REPUBLIC OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 251 OF 2008 AS CONSOLIDATED WITH HCCC 1965 OF 1991

NYANJA HOLDING LIMITED….....1ST PLAINTIFF

GEORGE NJAU MBUGUA NYANJA.....2ND PLAINTIFF

MRS ENID N. NYANJA.....3RD PLAINTIFF

VERSUS

CITY FINANCE BANK LIMITED.....1ST DEFENDANT

REDMARS HOLDINGS LIMITED.....2ND DEFENDANT

JUDGMENT

1. **1. GEORGE NJAU MBUGUA NYANJA** (the 2nd Plaintiff) hereinafter Nyanja and **Mrs. Enid N. Nyanja**, the 3rd Plaintiff, hereinafter Enid had a Bank customer relationship with **City Finance Limited** hereinafter the Bank. Nyanja and Enid are directors of **Nyanja Holdings limited** (the 1st Plaintiff) hereinafter Nyanja Holdings, while Nyanja is the sole proprietor of Nyanja Associates.

BRIEF BACKGROUND

2. Nyanja executed, on 8th December 1989, a mortgage over his property 7583/1, hereinafter Karen property, as a security for credit facility, to be advanced by the bank, of Kshs. 8 million, to Nyanja.

3. 3. By a charged date 23rd October 1989 over property L.R. No. 209/4796/3 Nyanja Holdings secured a credit facility afforded to it by the bank for Kshs. 3 million.

4. The bank alleges that Nyanja and Nyanja Holdings defaulted in the repayment of the above stated facilities. Nyanja denied such default and instead alleges that the bank applied interest, to those facilities, not permitted by law and thereby inflated the amount shown as outstanding in the loan accounts. Nyanja also alleges an overpayment of the loan account.

5. In case number HCCC 1096 of 1991, only filed against the bank, the claim by Nyanja Holdings, Nyanja and Enid is for injunction to restrain the bank from selling properties L.R. No. 209/4796/3 and the Karen property; for declaration that the bank applied rate of interest not permitted by the Central Bank of Kenya; that account be taken and an order be made for the bank to refund the amount found due to the Plaintiffs; and an order be made that the charged properties be discharged. The bank counter-claimed for Kshs. 19,221,405.95 plus interest as money owed by the Plaintiffs.

6. By case No. HCCC 251 of 2008 Nyanja Holdings, Nyanja and Enid allege that between June-July-August 2007, and on a date unknown to them, the bank exercised its statutory power of sale and sold to Redmars Holdings Limited, hereinafter Redmars, the Karen property. It is pleaded by those Plaintiffs that the said sale to Redmars was illegal, unlawful, oppressive and unfair and was a calculated plot and fraud on the part of the bank and Redmars to deprive the Plaintiffs of said property. The Plaintiffs also pleaded that the bank had sold other properties of the Plaintiffs and therefore prayed that the bank would give an account of the sale proceeds.

7. The Plaintiff also alleged that the Karen property was sold by the bank to Redmars hurriedly and while case No. HCCC 1965 of 1991 was part heard and was pending determination.

8. The Plaintiff's prayer in case HCCC 251 of 2008 is for injunction to restrain the bank and Redmars from trespassing, selling, disposing, wasting away alienating and/or interfering in any manner whatsoever with the Plaintiffs' occupation and possession of the Karen property, for an order of declaration that the sale of the Karen property was illegal, unlawful and therefore null and void; an order cancelling the conveyance in favour of Redmars and cancellation all documents of title relating to the sale of that property to Redmars; and an order of restoration of the said Karen property in favour of Nyanja.

9. The bank denied, by its defence any wrongdoing in the sale of the Karen property to Redmars. The Bank also pleaded that the issues raised in respect to that sale, such as valuation and prayer for injunction were res judicata in view of the Ruling of Nabuye J (as she then was) to an interlocutory application filed in case HCCC No. 1965 of 1991. The bank also pleaded that sale of other property namely property L.R. No. 37/256/3 is the subject of other separate Court cases which are still pending before Court.

10. Redmars pleaded that it is a stranger to the wrong doings in the sale, by the bank, of the Karen property. It pleaded that it is a bona fide purchaser for value of the Karen property and denied it acted maliciously, oppressively, illegally, unlawfully or fraudulently. That the said property was sold by the bank in exercise of its statutory power of sale. Redmars counter-claimed for possession of the Karen property and for mesne profit until possession is delivered up.

ISSUES

11. Although parties in this case presented many issues that they wished to be determined in my view, and having considered the parties pleadings, oral and documentary evidence, I find that there are four broad issues which will determine this matter. Those issues are:

a) Is there any money due from the Plaintiffs to the bank and if so how much due.

b) Was the sale of the Karen property by the bank lawful, if not what are the ramifications?

c) Is the Plaintiff's claim res judicata.

d) Who bears the costs?

ISSUE NO (i)

12. By this issue the Court will determine whether any money is due from the Plaintiffs to the bank and if so how much is due.

PLAINTIFF'S CASE

13. As stated before the Plaintiffs filed two cases, namely case Nos. HCCC 1965 of 1991 and HCCC 251 of 2008. Those two suits are consolidated and are under consideration in this judgment. The pleadings in those cases have been discussed here above.

14. The evidence on behalf of all the Plaintiffs was led by Nyanja. As it will be recalled Nyanja and Enid are directors of Nyanja Holdings, that is the 1st Plaintiff, and Nyanja is the sole proprietor of Nyanja Associates which is Nyanja's architectural firm.

15. The bank's evidence, which was not denied by the Plaintiffs, is that Nyanja Holdings operated bank account number 1020826 while Nyanja Associates operated account number 1020-255.

