



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 14 OF 2003

1. MOHANSON FOOD DISTRIBUTORS LIMITED

2. MEADOW VALE LIMITED.....PLAINTIFF

V E R S U S

1. KENYA COMMERCIAL BANK

2. FAYAZ BAKERS LIMITED.....DEFENDANT

J U D G M E N T

1. By their plaint dated the 20/1/2003 which was by cOnsen amended on the 12/3/2019, the Plaintiffs plead that on 29/6/1995, the 1st Plaintiff charged its properties known as **Kwale/Diani Beach/567, Kwale/Diani Beach/568, Kwale/Diani Beach/569, Kwale/Diani Beach/570, Kwale/Diani Beach/571 and Kwale/Diani Beach/572 together with a building standing thereon**(hereinafter referred to as the *suit properties*)to the 1st Defendant to secure the repayment of advances made to it by the 1st defendant.

2. The Plaintiffs pleaded that in a purported exercise of its statutory power of sale, the 1st Defendant put the suit properties for sale by public auction on different dates but succeeded in selling during the auction held on the 17/9/2002 at which the 2nd Defendant made a bid for Kshs. 4,400,000/=and emerged the purchaser

3. The Plaintiffs averred further that the purported sale by auction was without any legal basis or justifications because of the fact that no statutory notice as required by Section 74 of The Registered Land Act (repealed) were issued nor served and that the purported issued notices were fatally defective and/or invalid. Consequently, no power of sale had arisen.

4. The Plaintiffs then contended that the 2nd Defendant was in violation of the terms of the agreement for sale at the public auction as it failed to complete the sale within 90 day of the date of the auction by not paying the balance of the purchase price as required, prompting the 1st Defendant advocate to rescind the sale on the 17/12/2002 whereupon the plaintiffs, in a bid to redeem the suit properties, on the 16/12/2002,it entered into an agreement with the 1st Defendant, and through its advocates, the 1st Defendant accepted a sum of Kshs.5,000,000/=in redemption of the suit properties, and agreed to discharge the same on the understanding that the 1st plaintiff had no further interest or right to re-sell the suit property.

5. In breach of the said agreement for payment in full redemption of the suit properties, it was pleaded the 1st Defendant failed to discharge the suit properties to the Plaintiffs and the said suit properties were transferred to the 2nd Defendant by the 1st Defendant outside the terms and conditions of sale at the auction after the rescission and that the said transfer was fraudulently done

6. On those pleaded facts, the plaintiffs sought to given a judgment in terms of the following orders:

a) A declaration that the transfer of the property by the 1st Defendant to the 2nd Defendant is unlawful and/or a nullity;

b) An injunction restraining the Defendants whether by themselves, their agents and/or servants or through any person whatsoever acting or purporting to Act by through any or under them or any of the howsoever from transferring ,alienating, disposing of, charging or dealing with the property.

c) An order directing the rectification of the register relating to the property by canceling the registration of the transfer in favour of the 2nd Defendant.

d) On mandatory injunction against the 1st Defendant whether by itself or through its servants and/or agents to specifically perform its agreement to redeem the property and issue a discharge in favour of the 1st Plaintiff and transfer to the 2nd Plaintiff ;and

e) Any other incidental orders this Honourable Court may deem fit to grant.

7. After the respective cases were closed, the plaintiffs and the 1st defendant recorded a consent before court to amend the plaint and introduce two further prayers as bellow: -

f) Judgment be entered against the 1st Defendant for Kshs. 17, 500,000 being the excess sum collected by the 1st Defendant to be refunded to the Plaintiff with interest at Court rate from 22/1/2003 till payment in full.

g) The Plaintiff be awarded damages against the 1st Defendant in the sum of Kshs. 54,000,000/= for interest thereon from the 22.1/2003 for the illegal and unlawful sale of the suit property.

8. When served, the 1st Defendant filed a statement of defence dated 12/2/2003 denying all the allegations in the Plaint save for the descriptive paragraphs 1, 2, 3, 4 & 7. The 1st Defendant further stated that the sale by public auction as held on the 17/9/2002 was in exercise of its legitimate statutory power of sale enshrined in the charge dated 29/6/1995 and the notices issued fully complied with Section 74 of the Registered Land Act (repealed), they were valid and properly gave rise to a valid power of sale.

9. The 1st Defendant further stated that the delay by the 2nd Defendant to pay the balance of the purchase price was occasioned by the different interpretation and understanding of the Memorandum and Conditions of Sale and that the letter issued on the 17/12/2002 was on a false belief and fear that the 2nd Defendant was unable to raise the balance of the purchase price particularly in view of the many letters written by the 2nd Defendant.

10. The 1ST Defendant also stated that the 2nd Defendant being a *bona fide* purchaser for value without notice, acquired a good title and is indeed now a registered owner of the suit property because the 1st Plaintiff failed to lawfully redeem the suit properties by fully paying the outstanding debt then amounting to **Kshs. 62,926,458.50/=**. It was then further contended that, there was no agreement between it and the 2nd Plaintiff, that the 2nd Plaintiff intended to step in for the 2nd Defendant in the event it was unable to complete the transaction, but it then emerged that the 1st Plaintiff was merely hiding behind the 2nd Plaintiff in an attempt to purchase the charged property and/or redeem the suit properties. The

payment of the Kshs 5,000,000 by the 2nd plaintiff was admitted but it was contended that the sum was held towards the purchase price of another property in Mombasa

11. For the 2nd Defendant, a Statement of Defense dated 11/2/2003 was filed denying all the allegations in the Plaint save for the descriptive paragraphs 1, 2 & 3 and further admitted to have been the highest bidder at the public auction held on the 21/5/2002. However, that auction did not succeed because the bids received were below the reserve price.

