



**Associated Warehousing Co Limited t/a Bamburi Beach Resort & 3 others v Clarkson & Southern Limited & 5 others (Civil Suit 218 of 2007 & 20 of 2008 & Civil Case 1540 of 1999 (Consolidated)) [2023] KEELC 569 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 569 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 218 OF 2007 & 20 OF 2008 & CIVIL CASE 1540 OF 1999 (CONSOLIDATED)**

**NA MATHEKA, J**

**FEBRUARY 7, 2023**

**BY COUNTERCLAIM**

**TRUST BANK LIMITED (IN LIQUIDATION) .....PLAINTIFF**

**VERSUS**

**1. ASSOCIATED WAREHOUSING CO LIMITED**

**T/A BAMBURI BEACH RESORT**

**2. NITICHANDRA KRISHNALAN PANDYA**

**3. BHAVNA PANDYA.....DEFENDANTS**

**TO FORM**

**MOMBASA HCCC NO. 218 OF 2007**

**1. ASSOCIATED WAREHOUSING CO LIMITED**

**T/A BAMBURI BEACH RESORT**

**2. NITICHANDRA KRISHNALAN PANDYA**

**3. BHAVNA PANDYA.....PLAINTIFFS**

**VERSUS**

**1. TRUST BANK LIMITED (IN LIQUIDATION)**

**2. CLARKSON & SOUTHERN LIMITED**

**3. FIDELITY SHEILD INSURANCE CO. LIMITED**

**4. NETCALL HOLDING LIMITED**

**5. THE LAND REGISTRAR, MOMBASA.....DEFENDANTS**

**CURRENTLY**

**MOMBASA ELC 362 OF 2017**



1. ASSOCIATED WAREHOUSING CO LIMITED  
T/A BAMBURI BEACH RESORT  
2. NITICHANDRA KRISHNALAN PANDYA  
3. BHAVNA PANDYA.....PLAINTIFFS

VERSUS

1. TRUST BANK LIMITED (IN LIQUIDATION)  
2. CLARKSON & SOUTHERN LIMITED  
3. FIDELITY SHEILD INSURANCE CO. LIMITED  
4. NETCALL HOLDING LIMITED  
5. THE LAND REGISTRAR, MOMBASA.....DEFENDANTS

BETWEEN

ASSOCIATED WAREHOUSING CO LIMITED T/A BAMBURI BEACH  
RESORT ..... PLAINTIFF

AND

CLARKSON & SOUTHERN LIMITED ..... 1<sup>ST</sup> DEFENDANT  
FIDELITY SHEILD INSURANCE CO. LIMITED ..... 2<sup>ND</sup> DEFENDANT  
NETCALL HOLDING LIMITED ..... 3<sup>RD</sup> DEFENDANT  
REGISTRAR OF TITLES, MOMBASA ..... 4<sup>TH</sup> DEFENDANT

AS CONSOLIDATED WITH  
CIVIL SUIT 20 OF 2008

BETWEEN

NETCALL HOLDINGS LIMITED ..... PLAINTIFF

AND

ASSOCIATED WAREHOUSING CO LIMITED ..... DEFENDANT

AS CONSOLIDATED WITH  
CIVIL CASE 1540 OF 1999

BETWEEN

ASSOCIATED WAREHOUSING CO LIMITED T/A BAMBURI BEACH  
RESORT ..... 1<sup>ST</sup> PLAINTIFF  
NITICHANDRA KRISHNALAH PANDYA ..... 2<sup>ND</sup> PLAINTIFF  
BHAVNA PANDYA ..... 3<sup>RD</sup> PLAINTIFF



AND

TRUST BANK LIMITED ( IN LIQUIDATION) ..... 1<sup>ST</sup> DEFENDANT  
CLARKSON & SOUTHERN LIMITED ..... 2<sup>ND</sup> DEFENDANT

## JUDGMENT

### I. Pleadings

#### The plaintiffs' case

1. The plaintiffs herein filed a further re-amended plaint dated April 28, 2017 on May 2, 2017, they averred that the 1<sup>st</sup> plaintiff was at all material times the legal owner of parcel No subdivision No 1532 (original No 871/1) of section 1 MN Mombasa title No CR No 13476 referred herein as the "suit property". On October 31, 1995, the 1<sup>st</sup> plaintiff created a charge against the suit property to secure Kshs 20,000,000/=, which is claimed to have been illegal, invalid, fraudulent and a nullity in law, as it never created any statutory power of sale in favour of the 1<sup>st</sup> defendant. The plaintiffs averred that the charge was not properly executed and denied that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs never appeared before Mr Chhotalal K. Kanji for execution of the charge as the directors of the 1<sup>st</sup> plaintiff. The plaintiffs maintained that the certificate on page 16 of the charge is fraudulent since it was only executed by one director with no explanation at all.
2. The plaintiffs claimed that they had reason to believe that there was no interest charged since there was no specific interested specified and further argued that the provision allowing the 1<sup>st</sup> defendant to vary the interest was illegal and oppressive. The plaintiffs averred that the charge was intended to ensure that they will not at any time know the full extent of the debt and fetter the 1<sup>st</sup> plaintiff's right of redemption. The plaintiffs maintained that as at October 8, 1998 they fully redeemed the charge and as at July 31, 1999 they had made an overpayment of Kshs 8,504,125. The plaintiffs further averred that the 1<sup>st</sup> defendant could not have recovered more than the Kshs 20,000,000/= charged and further claimed that the statutory notices and the subsequent sale was illegal.
3. The plaintiff averred that the 1<sup>st</sup> defendant was placed under statutory management by Central Bank of Kenya (CBK) and *vide* a letter dated September 25, 1998, the CBK's appointed manager informed the 1<sup>st</sup> plaintiff that all contracts between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant had been determined and all advancement made to the 1<sup>st</sup> plaintiff were recalled. Further the manager demanded payment from the 1<sup>st</sup> plaintiff the sum of Kshs 20,471,718.75 as the amount due from the 1<sup>st</sup> plaintiff as at September 17, 1998. The plaintiffs wrote back on October 7, 1998 authorizing the 1<sup>st</sup> defendant to set off the said amount using the Bearer Certificate of Deposits (BCDS) of Kshs 18,000,000 which at the time were equivalent to deposits.
4. It is the plaintiff's case that on October 19, 1999, the court in Nairobi HCCC No 1540 of 1999 restrained the 1<sup>st</sup> defendant from selling the suit property until the BCDS of Kshs 18,000,000/= was used to offset against any outstanding loan. The plaintiffs averred that the 1<sup>st</sup> defendant went against the said ruling of court and sold the suit property to the 2<sup>nd</sup> defendant by way of private treaty and without notice to the plaintiffs. The plaintiffs averred that the sale was in contempt of court orders, there was under valuation of the suit property and lack of conducting a site visit of the property before purchase.



5. The plaintiffs further claim that the 2<sup>nd</sup> defendant fraudulently procured and executed a charge dated November 28, 2007, with the 3<sup>rd</sup> defendant. It was claimed that the 2<sup>nd</sup> defendant had illegally acquired the suit property hence could not execute a charge that was registered on 31<sup>st</sup> November 2007 was a non-existing date. The plaintiffs maintained that other than the 2<sup>nd</sup> and 3<sup>rd</sup> defendants having common directors and shareholders, they shared the same company secretary one Mr Wilfred Oroko. The plaintiff argued that the 3<sup>rd</sup> defendant had actual/constructive knowledge of the ruling delivered in Nairobi HCCC No 1549 of 1999 and further the ruling delivered in Mombasa HCCC 218 of 2007 on 27<sup>th</sup> November 2007 which restrained the 2<sup>nd</sup> defendant from dealing with the suit property in whatever manner.
6. The plaintiffs maintained that the transfer of charge dated January 9, 2008, where the 3<sup>rd</sup> defendant transferred the suit property to the 4<sup>th</sup> defendant was null and void for the reason it was procured by fraud on the part of the 2<sup>nd</sup> to 5<sup>th</sup> defendants. The 3<sup>rd</sup> defendant's charge was dated November 28, 2007, while the 4<sup>th</sup> defendant's charge was created on January 9, 2008 less than the 90 statutory days required in law. The transfer was said to be made pursuant to no statutory power of sale and was said to pass no valid title to the 4<sup>th</sup> defendant. The plaintiffs prayed for judgement against the defendants for:
  - a. A permanent injunction restraining the 4<sup>th</sup> defendant whether by itself, its servants and/or agents from interfering with the plaintiff's quiet and peaceful possession and enjoyment of the property known as subdivision 1532 (original number 871/1 section 1 MN Mombasa).
  - b. A declaration that the document purporting to be a charge dated October 31, 1995 did not create any statutory power of sale and that the 1<sup>st</sup> defendant and its advocates knew and still know that the documents did not create any statutory power of sale by reason that it did not comply with Section 69 (4)(a) of the Transfer of Property Act 1882 (repealed) and that the 1<sup>st</sup> defendant and its advocate had this knowledge from 1995.
  - c. A declaration that the incompetent charge dated October 31, 1999 did not specify any rate of interest and that therefore no interest was due or payable under that charge.
  - d. A declaration that the maximum amount secured by the incompetent charge dated October 31, 1995 was Kshs 20,000,000 inclusive of any interest.
  - e. A declaration that the 1<sup>st</sup> defendant had been restrained from selling the property by the order issued by the High Court in Nairobi in HCCC 1540 of 1999 (formerly 1266 of 1999) before offsetting any amount due from the value of the 6 bearer certificates of deposit and that before the purported sale of the property to the 2<sup>nd</sup> defendant without crediting the account with the value of those certificates (Kshs 18,000,000/=) together with interest thereon amounted to contempt of court was illegal, criminal, incompetent and null and void and that the transfer by the 1<sup>st</sup> and 2<sup>nd</sup> defendant was null and void for all purposes.
  - f. A declaration that the purported disposal of all interest in property protected by court did not extinguish the 1<sup>st</sup> plaintiff's ownership of the property or pass any interest of title to the 2<sup>nd</sup> defendant.
  - g. A declaration that the same property was protected by confirmed orders of injunction given in this suit with the full knowledge of the 2<sup>nd</sup> defendant and that therefore the subsequent charge dated November 28, 2007 of the property by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant was illegal, incompetent, null and void and amounted to a gross violation and contempt of those orders of injunction.