16. It is also not denied that 8th December 1989 Nyanja charged his Karen property to the bank for banking facility of Kshs. 8 million. That charge secured, for the bank, all money together with interest which were to be owed by Nyanja. It is important to reproduce some parts of the charge instrument for better understanding. The charge therefore provided:

> "***In pursuance of the said agreement and in consideration of the premises the borrower*** *(Nyanja)* ***hereby covenants with the Lender*** *(the bank)* ***that the borrower (a) will not demand pay to the Lender all the sums of money which are or as from time to time be owing by the borrower to the Lender whether in respect of moneys advanced or paid to or for the use of the borrower or charges incurred on the account of the borrower or for any moneys whatsoever which may then be due and owing by the borrower to the Lender either as principal or surety and either as solely or jointly with other person or persons …. Or in respect of moneys which the borrower shall become liable to pay to the Lender either under guarantee given by the borrower to the Lender or for money or any other facility guaranteed by the Lender for and on behalf and at the request of the borrower…. Any such moneys or liabilities shall be paid … together with commission and other usual charges law and other costs charges and expenses together with interest at the rate (not exceeding that allowed by Law) for the time being…. AND PROVIDED ALSO that the total moneys for which this security constitutes a security (hereinafter called "the Mortgage Debt") shall not at any time exceed the sum of Kenya Shillings Eight Million (Kshs. 8,000,000) (hereinafter called "the maximum principal sum") together with interest thereon at the rate aforesaid from the time of the Mortgage Debt becoming payable until actual payment thereof AND PROVIDED ALSO that the security hereby constituted shall be a continuing security for the payment of the Maximum Principal sum…."***

17. Nyanja and Enid as directors of Nyanja Holdings also executed a charge, in favour of the bank. They charged property L.R. No. 209/4796/3 which was registered in the name Nyanja Holdings. The terms of that charge in respect to liability of Nyanja Holdings are similar to the mortgage reproduced above except that the total money which that charge constituted as security, that is the "Mortgage Debt", would not exceed Kshs. 3 million together with interest. In that charge it was also provided that the rate of interest chargeable for the facility would not exceed that allowed by law.

18. Nyanja by his evidence in chief stated emphatically that the amount of money the bank was demanding from the Plaintiffs was imaginary. He sought to demonstrate what he termed as the bank's fraud, deceit, dishonesty and exploitation by saying that the bank had demanded from the Plaintiffs' different amounts.

19. Indeed the Plaintiffs have annexed in the Plaintiffs' exhibit No. 1 letters written either by the bank or on its behalf which demanded different amounts.

20. Nyanja stated in chief that the bank's demands were contradictory and because there was the threat to auction his properties, amongst them being the Karen property it put him under immense pressure leading to his ill health.

21. Further that the bank was charging illegal interest, for the facilities, which was beyond the rate set by the Central Bank of Kenya. Relying on the evidence of his accountant and of Interest Rate Advisory Centre (IRAC) Nyanja stated that the Plaintiffs had indeed repaid their loan and had overpaid the bank by Kshs. 56,156,251. To demonstrate that the Plaintiffs did not owe the bank money Nyanja referred to the Plaintiffs' properties sold by the bank as follows:

a. L.R. No.209/4796/3 at the price of Kshs. 18 million.

b. L.R. No. 37/256/3 at the price of Kshs.. 23 million.

c. L.R. No. 72/1327 at the price of Kshs. 25 million less Kshs. 7.9 million which was released by the bank under his instructions leaving a balance of Kshs. 17,100,000 to be credited into the Plaintiff's account.

22. Nyanja proceeded to state that the fact the bank released the amount of Kshs. 7.9 million, under his instructions meant that he was not, at the time, indebted to the bank.

23. Nyanja on being cross-examined confirmed that the Plaintiffs received loans and accommodation from the bank. He also confirmed that the banks did cancel some auction of the charged property. He also confirmed that the bank gave indulgences to the Plaintiff but he could not recall if the Plaintiffs honoured the proposals made to the bank. Nyanja confirmed that he did sign a copy of a letter from the bank dated 4th December 1991, which letter stated that Nyanja Holdings was indebted to the bank, as at 30th September 1991, to Kshs. 14,092,134.50 with interest. Nyanja said, in cross-examination:

"I signed that letter accepting the terms of the letter."

24. Nyanja also confirmed that he did file Court cases to stop the sale, by auction of his properties.

25. The second witness who testified touching on the issue number (i), identified above, was Wilfred Abincha Onono. He is a member of the Institute of Certified Public Accountants since 1978. He is currently the Managing Consultant of an entity called Interest Rates Advisory Centre Limited (IRAC). This witness has had a varied experience. He worked for the National Government of Kenya as the Deputy Secretary in various ministries and also as the Auditor General for the state corporations. He has worked in the private sector for Unilever Kenya Limited, Mumias Sugar Company and the Kenya Seed Company.

26. He stated that he was instructed by Nyanja to scrutinize and re-calculate interest on account number 01-2-0255, that is the account of Nyanja Associates.

27. IRAC considered the mortgage over the Karen property, general correspondence and the pleadings before Court amongst others. IRAC noted that the mortgage and the charge documents did not permit the application of interest rate, over the Plaintiffs' loan facilities, to exceed "that allowed by law". He stated that the permitted interest was governed by gazette notices issued by the Central Bank of Kenya. He referred to gazette notices as follows:

a. *Gazette Notice No. 4939 of 1989 published 16th October 1989.*

b. *Gazette Notice No. 1458 of 1990 published 27th March 1990.*

c. *Gazette Notice No. 1617 of 1990 published on 2nd April 1990.*

d. *Gazette Notice No. 3348 of 1991 published on 23rd July 1991.*

28. He referred to the provisions of Section 39(1) of Central Bank of Kenya Act Cap 491 which provides:

> "***The bank may from time to time acting in consultation with the minister, determine and publish the maximum rate of interest which specified banks or specified financial institution may pay for the deposit and charge of loans or advances…"***

29. The witness stated, in his evidence in chief that after re-calculation of the interest rate IRAC found that the bank had levied charges in contravention of Section 44 of The Banking Act amounting to Kshs. 5,608,648.15. IRAC also found that the statements of account for June 1998 to January 2000 were missing.