12. The 2nd Defendant then states that the 1st Defendant failed to comply with pre-conditions contained in the sale agreement regarding tendering of duly executed transfer to its advocate making it contractually impossible to complete the transaction within 90 days and therefore the 1st Defendant was to be blamed for the delay and as a result, it could not rescind the sale agreement. The alleged sale and payment between the 2nd plaintiff and the 1st defendant was thus term contrary to the memorandum of sale executed pursuant to the auction.

13. The 2nd Defendant stated that the suit properties were lawfully registered to it and that the Kwale County Council rate demand was unlawful as it had not been constructed in accordance with the provisions of the Rating Act. Therefore, the Kwale District Land Registrar was correct in registering the transfer. In the alternative, the 2nd Defendant saw the possibility of the sale being reversed and therefore through a Notice to Co-Defendant prayed for orders that:

a) The 1st Defendant should pay the 2nd Defendant loss of profit and loss of use of the suit premises from 20th December 2002 until date of payment.

b) General damages against the 1st Defendant

c) The 1st Defendant do pay the 2nd Defendant the sum of Kenya Shillings Four Million Four Hundred Thousand (4,400,000) plus interest at commercial rates from 20th December 2002 plus mesne profit until date of payment plus cost of this action (the 2nd Defendant refers to paragraph 7,8,10,11(a) (b) of its defence filed herein).

14. In support of its case, the Plaintiffs called **Mr. Sandeep Singh Khandari** as their sole witness to prove their case. The 2nd Defendant, on its part, relied on the evidence of its Director **Mr. Elias Ayub Khamisa**. The first defendant failed to comply with case conference directions and therefore did not call any witness to give evidence. The defense filed thus remained standing as no more than mere allegations.

15. The two witness relied on and adopted their respective witness statements as evidence in chief and then produced the Bundles of Documents filed as exhibits and the same were adopted by consent of the parties. As said before the 1st Defendant did not call any witness to support its case and consequently, the Plaintiffs' claim against the 1st Defendant remained uncontroverted just as the Notice to Co-Defendant remained also remained unchallenged.

Evidence led by the parties

16. The hearing of the suit commenced on the 21/11/2016. On that day **PW1 Mr. Sandeep Singh Khandari** testified and stated that in the charge between the 1st Plaintiff and the 1st Defendant, the 1st Plaintiff undertook and agreed to pay to the 1st Defendant “...on a date on which the chargor receive from the bank a written demand for payment to pay the bank such sum not exceeding the maximum principal debt as may be due and owing ...” in addition to the above, the total amount recoverable under the said charge by the 1st Defendant “shall not exceed Kshs 18,000,000/=....with interest”. Pursuant to charge, the 1st Defendant through the firm of **J.W. Kagwe & Company Advocates** purported to give notice of default demand payment of a sum of Kshs. 76,596,243.15 together with interest thereon at the rate of 53% p.a. However, the said letter was never sent to the 1st Plaintiff until 22/5/1998 and demanded

that payment to be made before 21/5/1998. Reference was made to that letter at pg. 21 of Pexhibit.

17. PW1 further stated that they responded to the aforementioned letter via their letter dated 23/5/1998 expressing their dissatisfaction and pointed out to the 1st Defendant that their letter was only posted on the 22/5/1998 and it was impossible to comply with the demand. However, the 1st Defendant through its advocates on the 15/6/1998 issued a statutory notice demanding payment of Kshs 82,108,875/= before the expiry of three months from the date of the notice. Further, PW1 stated that at the time the statutory notice were issued, the 1st Defendant advocate who was a sole practitioner in the firm of **J.K. Kagwe & Company Advocates** did not hold a valid practicing Certificate.

18. PW1 states that the 1st Plaintiff filed Mombasa High Court civil case No. 208 of 1999 (**Mohansons Foods Distributors Limited vs. Kenya Commercial Bank Ltd and Another** which case was consolidated with **Mombasa HCC NO. 207 OF 1999(Rana Estates Ltd & 2 others vs. Kenya Commercial Bank Ltd & another** and a consent was recorded between the parties for a total sum of Kshs. 34,000,000/=on the 2/9/1999. Pursuant to the consent, the 1st Plaintiff paid a total of Kshs.22,000,000/= via cheques but stopped payment when the 1st Defendant failed to provide to it bank statements showing how the payments made were being applied or the rate of interest that was applicable since the issue of interest was still pending determination. I consider the dispute to have been on interests and the prudent thing to have been done at the time was to apply to the court in the file the consent was recorded. I think that could have avoided or diminished the prospects of the litigation escalating as it has now done.

19. PW1 went on and stated that in total, they had paid a sum of Kshs.22,000,000/= when the total recoverable amount as per the charge was Kshs.18,000,000/=.However, the 1st Defendant authorised two accounts belonging to the Plaintiff to be overdrawn beyond the set limit of Kshs.18,000,000/=. PW1 further stated that no fresh statutory notices were ever issued that could have given the 1st Defendant the power to sell the charged properties via public auction, and that the amounts demanded by the 1st Defendant were grossly excessive and contrary to the terms of the consent.