- h. A declaration that the purported charge of the property by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant in violation of orders of this court did not create any interest in favour of the 3<sup>rd</sup> defendant and that charge is null and void for all purposes.
- i. A declaration that the 3<sup>rd</sup> defendant knew that the property was protected by orders of injunction in this suit before it took a charge over that property by reason of common directors with the 2<sup>nd</sup> defendant and by reason of a common company secretary who had sworn and filed affidavits in this suit prior to that charge.
- j. A declaration that the purported eviction of the plaintiffs from the property by the 2<sup>nd</sup> defendant without a court order, warrant or decree from a competent court was illegal, unlawful and malicious and that the 2<sup>nd</sup> defendant and it then advocates knew that the *ex-parte* orders to evict the plaintiffs issued by a resident magistrate in Mombasa RMCC No 2501 of 2007 were illegal, incompetent, null and void.
- k. Pending the hearing and final determination of this suit the 4<sup>th</sup> defendant by itself, its employees, servants, assigns or agents be restrained from building upon, constructing upon, demolishing or altering any building, structures, houses, cottages, flats or other constructions or development of any nature or entering upon, or having entered upon by any means from remaining upon and/or selling, offering for sale, subdividing, leasing, pledging, charging, transferring or in any manner dealing with or interfering with the plaintiffs quiet and peaceful possession and enjoyment of subdivision 1532 (original number 871/1 section 1 MN Mombasa) title No CR 13476.
- l. A declaration that the registration of the transfer dated August 9, 2007 by the 5<sup>th</sup> defendant in favour of the 1<sup>st</sup> defendant was null and void.
- m. A declaration that the transfer dated January 9, 2008 was null and void and that the registration of that transfer was also null and void.
- n. An order under section 64 of the Registration of Titles Act, chapter 281, Laws of Kenya (repealed) be given directing the 5<sup>th</sup> defendant to cancel all entries subsequent to the charge dated October 31, 1995 in the register/title and to correct the title by deleting those entries.
- o. A declaration that the 1<sup>st</sup> plaintiff had paid all monies due under the incompetent charge date October 31, 1995, was entitled to redeem the property and that the 1<sup>st</sup> defendant ought to have delivered to the 1<sup>st</sup> plaintiff a duly executed discharge of charge.
- p. An order directed to the 4<sup>th</sup> defendant to forthwith release to the 1<sup>st</sup> plaintiff the original title for subdivision 1532 (original number 871/1 section 1 MN Mombasa) registered as CR No 13476 and in default the 5<sup>th</sup> defendant be compelled to issue a provisional title to the 1<sup>st</sup> plaintiff.
- q. An order compelling the 5<sup>th</sup> defendant to cancel the registration of the charge dated October 31, 1995.
- r. A declaration that the 2<sup>nd</sup> defendant which is the subject of Mombasa High Court winding up cause No 1 of 2013 by reason by insolvency and inability to pay the 1<sup>st</sup> plaintiff costs in excess of Kshs 5,000,000/= continues to fraudulently incur legal costs and a further declaration that all fees it has paid to its advocates before settlement of the 1<sup>st</sup> plaintiff's aforesaid costs amount to decimation of its assets to defraud the 1<sup>st</sup> plaintiff as the petitioner in those winding up proceedings.



- s. A declaration that Messrs Oraro & Company Advocates are aware of the 2<sup>nd</sup> defendant's inability to pay its debts and is assisting the 2<sup>nd</sup> defendant to continue incurring costs that the plaintiffs are unlikely to recover and that therefore Messrs Oraro & Company Advocates should personally pay costs of the plaintiffs.
- t. A declaration that any transaction entered into and any contact, agreement or instrument executed by the 1<sup>st</sup> to 4<sup>th</sup> defendants and registered by the 5<sup>th</sup> defendant after October 19, 1999 were incompetent, illegal, invalid and null and void.
- u. A declaration that the 1<sup>st</sup> defendant purported to sell the property by private treaty at a gross under value to the 2<sup>nd</sup> defendant and that the 3<sup>rd</sup> defendant also purported to sell the same property to the 4<sup>th</sup> defendant at a gross under value and that no such sale passed any title to any purchaser.
- v. Punitive, exemplary and aggravated damages against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants.
- w. General, special, compulsory, aggravated and exemplary damages be assessed and paid by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> plaintiff for trespass to the property.
- x. Judgement against the 1<sup>st</sup> defendant to refund to the 1<sup>st</sup> plaintiff the sum of Kshs 8,143,383/= together with interest with effect from August 1, 1999.
- y. Costs of this suit to be paid by the 1<sup>st</sup> to 4<sup>th</sup> defendants jointly and severally subject to prayer (s) above.
- z. Interest on all payments whether by way of damages, costs or refund at costs rates from the date of filing suit until payment in full.

### **1<sup>st</sup> Defendant's Case**

7. The 1<sup>st</sup> defendant filed a defence to the plaintiffs' further re-amended plaint and counterclaim dated May 25, 2017 on June 5, 2017. The 1<sup>st</sup> defendant averred that the 1<sup>st</sup> plaintiff lost ownership of the suit property when the 1<sup>st</sup> defendant lawfully exercised its statutory power of sale over the suit property. The charge dated October 31, 1995 was said to be competent, properly drawn and executed as required by law and not fraudulent as purported by the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> defendant stated that at the time the suit property was sold, there was no court order in place barring them from disposing off the suit property. The 1<sup>st</sup> defendant stated that the suit is fatally defective, since the suit was commenced without the leave of court to institute a suit against the 1<sup>st</sup> defendant, who at the time of the commencement of the suit was under the statutory management of the CBK.
8. It was the 1<sup>st</sup> defendant's case that the Bearer Certificates of Deposits (BCDS) allegedly held by the 1<sup>st</sup> plaintiff to the tune of Kshs 18,000,000/= were at all times not equivalent to deposits as per the Central Bank of Kenya policy guidelines in relation to banks under statutory management. The 1<sup>st</sup> defendant maintained that the BCDS could not constitute payment of any kind and that they declined to accept the same for the purpose of payment. The 1<sup>st</sup> defendant stated that they declined offsetting the said BCDS against the 1<sup>st</sup> plaintiff's outstanding credit facility, and stated that they returned all the BCDS to the plaintiffs.
9. The 1<sup>st</sup> defendant accused the plaintiffs of breaching their duties as their customers, they maintained that the plaintiffs acted in bad faith, dishonesty and fraudulently and conspired to deny and deprive the 1<sup>st</sup> defendant of its lawful duties. The plaintiffs were accused of inter alia intentionally failing to service the loan when it fell due, purchasing the BCDS at a discounted rate after the 1<sup>st</sup> defendant was put



into statutory management and pretending the said BCDS were legal tender for payment against the outstanding loan, in full knowledge the same were presented prematurely. The 1<sup>st</sup> defendant argued that it would be unfair and inequitable for the plaintiffs to obtain relief for their unjust enrichment at the same time discriminating other depositors and creditors of the 1<sup>st</sup> defendant yet at that time the 1<sup>st</sup> defendant was placed under liquidation and it treated all its depositors and borrowers equally.