30. According to IRAC Nyanja Holdings was overcharged by the bank on unapproved interest rate and oher charges by Kshs. 104,654,218.98 and accordingly on that account the bank owed Nyanja Holdings Kshs. 36,979,073.02.

31. According to IRAC the bank overcharged Nyanja Associates by Kshs. 25,282,838.88 and that accordingly the bank owed Nyanja

Associates Kshs. 5,171,195.68.

32. On being cross-examined the witness stated that between 1991 and 1997 the legal maximum interest that banks could charge was 19%. That after 1997 Section 39 of the Central Bank of Kenya Act was repealed. That from the year 2001 to July 2005 the interest rate was controlled by the "Donde Act". That however after 2005 banks were free to agree on the interest rate with their customers.

33. The witness on further being cross-examined confirmed that in his witness statement he erroneously referred to Nyanja Holdings as obtaining a facility of Kshs. 8 million whereas it in fact obtained Kshs. 3 million. He also confirmed that he made an error in the amount shown as being given to Nyanja Associates.

34. Kenneth Muiru Mwangi operates an audit firm known as Muiru Kandia & Company. The firm was instructed by Nyanja to analyse the bank's statements of account. In so doing the witness stated that 18% interest rate was applicable up to 1st April 1990, as per Gazette Notice No. 1690 dated 23rd March 1989 and the interest rate of 19% up to 30th April 1997 as per Gazette Notice No. 1617 of 2nd April 1990. Thereafter the witness said he used the interest rate applied by the bank. He also stated, in his evidence in chief, that there were miscellaneous debits that he omitted in his re-calculation, except legal, valuation and auctioneer's fees. He omitted those because there was no legal basis to change them. He also applied to his statement, payments received by the bank and reflected in the bank statements and other payments he was informed by Nyanja but which are not reflected in the statements. In his view Nyanja was owed by the bank Kshs. 56,156,251 as at 28th June 2000.

35. The witness further stated that the bank had invariably charged the Plaintiffs'' account unauthorized interest rate at 11%,13%, 16%, 17%. 18%, 19%, 21%, 23%, 27%, 33%, 35%, 30%, 37%, 38%, and 47%. That the correct interest rate was 18% up to 1990 as provided in Gazette Notice No. 1690 dated 23rd March 1989 and later 19% up to 30th April 1997 as per Gazette Notice No. 1617 of 2nd April 1990. Thereafter the interest rates were liberalised. He produced his accounts of re-calculated amount which reflected the amount the Bank owed the Plaintiffs as an over payment of Kshs. 56,156,251. This witness was emphatic that the Plaintiff did not owe the bank money.

DEFENDANT'S CASE

36. The bank called Peter Kefa Onsongo to testify. He is the bank's Head of Credit Analysis. This witness testified on various letters written by Nyanja where Nyanja made proposals for the payment of the amount due on the Plaintiffs' accounts. He stated that the Plaintiffs charged their properties. The witness stated that the Plaintiffs offered their properties as security for advance of Kshs. 8 million and 3 million. However contrary to the pleadings before Court this witness testified that Nyanja and Enid charged their property L.R. No. 37/256/3 to secure a loan of Kshs. 10 million. Although this charge is exhibited in the bank's documents, until this witness testified there had not been any mention of that charge by the Plaintiff and its witness and those witnesses when cross-examined they were not questioned about that latter charge for Kshs. 10 million. More importantly, however, is that charge is not pleaded in the Plaintiffs' plaint or the bank's defence and counter-claim.

37. The witness went onto say that after the Plaintiffs failed to honour several offers of settlement of their loans the bank instructed Gitco Auctioneers, on 19th March 1991, to sell by public auction the property L.R. No. 7583/1. On receiving the auctioneer's notification of sale the Plaintiffs sought further indulgence that they be permitted to sell that property by private treaty. That proposal was accepted by the bank

on condition substantial deposit would be made by the Plaintiffs in their account. The witness referred to further indulgences given to the Plaintiff but said that when the bank noted the promised Kshs. 7 million had not been paid by the Plaintiffs the bank gave the Plaintiffs 90 day notice when it would re-advertise the property for sale.

38. In response to the Plaintiffs' evidence on the application of interest rate this witnessed stated:

> "***The bank charged interest of the Plaintiffs' loan as provided for by the regulations of Central Bank Kenya pursuant to its statutory powers… The bank informed the Plaintiff of a review on interest charged on its account from 19% to 21% p.a. with effect from 1st October 1991. Management fee, consultancy fee and appraisal fee charged at 6% have been reviewed downwards to 5%. Other terms and conditions remain as stated in their letter of offer."***

ANALYSIS AND DETERMINATION OF ISSUE NO (i)

39. I must begin by admitting that on the material presented by all the parties, in respect to this issue, it has not been an easy issue to determine. Having said that I will proceed to determine the issue on the parties' evidence. To remind myself this issue requires this Court to determine whether there is any money due from the Plaintiffs to the bank: and if so how much is owed.

40. The first to being is to acknowledge, as stated before that the Plaintiffs executed a mortgage over the Karen property for a facility of Kshs. 8 million. The Plaintiffs also executed a charge over property L.R. No. 209/4796/3 for Kshs. 3 million.

