



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

HCCC. NO. 3590 OF 1995

CENTRAL KENYA LIMITED.....PLAINTIFF

VERSUS

TRUST BANK LIMITED.....1ST DEFENDANT

TRUST FINANCE LIMITED.....2ND DEFENDANT

FLORICULTURE INTERNATIONAL LIMITED.....3RD DEFENDANT

FIRST NATIONAL FINANCE LIMITED.....4TH DEFENDANT

REGISTRAR OF TITLES.....5TH DEFENDANT

ANTHONY MUIRURI GACHOKA.....6TH DEFENDANT

SHAUN WARREN BARRETTE.....7TH DEFENDANT

THE LIQUIDATOR (KATKA ISLANDS LIMITED).....8TH DEFENDANT

KULDIP SINGH CHAWLA.....9TH DEFENDANT

AJAY INDRAVADAN SHAH.....10TH DEFENDANT

SATISHCHANDRA VENILAL NAKER.....11TH DEFENDANT

THE COMMISSIONER OF LANDS.....12TH DEFENDANT

THE ATTORNEY GENERAL.....13TH DEFENDANT

JUDGMENT

1. There is a controversy involving LR No. 7705/2, land situate in Thika (the suit land). That land is now registered in the name of Floriculture International Limited (Floriculture or the 3rd Defendant) after a statutory sale by Trust Bank Limited (the 1st Defendant or Trust Bank) and Trust Finance Limited (the 2nd Defendant or Trust Finance). The validity of the sale is challenged.

2. Before the impugned sale, the land was registered in the name of Central Kenya Limited (the Plaintiff or Central Kenya) which also contests the legality of a charge for Kshs.15,000,000.00 executed in favour of Trust Bank and another for Kshs.30,000,000.00 in favour of Trust Finance to secure amounts purportedly advanced by the two institutions to Katka Islands Limited (**in liquidation**) (Katka or the 8th Defendant). It is alleged that the charges, both registered on 17.6.1993, were done without the knowledge or authority of the owner of the

suit property, Central Kenya.

3. The bedrock of the case by Central Kenya is that the charges were unauthorized by it and not executed by it as required by law and would be null and void. That the Plaintiff only became aware of the charges on 29th November 1993 when a search at Land registry revealed them.

4. Central Kenya alleges a raft of reasons why the charges are unlawful and this Court could do no better than reproduce Paragraph 22 (a) – (l) of the Amended Plaint:-

a) That the 7th Defendant, Shaun Warren Barretto, was not and has never been a director of the Plaintiff and had no legal authority to execute a charge for the Plaintiff.

b) That the 1st and 2nd Defendants were in contravention with the law as laid out in the first exception to the Rule in Turquand's Case 5EL & BL 247 and more particularly by Underwood (A.L) Limited –vs- Bank of Liverpool and Martins Vol. 131, The Law Times which states that anyone dealing with a company is deemed to have notice of its public document and any act which is clearly contrary to these documents will not bind the company.

c) That the 1st and 2nd Defendants together with their legal representative the 9th Defendant, were negligent in not making proper inquiries as to the directors of the Plaintiff and particularly to the appointment of the 7th Defendant as a director of the Plaintiff.

d) The 1st and 2nd Defendants and their legal representative the 9th Defendant, acted negligently and contrary to the third exception of the Rule in Turquand's case more particular laid out in Morris –vs- Kanssen and Others (1946) AC 459 in not conducting a search to confirm the authority of the purported Directors as they were dealing with.

e) The 1st and 2nd Defendants and their legal representatives the 9th Defendant acted negligently in accepting the purported Resolution of the Plaintiff dated 7th April 1993 as the same did not conform to Articles 28 of the Company's Articles of Association in not stating the names of the directors present at the meeting as required by the Article. FURTHER, the said Defendants were negligent in assuming that the resolution was passed in a meeting with the requisite quorum.

f) That the 1st and 2nd Defendants should have been put to inquiry by the fact that the public records of the company indicated it to be a family company owned by a Mrs. Margaret Njeri Muiruri on behalf of herself and as administrator of the estate of Mr. Joseph Muiruri Gachoka (Deceased) and that the 6th Defendant purporting to represent the company was a twenty three (23) year old young man.

