REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 237 OF 2019

(Formerly HCCC No. 484 of 2013)

JANE NYOKABI GITHIRI

(Suing as the administrator of the estate of Stephen Githiri Babu).....PLAINTIFF

AND

FUSION CAPITAL LIMITED.....1ST DEFENDANT

SUE MANPOWER LIMITED.....2nd DEFENDANT

CHIEF LAND REGISTRAR.....3rd DEFENDANT

JUDGMENT

The Plaintiff's case

1. By a Plaint dated **15th** November 2013, the Plaintiff describes herself as the sole administratrix of the estate of Stephen Githiri Babu (deceased) who was the registered proprietor of Land Reference No. Ruiru East/ Juja East Block/2/938 measuring approximately 1.300 hectares (herein after referred to as the property). She states that by a charge instrument dated **16th** September 2010, the deceased charged the said property to the 1st defendant to guarantee borrowing by the **2nd** defendant.

2. She avers that the deceased was not a director of the **2nd** defendant, nor was there any consideration between the deceased and the **1st** and **2nd** defendants. She avers that at the time of taking the loan and executing the security documents, the deceased was critically ill, incapacitated both physically and mentally and confined at home. She avers that notwithstanding the incapacity, the **1st** and **2nd** defendants charged the property and as **27th** November 2012, the principal sum plus interests stood at **Kshs. 1,112,312.20.** She avers that the **1st** defendant has failed to disclose to her the current market value of the property as the law requires or to provide a valuation report or to render a true statement of accounts.

3. It is her case that the **1st** defendant acted fraudulently and in bad faith by issuing a Redemption Notice, seeking to exercise its Statutory Power of Sale, failing to disclose the principal debt; and for violating section **44A** of the Banking Act. Further, the Plaintiff states that the **1st** defendant seeks to unlawfully dispose the property which would benefit the **2nd** and **3rd** defendants unlawfully. As a consequence of the foregoing, the Plaintiff prays that the redemption notice and the intended auction be declared unlawful, null and void. She also prays for a permanent injunction restraining the defendants from dealing with the suit property in any manner adverse to the proprietary interests of the Plaintiff, her children, beneficiaries and the deceased's estate. Lastly, she prays for costs of the suit and any other relief the court may deem necessary.

The 1st defendant's defense

4. In its Statement of defence dated **22nd** August 2014, the **1st** defendant refutes the allegations in the Plaint and *inter alia* avers that the **2nd** defendant obtained a loan of **Kshs. 1,000,000/=** secured by the property; that the **2nd** defendant failed to service the loan; that the deceased was aware of the principal sum secured; that the charge was executed before an advocate; that the deceased was aware of the effects of the chargee's remedies; and, that the deceased was in his right state of mind.

The 2nd and 3rd defendants

5. The **2nd** defendant despite filing an appearance did not file any other pleadings nor did it participate in the trial. The **3rd** defendant never filed any pleadings nor did it participate in the proceedings.

The evidence

6. The Plaintiff, Jane Nyokabi Githiri testified that she is the sole wife of the deceased having married him in 1974, and that she obtained Grant of Letters of Administration *ad litem* dated **5th** April 2013. She testified that she cohabited with the deceased at their matrimonial home and subsequently they formalized their marriage under the Kikuyu Customary Law on **15th** September 1985 and that their marriage was blessed with **4** children. She stated that together with her husband, they acquired the property now part of the deceased's estate.

7. She testified that from June 2010, the deceased then aged **65** years was critically ill and he was mentally and physically incapacitated and confined at home at Muguga until his death. she testified that despite his illness and incapacity, in September 2010, he was approached at his home by the **1st** and **2nd** defendants to charge the property to secure advances to the **2nd** defendant. It was her evidence that despite his mental incapacity, under the advice of the **1st** and **2nd** defendants, he executed a charge over their matrimonial property in favour of the **1st** defendant guaranteeing borrowing by the **2nd** defendant.

8. She also testified that the property was controlled land within the provisions of the Land Control Act[1] (Repealed) and it was impossible for the deceased to attend the Land Control Board owing to his illness and that the Land Control Board was required to inquire about the existence of the deceased's spouse. She testified that in or about August 2012, after her husband' death, she received a Statutory Notice from the **1st** defendant's advocate claiming that the **2nd**defendant had defaulted in repaying the loan.