10. The 1<sup>st</sup> defendant mounted a counterclaim against the plaintiffs and sought the following prayers:
  - a. The plaintiff's suit be dismissed with costs.
  - b. Kshs 53,570,575.
  - c. Interest on the principal amount at the prevailing rates from time to time calculated on day to day basis from the July 1, 1999 until payment in full.
  - d. Costs of and incidental to this counterclaim.
  - e. Any other or further relief this honorable court may deem fit to grant.
11. The 1<sup>st</sup> defendant stated they created a legal charge dated October 31, 1995 against the 1<sup>st</sup> plaintiff's title to the suit property. That a loan facility of Kshs 20,000,000/= was advanced to 1<sup>st</sup> plaintiff and was subsequently guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs *vide* a duly executed guarantee dated September 15, 1995. It was a term of the charge that if by the legal date of redemption, the 1<sup>st</sup> plaintiff would not have fully regularized the loan, the 1<sup>st</sup> defendant was at liberty to recover the charge after demanding it in writing together with interest, penalties and legal costs. The 1<sup>st</sup> defendant maintained that as at August 23, 2007, the outstanding loan together with the accrued interest and penalties stood at Kshs 80,560,265.25/=. Subsequently, the 1<sup>st</sup> defendant exercised its statutory power of sale and sold the suit property for Kshs 31,000,000/= leaving a balance of Kshs 52,660,265.25 as at August 23, 2007 which the 1<sup>st</sup> defendant argued it's still outstanding and continues to attract interest and penalties. The 1<sup>st</sup> defendant now demands from the plaintiffs Kshs 53,570,575.25 as at October 18, 2007 plus interest and penalties in the manner set out in the charge till payment in full.

### **2<sup>nd</sup> Defendant's Defence to Further Re-amended Plaintiff**

12. The 2<sup>nd</sup> defendant filed a defence to the plaintiffs' further re-amended plaintiff and counterclaim dated May 8, 2017 on May 10, 2017. The 2<sup>nd</sup> defendant denied each and every allegation in the further re-amended plaintiff and averred that the 1<sup>st</sup> plaintiff was the owner of the suit property but denied that the 1<sup>st</sup> plaintiff is the present lawful owner of the suit property. The 2<sup>nd</sup> defendant denied the particulars of fraud, illegality or collusion and stated that the suit property was sold by the 1<sup>st</sup> defendant under a statutory power of sale. The 2<sup>nd</sup> defendant maintained that they were a bonafide purchaser for interest without notice of the ruling delivered on October 19, 1999 or any impediment hindering the sale under the 1<sup>st</sup> defendant's statutory power of sale. The 2<sup>nd</sup> defendant urged court to dismiss the plaintiffs' suit with costs.

### **3<sup>rd</sup> Defendant's Defence to Further Re-amended Plaintiff**

13. The 3<sup>rd</sup> defendant filed a defence to the plaintiffs' further re-amended plaintiff and counterclaim dated May 2, 2017 on May 3, 2017. The 3<sup>rd</sup> defendant stated it is was not privy to the charge between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant and is therefore not liable for any purported breach arising from the 1<sup>st</sup> defendant exercising its power of sale over the suit property. The 2<sup>nd</sup> defendant averred that the 1<sup>st</sup> plaintiff's rights over the suit property were extinguished when the suit property was sold, transferred and registered in favor of the 2<sup>nd</sup> defendant and its remedies, if any lie against the 1<sup>st</sup> defendant.



14. It is the 2<sup>nd</sup> defendant's case that it was not party to Nairobi HCCC No 1540 of 1999 and was not aware of the orders issued therein and argued that it only learnt of the said orders when served with court documents in Mombasa HCCC No 218 of 2007. Therefore, it cannot be held liable for breach of any court order since it was neither directed to them nor served with the said order. The 3<sup>rd</sup> defendant contended that it was involved in the financing of the 2<sup>nd</sup> defendant to purchase the suit property, and further stated that the plaintiff was not party to the contract between the 2<sup>nd</sup> and 3<sup>rd</sup> defendant hence has no locus to impugn on its content, validity or transactions emanating therefrom.
15. The 3<sup>rd</sup> defendant maintained that the charge dated November 28, 2007 was legally procured, executed and registered and denied that the said charge was tainted with fraud and collusion as alleged by the plaintiff. The 3<sup>rd</sup> defendant maintained that on January 9, 2008 it legally transferred the suit property to the 4<sup>th</sup> defendant in exercise of its power of sale and denied that the same was fraudulent as alleged by the plaintiff, and urged the court to dismiss the suit with costs.

#### **4<sup>th</sup> Defendant's Defence to Further Re-amended Plaintiff and Counterclaim**

16. The 4<sup>th</sup> defendant filed a defence to the plaintiffs' further re-amended plaintiff and counterclaim dated May 8, 2017 and denied every allegation set out in the further re-amended plaintiff. The 4<sup>th</sup> defendant stated that it is the registered owner of plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476 together with all the improvements and developments thereon. The 4<sup>th</sup> defendant claimed to be aware of the suit property *vide* a sale advertised in the Standard Newspaper on December 24, 2007 by Muga Auctioneers on instructions of the 2<sup>nd</sup> defendant for sale by public auction. The 4<sup>th</sup> defendant participated in the said auction that was carried out at the auctioneers' offices on January 9, 2008 and made the highest bid of Kshs 32,000,000/= . The suit property was then transferred to the 4<sup>th</sup> defendant by the 3<sup>rd</sup> defendant on January 9, 2008, which was subsequently registered and a certificate of ownership issued on January 11, 2008. The 4<sup>th</sup> defendant contended that before the sale it had established from the 5<sup>th</sup> defendant's registry that there was no impediment noted on the title against the said sale by the 3<sup>rd</sup> defendant. It is the 4<sup>th</sup> defendant's case that it has acquired indefeasible title to the suit property and is entitled to its occupation and use to the exclusion of the plaintiffs.
17. The 4<sup>th</sup> defendant raised a counterclaim against the plaintiffs and sought the following orders:
  - a. A permanent injunction restraining the plaintiffs whether by itself, its agents, officers, employees, servants or otherwise howsoever from effecting any change whatsoever in the state and/or condition of that parcel of land known as plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476, or any part thereof.
  - b. A permanent injunction restraining the plaintiff whether by itself, its agents, officers, employees, servants or otherwise howsoever from committing any act of waste against that parcel of land know as plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476, or any part thereof or doing or causing to be done any act or acts whatsoever inconsistent with or prejudicial to the 4<sup>th</sup> defendant as the registered owner thereof.
  - c. A permanent injunction restraining the plaintiff whether by itself, its agents, officers, employees, servants or otherwise howsoever from trespassing on and/or remaining on that parcel of land known as plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476, or any part thereof.



- d. A mandatory order for the plaintiffs to vacate and in default be evicted forthwith from that parcel of land known as plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476, or any part thereof at the plaintiffs' costs.
  - e. Damages for trespass
  - f. Mesne profit for such and such rate as this honorable court may direct.
  - g. Costs for the counterclaim together with interest thereon as such rate and for such period of time as this honorable court may deem just to grant.
  - h. Any other or further relief that this honorable court may deem fit to grant.
18. The 4<sup>th</sup> defendant averred that as the absolute and indefensible owner of the suit land, they are entitled to possession, occupation and quiet enjoyment of the same. That the occupation of the plaintiff on the suit property is unlawful and amounts to trespass and is liable for mesne profits.
19. The 5<sup>th</sup> defendant filed a defence and in their submissions, Mrs Waswa stated that there was no cause of action against them.

## II. The Evidence

### Plaintiffs' case

20. Nitinchandra Krishnalal Pandya, the 2<sup>nd</sup> plaintiff was PW1. He adopted his witness statement dated April 28, 2017 and the bundle of documents dated March 9, 2019. He deponed that the charge dated October 31, 1995, drawn by the firm of A.B Patel & Patel Advocates (Advocates for the bank) and certified by Chhotalal K Kanji did not specify the interest to be charged. He deponed that he was the only director who executed the charge despite his wife, the 2<sup>nd</sup> plaintiff being the second director. He confirmed that the BCDS were with the bank. He stated that even without offsetting the BCDS, the 1<sup>st</sup> plaintiff did not owe the 1<sup>st</sup> defendant any monies as Kshs 22 million was paid within two years at a maximum rate of 19%. He maintained that the certificate by Chhotalal K. Kanji was incorrect and stated that neither him nor the 3<sup>rd</sup> plaintiff appeared before the advocate.
21. He confirmed that this suit was filed in 1999 and they obtained orders stopping the sale of the suit property on October 19, 1999. He further deponed that on December 5, 2000, A. B Patel & Patel Advocates instructed auctioneers to visit the suit property despite the injunction from court. He deponed that on August 3, 2007 the 1<sup>st</sup> defendant entered into an agreement of sale to the 2<sup>nd</sup> defendant, where the suit property was sold by private treaty for Kshs 31 million and not public auction. PW1 stated that on November 27, 2007, Justice Maraga (as he then was) ordered for restraint of dealings over the suit property, however a charge dated November 28, 2007 was executed in defiance of these orders and registered on November 30, 2007. He deponed that the 2<sup>nd</sup> defendant transferred a charge to the 3<sup>rd</sup> defendant on January 9, 2008 before the statutory 90 days had lapsed since the said charge was registered on November 30, 2007.
22. On cross examination by Mr Makhanu, for the 1<sup>st</sup> defendant he stated that himself and his wife guaranteed the charge of Kshs 20 million from the 1<sup>st</sup> defendant and were bound by the terms and conditions thereto. That the charge had a redemption date of December 29, 1995, and that they had not completed payment by then. He claimed to have discovered in 1996 that the charge was unreasonable and spoke to the bank verbally, however he neither intimated to the bank that he would return the loan nor that the certificate signed by Chhotalal K. Kanji was false, on the ground that none of the directors appeared before him for execution. He confirmed that three years later the bank



wrote to them demanding payment of the outstanding loan of Kshs 21, 701,689.00 and at that point is when he moved to court for injunctive orders. He claimed that the suit property was sold at an undervalued rate of Kshs 31million while its value stood at Kshs 80 million as per the valuation report dated September 5, 2007.