g) The said charges were in contravention to the law as laid out in Reuben and Another –vs- Great Fingall Consolidated and Others (1906) AC 439 which states that a forgery is a nullity and cannot bind the company.

h) That the Rule in Turquands case does not apply when one is dealing with a chairman of a company in which capacity the 6th Defendant purported to act on behalf of the Plaintiff.

i) That the 1st and 2nd Defendants should have been put to inquiry by the previous fraudulent dealings of the 6th Defendant directed at them which should have warned them that the 6th Defendant was capable of committing a fraud.

j) The 9th Defendant as an Advocate of the High Court of Kenya failed to take reasonable Professional care when having the said charges executed in confirming the authority of the 6th and 7th Defendants to execute the charges.

k) The 1st and 2nd Defendant failed to take reasonable precaution when dealing with a twenty-three year old young man respecting a large sum of money (Kenya Shillings Forty-five Million) and a property belonging to a third party.

l) That the said charges were created fraudulently and registered fraudulently by 12th Defendant in that they were presented to the 12th Defendant for registration on a day after the date indicated as the date of registration and presentation

5. It is averred, as an alternative plea, that the two financial institutions were in breach of the loan agreement dated 4th June 1993 by allowing the 6th, 7th and 8th Defendant to incur liability on the agreements that were in breach of the covenants therein and placing liability on it outside of the covenants.

6. It is stated that on 28th April 1994, Central Kenya filed HCCC No. 1597 of 1994 (O.S) against the two financial institutions and the purported exercise of the statutory power of sale was during the pendency of those proceedings. In that event, it is asserted, there was a violation of doctrine of *lis pendens* as then applied in Kenya vide Section 52 of the Transfer of Property Act 1882.

7. In further criticism of the purported exercise of that power, Central Kenya avers that the power of sale had not arisen as no money had been disbursed by the two financial institutions to the account of Katka and that in any event no statutory notice had been served upon it, Central Kenya.

8. It is further contended that the two purported charges, having unequivocally elected to exercise their power of sale by way of public auction, could not sale the property by way of private treaty as they were legally estopped from doing so. Prejudice and detriment is argued

by the Central Bank who state that the sale by private treaty denied it the opportunity to bid for the property or to secure the interest of other prospective buyers with high bids. It is also alleged that Satishchandra Venilal Naker (Naker), the 11th Defendant, a director of Floriculture was a long standing businessman within Thika Municipality and would have known that the property was sold at a fraudulent under-value.

9. Again in respect to the purchase price, Central Kenya contends that it was sold at half the value of the property, such a low price that it was itself evidence of fraud. That no valuation of the property was conducted at the time of sale. Further, there was failure by Floriculture to inquire from persons in actual occupation of property of what rights they lay to the property and generally failure to make such inquiries that a prudent purchaser spending 60,000,000.00 would make.

10. Central Kenya avers that the principal shareholder of Floriculture, Naker was at the time material to this dispute a long-standing friend and business partner of the chief executive officer of the two financial institutions, one Ajay Indravadan Shah (the 10th Defendant) and he would have known of the disputes regarding the charges to the two institutions.

11. The purchase of the property by the 3rd Defendant was partly financed by the 4th Defendant. It is asserted by Central Kenya that the sale and the charges are null and void for the following reasons:-

a) They were not registered by virtue of non-compliance with Section 33 of the Registration of Titles Act (Cap. 281 Laws of Kenya) since the rates payable to the property under Section 21 of the Rating Act, Cap 267 Laws of Kenya for the years 1993 to 1995 were not paid until the 19th April 1995 and 29th May 1995 when they were paid in two instalments.

b) They were void by virtue of Section 6 of the Land Control Act (Cap. 302 Laws of Kenya).

12. In the end the Plaintiff seeks the followings prayers against the Defendants jointly and severally:-

1. A declaration that the purported charges to the 1st and 2nd Defendant over the suit property LR No. 7705/2 are null and void.

2. A declaration that the purported transfer to the 3rd Defendant and charge to the 4th Defendant over the suit property LR No. 7705/2 are null and void.

