendant from realizing its security through the sale of the mortgaged property.

The locus classics on this subject is the case of ***GIELLA –VS- CASSMAN BROWN & company Ltd***

[1973] E.A. 358. That case held ***inter alia*** that for a court to grant an injunction, the Applicant :-

(a) Must show a prima facie case with a probability of success;

(b) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(c) when the court is in doubt it will decide the application on the balance of convenience;

There is reason for restraining the 1st Defendant from exercising its statutory power of sale. It is because the 1st Defendant gave an ineffective notice in terms of Section 69A (1) of the Transfer of Property Act 1882 of India, as applied to Kenya as I have already established above. I have also established that the 2nd Defendant gave an effective notice in terms of the said provision of the said Transfer of Property Act. To restrain the 2nd Defendant the Plaintiffs/applicants must satisfy the conditions set out in Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725 which says:-

"*725**. When mortgagees may be restrained from exercising power of sales--***

"***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is 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, on the terms of the mortgage, the claim is excessive."***

This passage was quoted with approval by Kwach J.A. in **MRAO LTD –Vs- FIRST AMERICAN BANK OF KENYA LTD** [2003] K.L.R. 125, at page 127.

There is no dispute that the 2nd Plaintiff borrowed funds from both the 1st and 2nd Defendants. There is also no dispute that the 1st, 3rd and 4th Plaintiffs entered into a Guarantee Agreement, not merely as sureties but as primary obligors of the liability of the 2nd Plaintiff for repayments of loan made to the 2nd Plaintiff by the Defendants. Those loans were made separately, under separate instruments of loan and guarantee. The Plaintiffs' complaint is that the loans were disbursed late and all at once. My examination of the lending documents shows, as I have already noted elsewhere in this Ruling, that the disbursement would only be made once the conditions for disbursement were fulfilled. The onus for fulfillment of those conditions entirely depended upon the Plaintiffs jointly and severally I would say, because the 1st and 2nd Plaintiff's had a common directorate and shareholding by the 3rd and 4th Plaintiffs and an acknowledged interest of the 5th Plaintiff. This cannot therefore be used as an excuse for non-payment of the loan advanced or for granting an injunction.

Dr. Kuria took great exception to Hon. Mr. Justice Kwach's commentary at page 129 in the Mrao case:-

" ***I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debtors by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters."***

I am sure Dr. Kuria would have no dispute over the first part of Justice Kwach's opinion. A person or company entering into a commercial transaction and one involving large sums of money will take good legal advice, before appending his signature or a company's seal. On the latter part, I believe that Hon. Mr. Justice Kwach did not mean that the courts will give effect to contractual terms without the inquiry

into them. I am certain that courts will not give effect to an unilateral change of interest rates where the original term provides that interest will be changed upon prior notice to the borrower. In other words the court seized of the matter would as a matter of course inquire into all the terms of contract brought to the notice and attention of the court.

Perhaps one last point needs to be mentioned here as the 3rd Plaintiff, Joan Njoki Ndungi attached so much emphasis upon it. It is that if the court does not grant an injunction against the sale of the mortgaged properties, then the Plaintiffs would suffer great sentimental loss as the mortgaged properties were acquired nearly four decades ago by the late James Samuel Gichuru, the first Chairman of the Kenya National African Union (K.A.N.U), the Kenya's first Minister for Finance and later Minister for Defence, who died in 1982 followed by his wife, the mother of the 3rd Plaintiff, and therefore grand parents of the 4th and 5th Plaintiffs, and have remained the family's flagships in agriculture in the area.

My short and perhaps sharp answer to this is quite simple and straightforward. It is that when the 3rd, 4th and 5th Plaintiffs put the mortgaged properties as security to secure loan facilities for their pet corporate baby, the 2nd Plaintiff Redhill Flowers (Kenya) Ltd they were quite aware that they were putting the family jewel into the market place. The family jewel that is put in the market becomes a commodity for sale should the venture for whatever reason fail. The sponsors of the rose farm project lost any semblance of sentimental value to the properties the moment they were offered for security. Having become commodities for sale, those properties can be sold and bought in the market place they were put in under the mortgages.

In conclusion therefore, having examined the various lending documents herein and in particular the mortgage dated 11-05-1998 by ***Gimalu Estates Ltd and International Finance Corporation***, and having considered the very well researched and argued submission by Counsel on both sides, I am satisfied that the first Plaintiff properly charged the mortgaged properties to secure loans to the 2nd Defendant by the Defendants. Having also examined the various correspondence and in particular the letter by the 2nd Defendant's legal Manager Z.K. Mogaka dated 8-04-2003 I am satisfied that the notice was in conformity with the requirements of the provisions of Section 69 A (1) of the Transfer of Property Act 1882 of India as applied to Kenya.