9. She testified that prior to the said Statutory Notice, she had no knowledge of the loan, so she sought details from the **1st**defendant's advocates. She also stated that the **2nd** defendant's minutes which authorized the borrowing were signed by only one director, and, that the charge does not expressly state the principal loan. She stated that one of the directors of the **2nd** defendant is a party in succession proceedings relating to the deceased's estate pending in court seeking to unfairly benefit from the deceased's estate. She stated that at the time the deceased is said to have signed the charge instrument he was mentally incapacitated. Additionally, she testified that the **1st** defendant owed the deceased a fiduciary duty of care to explain to him and to ensure that he understood the effects of the charge. Also, she stated that the charge was executed before signing the loan agreement.

10. Kenneth Babu Gathiri, the Plaintiff's son testified that his father fell ill in June 2010 and with time he became physically and mentally incapacitated to the extent that he never left home. He testified that that there is a succession dispute in court involving the deceased's estate and that the property the subject of this case forms part of the estate. It was his evidence that he was not aware of the loan the subject of these proceedings and that the transaction required the consent of the land control board.

11. Dr. George Kungu Mwaura testified in support of the Plaintiff's case. He stated that he is a qualified doctor and that he prepared the medical report dated **30th** April 2013. He testified that the deceased was his patient and that he suffering from diabetes, high blood pressure, arthritis and severe mental depression and he was under severe delusions and severe mental deficiency and suffered from memory loss.

The 1st defendant's evidence

12. Winnie Gichuki, the **1st** defendant's legal Officer testified that the deceased guaranteed a loan to the **2nd** defendant secured by a third-party charge over the deceased's property. She produced a loan agreement, a letter of offer and the charge instrument, a certificate of official search and a letter of consent from the land control board. She stated that the charge was registered on **16th** September 2010, and that the charge was executed by the deceased and witnessed by an advocate. She testified that the borrower defaulted in repayment and the loan stood at **Kshs. 2.6** million. She testified that the **1st** defendant tried to exercise its Statutory Power of Sale but the Plaintiff obtained an injunction. She testified that a valuation was done and the property is described as vacant undeveloped land and there is no matrimonial home on the land. (The valuation report is among the bundle of documents filed). She testified that the charge was registered in September 2010 and at that time spousal consent was not a requirement.

The Plaintiff's advocates submissions

13. The Plaintiffs' counsel submitted that a one Susan Muthoni Kanja, a director of the **2nd** defendant is a party to ongoing succession dispute involving the deceased's estate (ie *Nairobi High Court Succession Cause No. 554 of 2011).* She argued that the **2nd** defendant stopped servicing the loan one month after the death of the deceased and she never contested the intended auction. Counsel argued that the **1st** defendant did not have a license to issue credit, hence it was not transacting banking business. She cited section **4 (1)** of the Banking Act which provides that *"Every **institution** intending to transact banking business, **financial business** or the **business of a mortgage finance company** in Kenya **shall,** before commencing such business, apply in writing to the **Central Bank for a licence**."*

14. Counsel submitted that section **2** of the Act defines an institution as a bank **or financial institution** or a mortgage finance company. She also argued that the said section, defines financial institution as ***a company, other than a bank,*** *which carries on, or proposes to carry on,* ***financial business*** *…"* Additionally, counsel cited section **2** of the Act which defines financial business as follows: - *(b) the employing of money held on deposit or any part of the money,* ***by lending,*** *investment or in any other manner for the account and at the risk of the person so employing the money."* Buttressed by the above provisions, counsel submitted that the **1st** defendant was for all intents and purposes and at all material times a financial institution carrying out financial business.

15. In view of the forgoing, she submitted that the **1st** defendant did not have the legal capacity to advance credit and enter into the Charge with the deceased and **2nd** defendant. As a consequence, counsel argued that the Charge instrument was illegal, null, void and of no legal effect. Counsel relied on *Attorney General v Law Society of Kenya & Another**[2]*** for the proposition that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. Additionally, counsel *cited Karagita Self Help Group v Thika River Estate*[3] which cited previous decisions for the proposition that a nullity is a nullity and always remains a nullity and that no litigant should be allowed to benefit from irregularities or nullities since these would be against the policy of law, and it cannot be good law to allow a party to benefit from a blatant violation of the law.

16. The other ground argued by the Plaintiff's counsel is that the deceased lacked the capacity to sign the charge on account of his sickness and mental incapacity. He relied on the medical evidence tendered by the **PW3.**

17. Additionally, counsel submitted that the charge was not properly executed. She cited Section **109 (2)** of the Registered Land Act[4] (Repealed) and argued that the Chargor and Chargee did not affix their seal to the charge instrument.

