Mosioma v Housing Finance Co. of Kenya Ltd & 3 others (Civil Suit 265 of 2007) [2021] KEHC 72 (KLR) (Commercial and Tax) (1 October 2021) (Judgment)

Neutral citation: [2021] KEHC 72 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 265 OF 2007

A MABEYA, J

OCTOBER 1, 2021

BETWEEN

JOSEPH SIRO MOSIOMA ..... PLAINTIFF

AND

HOUSING FINANCE CO. OF KENYA LTD ..... 1ST DEFENDANT

PETER CHEGE MUGO ..... 2ND DEFENDANT

WINNIE GATHONI CHEGE ..... 3RD DEFENDANT

PRINCIPAL REGISTRAR OF TITLES ..... 4TH DEFENDANT

JUDGMENT

1. It is said that the wheels of justice in this country really grinds slowly. If there be a case in point, this is it. The first witness (PW1) took the stand before me on 5/11/2012. The plaintiff closed his case on 20/11/13. However, I was transferred shortly thereafter to Bungoma High Court on 25/11/2013.

2. Thereafter, I was further transfered to the Civil Division, Chuka and Meru High Courts until 1/11/2020 when I finally returned to the Commercial Division of this Court. On 19/11/2020, the parties once again found themselves before me and the matter proceeded and was concluded on 3/3/2021. For 7 years the case was in limbo during which period the parties must have suffered unnecessary anxiety. Probably, it is an example of not how to dispense justice. Due to Covid-19, there was delay in delivery of this judgment. Be that as it may, all is well that ends well.

3. By a plaint dated 25/5/2007, the plaintiff pleaded that he was the registered proprietor of the property known as LR No. 12325/13 ("the suit property"). That by a charge dated 29/5/1985, the 1st defendant charged the suit property to secure a loan of KShs. 600,000/- advanced to the plaintiff. The said loan

was to attract interest of 13.2% and was repayable at a monthly instalment of Kshs. 7,857/- for a period of 7 years.

4. That the plaintiff had paid a total sum of Kshs. 2,000,000/- but the 1st defendant had continued to levy interest and other charges which were never agreed upon or authorized by law. That the 1st defendant conspired with the 2nd and 3rd defendant and entered into a deal whereby the 1st defendant sold the suit property to the 2nd and 3rd defendant for a sum of Kshs.14,000,000/-. The plaintiff set out what he alleged to be particulars of fraud and conspiracy totaling 18 in number.

5. The plaintiff further alleged that the 1st defendant's claim was barred by the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya. He therefore prayed for, inter alia, declarations that the charge over the suit property was a nullity and that the purported sale of the suit property to the 2nd and 3rd defendant was fraudulent, null and void.

6. The 1st to 3rd defendant (hereinafter "the defendants") filed a joint defence dated 30/4/2008. They contended that the plaintiff had taken a loan from the 1st defendant which he defaulted to pay. As a result of the default, the amount due accrued default penalties and interest as provided in the loan agreement. In the premises the 1st defendant was entitled to dispose off the suit property.

7. The defendants denied the allegation of fraud and conspiracy and contended that, the plaintiff having defaulted in his loan repayment, the 1st defendant was entitled to exercise its statutory power of sale.

8. The plaintiff filed a reply to the defence and contended that the purchase of the suit property by the 2nd and 3rd defendant was contrary to the *Law of Contract Act*, Cap 23 of the Laws of Kenya. That he had paid the 1st defendant a total sum of Kshs. 2,139,343/35.

9. He further contended that there was no valid statutory notice served upon him. That there was no notice of sale by private treaty and that the property had been sold to the 2nd and 3rd defendant at an under value.

10. At the trial, the plaintiff testified as PW1 and called one other witness. He stated that in May, 1985, he took a loan from the 1st defendant of Kshs.600,000/- for which he charged the suit property. The agreed interest rate was 13 ½ % p.a. which was variable on notice. During the loan period, he was never served with any notice of increase of the interest rate or increased monthly payment.

11. However, the 1st defendant charged him higher interest rates of, inter-alia, between 19.90% and 24% p.a. together with other charges not agreed upon. That these charges affected his monthly repayment program ending up with a default.