41. I have not been able to sight any letter of offers for those facilities. Mr. Onsongo, the bank's Head of Credit analysis was wrong to state that the conditions of the facilities were to be found in the letter of offer.

42. I therefore only have the mortgage and the charge to guide me on what were the obligations of each party. The obligations of each party in both the mortgage and charge, they mirror each other. It is clear from the said documents that the Plaintiffs were only obligated to pay the facility of Kshs. 8 million plus interest and any other money the Plaintiffs would be owing the bank. This is what those instruments refer to as "the Mortgage debt."

43. It is worth remembering that the Mortgage of the Karen property was to secure the bank account of Nyanja Associates being account number 0120-255. The charge over L.R. No. 209/4796/3 was to secure the account of Nyanja Holdings being account No. 0120-826.

44. I am most disappointed that when this case is mainly hinged on the Plaintiffs' allegation that they do not owe the bank any money the bank would present, in this case, bank statements that are not legible. This is in particular to the Plaintiffs' exhibit pages 162, 163, 164, 165 and to some extent pages 154, 166, 167, 170 and on and on. To have bank statements that are legible is more crucial to the bank because the bank has a counter-claim against the Plaintiffs for Kshs. 19,221,405.95. It is also important for the Court to have legible bank statements because of the Plaintiffs' claim that the bank charged interest that was not permitted by law. The fact that the bank failed to supply proper legible bank account can only lead this Court to consider the same as adverse to the bank's case.

45. The mortgage and the charge instruments provided that the interest chargeable would not exceed that allowed by law.

46. The Plaintiffs contended that the bank exceeded the amount allowed by law in the interest charged to their accounts. The Plaintiffs' called two expert witnesses.

47. The two expert witnesses were in agreement that the bank exceeded the amount allowed by law in the interest charged to the Plaintiffs' accounts. Those expert witnesses provided the Gazette Notices which set the interest chargeable from time to time. On the basis of those Gazette Notices those expert witnesses recalculated the Plaintiffs' accounts.

48. The bank through its witness denied that illegal interest was charged by the bank. This witness did not however deny there was restriction, by the Central Bank of Kenya, on the rate of interest up to April 1997.

49. In my view it was not enough for the bank to say that it did not charge illegal interest in the face of two experts who said otherwise. Bearing that the bank provided bank statements of the Plaintiffs that are not legible then one wonders how the bank expects this Court to find that it did not charge illegal interest. It was incumbent on the bank to show a working, just as the Plaintiffs' expert witnesses did, showing what interest rates were actually charged by it. The bank's witness, in his witness statement stated that the bank charged interest between 19% and 21% p.a. with effect from 1st October 1991. How vague can one be. This is a witness who hold a title, in the bank, that is the Head of Credit Analysis. How can he then be vague on a crucial issue in this case. It will lead this Court to find that the bank from time applied the unapproved interest rate.

50. Although the bank has relied on the various letters written by Nyanja admitting indebtedness I am of the view that the Plaintiffs cannot be taken to have admitted what was plainly unlawful. That is, what was the product of application of illegal interest rates. For judgment to be entered on admission it has to be clear, unequivocal and admission of that which is lawful. Se the case of **CHOITRAM VS NAZARI(1984) KLR 327**

> ***"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."***

51. Where I part company with the Plaintiffs' experts is that they applied credit to their accounts, and this is more particularly with the witness Kenneth Muriu Mwangi, hypothetical deposits to the Plaintiffs' accounts. Particularly Kenneth stated that he relied on information given by Nyanja on the amount realised at the sale of the Plaintiffs' properties. As much as I will part company with those expert's analysis on the deposits in the Plaintiffs' accounts, I also find that the bank has failed to give a proper account of the treatment of the sales proceeds of L.R. No. 72/1327, L.R. No. 37/256/3 and L.R. No. 209/4796/3. The bank has not clearly shown how much were the proceeds of those sales, and whether they credited and to which account, if at all. If the whole of the sale proceeds was not credited there was need to show what other charges were deducted from those proceeds. As I say so I do acknowledge that the Nyanja did confirm that he authorized for certain money to be paid out of the proceeds of sale of L.R. No. 72/1327, which property was sold with his consent.

52. The manner in which the bank treated the sale proceeds of those properties is not wholly satisfactory. It is not explained. I am of the view that the bank did not exercise reasonable care and skill expected of a bank.

53. The lack of exercise of reasonable care and skill is seen in the letter so of demand addressed to the Plaintiff. It ought to be remembered there were separate accounts with the bank, one being for Nyanja Holdings and the other for Nyanja Associates.

54. By a letter dated 27th February 1991 the bank wrote to Nyanja confirming the debit balance of two accounts was as follows:

a) Nyanja Associates Kshs. 6,742,998.50

b) Nyanja Holdings Kshs. 12,106,386.65

55. By letter dated 26th July 1996 written by the then bank's lawyers to Nyanja Associates stated that the debit balance of Kshs. 10,122,234.75. The rate of interest applicable to that amount was shown in that letter to 36% p.a.

56. By letter dated 8th October 1998 written by the bank's lawyers to Nyanja the lawyer indicated the credit balance of Nyanja Associates and Nyanja Holdings was Kshs. 175,744,931.80. Note the two accounts were consolidated without proper explanation by the bank seeing that the account holders were two separate entities.

57. By the bank's letter dated 4th December 1998 addressed to Nyanja the bank stated the debit balance for Nyanja Associates and Nyanja Holdings was Kshs. 161 million.