20. The witness then added that in purporting to exercise its statutory power of sale the 1st Defendant sold the suit properties at an aggregated value of Kshs. 4,400,000/= which sale was later rescinded. Thereafter, the 1st Defendant agreed to accept kshs.5,000,000/= in redemption of the suit properties in favor of a company appointed by the 1st Plaintiff but instead in collusion with the 2nd Defendant, the suit properties were transferred to the 2nd Defendant illegally without payment rates and issuance of a rates clearance certificate.

21. PW1 further stated that no accounts or bank statements have ever been given to them despite them paying a total of Kshs. 27,000,000/=. A valuation was never requested before the auction was conducted and no reserve price was availed to them and that the suit properties are currently valued at Kshs. 54,000,000/=.

22. On cross-examination by **Mr. Oduor**, PW1 confirmed that the 1st Plaintiff took a loan from the 1st Defendant and that there was no dispute on the interest payable and that the 1st Plaintiff received all the statutory notices and after all, the notice were in regard to the outstanding amount. Pw1 further confirmed that a consent on the payment of the outstanding amounts was entered into in HCC 207 of 1999 but the 1st Plaintiff did not pay the full amount in the consent and that the issue of interest was to be discussed at a later time but the same is yet to be paid.

23. On cross-examination by **Mr. Noorani**, PW1 confirmed that one of the Plaintiffs' directors was present at the auction conducted on the 17/9/2002 and that they approached Court after the suit properties were transferred to the 2nd Defendant. Pw1 was of the view that there was fraud because a transfer was effected without land rates being paid.

24. PW1 also confirmed that according to the Gazette Notice, the rates payment was demanded by 22/12/2003 and by letter date 15/1/2013, interest was only chargeable after January 2003 and all the while the 1st Plaintiff never paid land rates and that the schedule of the rate payable does not show the source of the document and that anybody could have authored the document. PW1 also confirmed that the 2nd Defendant through its advocates **Ghalia & Ghalia** had demanded for proof of rates payment or a confirmation whether the suit properties were agricultural land requiring consent from the land control board without a response.

25. PW1 confirmed that by consent dated 2/9/1999, they agreed on payment of kshs. 34,000,000/=. However, they only paid Kshs. 22,000,000/= by installments meaning that mathematically there is an outstanding balance of 12,000,000/=. That notwithstanding, the bank had sold another property at 24,500,000/=which sale was still valid and not contested and that the letter of rescission of the sale to the 2nd defendant was copied to him.

26. On re-examination, PW1 stated that in total they paid Kshs.67,500,000/=against the agreed sum of Kshs.34,000,000/=and there was no agreement to pay Kshs.82,000,000/=.

27. When questioned by the Court,PW1 stated that at the time of filling the suit, they had only paid in line with the consent of 2/9/1999 and that the agreement to redeem was evidence at page 63 of the Plaintiff bundle and the same is acknowledged vide letter date 16/12/2003.

Evidence by the Defendant

28. **DW1, Mr. Elias Ayub Khamisa** testified and stated that sometime in April he saw an advertisement in the newspaper of a public auction to be held on the 21/5/2002. He attended the auction but the reserve price was not reached and therefore, the properties were withdrawn from the auction. The suit properties were advertised again in the newspapers for a sale that was scheduled for the 179/2002. This time round he attended the auction and he was the highest bidder at Kshs. 4,400,000/- and his bid was accepted by the auctioneer in the presence of one **Pritpal Singh Khandari** who was a director to the 1st Plaintiff.

29. DW1 stated that he paid 25% of the bid in accordance to the conditions of sale and arranged for the finance of the purchase by way of a loan from its banker Barclays Bank of Kenya. Further, they instructed their advocate **Messr. Ghalia & Ghalia** to Act on their behalf in the transaction, and correspondence between the 1st Defendant's Advocates and their Advocate begun, leading to approval of draft transfer finalized for execution by the 1st Defendant after which an Application was made to the **Msambweni Divisional Land Control Board** for a consent in respect to the transfer, which was approved and a letter of consent duly issued.

30. DW1 states that its Advocate on the 28/11/2002 wrote to the 1st Defendant advocates informing them that they were holding the balance of the purchase price and undertook to release the same upon the receipt of duly executed transfer forms of the suit properties, but there was no response from the 1st Defendant's. However, on the 17/12/2002, 1st Defendant's advocate wrote to **Ghalia &Ghalia Advocates** purporting to rescind the sale on the allegations that the 2nd Defendant was in breach of the terms of the conditions of sale making time to be of essence. DW1 further stated that its Advocate responded to the letter of purported rescission by reminding the 1st Defendant that it was the one that had violated the terms and conditions of the sale and after a tele-conversation between the two advocates, the 2nd Defendant's advocate by letter dated 18/12/2002 sent the 1st Defendant a cheque for Kshs. 3,300,000/= to be held by them on their professional undertaking to release the executed transfers.

31. DW1 further states that the executed transfers were received by their advocate, the same were registered at **Kwale District Land Registry**, titles deeds issued in the name of the 2nd Defendant and that there was no fraud on their part. DW1 also averred that on the 31/12/2002, and by letter dated 22/1/2003, their advocate wrote to the 1st Plaintiff requesting for vacant possession. However, the request has never been yielded to and to date they have been kept out of their property and the suit properties continue to

deteriorate.

32. On cross-examination by **Mr. Khagram**, DW1 confirmed that its interest in the suit properties crystalized after the auction because he did not know occurrence before the auction and whether the statutory power sale had actually accrued as all he believed was that the 1st Defendant was acting in good faith and that currently they are unable to pay land rates because of this case.