3. An order for the cancellation of the said charges and transfer in (a) and (b) above by the 5th Defendant.

4. An account from the 1st and 2nd Defendants as prayed in Paragraph 31 of this Plaint.

5. Special damages against the Defendants.

6. General damages against the Defendants.

7. Costs on the higher scale

8. Interest for two counsels on (4) (5) and (6).

9. Such further or other relief as the Court may deem fit and just.

13. Trust Bank and Trust Finance filed a joint statement of Defence. They assert that the charges taken by them were lawful and properly registered. They assert that the suit property was lawfully sold to Floriculture. They deny that any of its directors were linked or have an interest in Floriculture.

14. As regards the exercise of their statutory power of sale, the two financial institutions state that no Court order or other legal prohibition barred them for exercising their statutory right of sale. Illegality or fraud in the sale is also denied.

15. The two institutions mount a counter-claim. They allege that even after the sale of the property at Kshs.50,000,000.00, it was not sufficient to clear the debt and there is currently a substantial shortfall. Further, that the Plaintiff has put them into great legal expense in not only defending this matter but also HCCC 1597 of 1994 (O.S) and Civil Appeal NO. 215 of 1996. The two pray for Special and General Damages against the Plaintiff.

16. The Defence of the 3rd Defendant is dated 4th December 2000. It pleads that under Section 29B (2) of the Transfer of Property Act, where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser is not impeachable on the ground that:-

a) No case has arisen to authorize the sale.

b) due notice was not given or,

c) the power was otherwise improperly or irregularly exercised.

The 3rd Defendant further argues that as the Plaintiff had made a claim for damages, that would be adequate in place of an equitable remedy and not in addition thereto.

17. The purchaser states that the existence of HCCC No. 1557 of 1994 (O.S) was never brought to its attention until 20th June 1995. The 3rd Defendant reiterates that the suit property was transferred to it by the 1st and 2nd Defendants for legal value and without notice of any irregularity or any matter putting it on inquiry.

18. The application of the doctrine of *lis pendens* is disputed.

19. Just like the first two Defendants, the 3rd Defendant mounts a Counter-claim. It alleges that the Plaintiff remains in wrongful occupation and user of the suit property and seeks orders for:-

a) damages.

b) an order of eviction from the suit premises.

c) mesne profits.

d) order of injunction restraining the Plaintiff and its servants and agents from interfering with the 3rd Defendant title, rights and interests in the suit property.

e) costs.

20. The Defence by First National Finance Limited (the 4th Defendant) is short and straightforward. It avers that the Plaintiff is no-suited and is stranger to the allegations made between the Plaintiff and the 1st, 2nd and 3rd Defendants. It states that it advanced monies to the 3rd Defendant and charged the suit property. That it had no notice of any of the claims made by the Plaintiff.

21. The 7th and 9th Defendants filed a joint Statement of Defence. They defend the validity of the charge documents and state that they were authorized by the Plaintiff, and lawfully and properly executed. They state that the sale was lawful and proper and deny any act of negligence or fraud. The two generally place the Plaintiff to strict proof of the allegations made in the Amended Plaintiff.

22. Just like the 1st and 2nd Defendants, the 7th and 9th Defendants allege that they have been put into unnecessary and great legal expense in defending this matter and HCCC No. 1597 of 1994 (O.S) and Civil Appeal No. 25 of 1996 and pray for Special and General Damages against the Plaintiff.

23. As regards the 6th, 8th and 11th Defendants, their Defences were struck out by court order on 20th September 2012 and interlocutory judgment entered against them on 9th September 2015.

24. At the main hearing three witnesses testified; Margaret Njeri Muiruri on behalf of Central Kenya, Micah Nabori for the 1st and 2nd Defendants and Kuldip Singh Chawla on his own behalf. The evidence of these witnesses are considered in detail as they relate to the issues for determination.