12. That the 1st defendant later on attempted to sell the suit property by private treaty. That there was no sale but a fraud as the dealings between the 1st and 2nd defendant was suspect. The property was valued at Kshs.24 million on 16/5/2007 but the 1st defendant sold it to the 2nd and 3rd defendant for Ksh 14 million. That the 1st and 2nd defendant had a prior relationship with each other revolving around the suit property. He engaged the services of Pw2 who reworked the interest and other charges levied on his account with the 1st defendant and concluded that the plaintiff had overpaid the 1st defendant.

13. In cross examination, the plaintiff admitted that the 1st defendant could charge him increased interest but on notification. He further testified that there was no sale agreement between the 1st and 2nd and 3rd defendant upon which the suit property could be transferred.

14. Pw2, Wilfred Abincha Onono, the Managing Consultant of the Interest Rates Advisory Centre Ltd (hereinafter IRAC) testified how the plaintiff approached him to recalculate the interest charged on the mortgage loan account by the 1st defendant.

15. He told the Court that during the period of the facility, the interest rates were regulated by Central Bank of Kenya. That the 1st defendant could not vary the interest rates unless upon notifying the plaintiff which it did not. That the Charge document did not provide for penalty interest on arrears. That the 1st defendant varied interest between 13.5% and 26%. As at April, 2007, the plaintiff had paid a total sum of Kshs. 2,139,343/35 as per the statement of the 1st defendant.

16. He further testified that the Charge provided that interest was to be charged annually but the 1st defendant charged the same monthly. That there were charges that were levied without the approval of the Minister in breach of section 44 of the *Banking Act*. That had the 1st defendant charged interest in accordance with the Charge document, the plaintiff's account would have been in credit of Kshs.99,534/25 as at 30/4/2007.

17. In cross-examination, he admitted that he had not included penalty interest in his recalculation for the reason that neither the Charge nor the Letter of Offer provided for the same. That had he included the same, his recalculation of interest would be different.

18. The 1st defendant relied on the witness statement of Simon Osok, D1w1 its Collection Officer, dated 7/11/2018. He testified that from his knowledge and the documents held by the 1st defendant, the plaintiff had not serviced the loan as required. That the 1st defendant issued various demands and statutory notices to the plaintiff due to the failure to liquidate his account. That the plaintiff made numerous proposals at different dates intimating that he was desirous of settling the principle sum and the arrears which had accrued on the mortgage account but never made such payments.

19. He further testified that the 2nd defendant made an offer to buy the suit property for a sum of Kshs. 14,000,000/- which was accepted by the 1st defendant.

20. In cross-examination, he admitted that the 1st defendant levied interest upon interest and that it varied interest without serving any notice upon the plaintiff. In re-examination, he referred to the bank statements to show that there was notice on interest variation.

21. The 2nd and 3rd defendant relied on the witness statement of D2w1 dated 26/9/2012 and the cross referenced witness statement dated 13/7/2020. Peter Chege Mugo told the Court that in April, 2007, one Martin of Express Business Solutions informed him of the availability of the suit property which he and the 3rd defendant were interested in. He visited the 1st defendant and made an offer of Kshs. 14,000,000/- which was accepted by the 1st defendant.

22. He paid the deposit of Kshs.1,400,000/- as 10% of the purchase price and thereafter approached the 1st defendant for a loan facility to finance the balance of the purchase price. The loan was approved and the suit property was charged as security for the same. That he and his wife purchased the suit property in good faith and for value. That he had no personal relationship with the staff of the 1st defendant.

23. The respective parties filed their respective submissions which the Court has carefully considered. From the record, the parties did not agree on the issues for determination. Therefore, each submitted on own issues. Having considered the pleadings, the evidence on record and the submissions of the parties; the court considers the following to be the issues for determination:

> Whether there was a valid charge over the suit property and its terms; whether there was a valid statutory notice; whether the 1st defendant clogged the plaintiffs' equity of redemption;

whether there was a valid sale of the suit property, whether the 2nd and 3rd defendants validly purchased the suit property and what reliefs, if any, should be given.

24. There is no dispute that the plaintiff executed a Charge dated 29/5/1985 over the suit property to secure the advance of Kshs. 600,000 by the 1st defendant. The said sum was repayable by monthly sum of Kshs 7,524/=. The rate of interest was agreed at 13 ½ %p.a. The 1st defendant could vary the said rate of interest with notice to the plaintiff. The Court holds that there was a valid Charge over the suit property. The charge was properly executed and registered in accordance with the law.