58. By letter of the bank's lawyer dated 4th January 1999 the bank informed Nyanja on behalf of Nyanja Associates that the debit balance of Nyanja Associates was Kshs. 160,369,151.80. Because that amount was not settled the bank instructed Palomino Enterprises Ltd, the auctioneer, to sell by auction the property charged by Nyanja Holding and the property of Nyanja Associates. The question that arises: which of those two entities, Nyanja Holding and Nyanja Associates, was alleged to owe the bank Kshs. 160,369,151.80?

59. The way the bank dealt with these two accounts seems to have been very murky.

60. With this Court's finding that the bank, on its own admission through the evidence of Onsongo, charged rate of interest not permitted by Law, contrary to the Mortgage/charge instrument; and having found that the bank failed to give a proper account of what it was demanding from the Plaintiffs; and the bank failed to properly account for sale proceeds; and having found that the bank unprocedurally consolidated the two bank accounts of Nyanja Holdings and Nyanja Associates, where does all of that leave the Bank's claim in its counter-claim.

61. The bank claims, in its counter-claim, against all the Plaintiffs for judgment for Kshs. 19, 221,405.95. This claim is made despite the fact that the bank had two separate accounts for Nyanja Holdings and for Nyanja Associates. Those are two separate entities. Nyanja Associates is a sole proprietorship while Nyanja Holdings is a Limited Liability Company. The counter-claim fails on that ground alone. There is no evidence in the bank statements before me and the bank's witness, Mr. Onsongo, did not attempt to prove that amount in the counter-claim in respect to those two entities.

62. In the final analysis I have stated that the bank did indeed charge interest that was not permitted by the law and therefore it was contrary to the mortgage/charge. I therefore find that there is no proof that the Plaintiffs were indebted to the bank as claimed in the counter-claim. The Plaintiffs have equally failed to prove over payment of their account on a balance of probability. The burden of proof, in civil cases, which the Plaintiffs failed to meet, was discussed in the case **EASTERN PRODUCE (K) LTD – CHEMONMI TEA ESTATE V BONFAS SHOYA [2018] eKLR,** by Justice H. A. Omondi thus:

> "*The burden of proof in civil cases on the balance of probability was defined in the case of* ***KANYUNGU NJOGU VS DANIEL KIMANI MAINGI*** ***[2000] eKLR*** *that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other."*

63. In respect to the first issue I find that here is no money due and payable by the Plaintiffs to the bank. Equally the Plaintiffs have failed to

prove any overpayment to the bank.

ISSUE NO. (ii)

64. This issue requires this Court to determine whether the sale of the Karen property by the bank to the Redmars was lawful. If not what are the ramifications.

65. From the initial stage I will begin by saying that there was no basis in law to sell the Karen property in view of the bank's failure to prove, before this Court, that Nyanja Associates or Nyanja were indebted to it and if so how much. This is because the mortgage, which provided the Karen property as security, did not cover the debt of Nyanja Holdings at all. It only covered the debt of Nyanja Associates and Nyanja himself.

66. Under the issue under consideration there are several sub-issues to consider.

67. The first such sub-issues I wish to consider is whether the bank had issued statutory notices as required by law. The Plaintiffs contend that statutory notice was not served on them by the bank.

68. The first consideration is, what did the law then provide. The law then, which now has been repealed, was The Indian Transfer of Property Act 1882. The Section, relevant to this issue, in that Act is Section 69A (1) (ITPA). It provides:

69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-

> (a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage- money, or of part thereof, for three months after such service; or
>
> (b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (emphasis mine)

SECTION 69A (1) OF THE INDIAN TRANSFER OF PROPERTY ACT 1882

69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-

> (a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage- money, or of part thereof, for three months after such service; or
>
> (b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or (emphasis mine)

9. The Court of Appeal in the case **TRUST BANK LTD V EROS CHEMIST LIMITED & ANOTHER [200] eKLR** pronounced itself on the requirement of that Section as follows:

> *"In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under section 69(A)(1) of the Transfer of Property Act.....*
>
> *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." (emphasis mine)*

70. The demand letters sent to the Plaintiffs are before Court.

71. The banks letter written by its then lawyers, Ndungu Njoroge & Kwach Advocates, dated 19th March 1991 did not state the period of notice given to Nyanja. It simply set out the amount Nyanja Associates owed the bank and the rate of interest. The letter then informed Nyanja that instructions to sell the Karen property had been issued to Gitco Auctioneers.

72. The other letter, also written on behalf of the bank by the same law firm is dated 26th July 1996. That letter set out the amount Nyanja Associates owed the bank and the rate of interest applicable, then the letter notified Nyanja that if payment was not made the mortgaged property would be sold by auction.

73. The same law firm again wrote a letter dated 6th October 1998 addressed to Nyanja. The title of that letter is "City Finance Bank Limited V Nyanja Associates & Nyanja Holdings Limited." That letter informed Nyanja the amount owed with the applicable interest rate but did not give the number of notice days before sale of the property by auction.

74. By letter dated 4th January 1999 that law firm gave notice to Nyanja that if Kshs. 160,369,151.80 with interest at the rate of 36% was not paid within seven (7) days the mortgaged property would be sold.

75. The bank wrote a letter to its lawyer dated 12th April 1991, which was copied to Nyanja and Enid, informing the lawyers that if Kshs. 7 million was not paid in ninety (90) days by Nyanja Associates and Nyanja Holding they were to proceed with the auction of the charged property.

76. It is important to note that although that latter letter of the bank required payment of Kshs. 7 million within 90 days it did not indicate how much Nyanja Associates on its own was liable to pay and how much Nyanja Holdings on its own was liable to pay. It also failed to demand the whole outstanding amount plus interest. That demand fails the test of Section 69A (1) of ITPA. It is because of that finding that I reject the Defendant's submission that statutory notices were issued to the Plaintiffs.