33. DW1 further confirmed that the balance of the purchase price of the suit properties was payable within 90 day which ended on the 16/12/2002, that time was of the essence and that as at 17/2/2002 no payment had been made and that is why the sale was rescinded by the 1st Defendant vide letter dated 17/2/2002. He added that he was not aware that the 1st Defendant received Kshs. 5,000,000/=from the Plaintiffs as shown by letter dated 16/2/2002. DW1also confirmed that he was not aware if prior to the transfer, rates had been paid and that if anything was not done properly, then its advocates are to blame.

34. In re-examination, DW1 stated that the transfer forms have the evidence that stamp duty had been paid and he is not aware that the 31/12/2002 was a public holiday, and finally that the document showing arrears of the land rate on the Diani Beach plots cannot be authenticated.

Submissions by the parties

35. The plaintiff's submissions were filed in court on 14/9/2018, the 1st Defendant's submissions were filed on the 19/11/2018 while those by the 2nd Defendant were filed in court on 12/2/2020. The counsel highlighted those submissions on 8/11/2018.

36. In those submissions the Plaintiff Counsel **Mr. Khagram** maintains that there was no service of valid statutory notices as provided under Section 74(1) of the Registered Land Act and the notice given that was less than 90 days from the date of service to pay the amount due did not amount to a statutory notice and that failure to serve valid statutory notices as required in law was not only fatal but also no statutory power of sale can be said to have accrued thereunder and therefore the sale was a nullity. For authority reliance was placed on the Court of Appeal case of **Ochieng vs. Ochieng (1995-1998) 2 E.A 260** where it was held that a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold.

37. **Mr. Khagram** further submitted that from the contents of the law society's minutes at page 30 of the Plaintiff bundle, **J.W. Kagwe** was fined for having practiced without a practicing certificate from 1990 to 7/12/1998 yet he purported to issue an alleged statutory notice dated 15/6/1998. Therefore, the statutory notice was a nullity as the advocate was not qualified and thereby perpetuating an illegality.

38. **Counsel** also submitted that an award of damages would not be quite an effective solution in so far as the Plaintiff are concerned and that the purported sale ought to be nullified given that the 2nd Defendant was complicit in the fraudulent manner in which the transfer of property was effected without payment of rates and after the sale had been rescinded.

39. Counsel also submitted that since the statutory power of sale never arose, then the Plaintiff's equity of redemption cannot be said to have been lost and in the premises, once the kshs.5,000,000/=was accepted in redemption, it was fraudulent of the 1st Defendant to transfer the property to the 2nd Defendant without payment of rates as the same was contrary to Section 86 of the Registered Land Act.

40. On the effect of registration, it was Counsel's submission that Section 77 (4) of the Registered Land Act was not applicable since the 1st Defendant's statutory power of sale never arose and that the purported sale was a nullity and therefore the registration was fraudulently obtained. For authority reliance was place on the case of **Simiyu vs. Housing Finance Company Kenya Limited &Other HCCC NO.937 of 2001-(2001)LLR 2668(HCK)**.

41. **Mr. Waweru** Learned Counsel for the 1st Defendant submitted that the suit property was lawfully

sold by the 1st Defendant in a public auction on the 17/9/2002 in the presence of the Plaintiffs' and in exercise of its statutory power of sale. No action was taken by the 1st Plaintiff to stop the sale. However, the 1st Plaintiff used the 2nd Plaintiff as a vehicle to purchase the charged properties and/or redeem the property through the back door and if the corporate veil of the 2nd Plaintiff was to be pierced there is no doubt the 1st Plaintiff will make noise.

42. **Mr. waweru** also submitted that the 2nd Plaintiff was informed of the transfer of the suit properties to the 2nd Defendant and to date, it has never demanded the refund of the kshs.5,000,000/= it made.

43. Counsel submitted that in 1999, the 1st Plaintiff and the 1st Defendant filed a consent letter in HCC no. 207 and 208 of 1999 and in respect to the power of sale, the consent stated that the 1st Defendant was free to exercise its statutory power of sale in the event of default on payment of installments agreed without the need to issue fresh notices since the consent order cured the any defects that had been alleged in respect of the statutory notices.

44. **Mr. Noorani** Learned Counsel for the 2nd Defendant maintained that although the 1st Defendant is challenging the validity of the statutory notice served prior to the 1st Defendant exercising its power of sale, they were clearly aware that the 1st Defendant was exercising its power of sale and they were aware of the sale to the 2nd Defendant as PW1 admitted that a director of the 1st Plaintiff was present during the second auction where the 2nd Defendant was the highest bidder and that it was also admitted that a property belonging to Rana Estate limited charged to the 1st Defendant was sold pursuant to the statutory power of sale at the 1st auction for Kshs. 24.5 million.

45. **Mr. Noorani** submitted that even if the Court were to find the statutory notices were defective, the fact that the 1st Plaintiff waited until a transfer was effected before coming to Court to seek protection means that the Plaintiffs' interests are limited to damages against the 1st Defendant as Section 77(3) of the RLA (repealed).