25. As regards the statutory notice, the defendants contended that proper statutory notices were served upon the plaintiff. The plaintiff on his part admitted that he was served with statutory notices but submitted that they were invalid.

26. From the record, there were a total of three statutory notices of sale. These are contained in the agreed bundle and are dated 27/11/2000, 10/2/2003 and 1/9/2004 respectively. The notice of 27/11/2000 demanded payment to be made within three (3) months from the date hereof. The notice of 10/2/2003 demanded settlement 'WITHIN THREE MONTHS' from the date of service of this notice". While the one of 1/9/2004 also demanded settlement in similar terms as the notice of 10/2/2003.

27. It was the defendants' contention that the said notices were valid and they led to various proposals by the plaintiff. They submitted that in the ruling of this court (Warsame J) granting the interlocutory injunction, the court had found that proper notices had been issued.

28. The issue of the form in which a statutory notice should be was determined by the Court of Appeal in the case of *Trust Bank Ltd vs Eros Chemists Limited & Anor* . After considering the then conflicting decisions of that Court, the 5 bench court held:-

> " The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale.
>
> For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period.
>
> To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid.
>
> In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice."

29. My understanding of the foregoing is that a valid statutory notice must give a period in excess of three months to the chargor to redeem his property. The notice must indicate that the right to exercise the power of sale shall arise after three months of service of the notice and not within. Any notice that is

expressed to be less than three months is invalid and of no effect. No statutory right of sale can arise on such a notice as it will be in breach of the express stipulation of the law.

30. In the present case, there were a total of three notices. The notice of 27/11/2000 fell short of the requirement of the law. The notices of 10/2/2003 and 1/9/2004 required payment within 3 months after service of the notice. I believe the two latter notices were valid and subject to what is stated hereinafter the 1st defendant's statutory right of sale could have arisen on the basis of the said notices.

31. The third issue is whether the 1st defendant clogged the plaintiff's right of redemption. The plaintiff contended that the 1st defendant acted in a manner that led to the clogging of his right of redemption. The defendants on the other hand contended otherwise.

32. The starting point is the Charge document which was the basis of the contractual relationship between the plaintiff and the 1st defendant. The pertinent clauses of the Charge stipulated as follows: -

> " 3. It is hereby agreed that interest payable by the borrower to the company hereunder shall be calculated as follows: -
>
> i. Until and including the Thirty-first day of December next following the date of this charge interest shall be calculated on the whole of the money advanced to or becoming owing by the Borrower before the said Thirty-first day of December as from the day on which it was advanced or become owing.
>
> ii. For the whole of each succeeding year interest shall be calculated on the amount of money hereby secured (whether principal or interest) on the preceding Thirty-first day of December. Interest on any principal money advanced to or becoming owing by the Borrower during any such succeeding year shall be calculated on the amount so advanced or owing as from the date on which it was advanced or becoming owing until and including the following Thirty-first day of December.
>
> iii. .....
>
> 4. It is hereby further agreed that the rate of interest payable on all money hereby secured shall be determined as follows: -
>
> i. Until the service of such a notice is hereinafter referred to interest shall be at the rate of Thirteen and a half (13 ½ &) per centum per annum.
>
> ii. The company may from time to time serve on the Borrower notice requiring payment of interest at such increased or reduced rate as shall in the decision of the company fairly represent the rate of interest commonly chargeable in Kenya having regard to such circumstances as it considers to be relevant and the decision of the company in this behalf shall not be questioned on any account whatsoever.
>
> iii. In the event of the company requiring an increase in the rate of interest under the provisions of sub-clause (ii) of this clause the company will notify the Borrower of the amount of the resulting

increased monthly instalments payable under the provisions of Clause 2 hereof and the first of such increased monthly instalments shall become due and payable on the first day of the month next after notification of the amount thereof to the Borrower."

33. It is clear from the foregoing that, while the rate of interest was agreed at 13 ½ % p.a, the 1st defendant could vary the same but after giving notice of such variation to the plaintiff. Such notice was to be in advance and was to further notify the plaintiff of the increased amount of monthly repayment which would become payable one month next after notification.