23. On further examination by Mr Chacha Odera, for the 2<sup>nd</sup> defendant, he deponed that he was not aware if the orders of October 19, 1999 were registered against the title of the suit property. He further stated that he was not in agreement with the bank when it sold the suit property by way of private treaty. On further cross examination by Mr Munyithya, for the 4<sup>th</sup> defendant he deponed that when the orders of October 19, 1999 were issued, the 4<sup>th</sup> defendant was not party to the suit, and that the said orders were not registered against the title. He also stated that there were no court orders stopping the 3<sup>rd</sup> defendant from selling the suit property to the 4<sup>th</sup> defendant. On reexamination, he stated that though he did not have any contract with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant the same are of interest to him since they relate to the suit property. With that the plaintiffs closed their case.

### Defendants' Case

24. Micah Likeuwan Nabori, DW1 adopted his statement and produced his bundle of documents both filed on July 24, 2017 as evidence. He stated that the 1<sup>st</sup> plaintiff charged the suit property with the 1<sup>st</sup> defendant to secure a loan of Kshs 20 million which was guaranteed by its directors, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. At the date of redemption, December 29, 1995, the 1<sup>st</sup> plaintiff was in default and the bank invoked its statutory power of sale after it was placed under statutory management by the CBK on September 17, 1998 and under liquidation on August 15, 2001.
25. He sought to clarify that BCDS were instruments used by the bank to raise capital and they were sold at a discounted price and were never met to offset a charge. He stated that anyone with the BCDS could cash them and that the 1<sup>st</sup> plaintiff never came in person to cash them and the ones that were sent by email were sent back to them. When the bank was placed under statutory management, the bank could neither recognize BCDS nor carry its normal business except to receive debt recoveries. He confirmed that when the 1<sup>st</sup> defendant exercised its statutory power of sale by selling the suit property by way of private treaty in August 2007 for Kshs 31 million there was no court order restraining the sale of the suit property. He confirmed that the decision to sell the suit property by way of private treaty was a decision made by Ms Ruth Ngure who was the liquidation agent at the time. He stated that the bank never informed the 1<sup>st</sup> plaintiff that they were selling the suit property by way of private treaty. He further added that the proceeds of the sale never settled the outstanding amount of Kshs 52 million, which the bank demands to date *vide* its counterclaim.
26. On cross examination, he deponed that when the suit property was sold the bank was under statutory management, where it could recover debts but only pay its depositors a maximum of Kshs 100,000/= and any money above was treated to preferential treatment. He argued that only credit in a deposit account, and not BCDS could be used to offset a loan, and in this case the BCDS held by the 1<sup>st</sup> plaintiff could not have redeemed the entire outstanding loan. On further cross examination, he confirmed that the bank returned the BCDS to the 1<sup>st</sup> plaintiff vide a letter dated January 7, 1999 from A.B Patel & Patel Advocates. DW1 insisted that the BCDS expired on January 1, 2000 and its validity was never extended. He maintained that the 1<sup>st</sup> defendant lawfully sold the suit property to the 2<sup>nd</sup> defendant and argued that there was no fraud in the transaction. He further contended that the bank did not deal with the 3<sup>rd</sup> defendant and insisted that they were paid by the 2<sup>nd</sup> defendant. DW1 stated that there has been no fraudulent case against the bank nor contempt of court proceedings brought against the bank for effecting the sale of the suit property.



27. Akbar Kurji was DW2 a director of the 2<sup>nd</sup> defendant, he adopted his statement dated October 7, 2017 into evidence and produced the documents attached thereto. He stated that the 2<sup>nd</sup> defendant was not a party to the case, where injunctive orders were issued and since the order was not registered on the title, they were not restrained from dealing with the property. He confirmed that the 2<sup>nd</sup> defendant entered into an agreement of sale with the Trust Bank Limited (In Liquidation) for Kshs 31 million. He stated that the 2<sup>nd</sup> defendant was financed by Fidelity Shield Insurance Co Limited to purchase the suit property. He confirmed that Fidelity Shield Insurance Co Limited has the same directors as those of Clarkson & Southern Limited.
28. He argued that the 2<sup>nd</sup> defendant conducted due diligence before purchasing the suit property and they were not aware that the 1<sup>st</sup> plaintiff had gone to court to challenge the sale. DW2 stated that the suit property was registered in the 2<sup>nd</sup> defendant's name on August 9, 2007 and on November 30, 2007 the suit property was charged to the 3<sup>rd</sup> defendant. He further stated that Fidelity Shield Insurance Co. Limited charged the suit property to Netcall Holdings Limited on November 30, 2007. He was however at pains to explain why the registrar's stamp on the charge bore the date 31<sup>st</sup> November 2007, a none existing date on the calendar, he stated that was a mistake done by the Registrar. On further cross examination, he stated that the 3<sup>rd</sup> defendant was not party to the court case that had injunctive orders. He stated that the 3<sup>rd</sup> defendant was merely a financier to the 2<sup>nd</sup> defendant in the transaction between the 1<sup>st</sup> and 2<sup>nd</sup> defendant but was not involved in the transfer from the 1<sup>st</sup> to the 2<sup>nd</sup> defendant. when the 2<sup>nd</sup> defendant could not pay the 3<sup>rd</sup> defendant, the same was sold to the 4<sup>th</sup> defendant.
29. Caren Jaguga was DW3, the 3<sup>rd</sup> defendant's legal officer. She adopted her statement dated May 2, 2017 and produced the documents dated December 21, 2012 into evidence. She confirmed that the 3<sup>rd</sup> defendant financed the 2<sup>nd</sup> defendant to buy the property, and paid Kshs 27,900,000/= and the charge was dated November 28, 2007. She confirmed that at the time of the sale, the 3<sup>rd</sup> defendant was not a party to the suit hence the orders of court of November 27, 2007 did not apply to them. She stated that the 3<sup>rd</sup> defendant joined the suit on January 17, 2008 and at the time Netcall Holdings Limited were the registered owners of the suit property. She deponed that after paying one installment the 2<sup>nd</sup> defendant was unable to service the loan and they requested the 3<sup>rd</sup> defendant to sell the suit property. The 3<sup>rd</sup> defendant went ahead to sell the suit property to the 4<sup>th</sup> defendant for Kshs 32 million, but they were unable to occupy the suit property because of the injunctive orders of November 27, 2007. She however confirmed that there was no valuation done before the 3<sup>rd</sup> defendant exercised their power of sale. She also confirmed that the charge was dated November 28, 2007, registered on November 30, 2007 and the same was advertised for sale on December 24, 2007, only 24 days after the registration was effected. She defended the sale and argued that though three months had not lapsed, the sale was effected at the request of the 2<sup>nd</sup> defendant. She denied that the charge was registered to defeat the court orders.
30. DW4 was Julius Ngumbao Mwengei, who testified on behalf of the 4<sup>th</sup> defendant. he adopted his statement and produced his documents as evidence. He stated before the 4<sup>th</sup> defendant bought the suit land by way of an auction and paid Kshs 32 million, he had visited the suit land and confirmed that it was occupied. He could not confirm whether the advocate who conducted the transaction was the same one who represented the plaintiff during the charge to the 1<sup>st</sup> defendant. He did not visit the lands office neither did he look at the details of the charge. He confirmed that the suit property was charged and sold within 40 days unlike the 90 days provided by the law. he did not know whether the auctioneers gave a 45-day notice before the sale. He stated that his advocate was the one who conducted the search and read the charge document.



31. He confirmed that though the suit property was worth Kshs 80 million the 4<sup>th</sup> defendant bought it at 32 million. He also stated that he could not confirm whether there was a valuation conducted before the sale and that he was not aware of the value of the suit property at the time of the auction, however he did confirm that the transfer was signed by the 4<sup>th</sup> defendant's directors who are the same as the 1<sup>st</sup> defendant's directors. He stated that at the time of the sale there was no caution on the title or a court order registered against the title. He stated that the 4<sup>th</sup> defendant was not a party to the suit at the time of the court orders and therefore the same would not apply to them.

### III. Issues

32. From the pleadings filed, evidence adduced, submissions made and authorities relied upon by the parties the main issues before court for determination are;
- i. Whether the charge dated October 31, 1995 between Associated Warehousing Company Limited and Trust Bank Limited was valid and enforceable.
  - ii. Whether Associated Warehousing Company Limited breached the charge dated October 31, 1995.
  - iii. Whether there existed a court order restraining Trust Bank Limited (In Liquidation) from exercising its statutory power of sale over the suit property.
  - iv. Whether the sale of the suit property by Trust Bank Limited (In Liquidation) to Clarkson & Southern Limited passed good title.
  - v. Whether the 1<sup>st</sup> defendant's counterclaim dated May 25, 2017 is merited.
  - vi. Whether the 4<sup>th</sup> defendant's counterclaim dated May 8, 2017 is merited.
  - vii. What orders ought to be granted by the court.