“77 (3) A transfer by a chargee in exercise of his power of sale shall be in the prescribed form and the Registrar may accept it as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

46. Counsel submitted that a bidder in a public auction is not concerned with or under any obligation to inquire into the validity of the power of sale or the process by which it is exercised. The moment the property is knocked down to the highest bidder, the chargor's equity of redemption is extinguished and the only remedy the chargor has is in damages and in this case, the delay by the 1st Plaintiff limited its remedy to damages. Reliance was placed on the Court of Appeal decision in **Nancy Kahkoya Amadiva v Expert Credit limited & another [2015]Eklr** and Counsel went ahead to critique the finding in **Ocheing v Ochieng**(supra) where the Court of Appeal held that the purchaser was an innocent purchaser for value but still deprived him of the title to the property.

47. **Mr. Noorani** further submitted that the alleged acts complained off by the Plaintiffs' occurred after the sale by auction that the 1st Plaintiff attended. Therefore, going by the decision in **Mbuthia vs. Jimba Credit [1988]**, the Plaintiffs' equity of redemption had been extinguished when the auctioneer's hammer came down and any fraudulent conduct after that point would in no way affect the chargor and the only fraud that would have benefited the chargor would have been fraud committed before the sale by auction.

48. On rescission, Counsel submitted that the 1st Defendant did not have a right to rescind and correctly changed their stand after discussion between **Omondi and Ghalia** and that the late payment of the balance of the purchase price and its acceptance was a matter between the 1st Defendant and the 2nd Defendant and cannot constitute fraud.

49. On non –payment of rates, Counsel submitted that PW1 under cross-examination admitted that the Gazette Notice no. 7706 of 6/11/2002 was published in the Gazette of 22/11/2002 notifying the public that rates would become payable on ratable properties appearing in the supplementary valuation roll of 1999 with effect from the expiry of the notice i.e 30 days from the publication of the notice and the notice having expired on the 22/12/2002, which was after the sale of the property and its completion as the transfers were executed on the 20/12/2002, and it took 10 days to have the transfers effected in the name of the 2nd Defendant.

50. While the plaintiff urged the court to allow the suit and grant to them the orders sought, the defendant deemed the suit bad only meriting dismissal with costs.

Issues, Analyses and Determination

51. The dispute being here as pleaded and on the evidence led, the issues can only be those fourteen as proposed by the plaintiff. It is noteworthy that the defendants have taken no issue with those proposed issues. I do agree that these issues are sufficient to dispose of the suit between the parties. I have isolated the following issues as falling for determination by the court.

- 1. Whether the 1st Defendant statutory notice were validly issued under Section 74 of the Registered Land Act (repealed) as to crystallise the chargee’s statutory power of sale?**
- 2. What was the effect and purport of the consent recorded in HCC 207 and 208 of 1999.**
- 3. Whether the 1st Defendant ought to have re-issued fresh statutory notices after the consent.**
- 4. Whether the sale of the suit properties to the 2nd Defendant and subsequent transfer was valid or null?**
- 5. What reliefs are available for the Plaintiff?**
- 6. Is the 2nd defendant entitled to its claim against the 1st defendant?**

Whether the 1st Defendant statutory notice were validly issued under Section 74 of the Registered Land Act.

52. It is common ground that the letter of demand dated 5/5/1998 was served upon the 1st plaintiff on the 22/5/1998. Though belatedly, I find that the purpose of the letter was to inform the Plaintiff that it was in default, which information was indeed delivered and became known to the Plaintiff.

53. Section 74 of the Registered Land Act (RLA) Cap 300 provides at subsections (1) and (2) thereof as follows:

“74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub section (1) the chargee may -:

(a) appoint a receiver of the income of the charged property, or

(b) sell the charged property. Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the charger fails to comply, within three months of

the date of service, with a further notice served on him under that sub section”

54. In the case at hand, by a letter dated 5/5/1998, the 1st Defendant’s Advocates demanded payment of the sum of Kshs. 76,596,243.15 together with interest and purported to give notice that:-

“unless payment is made in full to the above branch of the bank not later than close of business on the 21/5/1998,we have mandatory instructions to commence legal action against you for recovery thereof together with interest Court costs,legal fees etc and/or steps will be taken to enforce the bank’s right under its charge over titles number Kwale/Diani Beach/567, Kwale/Diani Beach/568, Kwale/Diani Beach/569, Kwale/Diani Beach/570, Kwale/Diani Beach/571 and Kwale/Diani Beach/572 and the debenture securing an amount of Kshs.50,000,000/=over your company’s assets by sale of the properties above by public auction without any further ...”

55. It is noteworthy that that letter was only posted on the 22.5. 1998 and therefore under Section 74(1) of the Act that notice was to expire after 30 days which would run up to about the 29th of June 1998, it being understood that a registered mail would be deemed served on the 7th day after registration. Section 74 of the Act demanded that there be a default of at least one month after service of the notice of default, and only if the default continued thereafter, the Chargee may only exercise any of his rights including the sale the charged property after the service and expiry of another notice for at least three months. In this matter I note that the statutory notice issued pursuant to section 74(2) was issued before the notice of default had expired and therefore the same was premature. If premature then one must ask the validity and legality of the three months ‘notice.

56. Reading the contents of the Statutory Notice dated 15/6/1998 annexed to the Plaintiff’s list of document at pg. 26 against the provisions of Section 74(1) & (2) of the R.L.A, I find it evident that the said notice did indicate the nature and extent of default, the amount the 1st Plaintiff was required to pay to rectify the default and the notification that the Defendant would proceed to exercise any of the remedies under the provision in accordance with the procedures provided for in that sub-part. I however hold that the notice served upon the 1st Plaintiff being premature was not only irregular but actually unlawful for being contra statute. If contra the statute, then it could not pass as a legal process but must be deemed null together with any steps consequent to it. I find the notice did not comply with the provisions of Section 74(2) of the Act and consequently, the 1st defendant’s statutory power of sale had not and could not have crystallized on the basis of the notice of 15.06.1998. it is of note that in furtherance of that notice there was a sale scheduled for the 17.09.1998. even though that sale has not been contested in this suit I do find that that date may not have been after three months after service of the notice dated 15.6.1998 unless there be evidence that the notice was served earlier than the 17th June 1998.