25. The parties herein did not file an agreed set of issues but from the pleadings the following emerge for determination:-

i Were the charges taken up by the 1st and 2nd Defendants void for lack authority and want of proper execution?

ii Were the facilities purportedly secured by the Charges disbursed in contravention of the loan agreement dated 4th June 1993?

iii Was the exercise of the statutory power of sale by the 1st and 2nd Defendants unlawful or otherwise premature?

iv Was the sale of the charged property to the 3rd Defendant in breach of the doctrine of *lis pendens*?

v Was the sale of the charged property to the 3rd Defendant fraudulent because of sale at an under-value and in disregard to the dispute between the Plaintiff on the one hand and the 1st and 2nd Defendants on the other?

vi Was the sale of the property to the 3rd Defendant and charge to the 4th Defendant null and void for non-compliance with Section 33 of the Registration of Titles Act and also for lack of the Land Control Board Consent?

vii Is the Plaintiff entitled to the orders sought?

viii Are the 1st, 2nd, 3rd and 9th Defendants entitled to the orders sought in their different counterclaims?

Of the validity of the charges

26. Impleaded by the Plaintiff is that the two charge documents dated 4th June 1993 over LR No. 7705/2 were unlawful because they were not authorized by the company and were executed by a person who was not a director of the Company. The two charge documents (D. Exhibit Pages 32 to 99) were executed by Anthony Muiruri Gachoka (the 6th Defendant) and Shaun Warren Barrette (the 7th Defendant). Indeed, in the final submissions by Central Kenya this is identified as the linchpin of the Plaintiff's case.

27. Anthony is the son of Mrs. Muiruri. In her testimony, she stated that in 1985, the property was charged to Agricultural Finance Corporation (AFC). Sometimes in 1997 she instructed her son, Anthony, to pay the debt to AFC and have the property discharged. That on or about 25th January 1994 she conducted a search on the property when she was shocked to discover that not only had the property been discharged on 17th June 1993 but the two impugned charges registered.

28. It was her testimony that there was no resolution made by the Plaintiff to charge the property. Further that Anthony did not have authority of the board of directors to execute the charge. In addition, that Shaun had never been a director or employee of Central Kenya. Lastly, that the execution was against the Articles of Association of the Company.

29. The Plaintiffs Articles and Memorandum of Association are dated 1st September 1982 (Plaintiffs Exhibit Pages 2-24). Article 28 of the Articles of the Company which is alleged to have been infringed reads as follows:-

“[28] The Directors shall cause Minutes to be made, in books provided for the purpose, recording in respect of every meeting of the Company, of the Directors and of committee of Directors the names of all persons present and all resolutions and proceedings at such meeting. The minutes of every such meeting shall be read at the next meeting of the company, of the Directors or of the Committee of Directors, as the case may be, and after being amended or corrected, if necessary, and approved by the meeting, shall be signed by the Chairman of the Meeting and, once so signed, shall be prima facie evidence of the matters stated therein. Regulation 86 of Part I of Table A shall not apply”

30. It was the evidence of Mr. Chawla (the 9th Defendant) who drew the charge documents that Anthony and Shaun confirmed to him that they were directors of Plaintiff Company and were duly authorized to execute the charge. Mr. Chawla told Court that he represented the Bank in the transaction.

31. A question that needs to be answered is whether there was due authority by the Company to grant securities to the Chargees and secondly whether the charge documents were executed in accordance with the Memorandum and Articles of Association of the Company. Shown to Court by Mr. Chalwa is a purported resolution by the Board of Directors of the Company held on 7th April 1993 (D. Exhibit Pages 10-12). Because of its centrality to this dispute I reproduce in full:-

CENTRAL KENYA LIMITED

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF THE ABOVE COMPANY DULY CONVENED, HELD AND CONSTITUTED ON THE 7TH DAY OF APRIL 1993

AT THE REGISTERED OFFICE OF THE COMPANY AT NAIROBI

The Chairman reported that arrangements were proposed with Trust Bank Limited (“the Bank”) whereby KATKA ISLAND LIMITED would be granted an advance by way of loan of Kenya Shillings Fifteen Million (Kshs.15,000,000/=) for the purpose of meeting the working capital requirements of KATKA ISLAND LIMITED on the terms set out in a facility letter form the Bank dated the day of1993 which was tabled at the meeting.