34. In *Christopher Ndolo Mutuku vs CFC Stanbic Bank Ltd* , the Court held: -

> " I have endevoured to analyse 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 vs Guilders International Bank Ltd [2003] KLR 8."

35. In the present case, the evidence was clear that the 1st defendant varied interest rate from 13 ½ % pa to a high of 26% p.a. It charged different rates of interest (13 ½%, 19.90%, 24%, 18.50%, 14% and 26%) at different times. There was no notice given to the plaintiff of such variation.

36. The 1st defendant sought to rely on the bank statements at pages 12 to 22 of the agreed bundle as evidence of notification. The Court takes the view that the aforesaid notices were post est facto. The charge presupposed that the notice of variation should have been in advance so that the plaintiff is forewarned of his increased liability. The notices on the statement came only once, at the end of the year when the interest had already been levied in breach of the Charge and the amount factored in the account.

37. Further, the 1st defendant sought to rely on its supplementary bundle of documents. This Court recorded that the documents in the said bundle could be testified on provided that they were to be strictly proved in accordance with the law. The makers of those documents were never called. The plaintiff having denied ever receiving them, the evidentiary burden of proof shifted to the 1st defendant to strictly prove those documents which it failed to. Accordingly, no notice of variation was given and the unilateral variation was illegal, null and void and of no effect.

38. The evidence on record also shows that the 1st defendant charged penalties and interest on those penalties. That was not contained in the Charge document. The statements of account show that not only did the 1st defendant charge interest on capital, it also charged what it termed as "Default Charge, and Other Charges". The latter two were never contained in the Charge document yet they constituted the bulk of what the 1st defendant was demanding from the plaintiff.

39. When parties enter into contractual relationships they are to be strictly held by their respective bargains. None of them can vary the terms unilaterally. The parties having executed the Charge to regulate their relationship, the 1st defendant could not be permitted to conduct its affairs outside the four corners of the Charge.

40. The unlawful variation of interest and the levying of these other unauthorized charges increased the plaintiff's liability beyond reach. He testified how he desperately tried to pay the amounts due but due to the escalated interests and other charges, he was unable to clear the loan.

41. PW2 was an expert witness. He testified how he recalculated the interest on the plaintiff's loan account. He used the Letter of Offer and the Charge and found that had the 1st defendant calculated and levied interest on the basis of the said documents the plaintiff had overpaid the loan as at April, 2007 by Kshs 99,534/25.

42. I warn myself that expert testimony is always not full proof. In the cases cited by the 1st defendant, it is clear that the evidence of an expert witness has to be received with circumspection.

43. In the text *Principles and precedents of the Art of Cross Examination by Aiyar & Aiyar, 10th Edn, pg 996*, it is observed:-

> " Expert evidence is viewed with reservation and sometimes with suspicion and mostly as opinion evidence to support any other useful and reliable evidence, but not as conclusive or corronorative"
>
> .....
>
> "An expert is fallible like all other witnesses.....therefore, in cross-examining him, it is advisable to get at the grounds on which he bases his opinion.....such evidence must always be received with caution they are too often partisans, that is, they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence".
>
> .....
>
> "That there is a natural tendency on the part of the expert witnesses to support the view of the party who called him. May so-called experts have been shown to be remunerated witnesses making themselves available on hire to pledge their oath in favour of the party paying them."

44. In S*tephen Kirimi Wang'ondu vs The Ark Ltd* it was held:-

> " 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....
>
> While there are numerous authorities that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weigh the probative value of expert evidence. This is because, while expert evidence is importance evidence it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
>
> Firstly, expert evidence does not "trump all other evidence. It is axiomatic that Judges are entitled to disagree with an expert witness....
>
> Secondly, a Judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence....
>
> Thirdly, 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 to be preferred.

Fourthly, a Judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones".

45. I have carefully considered the evidence of PW1 and D1W1. I have also considered the evidence of PW2, Mr Onono both in evidence in Chief and cross examination. I also saw the three witnesses testify. I have also weighed the probative value of PW2'

46. The testimony of PW2 was that going by the contractual documents the loan had been overpaid by April, 2007. He however testified that going by the calculations of the 1st defendant in what he called scenario I, there was a debit balance of Kshs 2,669,164/24 as at 30/4/2007. Since scenario I was not in accordance with the contract between the parties, I reject it and hold that it is not applicable. I hold that it is clear that had interest been calculated in accordance with the Charge, the plaintiff would have redeemed the suit property by April, 2007.