57. A lot was said and submitted on the validity of the notice having been issued by an advocate, one **J.W. Kagwe** who did not have a valid practicing certificate for the period as confirmed by the minutes of the Law Society of Kenya meeting held on the 7/12/1998.The Plaintiffs submit and contends that the statutory notices issued by him on the 15/6/1998 were fatally defective for being issued by an unqualified person perpetuating an illegality, and his acts should be held a nullity and an offence in terms of Section 34 of the Advocates Act.

58. This is a position which has been clarified and the law settled by no less a court but the Supreme Court in **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR**. The Court held said

“a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practicing certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client...”

The Court’s obligation coincides with the constitutional guarantee of access to justice

(Constitution of Kenya, 2010, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practicing certificate. The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities".

59. I find and hold that the spectre of illegality lies squarely upon the advocate and blame ought not to be apportioned on the 1st Defendant as its intention were to cause a statutory notice to be issued and the same was duly issued. Consequently, I find that the statutory issued by **J.W. Kagwe** was not an illegality and/or a nullity and the said Statutory notices would have been wholly validly issued save for the defect in failure to comply with the thresholds set by the law.

60. Over and above the defects in the notices I have highlighted and decided upon, it is common ground that on the 2/9/1999, a consent was executed between the parties which said:

"RE: HCC 207 and 208 of 1999

MOHANSONS (K) LTD VS KCB AND ANOTHER

1) The two matters be consolidated

2) That judgment be entered for the 1st Defendant in HCC NO.207 and the Plaintiff in 208 of 1999 for the principal sum of Kshs.34 million with interest thereon from 1.8.1995

3) The sum of kshs.34million be liquidated in monthly installments of kshs.3million with effect from 30/11/1999 and on the 30th day of each succeeding month until payment in full.

4) That the issue of interest be discussed and amount payable as interest be agreed upon

5) ...

6) ...

7) ...

8) ...

9) That in default of the payment agreed upon at clause no.3 above in the manner agreed, the entire principal amount plus interest and costs become immediately due and payable and the 1st Defendant is at liberty to exercise its statutory power of sale".

61. The Plaintiffs state that pursuant to the consent, the 1st Plaintiff paid a total of Kshs. 22,000,000/= via cheques whose copies were exhibited then stopped payment when the 1st Defendant failed to provide to it bank statements showing how the payments made were being applied and the rate of interest that was applicable since the issue of interest was still pending determination. In my view, the question of interests was left open for discussion and if there was to be an unsurmountable stalemate, the plaintiff ought to have pursued a determination from the court. I still think that can still be done if the file remains open because the matter is best suited in that earlier suit.

62. Upon reading the correspondence between the 1st Plaintiff and the 1st Defendant, found on pg. 40 to 59 of the Plaintiff list of document, which list was adopted by the consent of parties as an exhibit together with the consent dated 2/9/1999, I do find that the failure by the 1st Plaintiff to adhere to the payment of the principal sum of Kshs. 34,000,000/= via equal monthly installment meant that clause no. 9 of the

consent was activated and the 1st Defendant was at liberty to exercise its statutory power of sale. The question however would be what was now the sum due from the plaintiff since execution of the consent judgment and the subsequent payments made?

63. In my view the consent when signed and filed in court became not only a contract but also a court order. Its terms consensually and conclusively determined the debt owed by the plaintiff to the defendant bank. I am of the view that as worded it did vary the terms of the charge as far as the maximum debt was concerned and effectively capped or just sealed the debt at no more than the sum agreed plus interest that was to be subjected to further negotiations in the subject files. With the variation, a new debt situation was created by consent and I am convinced that in the event of a default it was not open to the 1st defendant to go back to the pre-consent situation as if nothing had ever occurred. I hold that the defendant had by the consent erased all the gains including any right to move towards collection of the debt and was now on a clean slate. A default by the plaintiff obligated the 1st defendant to start a fresh by issuance of fresh notices even if the previous ones had been valid and effective. Without issuance of fresh notices, the statutory right could not and had not accrued.

Whether the sale of the suit properties to the 2nd Defendant and subsequent transfer was valid or null?

64. Having found that the 1st Defendant ought to have issued fresh statutory notice to sell as provided under Section 74 of the RLA, I find that since the 1st Defendant failed to demonstrate the issuance of fresh notice under the law, it was in breach of the 1st Plaintiff's rights as guaranteed under Section 74(2) of the RLA and as a result of the breach the auction sale on the 17/9/2002 was unlawful, null and void, and incapable of passing effective and proper title to the purchasers. An act tainted with a violation of the law or outright illegality cannot engender legal title nor protection. Even though no evidence has been led to show that the 2nd Defendant had committed any wrong towards the sale and was thus an innocent purchaser for value without notice, the transfer is void as it was and remains based on a violation of a mandatory statutory dictate. In coming to this conclusion I have been guided by the position of the law that what is done contrary to the law is bad and never receives succor of the law and definitely not the court.