### IV. Determination

Whether the charge dated October 31, 1995 between Associated Warehousing Company Limited and Trust Bank Limited was valid and enforceable

33. Before considering the first issue for determination the 1<sup>st</sup> defendant raised the issue of whether the plaintiff required leave of the court to continue with the suit after the 1<sup>st</sup> defendant went into liquidation. The 1<sup>st</sup> defendant did not raise the same in their pleadings but during the trial. They submitted that section 26 (2) of the [Kenya Deposit Insurance Act](#) 2012 provided that;

“No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court.”

That similarly section 228 of the [Companies Act](#) (cap 486) Laws of Kenya (repealed) required leave of court to continue or commence legal proceedings against a company in liquidation and hence the suit is incurably incompetent and should dismiss the plaintiffs' case and continue with the 1<sup>st</sup> defendant's case. The plaintiffs submitted that the rights to fair trial under article 25 (c), access to justice under article 48 and fair hearing under article 50 (1) of the [Constitution](#) are guaranteed and this would not be so if one needs permission from the court before being heard. This court notes that the 1<sup>st</sup> defendant raised the issue of leave during the trial and after the pleadings had been closed. article 159 (d) of the [Constitution](#) of Kenya 2010 requires the court to administer justice without undue regard to procedural



technicalities. article 159 (b) requires justice not to be delayed. Article 159 (2) (d) of the Constitution states that;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-(a)justice shall be administered without undue regard to procedural technicalities.”

In the case of Kenya Ports Authority v Kenya Power & Lighting Co Limited (2012) eKLR Mwongo J defined procedural technicalities as;

“Combining the meaning of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying structures and rules which hinder the achievement of substantial justice.”

This matter was instituted before the 1<sup>st</sup> defendant went into liquidation and I concur with the plaintiffs’ submissions that it would be inequitable in the circumstances to require the plaintiff to obtain leave and yet the 1<sup>st</sup> defendant has a counterclaim which they desire to pursue to its logical conclusion. Indeed, I find that no prejudice will be suffered by either party and decline to dismiss the plaintiffs’ suit for that reason.

34. Associated Warehousing Company Limited, the 1<sup>st</sup> defendant charged land parcel No subdivision No 1532 (original No 871/1) of section 1 MN Mombasa title No CR No 13476 to Trust Bank Limited, the 1<sup>st</sup> defendant on October 31, 1995 for Kshs 20,000,000/=. The charge was executed by the directors of the 1<sup>st</sup> plaintiff and registered in favor of the 1<sup>st</sup> defendant on December 8, 1995.
35. The plaintiffs’ argument is that the said charge was invalid and did not create any statutory power of sale for two reasons. The first reason was that the charge failed to lay down the specific interest to be paid. The plaintiffs argued that at all times they could not ascertain how much monies were outstanding for their redemption and as such, it was only the principal amount of Kshs 20,000,000/= that was recoverable by the bank. There was no rate of interest fixed in the charge, however throughout the document, reference was made to an interest payable together with other charges fixed by the lender. The charge provided:

“...the lender shall in its sole discretion from time to time determine with full power to the lender to charge to charge different and penal rates for differences accounts and such interest shall be calculated and charged in the usual mode of the lender and compounded on daily balances and applied to the accounts with monthly rest both before and after any demand provided always that the lender shall not be required to advise the chargor of prior to any charge in the rate of interest payable nor shall failure by the lender to advise the chargor as aforesaid prejudice in any way howsoever the recovery by the interest charged subsequent to any change provided always that in the case of any such moneys being also secured to the lender under an agreement or instrument reserving a higher rate of interest than is herein provided nothing herein contained shall affect the right of the lender to recover such higher rate of interest or as the case may be the difference between such higher rate and the rate payable herein.”

36. The court noted that in the 1990s some financial institutions failed to stipulate particular rates of interest in their lending agreements. Indeed, banks ought to specify in their lending agreements what interest rate is payable. I am of the view that the charge document did not contend with no interest



payable, what it failed to stipulate was the specific rate at which the interest was to be paid. I do note that it was much later *vide* a letter dated August 29, 1998 (page 21 of the 1<sup>st</sup> defendant's list of documents dated July 21, 2017) the bank notified the 1<sup>st</sup> plaintiff that the interest rate charged on the charge would be 36% per annum and excess over the limit at 39% per annum plus 1% commitment fee with effect from September 1, 1998.

37. In *Shah v Guilders International Bank Limited* (2003) KLR 8 the Court of Appeal dealt with a similar issue where the lending agreement had failed to stipulate the interest rate. The court held that where a bank fails to stipulate particular rates of interest in lending agreements they run the risk that the court will fall back on the exercise of its discretion conferred by section 26 (1) of the *Civil Procedure Act* and exercise discretion in awarding interest, the rate of interest that can be as low as 14% per annum which is currently the court's rate. The court held that;

“If the lending bank wishes to charge commercial rate of interest or the ruling rate or whatever other name they choose to call it, we can see absolutely no difficulty in ascertaining what that rate is at the time the agreement is being made and inserting it in the agreement with the proviso that it is subject to alteration, either upwards or downwards, as circumstances may dictate.”

38. Further to that, when the 1<sup>st</sup> plaintiff entered into a contractual relationship with the 1<sup>st</sup> defendant, it is strictly bound by the terms and conditions set therein. The lack of a specific rate of interest charged mentioned in the charge cannot invalidate the charge. Mabeya J in *Christopher Ndolo Mutuku & another v CFC Stanbic Bank Limited* (2013) eKLR held that;

“I have endeavored to analyze the documents placed before me to be able to decipher how the parties intended to deal with each other. They indicated in the charge document that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be effected. Clauses 2 and 11 of the charge must be given effect. I cannot re-write the agreement or the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it. This is what the Court of Appeal seems to have said in the case of *Shah v Guilders International Bank Ltd* (2003) KLR 8.”

39. Be that as it may, 1<sup>st</sup> defendant has not demonstrated to court that before the 1<sup>st</sup> plaintiff defaulted, it has communicated to the 1<sup>st</sup> plaintiff on the specific rate charged on the interest. There is no evidence that the 1<sup>st</sup> plaintiff was aware of the specific interest rate that it was paying towards the charge before the date of redemption. The charge was that the rate would be varied at the discretion of the bank, however at the very least the same ought to have been communicated to the 1<sup>st</sup> plaintiff personally through mail or a letter. In my view it is unjust for the 1<sup>st</sup> defendant to have the sole discretion to vary or change a critical term of the contract without any recourse to the appellant, in terms negotiating with him or even notifying him of the change. In *David Wafula Nyongesa v National Bank of Kenya* (2020) eKLR it was held that;

“So, having found that the terms on variation of the interest rates were unconscionable, what should I do” There is lots of case law in Kenya on the point. In *Kenya Commercial Bank Finance Company Ltd v Ngeny & another* [2002] 1 KLR 106 , the court said: “The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable



and oppressive or where having agreed to certain terms and conditions thereafter imposes additional term upon the other party. Equity can intervene to relieve that party of such condition.”

I find that the interest rate charged after variation was manifestly excessive and was effected without proper notice to the appellant.”

40. Though the court finds the charge dated October 31, 1995 was valid, as held by the courts in the above mentioned cases, the rate of interest though at the discretion of the bank ought to be communicated to the borrower. In this case I find no evidence that the 1<sup>st</sup> defendant ever communicated the rate of interest payable before the date of redemption to enable the 1<sup>st</sup> plaintiff ascertain the amount owing.