It was a term of the arrangements that CENTRAL KENYA LIMTIED would guarantee the total liabilities of KATKA ISLAND LIMITED to the Bank and Charge in support its property known as Land Reference Number 7705 Thika Municipality.

The Chairman then read the Minutes of the Extraordinary General Meeting of the Company previously held that day and reported that the shareholders had directed the Board to create and issue the Guarantee and the Legal Charge in favour of the Bank and had empowered the Board to do so.

The Board then reviewed the financial position of KATKA ISLAND LIMITED. Taking into account the financial and other assistance given from time to time to the Company by KATKA ISLAND LIMITED and the increased capacity of KATKA ISLAND LIMITED to give such assistance as a result of the proposed loan and the limited exposure to loss likely to flow from the Guarantee and the creation of the supporting security, the Board were unanimously of the opinion that the granting of the proposed Guarantee and supporting security in favour of the Lender would be in the commercial interest of the Company.

IT WAS RESOLVED AS FOLLOWS:-

1. That the Company be and is hereby authorized to execute a Loan Agreement with the Bank in connection with the aforesaid loan to Katka Island Limited in the form now produced to the Board.
2. That the Company be and is hereby authorized to execute a Guarantee to the Lender in the form produced to the Boards for all moneys obligations and liabilities now or hereafter due owing or incurred from or by KATKA ISLAND LIMITED to the Lender with a limit on the amount recoverable from the Company of a principal sum of Kenya Shillings Thirty Million (Kshs.30,000,000) together with interest and other moneys as therein provided and that such Guarantee be forthwith delivered to the Lender as security.

3. That a Legal Charge over the premises of the Company vis; the property known as Land Reference Number 7705/2 Thika be created in favour of the Lender as a continuing security for all moneys obligations and liabilities at any time due owing or incurred by the Company to the Lender as set out in the Legal Charge now produced to the meeting.

4. That the said Loan Agreement, the Guarantee and Legal Charge be and the same are hereby approved and that the Common Seal of the Company be affixed thereto.

IT IS HEREBY CERTIFIED that the above is a true extract from the minutes of the meeting of the Board of Directors of the Company and that the resolutions set forth above were duly passed in accordance with and comply with the Memorandum and Articles of Association and Regulations of the Company and that neither such resolutions nor drawings under the above facilities will infringe any restrictions on borrowing charging giving guarantees or otherwise affecting the Company

CHAIRMAN (SIGNED)

32. The resolution was signed by Anthony in which he describes himself as the Chairman of the Company. However, it is not the Plaintiff's case that Anthony was not a Director of the Company on 7th April 1993 when he purportedly signed the resolution on behalf of the Board but that he was not its Chairman. As regards execution the case for Central Kenya was that the execution of the charge was fraudulent and it involved a non-director. No admission is made on by the Defence on these crucial issues.

33. The attack by the Plaintiff on this resolution is very pointed and is found in paragraph 22(e) of the Amended plaint, which requires to be reproduced;-

“The 1st and 2nd Defendants and their legal representatives the 9th Defendant acted negligently in accepting the purported Resolution of the Plaintiff dated 7th April 1993 as the same did not conform to Articles 28 of the Company's Articles of Association in not stating the names of the directors present at the meeting as required by the Article. FURTHER, the said Defendants were negligent in assuming that the resolution was passed in a meeting with the requisite quorum”.

34. Important as well is that the hypotheses of the Plaintiff's case is that the entire transaction, beginning from the resolution to the taking of the charges, was fraudulent. The Plaintiff therefore bore a heavy burden of providing cogent proof of the fraud. Of this burden it has been said by Tunoi JA(as he then was) in Vijay Morjaria Vs Nansingh M Dabar and another(2000)eKLR ;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489”.