In the case of ***Stanley Munga Githunguri –Vs- Jimba Credit Corporation Ltd,*** Civil Appeal No. 144 of 1988 – Apalo J.A., Gicheru & Kwach Ag. JJA. observed at page 7 of their judgment ***inter alia*** "the learned judge expended a great deal of effort and energy in considering what is described as the main issue – the true legal consequences of the admitted breach of Section 10 (1) of the Banking Act …… No fewer than 8 pages of his 15 pages Ruling deal with this issue. Having resolved this issue against the Appellant, he practically brought the matter to an end..….. but the learned judge was not at that stage required to pronounce finally on the question. All he had to consider was whether the appellant presented a ***prima facie*** case which may well succeed.

Perhaps, I am guilty of this verbosity. I have written at length in line with the issues presented to me by the Plaintiffs/Applicants and the responses by the Defendants, in support and against the prayers for injunction. I felt I had to do justice to those arguments as best as I could, hence this voluminous Ruling. In summary however, I find and hold as follows:-

(1) **The Plaintiffs and Defendants did obtain Valid Land Control Board Consents from the Kiambu Land Control Board. The Consents were dated 11.12.1997 (in case of both the mortgages securing the IFC Loan Agreement and the National Bank of Kenya Ltd over L.R. No. 167/9 and L.R. 168/9.**

(2) The mortgages issued thereafter and dated 10-02-1998 *(by Gimalu Estates Ltd to the International Finance Corporation)* **and the other dated 11.05.1998 (by Gimalu Estates Limited and consented to by the International Finance Corporation) to National bank of Kenya Ltd. were valid and enforceable in accordance with their terms.**

(3) The Loan Agreements dated 24-06-1997 (between Redhill Flowers (Kenya) Ltd. and International Finance Corporation) and dated 19-01-1998 on which the mortgages were based were not frustrated.

(4) There was no impropriety on the part of the Defendants. There was nothing to shock the conscience of the court to make it against equity and good conscience for the stronger party, the International Finance Corporation or the National Bank of Kenya to retain the benefit of the transaction the mortgages securing the funds disbursed. The Defendants released their funds in accordance with the Loan Agreements.

(5) In the Law of restitution, if the Court set aside a bargain as unconscionable it would do so on equitable terms. Generally the principal sum must be repaid with interest and costs may be ordered against the Plaintiffs.

(6) There was no basis for finding of a mistake by either party to support the proposition in the law of restitution;

(7) The Letter Agreements rescheduling the repayments of the IFC Loan under the IFC Loan Agreement did not introduce terms that the 2nd Plaintiff do commence payments when the rose farm had been extended by 5 ha.

(8) The Letter Agreements did not suspend the operation of either the mortgages or the Debenture by Redhill Flowers (Kenya) Ltd, and Gimalu Estates (Joint and Several) to National Bank of Kenya Ltd.

(9) The 1st Defendant International Finance Corporation has Valid mortgage with the Gimalu Estates Ltd over L.R. No. 167/9 and L.R. No. 168/9 but the exercise of statutory power of sale over the said properties has not arisen because there is no proper notice in terms of Section 69 A (1) of the Transfer of Property Act, 1882 of India as applied to Kenya.

(10) The 2nd Defendant has a Valid mortgage between it and the first Plaintiff Gimalu Estates Ltd with the consent of the 1st Defendant, International finance Corporation and by virtue of the Valid Statutory notice given by the 2nd Defendant the right to exercise such power of sale by public auction or private treaty has arisen.

(11) When the sponsors of the rose farm offered the mortgaged properties as security for loans to their corporate baby, Redhill Flowers (Kenya) Ltd, they also converted their sentimental attachment or value to the mortgaged properties into commodities for sale and is a loss they willingly agreed to suffer.

(12) The Plaintiffs' application for injunction as against the 1st Defendant, International Finance Corporation succeeds but the application for injunction against the 2nd Defendant fails.

In the result therefore the Plaintiffs/Applicants application dated 26-09-2003 succeeds as against the 1st Defendant, International Finance Corporation and each of the said parties shall bear its own costs. The application as against the 2nd Defendant, National Bank of Kenya Ltd is dismissed with costs to the 2nd Defendant. There shall be orders accordingly.

Dated and delivered at Nairobi this 14th day of June, 2006.

ANYARA EMUKULE

JUDGE.