47. The 1st defendant not only unilaterally varied the interest rates and levied unlawful charges on the loan thereby making it unredeemable. It also made demands on the plaintiff of astronomical amounts that were not due thereby leaving him gasping for breath. It capitalized on penalty charges and other charges, it purported to enter into a private treaty with the 2nd defendant and acted with lightning speed in having the suit property transferred to the 2nd and 3rd defendants secretly. It aided them in acquiring the suit property by advising them to increase the offer from Kshs 13.5 to Kshs 14 million and advanced them Kshs 12.6 swiftly to seal the deal.

48. It is the Court's view that all the foregoing acts were calculated and actually clogged the plaintiff's equity of redemption. The 1st defendant's actions were anything else than to recover what it alleged to be its outlay. It rejected a professional undertaking to receive Kshs 3.7m from a reputable firm of advocates the Rachier & Amolo Advocates for very unclear reasons.

49. Accordingly, the 3rd issue is answered in the affirmative, the 1st defendant clogged the plaintiff's equity of redemption.

50. The fourth and fifth issues are inter-twinned. These are to the effect that whether the sale of the suit property was valid and if the 2nd and 3rd defendant were innocent purchasers for value without notice. The defendants contended that the sale was above board and that it was in accordance with the law. The case of *Isaiah Nyabuti Onchongo vs Housing Finance Company of Kenya Limited* was cited in support of the proposition that where a statutory notice has properly been served, sale by private treaty is lawful.

51. On the other hand, the plaintiffs contention was that the sale was invalid, fraudulent and that the 2nd and 3rd defendants were not innocent purchasers for value.

52. No doubt the law allows a chargee to sell by private treaty any charged properly in case of default. Section 69 A of the *Transfer of Property Act (Repealed)* (now repealed) did not specify or tabulate how and in what order a mortgagee has to exercise its remedies thereunder. This Court holds that since the remedies under that provision compete with the equity of redemption, which is always a darling of equity and the law the remedies must be exercised in utmost good faith.

53. In *Sharok Kher Mohammed Ali & Another v Southern Credit Banking Corporation Limited* , Warsame J, as he then was, held of sale by private treaty:-

" As stated earlier the rule against clogging or fettering the equity of redemption relates to the very essence of an equitable right to redeem the mortgaged property. The right to redeem a charged mortgaged property cannot be feltered or clogged by any stipulation other than

under the right procedure. I think the procedure adopted by the bank is in contravention of the law and equity. In HCCC No. 265 of 2000 Joseph Siro Mosioma v H.F.C.K & 3 Others I addressed my mind as to whether financial institutions had powers to sell up a charged property by a private treaty. In that ruling I stated that the bank officials and/or agents in selling a property by private treaty must address their minds to the drastic effects of depriving the owner of the charge property. My position was the banks are required to give a fair amount of time and/or notice in addition to giving the mandatory statutory notice under the relevant laws before an attempt to sell the property by private treaty is endeavoured. I also deprecated the practice of banks rushing to sell the charged or mortgaged properties through private treaty without giving adequate notice and without attempting to sell the same by public auction. It was my view in that ruling that there cannot be any sale by private treaty when there has been no previous attempts to sell the subject property by public auction. In my humble view there must be evidence or attempts to sell the charged property through a public auction which failed either through a conduct of the borrower or some other issues relevant to the case.

I reiterate my position in that ruling that a mortgage cannot at his convenience deal with the mortgage property in the manner he deems fit by resorting to sell by private treaty at a first instance. The right to sell by private treaty is not avaible and cannot be exercised by the mortgage unless and until the mode of public auction has been attempted but failed due to the conduct of the borrower, where a chargee resorts to sell by private treaty without attempting to sell by public auction the resulting transaction would be void ab initio. In this case the bank purported to sell the suit property through a private treaty before it had given the mandatory statutory notice required under section 69A of I.T.P.A, and without attempting to sell by public auction. That was absolutely illegal and in contravention of the clear provisions of section 69A of I.T.P.A. I make a finding that an illegal transaction cannot be a basis to confer a right on a third party especially like the present defendant whose conduct is somewhat suspicious."