18. The Plaintiff's counsel argued that the letter of offer dated **24th** August 200 offering the loan facility to the **2nd** defendant was not copied to the deceased. She argued that there is nothing to show that the deceased issued a guarantee as required under clause **5** of the letter of offer. Also, she submitted that there is no application to the Land Control board to show that the deceased signed the same and that there are no minutes from the Land Control Board indicating the Deceased appeared in person before the board. Also, she submitted that the deceased was not in attendance at the **2nd** defendant's meeting which resolved to take a facility with the said Property as security.

19. Additionally, the Plaintiff's counsel argued that the charge was attested by the **1st** defendant's advocate, hence, there is a possibility of conflict of interest. Citing *John Didi Omulo v Small Enterprises-Finance Co. Ltd. & Another**[5]*** counsel urged the court to void the charge for want of the consent of the Land Control Board. Additionally, counsel submitted that the **1st** defendant acted in bad faith and that the deceased was not accorded an opportunity to seek independent advice. She submitted that the Statutory Notice dated **19th** July 2012 is invalid because it was addressed to the deceased. She relied on *Josephine Njoki Mwangi v Housing Finance Corporation of Kenya Limited*.[6] Also counsel submitted that the Statutory notice dated **27th** November 2012 issued to the Plaintiff is also invalid since she is not the administrator of the deceased's estate and that she obtained a limited grant for purposes of instituting these proceedings. She relied on *John Mwenja Ngumba & Another v National Industrial Credit Bank Limited (Nic) & Another.**[7]***She argued that the Redemption Notices issued by the auctioneers are void. Citing *East Africa Ventor Co. Ltd v Agricultural Finance Co-Op Ltd & Another**[8]*** counsel urged the court to find that the first defendant failed to issue valid statutory notices as provided by section **90 (1)(2) & (5)** of the Land Act. Counsel argued that in the event the court voids the charge, to order that it to be discharged and order the defendants to pay costs.

The defendant's advocates' submissions

20. The defendants counsel submitted that the **2nd** defendant applied for a loan facility which was secured by the suit property and that the debt remains unpaid. Counsel argued that the Plaintiff's case is that at the time the deceased executed the charge instrument, he was not mentally sound. He argued that the doctor's testimony was wanting and that the medical report was prepared **3** years after the deceased's death. He argued that the report is shallow and it does not disclose the source of the findings. He submitted that the testimony tendered does not meet the threshold under section **107** of the Evidence Act.[9]

21. The defendant's counsel relied on *Grace Wanjiru Munyinyi & another v Gideon Waweru Githunguri**[10]*** which held that there is a presumption that every person is of sound mind until the contrary is proved and that the onus lies on the person who alleges the contrary. Citing *Patrick Muchira v Patrick Kahiary*[11] counsel submitted that allegations of unsound mind require cogent proof. He argued that the charge instrument was duly executed by the chargor and the chargee in the presence of an advocate. He also relied on *In the matter of Gerisho Kirima* for the proposition that *prima facie* proof must be tabled to establish that a person against whom orders are sought is of unsound mind.

22. Counsel submitted that the Plaintiff has not met the tests laid down in *Giella v Cassman Brown**[12]*** to merit the injunction sought. Further, he relied on *Mcdonald v Cananda (AG)**[13]*** and *Ngrurumani Limited v Jan Bonde Nielson & 2 others*.[14] He also cited *Mrao Limited v First American Bank Kenya Limited* [15] which defined a *prima facie* case and urged the court to find that the Plaintiff has not established a *prima facie* case.

23. Counsel cited *Woodcraft Industries Ltd & 3 others v East African Building Society* [16]which held that to grant an injunction restraining a party from exercising statutory power of sale which has arisen amounts to shirk judicial responsibility to enforce contractual rights. Counsel relied on *Kyangaro v Kenya Commercial Bank Ltd & another**[17]*** which held that courts should not be converted to havens of refuge by loan defaulters. Citing authorities, counsel argued that the Plaintiff has not demonstrated irreparable harm and that the balance of convenience lies in favour of refusing the injunction

Determination

24. The Plaintiffs' counsel cited section **4 (1)** of the Banking Act,[18] and section **2** of the Act which defines an institution as a bank or financial institution or a mortgage finance company. She also argued that the said section, defines financial institution as a company, other than a bank, which carries on, or proposes to carry on, financial business and argued that the **1st** defendant was for all intents and purposes a financial institution carrying out financial business. In paragraph **2** of the Plaint, the Plaintiff described the **1st** defendant as "a finance institution and offers mortgage and financing services (sic)."