#### **Whether Associated Warehousing Company Limited breached the Charge dated 31<sup>st</sup> October 1995**

41. The charge dated October 31, 1995 was validly executed and was enforceable. It was a term of the charge that the 1<sup>st</sup> plaintiff was to redeem the charge by December 29, 1995. The charge further stipulated that any time after the date of redemption, the bank shall demand in writing for all monies owned together with interest at the rate payable at the time. Clause 7 of the charge expressly stated that upon default the charge shall become payable and the bank shall exercise its statutory power of sale. As at December 29, 1995, the day of redemption, the 1<sup>st</sup> plaintiff was in default.
42. The bank wrote to the 1<sup>st</sup> defendant on July 6, 1998 (page 20 of the 1<sup>st</sup> defendant’s list of documents) informing them to settle the loan facility by December 28, 1998. There was another letter dated August 29, 1998 (page 21 of the 1<sup>st</sup> defendant’s list of documents dated July 21, 2017), where the bank notified the plaintiffs that the interest rate charged on the charge would be 36% per annum and excess over the limit at 39% per annum plus 1% commitment fee with effect from September 1, 1998. The final demand by the bank before its placement under statutory management by CBK, was vide a letter dated September 15, 1998 (page 22 of the 1<sup>st</sup> defendant’s list of documents), where the bank other than reducing the interest charged on the excess over the limit to 36% from 39% demanded the outstanding amount to be paid by December 31, 1998.
43. On September 17, 1998, the Central Bank of Kenya released a press release (page 23 of the 1<sup>st</sup> defendant’s list of documents), where it announced that Trust Bank Limited was placed under statutory management for failure to meet its financial obligations to other commercial banks at the clearing house. CBK proceeded to appoint Micheal Muhindi, as its statutory manager in accordance with section 34 of the *Banking Act* to assume all the management, control and conduct of the affairs and business of the bank to the exclusion of its directors. The statutory manager had the power to sell off the bank’s properties in order to improve the liquidity of the bank.
44. The statutory manager, Mr Micheal Muhindi wrote to the 1<sup>st</sup> plaintiff on September 23, 1998 informing them that the 1<sup>st</sup> defendant had been placed under statutory management by the CBK and that the contract between the two was determined and all outstanding debts due. The bank demanded Kshs 20,471,718.75 accruing at interest of 36% per annum due from September 1, 1998 until the expiry of the said notice and thereafter an interest of 39% per annum till payment in full. The bank also notified the 1<sup>st</sup> plaintiff that if the amount demanded was not paid within 7 days, the bank would realize their security to recover the same without further notice.
45. The demand letter from the bank dated September 29, 1998, instigated the 1<sup>st</sup> plaintiff to write to the bank on October 7, 1998. In the said letter, the 1<sup>st</sup> plaintiff acknowledged that the bank had advanced Kshs 20,471,718.75/= as at September 17, 1998. The 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs proceed to instruct and authorize the bank to use Kshs 18,000,000/= held by the 1<sup>st</sup> plaintiff as cash deposits to offset the



amount due. The bank responded to the 1<sup>st</sup> plaintiff's letter dated October 7, 1998, with a letter dated October 31, 1998, where the bank declined to accept the settlement of the outstanding liabilities by settling them off against the deposits in form of BCDS. On December 11, 1998, the bank wrote to the 1<sup>st</sup> plaintiff returning the original BCDS totaling to Kshs 18,000,000/=. The bank went on to remind the 1<sup>st</sup> plaintiff to clear the outstanding liability of Kshs 22,617,935/= as at December 11, 1998 within seven days' failure to which they would recover the same without reference to the 1<sup>st</sup> plaintiff.

46. It is evident that at the time the 1<sup>st</sup> defendant was being placed under statutory management by the CBK the 1<sup>st</sup> plaintiff was in default of the charge. The proposal by the 1<sup>st</sup> plaintiff to have its BCDS used to settle the outstanding amount was refused by Michael Muhindi, the statutory manager appointed by CBK.

Whether there existed a court order restraining Trust Bank Limited (In Liquidation) from exercising its statutory power of sale over the suit property

47. Being dissatisfied with the 1<sup>st</sup> defendant's statutory manager's decision to decline the use of their BCDS to offset their outstanding amount, the plaintiffs filed a chamber summons dated June 25, 1999 in Milimani HCCC 1266 of 1999, *Associated Warehousing Company Limited & 2 others v Trust Bank Limited (under Central Bank of Kenya Statutory Management)*, and sought the following orders:

1. That the defendant whether by itself or its servants or agents or advocates or auctioneers or any of them or otherwise be restrained by injunction until judgement in this action or further order of this honorable court from the following acts or any of them, that is to say from advertising for sale, as threatened, selling by public auction or private treaty or otherwise howsoever ay any other time or by competing by conveyance or transfer of any sale concluded by auction or otherwise howsoever of all that parcel of land known as subdivision No 1532/I/MN situate in Mombasa together with all the improvements thereon.
2. That further registration or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in all that parcel of land known as subdivision No 1532/I/MN Mombasa with any land registry, government department and all other registering authorities be and is prohibited until further orders of this honorable court.
3. That pending the hearing of this application inter-parties an interim order in terms of prayer 1 and 2 hereinabove be made to ensure that the orders to be herein are not rendered nugatory.
4. That the costs of this application be costs in the cause.

48. The application was heard on merits and on October 19, 1999, in the presence of Mr Kowade Counsel for the plaintiffs, Lady Commissioner Gacheche J.W (Commissioner of Assize) delivered her ruling and she held that;

“In the circumstances, the plaintiff who have all along maintained that they are willing to pay the balance of the balances outstanding after the set off, have established a *prima facie* case and this application must succeed. An injunction is hereby granted restraining the defendants from proceeding with the sale of the plaintiffs' properties until the sum equivalent to the value of the six BDCS is set off against the outstanding loan.”

49. The 1<sup>st</sup> defendant, Trust Bank Limited (In Liquidation) was dissatisfied with the ruling dated October 19, 1999 and filed a notice of appeal dated October 28, 1999 seeking to appeal against the said ruling to the Court of Appeal. On October 27, 1999, counsel for the bank A.B Patel & Patel wrote to the Deputy



Registrar High Court Nairobi requesting for a certified copy of the ruling dated October 19, 1999 for the purpose of filing an appeal in the Court of Appeal. On November 16, 2000 the Court Appeal ruled on the bank's appeal civil appeal No 91 of 2000 Trust Bank Limited vs Associated Warehousing Company Limited. The court struck out the appeal for being incompetent on the ground that the ruling (being appealed from) was not signed and did not comply with order 20 rule 3 (of the old Civil Procedure Rules).

50. The bank interpreted this ruling of the Court of Appeal as being that the ruling was invalid for being unsigned. It is on this basis that the 1<sup>st</sup> defendant anchors its case that the unsigned ruling was invalid and consequential orders were a nullity, and that there was no valid court order restraining the bank from exercising its statutory power of sale. After the ruling of the Court of Appeal, the bank proceeded to instruct Triple One Auctioneers on December 5, 2000 to advertise the suit property for sale by public auction after the expiry of 45-days statutory notice.
51. The interpretation by the 1<sup>st</sup> defendant that the order of Court of Appeal dated November 16, 2000 was to the effect that the ruling of Lady Commissioner Gacheche dated October 19, 1999 was invalid and the orders issued therein were a nullity. I disagree with the argument advanced by 1<sup>st</sup> defendant in their submissions that seem to equalize an unsigned ruling to an unsigned pleading. In the case they rely on *Nairobi City County Government v Kenya Revenue Authority & anor* (2017) eKLR, the court was dealing with an unsigned statutory statement in a judicial review application. The statement was neither signed by the applicant nor by the counsel on record. The court held that failure to file a signed statutory statement renders the application for leave fatally defective ab initio and therefore incompetent for noncompliance with order 53 rule 4 (1) of the *Civil Procedure Rules 2010*. This was a pleading and not a court ruling and/or pronouncement. This case cannot support the 1<sup>st</sup> defendant's position that an unsigned ruling renders it invalid and a nullity.
52. A ruling of the court is not a pleading, it is a pronouncement or a decision of a court of competent jurisdiction on a certain legal issue before it and cannot be invalidated by the mere reason it has not been signed. Notwithstanding that, the court has perused the voluminous court file and came across the ruling dated October 19, 1999 that bears the signature of Lady Commissioner Gacheche. In my view, it was a wrong for the counsel on record for the bank to proceed with filing a record of appeal comprising of an unsigned ruling at the Court of Appeal when there is a signed one in the court file. The appeal court having determined that the appeal was incompetent, it meant that the ruling dated October 19, 1999 has never been discharged, appealed against, set aside nor varied.
53. What is clear to court is that from the onset the 1<sup>st</sup> defendant disregarded the orders of court issued on October 19, 1999 on their own interpretation that the same was invalid and the orders therein a nullity. If indeed the 1<sup>st</sup> defendant had reason to believe that the ruling dated October 19, 1999 was invalid on the basis it lacked the commissioner's signature it ought to have sought the interpretation of the trial court on the same. In *Hadkinson v Hadkinson* (1952) 2 All ER 567 Romer L.J held that;

“It is the plain and unqualified obligation of every person against, or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C, said in *Chuck v Cremer* (1) (1 Coop temp. Cott 342):

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid whether it was regular or irregular. That they should come to court and not



take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.” (emphasis mine)

54. The entire suit HCCC 1540 of 1999 was dismissed on April 4, 2003 for want of prosecution by the court of its own motion, pursuant to a notice to show cause dated March 10, 2003. The suit was then reinstated on June 29, 2004 by Azangalala J (as he then was) on the ground that neither the plaintiff nor counsel for plaintiff was not served with the notice to show cause prior to the dismissal of the suit. The injunctive orders dated October 19, 1999 were therefore to remain in force pending the sum equivalent to the value of the six BDCS being set off against the outstanding loan. A judge of concurrent jurisdiction having been persuaded to make such orders, it would be an interference of her discretion for the court to have reinstated the suit without the said orders. In my view, the orders of court issued on June 29, 2004 reinstated the suit together with the injunctive orders already in place as those orders had not been set aside.
55. In *Ramesh Popatlal Shah & 2 others v National Industrial Credit Bank Limited* (2005) eKLR, it was held that;
- “Pausing there for a while, it seems that unless and until a court order is discharged, it ought to be obeyed. A question that immediately arises is this – what happens between the making of the order(s) and the date of the discharge? Simple logic dictates that as long as the orders are not discharged, they are valid. And since they are valid, they should be obeyed, in observance, not in breach. That being the case, it seems to me that the only way in which a litigant can obtain a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the pain of committing a contempt of court.”
56. There were existing injunctive orders restraining the 1<sup>st</sup> defendant from exercising its power of sale until it offsets the BDCS against the charge. In *William Sapuro Kimanaa v National Bank of Kenya Limited & anor* Nairobi (Milimani) HCCC No 1933 of 1999 (unreported) (*Odunga’s Digest in Civil Case Law and Procedure* Vol 2 page 210) Khamoni J stated that;
- “Where a court grants an injunction stopping a sale, alienation, dealing in, or with or otherwise interfering with the property until the suit filed is heard and determined, the subsequent issue of a fresh statutory notice does not give the defendant authority to ignore the mandatory injunctive court order as the parties must first clear the suit from their way. The holder of a statutory power of sale can only find the power useful if the suit property affected has no inhibition or restriction or injunctive court order, which must not necessarily be from the chargor or the person to whom the statutory notice was served.”
57. The fact is that the 1<sup>st</sup> defendant disobeyed the orders of October 19, 1999 when they proceeded to sell the suit property to the 2<sup>nd</sup> defendant on August 3, 2007 for Kshs 31,000,000/= by way of private treaty. This blatant disobedience of the court orders not only impeded the course of justice but also made it more difficult for the court to ascertain the truth over the 23 years this case has dragged in court.
58. The plaintiffs’ further submitted that the charge in 1995, the private sale in August 2007, the charge in November 2007 and the auction of the suit premises in January 2008 were subject to the Indian Transfer of Property Act as the property is registered under the Registration of Titles Act (also repealed



in May 2012). That therefore, the doctrine of lis pendens under section 52 of the ITPA applies with full force to those transactions.

59. On the issue of lis pendens, there seems to be two opinions in this area. One view which is the view that the doctrine is not applicable in cases of mortgages and charges and that a chargee cannot be stopped under the doctrine when exercising the statutory power of sale. In B.B. Mitra on Transfer of Property Act 1882 where the learned author expresses that lis pendens does not apply to a suit for redemption brought by the mortgagor who has given the mortgagee under the mortgage an express power of sale. Similarly, in the case of *Aprotech Services Ltd v Savings & Loans Kenya Ltd* (2001) LLR 1498, the High Court held that the doctrine of lis pendens was not meant to apply to situations of mortgages as it would be a great clog to commercial activities involving land as security. Also in *Al-Jalal Enterprises Ltd* (2014) eKLR the High Court held that;

“the doctrine as embodied in section 52 of the repealed Indian Transfer of Property Act has no application whatever to a mortgagor who has given, under that mortgage, an express power of sale and that, he cannot, by starting a suit, perhaps a perfectly useless suit for redemption, derogate from that which he has, in express terms, conferred on the mortgagee by the instrument, namely, the power of sale.”

The other view is represented by the Court’s in its decision in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017) eKLR where the Court laid emphasis on the fact that the doctrine should apply only where there is active litigation. On whether the doctrine should apply to charges the court stated that;

“As to whether there is any interplay between statutory power of sale and the doctrine of lis pendens; the *Black’s Law Dictionary* defines lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending. The Supreme Court of India in the case of *KN Aswathnarayana Setty (D) Tr LRs & Others v State of Karnataka & others* [2013] INSC 1069 stated that the doctrine is based on the legal maxim ‘*ut lite pendente nihil innovetur*’ (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Our previous land legislation regime expressly embraced the doctrine under section 52 of the repealed (Indian) Transfer of Property Act (ITPA) 1882 by stipulating that:

“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 proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or 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.” emphasis added.

Although the court in the above case did not specifically say so, it appeared to insinuate that all parties to a suit are bound by the doctrine of lis pendens during active litigation. In the instant case, I hold the latter view that the doctrine is applicable in cases of mortgages and charges when there is active litigation. I find in the instant case the transactions concerning the suit property were in breach of the lis pendens rule.



## Whether the sale of the suit property by Trust Bank Limited (In Liquidation) to Clarkson & Southern Limited passed good title

60. On the December 5, 2000 the 1<sup>st</sup> defendant bank made its first attempt to sell the suit property by way of public auction. The 1<sup>st</sup> defendant instructed Triple One Auctioneers to advertise the suit property for sale by public auction after the expiry of 45-day statutory notice. On December 8, 2000, the auctioneers issued the 1<sup>st</sup> plaintiff with a 45-day notification of sale for an outstanding amount of Kshs 36,675,300 and slotted the sale by public auction for February 14, 2001, however the same did not take place. The bank's liquidator made a second attempt to sell the suit property by private treaty. The bank's liquidator instructed Acumen Valuers to value the suit property, and on August 17, 2006, the valuers valued the suit property at Kshs 38,000,000/= for open market value and Kshs 27,000,000/= for forced sale value. The bank proceeded to instruct the firm of Muema Kitulu & Co Advocates to sell the suit property and on August 3, 2007 the 1<sup>st</sup> defendant proceeded to sell the suit property to the 2<sup>nd</sup> defendant for Kshs 31,000,000/= by way of private treaty.
61. The 2<sup>nd</sup> defendant has defended the sale by private treaty between itself and the 1<sup>st</sup> defendant on August 3, 2007, by claiming to be a bonafide purchaser for value without notice. Further the 2<sup>nd</sup> defendant has submitted that section 69B (2) of the *Transfer of Property Act* (repealed) provided that where a transfer is made in the exercise of the chargor statutory power of sale, title of the purchaser shall not be impeached on the ground that the power was irregularly exercised. The 2<sup>nd</sup> defendant maintained that it was not aware of the order dated October 19, 1999 and the only encumbrance it was aware of on the title was the charge.
62. The 1<sup>st</sup> defendant flouted a valid order of the court, which stayed its statutory power of sale until the sum equivalent to the value of the six BDCS were set off against the outstanding amount. The bank's right to sell in exercise of its statutory power of sale was expressly stayed under the terms of the order dated October 19, 1999. The bank had no right to sell in the exercise of its statutory power of sale without the sanction of the court. The bank was prohibited to sell and the stay of sale was in my view a suspension of the bank's right as a chargor and its right under the charge to exercise its statutory power of sale.
63. The Court of Appeal in *Commercial Bank of Africa Limited v Isaac Kamau Ndirangu* (1992) eKLR, the court held that;
- “It is imperative that orders of the court must be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the courts. The blatant disobedience of the court's consent order in this case renders any transactions in breach of the order to be void and the learned judge was fully justified in making the orders complained of. To allow the appeal would be tantamount to rewarding the guilty parties for this grave contempt of court.”
64. There can be no doubt in the mind of this court that the transfer of the suit property pursuant to the agreement of sale dated August 3, 2007 was in complete disregard to the court order of October 19, 1999. The sale, transfer and registration of the suit property from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant cannot stand and must be nullified. The said sale was in contempt of the orders of court and was an improper exercise of the right of sale of the bank as the chargor.



65. A bonafide purchaser is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. The Court of Appeal in Kampala in *Katende v Haridas and Company Limited* (2008) 2 EA 173, it was held that;

“For a purchaser to successfully rely on the bonafide doctrine as held in the case of *Hannington Njuki v William Nyanzi* HCCS No 434 of 1996, must prove that:

- i. he holds a certificate of title,
- ii. he purchased the property in good faith,
- iii. he had no knowledge of the fraud,
- iv. he purchased for valuable consideration,
- v. the vendors had apparent valid title,
- vi. he purchased with no notice of any fraud and
- vii. he was not party to any fraud.

A bonafide purchaser of a legal estate for value without notice has absolute, unqualified and answerable defense against the claim or any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up.”

66. The 2<sup>nd</sup> defendant has failed to discharge the burden of proof, that the 1<sup>st</sup> defendant had apparent title to transfer in the suit property. The conduct of the 2<sup>nd</sup> defendant was not of a diligent bonafide purchaser as described above. The 2<sup>nd</sup> defendant ought to have known that there is a pending case touching on the title of the suit property, if its representatives would have visited the suit property and inquired about the title of the suit property. On trial DW2 stated that he had conducted due diligence before purchasing the suit property but did not disclose what extent of diligence was conducted. If indeed the 2<sup>nd</sup> defendant conducted due diligence it would have discovered that there was a pending case that went to the root of the title of the said property. This casual conduct raises more questions than answers and portrays the 2<sup>nd</sup> defendant a suspect and cannot be described as a bonafide purchaser for value.

67. The order of the court made on October 19, 1999 restraining the sale still stood unchallenged at the time the sale by private treaty to the 2<sup>nd</sup> defendant took place. It follows, therefore that there was no valid title that could be passed under section 69 of the *Transfer of Property Act* (repealed). The imperfect title could not pass a good title as it was fatal going into the root of the transaction. The 1<sup>st</sup> defendant did not have a valid title to pass to the 2<sup>nd</sup> defendant hence the conclusion that the 2<sup>nd</sup> defendant was not a bonafide purchaser for value without notice. Consequently, the sale of the suit property to Clarkson & Southern Limited ought to be set aside and the registration of such sale nullified and declared to have no effect whatsoever on the title of the suit property.