77. The other sub-issue to consider is whether the bank was entitled to sell the Karen property by private treaty.

78. The mortgage instrument provided for sale by private treaty and Nyanja who executed that Mortgage was bound by that term. The bank cannot be faulted for having sold the Karen property by private treaty.

79. The next sub-issue is whether the sale of the Karen property by the bank to Redmars was fraudulent and or illegal.

80. The Plaintiffs by their plaint gave particulars of the alleged fraud in that sale as: that the bank sold the Karen property when the Plaintiffs had overpaid their facility; the bank sold the property at undersale; that the sale and the registration of the conveyance was done hurriedly; that there was no known criteria of how Redmars was identified as the highest buyer; that through the Defendants' fraud and conspiracy no valuation was done of the property; and that the sale of the property was done during the subsistence of the case filed by the Plaintiffs, being HCCC No. 1965 of 1991.

81. In respect to the Plaintiffs' allegation that they had overpaid their loan facility, as I stated above, there was insufficient proof of such overpayment.

82. The bank stated in evidence that the Karen property was not sold undervalued. The bank according to its evidence relied on the valuation of Dayton Valuers dated 22nd February 2006. The value given to the Karen property in that valuation was Kshs. 90 million open market value; Kshs. 72 million open market value for mortgage purposes, and Kshs. 60 million forced sale value.

83. The Plaintiffs had the property valued by a valuer called Horeria & Company dated 16th August 2007. The value given to the property by that valuation was: Kshs. 295,500,000 as the current open market value. That value was broken down as follows; land Kshs. 269,500,000; buildings Kshs. 17,5000,000; borehole Kshs 2,500,000; Eucalyptus trees Kshs. 4,000,000; and other improvements Kshs. 2,000,000.

84. There are few things to note in respect to those two valuations. In the case of the bank's valuation the valuer confirmed that they did not access the Karen property. He was not permitted to enter. He therefore relied on third party information, about the property. In the case of the Plaintiffs' valuation the valuer was not given specific instruction on how his valuation would be put into use. The bank's valuer was, on the other hand, informed that the valuation was for purpose of selling it. Indeed that will be seen by the way he broke down his valuation of the property.

85. But the question is was there valuation before the bank embarked on the sale of the Karen property by private treaty.

86. The bank's valuation by Dayton Valuers under what is entitled as "Limiting conditions" has the following clause:

> "***8. This valuation is invalid unless it is signed by a director and bears the official company seal."***

87. It is not denied that the valuation presented by the bank, in evidence in this case was not signed, at all, and did not bear "the official company seal."

88. This is what Mr. Onsongo said about that valuation while being cross-examined:

> "***The property was valued before sale by Dayton Valuers. This is a valuation report to that effect… Valuation was done but it is invalidated by fact it was not signed."***

89. Although Mr. Onsongo retracted that clear statement, when being re-examined it remains that the valuation itself stated that it was invalid if not signed and if it was without the official company seal.

90. That valuation was submitted in evidence by Justus Munene Munyi. His name does not however appear as one of the persons who carried out that valuation. The names that appear are "M.A. Wanyonyi" and "Lilly Kithinji."

91. I need to say that I did not believe the evidence of Justus Munene Munyi, the valuer. I formed the opinion that he was less than candid. When he was cross-examined he began by saying that it was he who compiled the valuation report. On being questioned further by Plaintiffs' advocate he stated:

> "***We compiled the report the three of us.***"

92. So over and above my finding above that the valuation, without the signature of a director or company seal, was invalid, I also doubt that the witness who presented it to Court, whether he indeed visited the property.

93. As stated before that valuer also compiled a valuation from information given to him by third party. That is hearsay evidence. That fact on its own reduces weight of that evidence in his valuation in the eyes of the Court. What is the value a valuation conducted without the benefit viewing the property. One might as well sit in an office and write a valuation on information given without going out to the property. Such a valuation cannot be relied upon.

94. In looking at the mortgage instrument I have noted that the bank reserved for itself the right of entry on the Karen property. Why did the bank not use that right. By the date of that valuation, the year 2006, the case HCCC No. 1965 of 1991 was still subsisting. The bank could have applied to Court for an order giving it the right of entry to be given to it or its valuer. It did not.

95. The fact that the bank did not exercise that right leaves me wondering whether indeed the valuation was done before the sale of the Karen property or after the sale, to answer to the allegations made by the Plaintiffs.

96. I find and hold that the bank sold the Karen property without a valid valuation or at all.

97. Although the Plaintiffs alleged that the conveyance in favour of Redmars was registered hurriedly the Plaintiff failed to give evidence to support that allegation. This Court is not in a position to take judicial notice of the time it takes the land office to register documents with evidence. That allegation remains unproved and it fails.

98. The other sub-issue to consider is whether fraud or conspiracy can be found in the sale of the Karen property.

99. The evidence of Redmars was by Pomesh Shah, its director.

100. He stated in evidence that he saw the Karen property advertised at Nakumatt Ukay, in parklands. He said that the advert was by Dayton Valuers.

101. First thing to state is that no evidence was presented before Court of such an advert, or any other. More importantly when Mr. Munyi from Dayton Valuers testified no evidence was led that Dayton carried out such an advert. The bank sought to rely on a letter dates 12th October 2006 written by C.N. Kihara Advocate. By the date of writing that letter C.N. Kihara Advocate represented the Plaintiffs in their case HCCC 1965 of 1991. C.N. Kihara Advocate wrote that letter to Dayton Valuers inquiring of an advert of the sale of the Karen property.