25. However, in a clear departure from the averments in the Plaint, in his submissions, the Plaintiff's counsel submitted that the **1st** defendant did not have the legal capacity to advance credit and enter into the Charge with the deceased and **2nd** defendant. In fact, the parties filed agreed issues and the capacity of the **1st** defendant to advance the loan or undertake financial services is not among the framed issues.

Additionally, in his submissions, the Plaintiff's counsel urged the court to find that the charge instrument is null and void for want of land board consent and urged the court if it so finds to order that the same be discharged. There are no averments or prayer to that effect in the Plaint. This submission, is not anchored on the Plaint or the agreed issues.

26. The Plaintiff's assault on the charge was premised on the alleged mental incapacity of the deceased and a challenge on the validity of the Statutory and Redemption Notice. The other ground of assault mounted by the Plaintiff is the alleged failure to comply with section **44A** of the Banking Act, a provision which limits recoverable interest on default loans. However, the Plaintiff's case was expanded by way of submissions to cover un pleaded grounds. Similarly, the Plaintiffs' counsel in his submissions made detailed submissions on alleged breach of fiduciary duty by the **1st** defendant, also, an issue which was not pleaded. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court[19] on the principles of good pleadings: -

> *"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. … Elegance is the simplicity found on the far side of complexity.*

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

… *Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.*

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination."[20] *(Emphasis supplied)*

27. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). Material facts are only those relied on to establish the essential elements of the cause of action.

28. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. (See the Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited).*[21]

29. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat unleaded issues as having been fully investigated. Order **15** Rule **2** of the Civil Procedure Rules, 2010, provides that the court may frame the issues from all or any of the following materials—

> *a. allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;*
>
> *b. allegations made in the pleading or in answers to interrogatories delivered in the suit;*
>
> *c. the contents of documents produced by either party.*

30. It is therefore clear that issues in a suit arise, from pleadings or evidence both oral and documentary. However, issues in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The need for pleadings to be as precise as possible cannot be doubted. In *M N M vs. D N M K & 13 Others*,[22] it was held that:-

> *"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:*
>
> *"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."*
>
> *Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:*
>
> *"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."*

A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However, that was clearly not the case in this appeal."

31. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[23] This being the case, the argument that the **1st** defendant the **1st** defendant did not have the legal capacity to advance credit and enter into the Charge with the deceased hangs in the air. Similarly, the submission that the charge in invalid for want of Land Board Consent is not supported by the averments in the Plaint. Also unsupported by the Plaint is the submission that the **1st** defendant was in breach of its fiduciary duty. I decline the invitation to be drawn outside the scope of the Plaintiff's averments and the agreed issues.

32. The nub of the Plaintiffs case is that the deceased lacked the capacity to execute the charge. This argument is founded on the allegation that the deceased was ailing since June 2010 and that his mental capacity had deteriorated. It is also argued that he was essentially confined at home. The argument as I see it is that the charge instrument is voidable for want of capacity on the part of the deceased. In support of this argument is the evidence of the Plaintiff is the Dr. G. K. Mwaura, a Medica Doctor who prepared the medical report dated **30th** April 2013. Simply put, Dr. Mwaura testified as an expert in the medical field and for this reason it is extremely important for me to say something about expert evidence to form a basis for my observations on the evidential value of his testimony.

33. Lucky for me, I have had the opportunity to address the question of expert evidence in several previous decisions among them *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* ***[24]*** and *Mohamed Ali Baadi and others v Attorney General & 11 others.* ***[25]*** Expert evidence forms an important part of litigation. This is because it is vitally important for the courts to get the necessary help from those skilled in particular fields and in the different technologies in forming an opinion and coming to a conclusion. Under section **48** of the Evidence Act[26] opinions of science or art are admissible if made by persons specially skilled in such science or art. A person specially skilled in art or science is therefore deemed to be an expert. The term science or art usually means any branch of learning which requires a course of previous habit of study in order to obtain competent knowledge of its nature.[27]

34. Some expert evidence would be based on the result of field visits, physical examination of patients and medical treatment, site inspections and in other cases the opinions will be treated on analytical reports. The first and foremost requirement of a party who calls an expert witness is to establish the credentials of the person as an expert, or one who is especially skilled in that branch of science, to the satisfaction of the court. That, is, the witness should fall within the definition of 'specially skilled' as laid down under section **48** of the Evidence Act.[28] I am afraid, the Plaintiff's did not lead the witness to illuminate the court so as to satisfy the ambit of section **48** of the Evidence Act. Other than stating that he is a medical doctor of **35** years, it would have been useful for the witness to say more about any specialization in the field of medicine (if any).

35. The question whether a person is specially skilled within the above provision is a question of fact that has to be decided by the court and the opinion of the expert is also a question of fact and if the court is not satisfied that the witness possesses special skill in the relevant area, his or her opinion should be excluded.[29] Failure to prove the competency of a person a party calls into the witness box as an expert presents a real risk of evidence of such a person being ruled out as irrelevant or in adequate.

36. More important, the expert witness, ought to explain the reasoning behind his opinion. In scientific evidence, the reasoning may be based on the following: - site inspection reports, analytical reports, evidence of other witnesses, and the evidence of the experts.[30] In case of illness as in the present case, the witness should give details of the history of the patient, illness, tests/investigation done including x-rays, results, treatment given, and the condition of the patient and the basis of the opinion. There should be a clear explanation of the observations made and prognosis.

37. Opinion expressed must be confined to those areas where the witness is specially skilled. The weight to be attached to such an opinion would depend on various factors. These include the circumstances of each case; the standing of the expert; his skill and experience; the amount and nature of materials available for comparison; the care and discrimination with which he approached the question on which he is expressing his or her opinion; and, where applicable, the extent to which he has called in aid the advances in modern sciences to demonstrate to the court the soundness of his opinion.[31] The evidence before me failed this test. The opinion of the expert is relevant, but the decision must nevertheless be the judges.[32]

38. Reflecting on conflicting expert evidence brings into focus a passage from a judgment by Sir George Jessell MR in *Abringer v Ashton*[33] where he used the phrase ***"paid agents "*** while describing expert witnesses. Almost 100 years later Lord Woolf joined the list of critics of expert witnesses. In his *Access to Civil Justice Report*, Lord Woolf stated:-

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients." ***[34]***

39. The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded. Unfortunately, Dr. Mwaura's evidence just like the medical report prepared **3** years after the death of the patient failed this test. The evidence lacked crucial details such as a detailed history of the patient, examinations/tests/investigation done and results, treatment given, period of treatment, reviews done and progress made, prognosis and opinion and the basis for the opinion and treatment records.

40. While the test for admissibility of expert evidence differs from jurisdiction to jurisdiction, judges in all jurisdictions face the common

responsibility of weighing expert evidence and determining its probative value.[35] This is no easy task. Expert opinions are admissible to furnish Courts with information which is likely to be outside the courts' experience and knowledge. The evidence of experts has proliferated in modern litigation and is often determinative of one or more central issues in a case.[36] Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. The weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires specialized, technical or scientific knowledge only an expert in the field is likely to possess. While expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.[37] Four consequences flow from this.[38]

41. One, expert evidence does not "trump all other evidence."[39] It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.[40]

42. Two, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence.[41] To do so is a structural failing.[42] A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and *vice versa*. For example, expert evidence can provide a framework for the consideration of other evidence.

43. Three, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is cogent and give reasons why the court prefers the evidence of one expert as opposed to the other. Four, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact.[43]

44. A further criterion for assessing an expert's evidence focuses on the quality of the expert's reasoning. A court should examine each expert's testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v Minories Finance Ltd. and Another*[44] Jacob J. observed that what really mattered in most cases was the reasons given for an expert's opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented "[i]f the reasons stand up the opinion does, if not, not." A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

45. Where there is a conflict between experts on a fundamental point, it is the court's task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.[45] A court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it.[46] A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative[47] or manifestly illogical.[48] Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based.[49]

46. Guided by the above exposition of the law on considerations to guide admissibility of expert evidence, I find and hold that the testimony of Dr. Mwaura is not of assistance to this court and its probative value does not meet the required threshold.

47. The right of the mortgagee is to retain his hold over the secured property until his debt is paid and, if the mortgagor is in default, to have the property sold and obtain payment of his debt out of the proceeds of the sale. A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the mortgagee's rights are fused into the title itself.

48. The allegation that the deceased was incapable of signing coming as it does long after his death and after the **1st** defendant's right to exercise its statutory power of sale has arisen is highly unconvincing. On record is a loan application form signed by two director's contrary to the Plaintiff's assertions. The charge instrument clearly shows that it was signed by the deceased in the presence of an advocate, the borrower (**2nd**defendant), that it was signed by two directors as required, and also it was signed by the chargee. The charge instrument was registered as the law requires. The registration of the charge bring into operation the provisions of section 56 of the Land Act discussed below.

49. The argument that the charge instrument is invalid is unsustainable and goes against section **56** of the Land Act. In *Equip Agencies Limited v I & M Bank Limited*,[50] the court citing previous decisions was emphatic that courts are reluctant to entertain arguments challenging the validity of a charge instrument long after utilizing the funds and after default in repaying the loan. The court stated:-

28. That section 56 of the Land Registration Act, deals with the form and effect of registration of a charge and no legal charge can be registered unless the Registrar is satisfied that all the necessary consents and requirements have been fulfilled. Registration therefore automatically confers statutory compliance. Further reliance was placed on the case of; Al-Jalal Enterprises Limited vs. Gulf Bank Limited (2014) eKLR where the Court found that a challenge to the validity of a charge at the time of the hearing of the suit was an afterthought. The case of; King'orani Investments c. Ltd vs Kenya Commercial Bank Limited & Another (2007) eKLR, was also cited where the Court held that a challenge on the validity of the security documents after 10 years of registration has no merit and stated as follows

> *" even if we ignore all else, the attempt to disown the Debentures on grounds they are invalid is proof of the Plaintiff's poor attitude towards its obligation to the bank and the debt owed and this cannot be allowed."*

29. Be that as it were from the decisions above, it is clear that Courts are not inclined to uphold arguments questioning the validity of a charge document long after the Borrower has received the Banking facility utilized the same and/or is in default. In the case of; Coast Brick & Tiles vs Premchand (supra), the Court had this to say;

"By s 32 upon registration the land specified becomes liable as security. In view of these provisions I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus. The second reason for my opinion that the onus is heavy is based upon the particular facts of this case. The mortgage was duly registered on February 27, 1956, and the Plaint in the action is dated September 21, 1960; no hint of any alleged invalidity was given during these four and half years. ….A case so presented cannot inspire confidence."

50. In *Al-Jalal Enterprises Limited vs Gulf African Bank Limited* (supra) the Court stated: -

"16. … This issue has been addressed by the Court of Appeal since 1966 where the Court has found no sympathy for debtors who after executing valid security instruments later turn around and challenge the validity years later when the bank commences the sale of the securities. In the present case, it is unconscionable to turn and purport to use any baseless excuse to frustrate the bank from realizing its security after it has lent money to the Plaintiff."

51. The argument that the consent of the Land Control Board was not sought and obtained collapses because on record is a letter of consent showing that consent was obtained on **20th** August 2010. I find no basis to doubt the said consent on the basis of the Plaintiffs argument that the application form was not annexed. Section **56** of the Land Act extinguishes the said argument, and by extension the previsions of cap 300 under which the charge was registered. I also note that the **2nd** defendants application for funds and the minutes authorizing the borrowing were signed by two directors contrary to the Plaintiffs assertions.

52. The Plaintiff claims that she learnt about the charge after being served with the statutory Notices. Even assuming the said allegation is correct, spousal consent was not a requirement prior to 2012. Further, the Plaintiff argues that the said property is matrimonial property. It must be accepted that exercise of Statutory Power of Sale which has arisen in itself is not an odious thing. It is part and parcel of normal legal process. It is only when there is disproportionality between the means used in its exercise compared to law, that alarm bells should start ringing. If there are is no illegality in the manner in which the Statutory Power of sale is being exercised, its exercise may not be avoided. In this regard, I find no basis to fault the manner in which the 1st defendant sought to exercise its statutory power of sale.

53. It has been argued that the property is the matrimonial home. This argument is suspect considering the fact that the valuation report clearly states that the plot is undeveloped. In any event, to put matrimonial property into that class of assets beyond the reach of exercise of lawful Statutory Power of Sale has the effect of sterilizing such properties from commerce, thereby rendering matrimonial homes useless as a means of raising credit for the benefit and advancement of the property owners. Furthermore, it would lock up capital and prevent the home owning entrepreneur from using his or her home as security to finance business initiative. Entertaining such an argument would suggest that the law is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on borrowers without any regard for the interests of credit providers. For just as the law seeks to protect borrowers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry.

54. The Plaintiff alleged fraud on the part of the defendants. The law is that he who alleges fraud must prove fraud. The threshold required is higher than in ordinary civil cases and lower than criminal cases. A casual examination of the facts of this case and the documents used to perfect the security leave me persuaded that the Plaintiff has not established fraud.

55. There is no contest that the money was borrowed and that there is default. A key consideration in a case of this nature is whether the chargee's Statutory Power of Sale has arisen and the manner in which the exercise of statutory power is under taken and whether the Plaintiff had established any basis to persuade the court to stop the **1st**defendant from exercising a legally accrued right.

56. The Plaintiff prays for a permanent injunction against the defendants. A permanent injunction is permanent relief granted after a final adjudication of the parties' legal rights. Such final relief can be prohibitive or mandatory in nature. The Supreme Court of Cananda in *1711811 Ontario Ltd. v Buckley Insurance Brokers Ltd**[51]* explained with sufficient clarity the different between interlocutory and permanent injunctions as follows: -

[56] The next useful distinction to be drawn is between interlocutory and permanent injunctions. Interlocutory injunctions are imposed in ongoing cases whereas permanent injunctions are granted after a final adjudication of rights: see Sharpe, at para. 1.40, citing Liu v. Matrikon Inc., 2007 ABCA 310 (CanLII), 2007 ABCA 310, 422 A.R. 165, at para. 26. As will be seen, this conceptual distinction features prominently in the present case, where a key issue is whether the court must apply a different test for permanent injunctions than for interlocutory injunctions.

[57] It is also important to distinguish between mandatory and permanent injunctions. A mandatory injunction is one that requires the defendant to act positively. It may require the defendant to take certain steps to repair the situation consistent with the plaintiff's rights, or it may require the defendant to carry out an unperformed duty to act in the future: see Sharpe, at para. 1.10. Mandatory injunctions are rarely ordered and must be contrasted with the usual type of injunctive relief, which prohibits certain specified acts.

[58] Because of their very nature, mandatory injunctions are often permanent. However, permanent injunctions are not necessarily mandatory. An example illustrates this point. If, after trial, a court orders that a defendant can never build on a right of way, it will have made a permanent order enjoining the defendant from building on the right of way. But, the injunction would not be mandatory because it does not require the defendant to perform a positive act.

[59] In short, the words "mandatory" and "permanent" are not synonymous, especially in the context of injunctive relief.

57. The court also explained the differences in the tests for interlocutory versus permanent injunctions. It stated as follows: -

[74] The test for interlocutory injunctions is the familiar three-part inquiry set out in RJR-MacDonald: is there a serious issue to be tried; would the moving party otherwise suffer irreparable harm; and, does the balance of convenience favour granting the injunction.

[75] ***Does that same test apply when the court is deciding whether to grant permanent injunctive relief?...*** *AdLine contends that it does and points to cases such as Hanisch v. McKean, 2013 ONSC 2727 (CanLII), 2013 ONSC 2727, at para. 111, and Poersch v. Aetna, 2000 CanLII 22613 (ON SC), 2000 CanLII 22613 (Ont. S.C.), at para. 103, where the courts have expressly applied the test when deciding whether to grant permanent injunctive relief.*

[76] I would not accept this submission. ***In my view, a different test must apply.***

[77] ***The British Columbia Court of Appeal recently considered the test for a permanent injunction and its relationship to the test for an interlocutory injunction.*** *In the decision under review in Cambie Surgeries Corp. v. British Columbia (Medical Services Commission), 2010 BCCA 396 (CanLII), 2010 BCCA 396, 323 D.L.R. (4th) 680,* ***the trial judge granted permanent injunctive relief based on the test for an interlocutory injunction.*** *Despite the parties' agreement that the trial judge correctly set out the test, the British Columbia Court of Appeal held that the wrong test had been applied and reversed the trial decision.*

*[78****] Justice Groberman, writing for the court, explained that the RJR-Macdonald test is for interlocutory – not final or permanent – injunctions. At para. 24 of Cambie Surgeries, he explained that the RJR-Macdonald test is designed to address situations in which the court does not have the ability to finally determine the merits of the case but, nonetheless, must decide whether interim relief is necessary to protect the applicant's interests****.*

[79] In paras. 27-28 of Cambie Surgeries, Groberman J.A. explained:

> ***Neither the usual nor the modified test discussed in RJR-MacDonald has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.***
> ***In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, per se, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief****.*

*[80****] I would adopt this reasoning. The RJR-Macdonald test is designed for interlocutory injunctive relief. Permanent relief can be granted only after a final adjudication. Different considerations operate and, therefore, a different test must be applied, pre- and post-trial.***

58. To obtain a permanent injunction, a party is required to establish: (1) its legal rights; and (2) that an injunction is an appropriate remedy. Permanent relief can only be granted after a final determination of the underlying substantive claim on a balance of probabilities. However, even after such final determination, it does not follow that an injunction will be an automatic or appropriate remedy. Given that an injunction is an equitable remedy, its granting is discretionary and subject to the equitable considerations that govern the exercise of that discretion.