35. See also the Court Of Appeal decision in Kinyanjui Kamau v George Kamau Njoroge [2015]Eklr where it observed;

As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

36. The starting point by Plaintiff would have to be that of providing impeccable evidence as to directorship and chairmanship of the Company at the date the resolution was said to have been made, that is 7th April 1993 and when the Charge documents were executed, 4th June 1993. These are the material dates. In a bid to provide that evidence the Plaintiff produced a letter dated 21st January 1994(p exhibit page 30) from the Department of Registrar General showing the Directors of the Company as at the date of the letter. It was not explained to this Court, and it is unclear to it, why the Plaintiff did not provide proof of directorship as on the dates of the challenged resolution and execution of the charge documents. The evidence tendered, I am afraid, could never be good enough to prove directorship as at 7th April 1993 and 4th June 1993. Without that proof ,then the Plaintiff's action would have lost crucial traction.

37. The Court turns to a related matter. Article 28 of the Articles of the Company which is alleged to have been infringed reads as follows:-

“[28] The Directors shall cause Minutes to be made, in books provided for the purpose, recording in respect of every meeting of the Company, of the Directors and of committee of Directors the names of all persons present and all resolutions and proceedings at such meeting. The minutes of every such meeting shall be read at the next meeting of the company, of the Directors or of the Committee of Directors, as the case may be, and after being amended or corrected, if necessary, and approved by the meeting, shall be signed by the Chairman of the Meeting and, once so signed, shall be prima facie evidence of the matters stated therein. Regulation 86 of Part I of Table A shall not apply”

38. Looking at the extract of the minutes presented to the Bank or at least its lawyers it does not conform to Article 28 in one respect; it does not have names of all persons present in the meeting said to have taken place on 7th April 1993.

39. But as this Court has concluded that the Plaintiff has not proved that Anthony was neither a director nor Chairman of the Company, there may be no reason to begrudge the Bank's advocate for assuming that the copy of the minutes of 7th April 1993 was a true and faithful reflection of a lawful and properly constituted meeting of the board of the Company. The Court accepts Mr. Chawla's assertion that the rule in Turquand's case entitled him to assume that all things had been done regularly in accordance with the constitution of the company. The Court of Appeal in East African Safari Air Limited –vs- Anthony Ambaka Kegode & Another [2011] eKLR said as follows about the Rule:-

“While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called “the indoor management” and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained.” (emphasis added).

Gower's Principles of Modern Company Law has summarized the rule in Turquand's case as follows: -

“This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt with had actual authority. Not only is it convenient, it is also just. The lot of creditors of a limited liability company is not a particularly happy one; it would be unhappier still if the company could escape liability by denying the authority of the officers to act on its behalf.”

40. Whilst the names of the persons present in the meeting had been omitted, Chalwa acting for the Banks was entitled to assume that the directors of the company not only attended the meeting but also raised the requisite quorum.

Consideration

41. Was the consideration for which the charge was taken fulfilled? The Plaintiff alleges that monies were not disbursed in accordance with the loan Agreement dated 4th June 1993 (D1 Exhibit Pages 3-31). The Plaintiff's witness never led any evidence to support this allegation. On its part, the Bank's witness produced statements of Katka Limited of the debt. In addition, the borrower does not complain of none disbursement. Indeed, there is admission on the part of the Company of default (see letter of 3rd June 1994). Nothing can turn on this Complaint.

Of exercise of the statutory power of sale:

42. Because of default in repaying the facility, the 1st and 2nd Defendants were within their rights in exercising the statutory powers of sale of the charged property. The company, however, complained about the manner in which it was exercised. In the Plaint, it pleads that no statutory notice was served upon the Plaintiff. Save for stating that the company was completely unaware of the sale, Mrs Muiruri, the only witness for the Plaintiff, is completely silent on this aspect of the case.

43. This Court has agonized as to whether the Banks needed to lead evidence that would rebut the allegation that statutory notice was not issued as required by the law and has reached the conclusion that the Bank was, in the circumstances of this case, not obliged to. This is because not only did the Plaintiffs fail to adduce any evidence that the Notice was not served but had also as, an alternative plea, it stated that although the Notice had been served the Banks choose to sale the property by way of private treaty instead of by public auction as in the Notice served.

44. Indeed, the issue of statutory notice appears to have been completely abandoned by the Plaintiff as no mention of it was made in the closing submission to Court.

45. The Court moves on to a different but related matter. The statutory notice was required by Section 69A of the repealed Indian Transfer of Property Act. As is clear from the provisions of S. 69(1) of the Act, should default persist, then the Bank can choose to sale the property by way of public auction or by private treaty. The Provisions read:-

[69(1)] A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage- money, or part thereof, immediately due and payable.

46. In this matter it is said that the Bank decided to sale the property by private treaty to the 4th Defendant. The sale was financed by the 4th Defendant and a payment of Kshs.60,000,000.00 made to Trust Bank (D. Exhibit 1 Page 144). The main contention would have been that the sale was at an under-value. But on this aspect, the Plaintiff did produce any evidence as to the value of the property at the time of sale or at all to justify the assertion of sale at an under-value.

Of lis pendens

47. As regards the doctrine of *lis pendens*, it was suggested by the Plaintiff that the sale was in disregard of the pendency of HCCC No. 1597 of 1994 (O.S). The doctrine of *lis pendens* found statutory codification in Section 52 of the Repealed ITPA which reads:-

[S.52]. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

48. In Paragraph 25 of the Amended Complaint, the Plaintiff avers as follows:-

On or about the 2/5/95 while the said suit that is HCCC No. 1597 of 1994 (O.S.) was still pending the 1st and 2nd defendants purporting to exercise chargees power of sale purported to transfer the suit premises to the 3rd Defendant whose directors at the material time were linked to or were agents of the majority shareholder in the 1st and 2nd defendant to wit on Ajay Shah. The said directors of the 3rd Defendant ceased to hold office in the 3rd defendant immediately after the transfer.

49. The thrust of the allegation is that there was a sale to fraudulently defeat the purpose of the originating summons. The doctrine of *lis pendens* presupposes the pendency of a suit. It was therefore imperative for the Plaintiff to prove that the suit was pending at the time the sale happened. It was not enough to simply present to the Court a copy of the originating summons as it did.

50. At any rate if the sale indeed happened during the pendency of the originating summons then it would have been in disregard to the originating summons itself. It is therefore not clear to this Court why the Plaintiff did not seek to set aside the sale in those proceedings.

Transfer to 3rd Defendant

51. This Court then turns to another issue. Once there was a contract of sale to the 3rd Defendant and indeed a transfer of the property then Plaintiff's equity of redemption had been extinguished and it would not be for it to question the manner in which the property was transferred by the chargee to the purchaser. And so the argument that the transferor breached the provisions of Section 33 of the Registration of Titles Act and the Land Control Act are unhelpful to the Plaintiff's case.

52. And I wish to add that the Court sensed an attempt by the Plaintiff's counsel to set up the argument of lack of consent of the Land Control Board to defeat the charge taken in favour of the 1st and 2nd Defendants. This the Court will not allow it because in its pleadings the issue of lack of Land Control Board was pleaded in specific reference to the transaction between the 1st and 2nd Defendants on the one part and the 3rd Defendant of the other and the simultaneous charge taken up by the 4th Defendant. It was not pleaded to impeach the charges made in favour of the 1st and 2nd Defendants. I take it that the Plaintiff, in making those submissions, was had genuinely misconceived the nature of the case it had pleaded.

53. All in all, the Plaintiff has completely failed to prove its case against the Defendants. But had it done so the remedy would be in damages, a good measure being the value of the sold property. The only value before Court is KShs.60,000,000.00. That is the award I would have made.

The Counterclaims

54. I turn briefly to the Counterclaim by the other Defendants other than the Banks. None was proved and none will be granted.

55. For the Banks it was their case that after realization of the security there was still a debt due to it. This would have to be a specific figure and in the nature of Special Damages. In the Counterclaim, the Banks do not specify the amount. That is against settled law that special damages must not only be specifically pleaded but also proved. The entire Counterclaim fails.

56. The outcome:-

56.1 The Plaintiff's claim is dismissed as against all Defendants.

56.2 The Counterclaims are also dismissed.

56.3 Parties to the proceedings will bear their own costs.

Dated, Signed and Delivered in Court at Nairobi this 14th Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

Ouma for 4th Defendant

Owinya for Musyoki for Plaintiff

Masinde for Rubin Dar for 1st and 2nd Defendants

No Appearance for other Defendants

Court Assistant: Nixon