102. That letter, without calling its maker to prove that indeed there were adverts does not prove there was advert of the Karen property before its sale. More particularly it does not prove there was an advert at Nakuamatt Ukay, as alleged by Pomesh Shah.

103. Pomesh Shah further stated that on contacting the bank he negotiated the price of the Karen property to Kshs. 60 million. Those negotiations were for the purchase of the property in his name. He stated that after being advised by his then advocate Mukite Musangi & Company Advocates he incorporated Redmars with his partner. He thereafter had the property registered in Redmars, which he referred to as special vehicle company, which was his nominee.

104. Pomesh Shah stated that neither he nor his partner were involved with the bank.

105. It was pleaded that Redmars was an innocent purchaser for value without notice. It was submitted on behalf of Redmars that if the bank was at fault in selling the property that would not affect Redmars title because it was purchaser for value without notice. Redmars relied on the case **ELIZABETH WAMBUI GITHINJI & 29 OTHERS V KENYA URBAN ROADS AUTHORITY [2019] eKLR, thus**:

> "*The Ugandan case of **Katende v. Haridar & Company Limited** **(2008) 2 E.A.173**, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-*
>
> > "***..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:***
> >
> > ***a. he holds a certificate of title;***
> >
> > ***b. he purchased the property in good faith;***
> >
> > ***c. he had no knowledge of the fraud;***
> >
> > ***d. he purchased for valuable consideration;***
> >
> > ***e. the vendors had apparent valid title;***
> >
> > ***f. he purchased without notice of any fraud;***
> >
> > ***g. he was not party to any fraud.***
>
> ***A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner."***

106. The problems with the sale to Redmars are myriad and I will attempt to discuss some of the most crucial ones.

107. I have already found that the mortgage instrument permitted the bank to sell the Karen property by private treaty in case of default on the part of Nyanja. But the irreconcilable facts about the sale to Redmars is the lack of paper trail leading to that purchase. Starting with the lack of advertisement. As stated before although Pomesh Shah said he noticed that the property was being sold when it was advertised at Nakumatt Ukay, in Parklands. That advert allegedly was by Dayton Valuers. The valuer who gave evidence on behalf of Dayton Valuers

was not questioned about such advertisement. One would have expected that Redmars learned advocate would have ensured that Dayton valuer representative would have confirmed that such advert was put in Nakumatt Ukay.

108. Additionally Pomesh Shah said that he contacted his advocate, after having negotiated the purchase price with the bank. After raising the money for the purchase price he said that he paid his advocate Kshs. 60 million. He could not remember through which bank he paid. He did not produce a receipt from his advocate nor did he produce a receipt of the bank acknowledging receipt of that purchase price. Did he indeed pay the purchase price before conveyance was done for him? That is indeed the big question. Mr. Onsongo the bank's official on being cross-examined stated that although the property was sold to Redmars he could not tell how Redmars was determined to be offering the best price. Mr. Onsongo was unable to say who the other bidders were, all he said is that there were other bidders. Why that issue was shrouded in secrecy is not easily understood. Mr Onsongo and Pomesh Shah did not produce a sale agreement between Redmars, or Pomesh Shah for that matter, with the bank. But what surprised me most was the words of Mr. Onsongo, on being cross-examined, when he said that he did not know whether the bank was paid by Pomesh Shah the sale proceeds of Kshs. 60 million. He was also unable to say whether the payment was done before or after the conveyance in favour of Redmars.

109. Nyanja in his evidence accused the bank lawyer of colluding with Redmars.

110. I would respond to that accusation by saying that, my view after reviewing the evidence before me is that, that accusation is not farfetched. I venture to explain myself, with the greatest respect to persons I will discuss.

111. It did not escape my attention that the sale of the Karen property was undertaken during the subsistence of the Plaintiffs' case HCCC No. 1965 of 1991. That case, which is now consolidated with case HCCC 251 of 2008, had all the three Plaintiffs and the only Defendant was the bank. By that case the Plaintiffs were seeking to stop the bank from selling the Karen property. The bank in case HCCC 1965 of 1991 was represented by the firm of Singh Gitau Advocates. This is confirmed in the replying affidavit of Esther Karanja the Bank's credit manager dated 4th October 2007. Even the defence of the bank in case HCCC No. 251 of 2008 was filed by that firm. The defence and counter-claim of Redmars, in that case HCCC No. 251 of 2008, was filed by the firm of Mukite Musangi & Company Advocates.

112. The representation changed later when the bank was represented by Wamae & Allen Advocates. Mukeite Musangi & Company Advocates continued to act for Redmars but in all Court representation, Redmars was represented by Mr. James Singh Advocate. Pomesh Shah did confirm that James Singh and Mukite Musangi are in a partnership. The question is when did that partnership commence. And if it existed does it still exist. And if it still does exist why would Mukite Musangi & Company continue to represent Redmars up to the date I received the final written submissions of Redmars in this case. It begs an answer on how Mukite Musangi who is in a partnership with James Singh would continue to run a firm in his sole name in Nakuru while still in a partnership with James Singh. It is perplexing. What is being concealed?

113. And this is why I have gone that route in my discussion. James Singh acted for the bank when Redmars had the Karen property registered in their name, after allegedly buying it from the bank. In a company search done on a company known as Chester Insurance Brokers Limited it was revealed that as per the company return filed on 24th Mach 2009, of Chester Insurance Brokers Limited the directors are shown as, amongst others:

Pomesh Bansilah Shah

James Gitau Singh.

That company was incorporated on 16th September 1998.

114. It follows that Pomesh Shah knew James Gitau Singh, the bank's lawyer, at the time of sale and purchase of the Karen property took place.