65. The Court of Appeal in **Stephen Boro Gituha v Nicholas Ruthiru Gatoto & 2 others [2017] eKLR** reaffirmed the position of the law it had set in **OCHIENG & ANOR vs. OCHIENG & OTHERS (1996)eklr** in the following words:-

“ ...it is the duty of the Chargee to make sure that there is compliance with the requirements of Section 74(1) of the Registered Land Act (Repealed). That burden is not in any way on the Chargor. That once the Chargor alleges non-receipt of the statutory notice it is for the Chargee to prove that such notice was in fact sent....”

“Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.”

66. In choosing to be guided by this decision I have taken the challenge pushed my way by the 2nd defendant in the submissions in the entire paragraph 4 regarding the effect of a non-valid or irregular transfer on the chargor's title and the remedies available under the repealed statute. In giving me that challenge, counsel has with admirable industry pointed out to court would appear to be contradictory positions taken by the court of appeal and has in that contrasted the decision in **Ochieng vs Ochieng** (supra) and that in **Nancy K Amadiva vs Expert Credit Ltd (2015)eklr**. My reading of the two decision demonstrate to me no contradiction at all. In Ochieng's case the court was reiterating the need for all to comply with the law and underscoring the fact that one cannot sidestep a statutory

provision and yet seek to get applauded by the court for its transgression against the law impacting as it were on the right to property. The court was saying in other word that one should not be allowed to keep a benefit obtained contrary to the dictates of the law. On the other hand, Amadiva's case was decided on the merits for lack of proof of fraud and defects in the charge. I hear the court appeal to underscore the fact that the failure by the auctioneer to comply with the law was indeed weighty but it refrained from making an adverse finding because the auctioneer had not been sued. At paragraph 27 the court said:

“Had the auctioneer been party to the suit perhaps we would have considered the matter differently and arrived at a different conclusion”

67. I hear the court, even in Amadiva's case to say that fidelity to the law is key but refrains from making appropriate orders because of the equally important legal requirement that none should be condemned unheard.

68. It is my opinion and understanding upon reading the decisions of the court of appeal in this area I get the learning that the law remains that the court will not countenance failure to comply with the law nor reward a party for own violation of a statute by allowing a perverter of the law to keep a benefit thereby obtained. This court has all along held it strongly that to depart from this path would defeat the very purpose of a justice system based on the rule of law. In **Disney Insurance Brokers Ltd v Mombasa County Government [2018] eKLR** this court in considering the approach courts take when face with a violation of the law said:-

“I understand the law as enacted and annunciated in stare decisis and grounded on the Latin *ex turpi causa non oritur action*, to be purposed to discourage contracts which are injurious to the public by going against the public policy and or enacted statutes”.

69. As of today I am yet to read any binding or persuasive decision by the superior court of this country that blesses the breach of a statutory obligation by a party. For that reason, it remains by finding that when the provisions of section 74 of the repealed act was not complied with, the purpose of the Provision, the protection and preservation of the equity of redemption, was defeated, and that amounted to circumvention of the law which then cannot be allowed to stand. I find that the sale was wrongful and therefore have it set aside together with the resultant registration in favour of the 2nd defendant. For that decision to be effectuated it is directed that the register be rectified so as to reinstate the charge in favour of the 1st defendant.

70. With the foregoing determination, prayer (b) of the plaint would now serve any purpose unless one was to wholly believe that the defendants are bent on further alienation even with this determination in place. I am not of that belief for I believe the interlocutory orders have preserved the property so far. Up to this extent, only prayer (d) in the filed plaint outstands my determination. That prayer was premised on the pleading that the 2nd plaintiff did pay to the 1st defendant a sum of Kshs 5,000,000 as a consideration for the purchase of the suit property after the 2nd defendant failed to pay the balance of the auction purchase price within the time stipulated in the memorandum of sale. In resisting that claim the 1st defendant pleaded at paragraph 13e of its defense that the said sum was held on a separate account of the sale of a different property known as **Plot No 1922, section I, Mainland North**, sold in a public auction held on the 18th December 2002. No evidence was however led by the 1st defendant in that respect and the pleading as such remained allegation which is never equal to evidence. On the basis of that sum the 2nd plaintiff prays for specific performance. I think it would negate on the determination I have made hereto before to order specific performance when the charge remains registered against the title. I however take note that it would be unconscionable to let the money paid and accepted not to have been employed for the intended purpose to keep lying with the 1st defendant. That sum must be refunded to the 2nd plaintiff and I order that it be refunded with interests at 14 % p.a from the date it was paid till payment in full.

71. Beyond the four prayers in the plaint filed, the plaintiff and the counsel for the 1st defendant did agree to have the plaint amended, after production of evidence had closed, and the court allowed that consent

and the informal amendment to the plaint, to include the following prayers: -

f) Judgment be entered against the 1st Defendant for Kshs. 17, 500,000 being the excess sum collected by the 1st Defendant to be refunded to the Plaintiff with interest at Court rate from 22/1/2003 till payment in full.

g) The Plaintiff be awarded damages against the 1st Defendant in the sum of Ksh. 54,000,000/= with interest thereon from the 22.1/2003 for the illegal and unlawful sale of the suit property.