### **Whether The 1<sup>st</sup> Defendant’s Counterclaim Dated May 25, 2017 Is Merited**

68. In its counterclaim, the 1<sup>st</sup> defendant averred that the 1<sup>st</sup> plaintiff was in breach of the charge as at the date of redemption and it was at liberty to exercise its power of sale to recover Kshs 20,000,000/= together with the interest and penalties. It was the 1<sup>st</sup> defendant’s case that, even after selling the suit property to the 2<sup>nd</sup> defendant at fair market price of Kshs 31,000,000/= there was left a balance of Kshs 52,660,265.25 as at August 23, 2007. The 1<sup>st</sup> defendant urged court to find that the plaintiff



is in arrears of Kshs 53,570,575.25 as at October 18, 2007 as the outstanding loan amount together with the accrued interest and penalties.

69. On the issue of interest and penalties the 1<sup>st</sup> defendant bank wrote to the 1<sup>st</sup> defendant on 6<sup>th</sup> July 1998 (page 20 of the 1<sup>st</sup> defendant's list of documents) informing them to settle the loan facility by December 28, 1998. There was another letter dated August 29, 1998 (page 21 of the 1<sup>st</sup> defendant's list of documents dated July 21, 2017), where the bank notified the plaintiffs that the interest rate charged on the charge would be 36% per annum and excess over the limit at 39% per annum plus 1% commitment fee with effect from September 1, 1998.

70. In this case, the issue of the conscionability of the contract arises, especially with respect to the question of the 1<sup>st</sup> defendant having the sole discretion to vary or change a critical term of the contract without any recourse to the plaintiffs, in terms of negotiating with them or even notifying them of the change. That issue was raised and dealt with in the decision of *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (2014) eKLR, where the Court of Appeal said that;

“26. ...While we agree that the clause does appear to give the respondent discretion to vary the rate of interest, we do not accept that this discretion was absolute. Once interest is agreed upon, and an agreement is entered into which in effect gives a lender the discretion to vary the interest, it is our view that the discretion cannot be exercised willy nilly to charge exorbitant interest.

27. Consider the English decision of *Paragon Finance plc v Staunton; Paragon Finance plc v Nash* [2002] EWCA Civ 146All ER 248. In this case a mortgage company (Paragon Finance) had claimed possession from the two defendants on the grounds that the defendants were in arrears with the mortgage interest repayments. It was not in dispute that the repayments were owing. The defendants however took issue with the rate of interest charged and argued that the mortgage company had failed to adjust the interest rate chargeable in line with the prevailing market rates. The legal charges held by the mortgage company gave it the power to vary a portion of the interest rate from time to time. On appeal, among the issues that the court was to determine was whether the discretion given to the mortgage company to vary interest rate was subject to an implied term that it was bound to 'exercise that discretion fairly, as between both parties to the contract, and not arbitrarily, capriciously or unreasonably.' The court then held that 'the power given to the claimant by the mortgage agreements to set interest rates from time to time was not completely unfettered. A construction to the contrary would mean that the claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level.'

28. we are in agreement with the sentiments of the English Court that the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown



or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower.

29. We find it particularly unfortunate that in the present appeal, the respondent varied the interest and seemed not to provide this knowledge to the appellant or to the borrower. We think this was wrong. If that information was readily availed to the borrower, the borrower would make an informed decision based on his or her circumstances and the consequences that are likely to arise due to the variation undertaken. The borrower may choose to opt out of the contract through full liquidation or look at other institution that would accommodate his or her interest. Information supplied to a borrower before any adverse variation of interest rate is made affords him an opportunity to assess this relationship with his lender, and the right to terminate the contract may even be exercised.”

71. The variation of 36% per annum and excess over the limit at 39% per annum plus 1% commitment fee in question was huge and it had serious implications on the instalments that the plaintiffs had to pay. It was only fair that plaintiffs should have been notified and given leave to negotiate. It would, therefore, mean that the manner the term on interest and penalties was varied was unconscionable, unfair and burdensome on the plaintiffs. In *Kenya Commercial Bank Finance Company Ltd v Ngeny & Another* (2002) 1 KLR 106, the court said that;

“The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional term upon the other party. Equity can intervene to relieve that party of such condition.”

The same court said, in *Shah v Guilders International Bank Ltd* (supra);

“... where the rate of interest (has been agreed upon by parties) the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent.”

I find even if the sale was legal (which we found it was not) the interest rate charged after variation was manifestly excessive and was effected without proper notice to the plaintiff and would not be allowed.

72. As far as this court is concerned though, the sale of the suit property was illegal for the obvious reasons extensively analyzed above. The 1<sup>st</sup> defendant’s counterclaim has no merit since it is based on a violation of the court orders issued on October 19, 1999. As at the date of the ruling, the outstanding amount was subject to the offsetting of the six BDCS held by the 1<sup>st</sup> defendant. Since these orders remain unchallenged the parties ought to revert back to this position and act accordingly. I find that the 1<sup>st</sup> defendant has failed to prove its counterclaim on a balance of probabilities and is dismissed with costs to the plaintiffs.

#### **Whether The 4<sup>th</sup> Defendant’s Counterclaim Dated May 8, 2017 Is Merited**

73. Having evaluated the evidence, the 2<sup>nd</sup> defendant has not established the plea of a bonafide purchaser for value without notice. The transfer and subsequent registration of the certificate of title from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was null and void for being executed in defiance of the orders of court issued on October 19, 1999. Consequently, the subsequent dealings based thereon, the 2<sup>nd</sup> defendant’s action of charging the suit property to the 3<sup>rd</sup> defendant on November 28, 2008 and the 3<sup>rd</sup> defendant



registration as the proprietor of the suit property on 11<sup>th</sup> January were devoid of valid title and are hereby of no legal effect to the title of the suit property.

74. It is apparent to court that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants benefited from and took advantage of the situation to casually transfer the suit property among themselves in a rather non-conventional way. During cross examination, DW2, the 2<sup>nd</sup> defendant's director admitted that Clarkson & Southern Limited had the same directors as Fidelity Shield Insurance Co Limited, who financed them to purchase the suit property. He further revealed that upon default, the Fidelity Shield Insurance Co Limited sold the suit property to Netcall Holdings Limited on November 30, 2007 for Kshs 32 million, the current registered owners.
75. The acts committed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were geared to concealing material facts and in my view amount to fraudulent actions. During trial, more questions than answers arose that have been lingering in the mind of the court. If indeed the 2<sup>nd</sup> defendant defaulted in payment, I find it curious that the 2<sup>nd</sup> defendant did not pursue its equity of redemption. That the 3<sup>rd</sup> defendant did not conduct a valuation before they exercised their statutory power of sale to the 4<sup>th</sup> defendant. That the suit property was advertised for sale 24 days after the charge was registered on November 28, 2007. That the 2<sup>nd</sup> defendant was quick to give a nod to a sale that would deprive it of its equity of redemption.
76. The 3<sup>rd</sup> defendant sold the suit property for Kshs 32 million while the same was valued at Kshs 80 million. DW4 painted a picture to court of how casually the sale between the 3<sup>rd</sup> and 4<sup>th</sup> defendant took place. He admitted that the 4<sup>th</sup> defendant never conducted a site visit before the purchase nor was there the 90-day statutory notice issued before the sale. He could neither confirm whether there was a valuation conducted before the sale and this to court speaks volumes as to the character of the parties herein. The court does not take lightly the actions of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants who clearly undervalued the suit property and in collusion casually dealt with the title of the suit property while the suit still existed before court. The suit property was fraudulently and grossly undervalued and title irregularly and fraudulently passed to the 4<sup>th</sup> defendant. I find the 4<sup>th</sup> defendant has failed to establish its counterclaim on a balance of probabilities and I dismiss it with costs to the plaintiffs.

### **What Orders Ought To Be Granted By Court**

77. Consequently, I make a finding that the plaintiffs have established their case on the balance of probabilities and grant the following orders;
  1. A declaration that the sale and/ transfers of parcel of land known as plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476 from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and from the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant and from the 3<sup>rd</sup> defendant to the 4<sup>th</sup> defendant are a nullity and are hereby set aside.
  2. An order directing the 5<sup>th</sup> defendant/Government Land Registrar to cancel the aforesaid transfers and restore the status quo prior to October 19, 1999.
  3. An order directing the 1<sup>st</sup> defendant to recalculate and render true and full accounts to the plaintiffs as at October 19, 1999 and as per the said court order of October 19, 1999.
  4. A permanent injunction restraining the defendants, their agents and/or servants or any other person acting under their authority from trespassing, selling, dealing, interfering, alienating or disposing of the properties known as plot No 1532 (original No 871/1) section 1 MN Mombasa title No CR 13476 by public auction or otherwise howsoever interfering and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the plaintiffs' interest in the said property in any way other than in accordance with the law.



5. Costs of this suit to the plaintiffs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7<sup>TH</sup> DAY OF FEBRUARY 2023.**

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**N.A. MATHEKA**

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**JUDGE**