115. Can Pomesh Shah, who confirmed that it was him who negotiated with the bank to buy the Karen property be said to have been a purchaser without notice. It will be recalled that Pomesh Shah confirmed he purchased the property, himself and his partner, then had the property registered in the name of Redmars his nominee. I find and I hold that in view of my discussion above that Pomesh Shah cannot be said to be an innocent purchaser for value without notice.

116. My understanding of what might have been the thinking of the bank, when it transferred the Karen property to Redmars, was that the bank was exasperated with the continued habit of Nyanja stopping it, by obtaining Court orders, restraining it from selling the Karen property. This becomes very clear in the various affidavits and pleadings filed on behalf of the bank. This is what Esther Karanja, the bank's credit manager, stated in her affidavit dated 22nd May 2008:

> "***That the conduct of the Plaintiffs in this matter had been deplorable. The Plaintiffs, over the course of the proceedings in HCCC 1095 of 1999 have filed several applications seeking to restrain the Defendant from realising properties charged to it."***

117. Does that sentiment mean that the bank with a view to prohibiting any further legal stoppages of the sale of the charged property, hurriedly, as stated by the Plaintiffs, transferred the Karen property to Redmars, when the injunction order had been vacated. Is that why M. Onsongo could not categorically state whether the Karen property was transferred before or after receiving the purchase money of Kshs. 60 million by the bank.

118. As I stated before the Defendants' cases are defeated by the lack of paper trails to support their contention. The lack of paper trail can only be viewed adversely against both the Defendants. How can a property of such value as the Karen property be transferred without receipt to prove payment and without sale agreements. It should be noted that Mr. Onsongo said the purchase price Kshs. 60 million was not credited into the Plaintiffs' account. That money was said by him to be in the bank, somewhere, where it is not earning interest. Note there was no evidence of that money being at the bank, before Court. In the meanwhile the amount claimed by the bank against the Plaintiffs, in the counter-claim continues to accrue interest to date.

119. Having made the above finding I will refer and rely on the decision **OF ELIJAH KIGNGENO ARAP BII V SAMUEL MWEHIA GITAU & ANOTHER [2014] eKLR** thus:

> "*However, it can be stated generally that the duty of the mortgagee is to act in good faith and to see that the sale is not tainted by some kind of impropriety. The duties of the mortgagee in the context of* ***Section 104 (2)*** *of the Law of Property Act, 1925 of England which is in pari materia to* ***Section 69B (2)*** *of TPA were comprehensively discussed in* ***Corbett vs. Hatifax*** *PLC [2003] 4 All ER 180. In earlier case,* ***Lord Waring vs. London and Manchester Co. Ltd.*** *[1935] ch 310 at 318 Crossman J said of purpose of* ***Section 104 (2)*** *of Transfer of Property Act, 1925 of England which as we have already observed is in pari materia to the entire* ***Section 69B (2)*** *of TPA:*
>
> > "***Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course if the***

> ***purchaser becomes aware, during that period of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance".***

120. My finding is that there is sufficient evidence, which meets the high standard required to prove fraud, which entitles this Court to say that Redmars did not get a good title on getting the property transferred to it. I find and hold that the sale between the bank and Redmars is null and void. The Plaintiffs are entitled to the prayer to have the Karen property retransferred back to Nyanja.

ISSUE (iii)

121. The Defendant pleaded that case HCCC 251 OF 2008 was res judicata in view of the Ruling delivered by Nabuye J (as she then was).

122. That ruling which was delivered in HCCC 1965 of 1001 was in respect to an interlocutory application, where the Plaintiffs sought to amend the plaint to include Redmars and also sought to injunct the bank and Redmars from dealing with the Karen property adversely to Nyanja's title. I have read through the ruling of Nabuye J dated 29th April 2008. As stated before the learned Judge was by that Ruling considering an interlocutory application. The tenor of that ruling is that the judge was clear that she was dealing with an interlocutory application. And to support that my finding one only needs to look at the ruling of Khaminwa J, (as she then was) of 13th November 2008. In that ruling, in response to Defendants' argument that the application before the judge was res judicata, because of the ruling of Nabuye J, Justice Khaminwas stated more than once that it was not res judicata. I too find that the issues before me are not res judicata. That finding is in keeping with the Court of appeal holding in the case **MBUTHIA V JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) eKLR viz:**

> "*The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits."*

ISSUE (iv)

123. The costs shall follow the event, in this case. The Plaintiffs have by and large succeeded in their claim. They shall therefore have the costs of the suits.

CONCLUSION

124. The judgment of this Court is as follows:

a) A declaration is hereby made that the sale of the property known as L.R. No. 7583/1 KAREN ESTATE Nairobi to Redmars Holdings Limited was illegal, unlawful and therefore was null and void.

b) An order is hereby issued of cancellation of the conveyance to Redmars Holdings Limited dated 21st August 2007 in respect L.R. No. 7583/1 KAREN ESTATE Nairobi.

c) An order is hereby issued restoring the property L.R. No. 7583/1 KAREN ESTATE Nairobi in favour of GEORGE NJAU MBUGUA NYANJA.

d) An injunction is hereby granted restraint the 2nd Defendant, its servants and/or agents, employees from trespassing, selling or disposing, wasting away or alienating and/or interfering in any manner whatsoever with the Plaintiffs' occupation of L.R. No. 7583/1 KAREN ESTATE Nairobi.

e) The Plaintiffs are awarded costs of the HCCC 1965 OF 1991 and HCCC 251 of 2008 and the costs of the 1st and 2nd Defendants' counter-claims which counter-claims are hereby dismissed.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **5th** day of **MAY,** 2020.

MARY KASANGO
JUDGE
ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **5th** day of **May, 2020.**

MARY KASANGO

JUDGE