54. I associate myself fully with the foregoing view. It is clear that the intention of the law on exercise of statutory power of sale is to give the chargor as much latitude and time as possible to exercise his equity of redemption. Indeed, after the statutory notice of sale, there is another notice that has to be given in case of sale by public auction under the Auctioneers' Rules. That notice is meant to give a chargor as much time as possible to exercise the right of redemption. Resorting to sale by private treaty as a first resort deprives a chargor that extra period that is available in public auction.

55. Further, by subjecting a property to public auction, there is an opportunity of getting the best possible price as would be dictated by the market forces as opposed to private treaty. In private treaty, the price is set by the chargee and the purchaser and deprives the realization of the best price for the charged property.

56. In any event, private treaty is open to abuse. The chargee may collude to dispose of the charged property to a pre-determined purchaser thereby defeating the equity of redemption. With public auction, the reserve price is usually advertised and there is transparency in the process. This is not so with private treaty which is usually secretive and opaque.

57. I therefore hold that notwithstanding that there is no requirement or order of exercising the rights under section 69A of the T.P.A, a chargee must first attempt public auction before resorting to private treaty.

58. In the present case, by resorting to private treaty in a discreet and opaque manner before attempting public auction, the 1st defendant acted fraudulent.

59. The 2nd defendant testified that he saw the advert in the daily newspaper of 19/4/2007 by Crystal Valuers Ltd. The property was being sold for Kshs 15 million. However, he crandestinely sneaked to the offices of the 1st defendant, conspired with the 1st defendant and made a deal to purchase the suit property for Kshs 14 million only. That was less than what the rest of the public had been notified as the purchase price by the 1st defendant's agent Crystal Valuers Ltd.

60. The defendants denied that they had conspired to deprive the plaintiff the suit property. *Black's Law Dictionary, 11th Edn, Thomson Reuters 2019 at pg 386* defines conspiracy as: -

> " An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreements objective.."

61. In the present case the 2nd defendant told the court that he had been going to the 1st defendant's offices looking for a property to purchase for 3 years. That he was always informed that, although the suit property was on the sale Board of the 1st defendant, "they were still negotiating".

62. In early April, 2016, an agent of the 1st defendant by the name Martin of Express Business Solutions called him and advised him that the suit property was available for sale by the 1st defendant. The 2nd defendant then gave an offer of kshs 14 million. In the meantime, the 1st defendant instructed Crystal Valuers Ltd to advertise to the general public the availability of that property for sale at Kshs 15 million. The property was among those advertised for sale on the daily newspaper of 19/4/2007 that was produced in evidence.

63. The question that arises is, if the 1st defendant had instructed an agent to advertise the property for Kshs 15 million, why enter into negotiations with the 2nd defendant and seal a deal for less? The 2nd defendant testified that he saw the advert of 19/4/2007, why did he rush on the same day to pay the Kshs 1,400,000 million as deposit vide cheque No. 976531 if not to achieve the objective of depriving the plaintiff of the property?

64. One other thing, the 2nd defendant testified that he had made an offer of Kshs. 13.5 million but was advised to increase it to Kshs 14 million. He did not tell the Court what informed his offer of Kshs 13.5 million for the suit property. However, it is not in dispute that on the 1st defendants' instructions, Crystal Valuers Ltd carried out a valuation of the suit property and made a report dated 16/2/2006. In that report which is on record, the suit property was valued at Kshs 15 million and the Mortgage value was given at Kshs. 13.5 million. One wonders how the 2nd defendant would, out of the blue, give an offer equivalent of the mortgage value given by the 1st defendant's valuers.

65. It may be concluded that, the 1st defendant advised the 2nd defendant what the mortgage value of the suit property was. Then the 1st defendant purported to ask the 2nd defendant to increase "the offer" to Kshs 14 million so as to appear to be an above board transaction. The court was not convinced or could not be hoodwinked!

66. I saw the 2nd defendant testify. He came through as a smooth talker who is a stranger to the truth. He was involved through in the years 2006 to 2007, in the 1st defendants' machination to dispossess the plaintiff of the suit property.

67. There is also the issue of the value of the property. The valuation produced by the plaintiff was for Kshs 24 million. The same was done in May 2007. The valuation relied on by the 1st defendant was

admittedly done without physical examination of the suit property. It was made in February, 2006. It was admitted that the valuers did not gain entry to the suit property and therefore the value put by them cannot be relied on. In this regard, the property was sold at a gross under value.