59. In deciding whether an injunction is an appropriate remedy in a particular case, the following considerations are relevant: Are the wrong(s) that have been proven sufficiently likely to occur or recur in the future? If not, a permanent injunction is likely not an appropriate remedy.– Is there an adequate alternative remedy? In most cases, the question will be whether the claim can be adequately remedied by an award of damages.

60. From my analysis of the facts, the law and the evidence herein above, it is my finding that the Plaintiff has failed to establish that any legal rights capable of being protected by a permanent injunction. The upshot is that the Plaintiff does not merit any of the orders sought. Therefore, I dismiss the Plaintiff's suit with costs to the **1st** defendant.

Orders accordingly

Signed and dated at **Nairobi** this **17th** day of **June** 2021

John M. Mativo

Judge

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[1] Cap 302, Laws of Kenya (Repealed).

[2] {2017} e KLR.

[3] Nairobi HCC No. 2561 of 1994, at page 14

[4] Cap 300, Laws of Kenya (Repealed).

[5] {2005} e KLR.

[6] {2008] eKLR

[7] {2013} e KLR.

[8] {2017} e KLR.

[9] Cap 80, Laws of Kenya.

[10] {2011} e KLR.

[11] HCCC No. 113 of 1999.

[12] {1973} AC 378.

[13] {1994}1 SCR 311.

[14] {2014} e KLR.

[15] {2003} e KLR

[16] HCCC No. 60 of 2000.

[17] {2004} e KLR.

[18] Cap 488, Laws of Kenya.

[19] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[20]See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].

[21]{2015} e KLR.

[22] {2017} e KLR.

[23] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[24] {2016} e KLR

[25] {2018} e KLR.

[26]Cap 80, Laws of Kenya.

[27] *Judges and Environmental Law, A Handbook for the Sri Lankan Judiciary*, Environmental Foundation Limited, at page 125 Available at www.sljti.org-Accessed on 20th October 2017.

[28] Section 48. (1). When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. (2) Such persons are called experts.

[29] *H.A. Charles Perera vs M. L. Motha* 65 NLR 294.

[30] *Judges and Environmental Law, A Handbook for the Sri Lankan Judiciary*, Environmental Foundation Limited, Chapter four.

[31] Ibid.

[32] *The Queen vs K.A. Wijehamy* 61 NLR 522.

[33] {1873} 17 LR Eq 358 at 374.

[34]Lord Woolf MR, *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1995, p. 183.

[35] Evan Bell, *Judicial Assessment of Expert Evidence*, Judicial Studies Institute Journal, 2010 Page 55.

[36]*State v. Pearson and Others* (1961) 260 Minn. 477.

[37]*Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) v. Simmons* [2010] E.W.C.A. Civ 54.

[38] *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR.

[39] Ibid.

[40] Ibid.

[41] *Ndolo vs Ndolo,* Nairobi Civil Appeal No. 128 of 1995 {1996}eKLR, *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros. vs Augustine Munyao Kioko* {2006}eKLR.

[42] *Huntley (also known as Hopkins) (a protected party by his litigation friend, McClure) vs. Simmons* [2010] E.W.C.A. Civ. 54.

[43] *Jakto Transport Ltd. v. Derek Hall* [2005] E.W.C.A Civ. 1327.

[44] *Routestone Ltd. v. Minories Finance Ltd. and Another* {1997} BCC 180, [1997] 1 EGLR 123.

[45] *Shah & Another vs Shah & Others* {2003} 1 EA 290.

[46] *Drake v. Thos Agnew & Sons Ltd.* [2002] E.W.H.C. 294.

[47] *Gorelik vs. Holder* 339 Fed. App 70 (2nd Cir 2009).

[48] *Golville vs Verries Pechet et du Cauval Sciete Anonyme* (Court of Appeal (Civil Division), unreported, 27 October 1989).

[49] *Makita (Australia) Pty. Ltd. v. Sprowles*, {2001} N.S.W.C.A. 305.

[50] {2017} e KLR

[51] 2014 ONCA 125 at paras. 77-80