72. The two prayers are there due for determination even though no amended plaint was filed after the consent. Having looked at the Plaint dated 20/1/2003, it is my view and finding that the issue of the sums due and payable to the 1st Defendant by the 1st plaintiff was never pleaded so as to invite a finding by this court. It is of note that at paragraph 14 of the Plaint it was pleaded as follows:

“There are however two suits (MSA HCC NO.208 of 1999 –Mahansons Food Distributors Limited V Kenya Commercial Bank Limited & Anor and Msa HCCC. No. 207 of 1999 Rana Estate limited and 2 others v Kenya Commercial Bank Limited & Anor) which have been consolidated and which related to the question of the amount in which the first Plaintiff is indebted to the first Defendant. A consent order was however recorded therein pursuant to which substantial payment had been made by the first Plaintiff to the first Defendant.”

73. From the foregoing, it can be inferred, that the issue of the amount payable on the charge was never a question for determination in this suit. Consequently, the same ought to be left to rest and I consider the same rested by the consent recorded in the other consolidated suit. It is only that court which is seized with the issue of the amount payable. This court must observe the legal dictate that it can only determine issues raised and placed before it by the parties in the pleadings filed. The upshot of the above is that prayer (f) of the amended Plaint fails and the same is hereby dismissed.

74. On the prayer (g) being the specific sums claimed as damages awardable against the 1st Defendant in the sum of Kshs. 54,000,000/= with interest thereon from the 22.1/2003 for the illegal and unlawful sale of the suit property, the same could only be due for consideration had the court upheld the sale. Now that the property has reverted to the 1st plaintiff, that prayer being the equivalent of the value of the suit properties is not awardable unless one was to be out to duplicate the benefit to the plaintiffs.

What relief are available to the 2nd Defendant?

75. The 2nd defendant took its liberties provided by the then order 1 Rule 21, now Rule 24, and issued a Notice against a Co-defendant. The Rule under which such a notice issues is worded as follows.

Defendant claiming against a co-defendant [Order 1, rule 24.

76. I view a notice issued pursuant to this rule to take the stature of a cross-claim or counter claim by a defendant against a co-defendant. It is an action of its own and attract remedies like a plaint and a counter-claim does. I therefore understand that in it, the 2nd defendant seeks a refund of the purchase price and damages it calls mesne profits.

77. Having found that the sale by auction of the suit properties was a nullity and the 2nd Defendant having made a claim against the 1st defendant, there can be no doubt that at the very least the 2nd Defendant is entitled to a refund of the Kshs. 4,400,000/= being the amount he paid as purchase price at the auction. That sum must be restituted because the consideration for which it was paid has now dissipated. It is of note to me that the 1st Defendant did not file any document in opposition to the Notice, as the law permits. More important though is the fact that no evidence was led in resistance to the claim. Even the submissions offered did not give regard to the prospects of the sale being upset it being confidently asserted that the 2nd defendant had acquired a good title. On the material available I do enter judgment for

the 2nd defendant against the 1st defendant in the sum of Kshs 4,400,000.

78. On mesne profits, Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as:-

“mesne profits”, in relation to property, means those profits mwhich the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

79. The Court of Appeal in the case of **Attorney General v Halal Meat Products Limited [2016] eKLR** considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”

80. Similarly, in the case of **Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR**, the Court held as follows:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. The said provisions state as follows with regard to a decree for possession and mesne profits:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

a. For the possession of the property.

b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.

c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-

i. The delivery of possession to the decree-holder

ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or

iii. The expiration of three years from the date of the decree, whichever even first occurs.

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

81. Having found that mesne profit is a special damage, it is my humble opinion that the 2nd defendant has not tabled evidence before this court to enable the court makes a determination on the same. The evidence led in this regard by production of the valuation report, by PW1, is the kind of evidence that would have gone a long way to support a claim for loss of bargain but that is not before me. In any event there was no evidence that anybody had used the property to derive a benefit. Certainly not the 1st defendant. The evidence available is that it is the court that restrained the 2nd defendant from taking possession. That order cannot be blamed upon the 1st defendant as the wrong doer. Consequently, the same is not awardable. The above finding applies to the claim for loss of profit and loss of use of the suit premises as pleaded in the Notice to Co-Defendant.

Rendition and Final Orders

82. I have found for the plaintiff and the second defendant in their prayers as detailed above. This portion is therefore merely to summarize those determinations. In short, judgment be and hereby entered for the plaintiff and the 2nd defendant, severally against the 1st defendant as follows: -

For the plaintiffs:

- a) A declaration is hereby issued declaring that the transfer of the property by the 1st Defendant to the 2nd Defendant was unlawful and a nullity;**
- b) An order is hereby issued directing the rectification of the register relating to the property by canceling the registration of the transfer in favour of the 2nd Defendant.**
- c) For the avoidance of doubt, having set aside the sale, the rights and obligations under the legal charge, as varied by the consent judgment, are hereby restored and the rectification of the register shall include the restoration of that charge.**
- d) An order that in place of specific performance of the sale to the 2nd plaintiff, the 1st defendant pays to the 2nd plaintiff the sum of Kshs 5,000,000 with interests at 14% pa from the date of payment till payment in full.**

For the 2nd defendant

- e) That the 1st Defendant refunds the 2nd Defendant the sum of Kenya Shillings Four Million Four Hundred Thousand (4,400,000) plus interest at 16.5% from 20th December 2002 until date of payment in full. The interest shall be compounded and not simple calculated for the reason that there was evidence that the 2nd defendant obtained a bank loan to finance the purchase and was charge interest at the said rate calculated in a compounded fashion**
- f) The 1st Defendant shall bear cost of this suit and that of the claim by the 2nd defendant's claim against it.**

Signed, dated and delivered at Mombasa this 5th day of June 2020

P.J.O. OTIENO

JUDGE