68. As regards the events after the offer by the 2nd defendant of 16/4/2007, they are suspect. The 2nd defendant did not have enough money to purchase the suit property. He said that he looked for financiers in town and found none except the 1st defendant. He never produced any evidence to back his assertions.

69. The Court's finding is that the 1st defendant was out to help the 2nd defendant. The documents relied on by the 2nd defendant as D2 Exh1 were not proved in accordance with the law. The Court had directed that they be proved strictly. None was called to testify and produce them. They bear little if any evidentiary weight.

70. As regards the alleged Sale Agreement dated 30/4/2007, the Court doubts the same for the following reasons. Both the 1st and 2nd defendant had indicated that Mamicha Advocate was to attend and testify on it. They failed to call him. Secondly, none of the defendants referred to that agreement during the hearing of the inter-locutory application for injunction although it was very central to the case. That was the earliest opportunity they had to produce it but they did not.

71. When the agreed documents were being prepared in 2009, it was neither included nor mentioned. It surfaced in 2012 when it was being stamped and a supplementary bundle was filed. Further, it had an alteration on the date. A look at the date of "30th April, 2007 is clear that it was altered from"20th April, 2007 Mamicha Advocate who would have shed light on it gave the court a wide birth at the instance of the defendants.

72. The general rule is that, the legal burden of proof lies upon the party who invokes the aid of the law and asserts the affirmation of an issue. Further the evidential burden is cast upon any party to prove any particular fact which he desires the court to believe of its existence. That is the purport of Sections 107 through 109 of the *Evidence Act*.

73. In *Jenniffer Nyambura Kamau vs Humphrey Mbaka Nandi* the Court of Appeal held:-

> " We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side."

74. In the present case although the Court directed that the documents relied on by the defendants, other than the agreed bundle, be strictly proved, they failed to call the makers thereof. None of the correspondence that were exchanged between the 1st defendant, Mamicha and Co. Advocates and the 2nd defendant in the period 16/4/2007 and 4/5/2007 suggested the existence of the said Sale Agreement.

75. The Court's conclusion is that, the sale Agreement must have been specially prepared post 2010 specifically for these proceedings. Accordingly, there was no valid sale of the suit property in respect

of which the plaintiff can be said to have had his equity of redemption extinguished. The *Law of Contract Act*, Cap 23 Laws of Kenya requires an agreement to be in writing signed by the parties. As at 30/4/2007, there was no Sale Agreement for the sale of the suit property to the 2nd and 3rd defendant.

76. Further, the conduct of the 2nd defendant is far from that of an innocent purchaser of the suit property for value without notice. He was deeply involved in the fraudulent acts of the 1st defendant in putting the suit property far away from the plaintiff.

77. The defendants submitted that the plaintiff did not specifically plead the particulars of fraud. Paragraph 10 of the plaint in my view, sufficiently pleaded the particulars of conspiracy and fraud. The said particulars were proved at the trial to the required standard.

78. Accordingly, I find that the plaintiff has proved his case to the required standard.

79. As to the reliefs, the evidence is clear that out of the sum of Ksh 600,000/= advanced to the plaintiff, the 1st defendant had received in excess of Kshs 2.1 million from the plaintiff. This included both interest and other charges levied by the 1st defendant. There was evidence of an over payment of Kshs. 99,549/-.

80. Accordingly, I allow the plaintiffs suit and grant the following reliefs:

SUBPARA a)

A permanent injunction is hereby issued against the 1st defendant by itself, its officers, agents and/or servants from charging, selling transferring, alienating, or in any other way whatsoever and howsoever dealing with or interfering with LR No. 12325/13, Hill View Estate, Lower Kabete, Nairobi.

b) A declaration hereby issues that the monies secured by the Charge dated 29/5/1985 having been repaid in full, the said Charge over LR No. 12325/13, Hill View Estate, Lower Kabete, Nairobi, be and is hereby discharged forthwith.

c) A declaration hereby issues that the purported sale by the 1st defendant to the 2nd and 3rd defendant of the suit property was fraudulent, null and void.

d) Since no damages were proved, none are granted.

e) The defendants shall bear the costs of the suit.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE