REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 252 OF 2008

HUSSENI DAIRY LIMITED................................PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LIMITED.......................1ST DEFENDANT

AKBAR K. KURJI...............................././//2ND DEFENDANT

JUDGMENT

(1) The Plaintiff **HUSSEINI DAIRY LIMITED** instituted this suit by way of Plaint dated **12th May 2008,** which was amended on **24th May 2010** and further on **24th May 2010** and further amended on **30th June 2017** pursuant to a Court Order. In its Further Amended Plaint dated **12th July 2017** the Plaintiff prayed for judgment against the Defendant for:

a. An order of permanent injunction restraining the Defendants whether by themselves, their agents, or advocates or auctioneers or any of them or otherwise from doing the following acts or any of them that is to say from interfering with rights of possession, advertising for sale, disposing off, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever interfering with the ownership of titled to and or interest to ALL THAT parcel of land known as L.R No.1196/MN Mombasa.

b. A permanent order of injunction restraining the Defendant whether by itself its principles, servants or agents, or advocates or auctioneers or any of them or otherwise from doing the following acts or any of them that is to say from interfering with rights of possession, advertising for sale, disposing off, selling by public auction or otherwise howsoever at any other time of by completing by conveyance or transfer of any sale concluded by auction or private treaty leasing, letting otherwise howsoever interfering with the ownership of title to and or interest in All that parcel of land known as L.R NO.1196/1/MN Mombasa and all the trailers subject matter of Hire Purchase Agreements reference number HP/02/3779 and HP/02/3780 dated 7th June 2002 and 11th June 2002 respectively and all other trucks, trailers and motor vehicles held as security by the bank.

c. A permanent order of injunction restraining the 1st Defendant, its servants and agents from repossession, attaching or in any way interfering with the Plaintiffs use and possession of the Motor vehicles and Trailers listed herein below and an order for the release of their logbooks and any other documents of title held by the Defendant and a declaration that the Hire Purchase Agreements in relation thereto are discharged and the 1st Defendant's right thereunder extinguished.

aa. SEMI TRAILERS

Registration No.	**Chassis number**
ZB 8453	**7470**
ZB 8452	**7471**
ZB 8904	**7482**

ZB 8603 7484

ZB 8605 7483

ZB 8600 7485

<u>bb. NISSAN DIESEL</u>

Registration Number	Chassis Number	Engine No.
KAD 042D	00423	102047T

<u>cc. MERCEDES BENZ</u>

Registration Number	Chassis Number	Engine No.
KAE 094E	62011225341152	42291120197892

dd. NISSAN DIESEL CWC 45 PPN

Registration Number	Chassis Number	Engine No
KAC 697D	00212	100140T

ee. DAF FTT 3300

Registration Number	Chassis Number	Engine No
KAD 623X	396205	H80309

<u>ff.VOLVO PRIME MOVER</u>

Registration Number	Chassis Number	Engine No
KAG 605T	554865	225838

<u>gg. TOYOTA HILUS PICK UP</u>

Registration Number	Chassis Number	Engine No.
KAH 818M	LN85-0152886	2L-4098603
KAH 812M	LN85-0152885	2L-4098668
KAH 826M	0139681	3L-4157640
KAK 513R	LN85-0167388	2L-4575601

hh. ISUZU TIPPER TRUCK (6X4)

Registration Number	Chassis Number	Engine No.
KAJ 216R	3000534	119677

iii.<u>LAND ROVER DEFENDER STATION WAGON</u>

Registration Number	Chassis Number	Engine No.
KAJ 821A	8190894	16L-47688A

jj. <u>HIRE PURCHASE AGREEMENT NO.HP/02/3779</u>

Chassis Number Trailer Reg. No.

7859	**ZB 9528**
7860	**ZB 9529**
7861	**ZB 9527**
7862	**ZB 9500**
7863	**ZB 9499**
7864	**ZB 9502**
7865	**ZB 9501**
7866	**ZB 9510**
7867	**ZB 9504**
7868	**ZB 9503**

kk. HIRE PURCHASE AGREEMENT NO.HP/02/3780

Chassis Number	**Trailer Reg. No.**
7750	**ZB 9221**
7751	**ZB 9220**
7756	**ZB 9223**
7757	**ZB 9225**
7758	**ZB 9224**
7759	**ZB 9226**
7760	**ZB 9227**
7761	**ZB 9228**
7762	**ZB 9229**
7763	**ZB 9230**

d. A declaration that the 1st Defendant is not entitled to appoint any person (s) as Receiver and manager(s) of the Plaintiff's business, property (moveable or immovable), goodwill, assets and undertakings under the Debenture(s) and a further declaration that the Defendant has no right to take over the assets, management and control of the Plaintiff and a further declaration that the Deed of guarantee by the directors is null and void and of no effect and that the same is in any event competently discharged by the subsequent events and an order for its discharge.

e. An order of permanent injunction restraining the Defendants and each of them from trespassing or continuing to trespass (if already thereon) upon the Plaintiff's said business premises, offices, equipment and property (both moveable and immovable).

f. Orders cancelling the Registration of the purported Debenture, Charge(s) and Hire Purchase Agreements.

g. An order that the Defendants forthwith concur in doing all acts and things and executing all the necessary deeds and documents in order to effectuate the orders above and declaration that the Defendants conduct of moving to realize the suit property in the manner they have done is unlawful and they are not entitled under the law to realize any of the suit property.

h. An order directing the Defendants to deliver up to the Plaintiff the said documents a title duly released and discharged from the charge an order for the refund of the sum overpaid and a further order that the Defendants forthwith concurs in doing all acts and things and executed all the necessary deeds and documents in order to effectuate the orders aforesaid, and upon failure to do so the Deputy Registrar be mandated to do so.

i. **General damages for fraud.**

j. **Damages in the sum of Shs.104,170,199.15 as particularized in paragraph 46E of the Amended Plaint"**

(2) The 1st Defendant **SOUTHERN CREDIT BANKING CORPORATION LTD** and the 2nd Defendant **AKBAR K. KURJI** filed a joint Amended Defence dated **13th July 2010** and a Further Statement of Defence dated **2nd August 2017** in which they denied all the Plaintiffs allegations and put it to strict proof of the same. The Plaintiff filed a Reply to Defence dated **6th February 2018**.

(3) This suit commenced for hearing on **16th January 2014** before **Hon Lady Justice Jackie Kamau.** Thereafter **Hon Lady Justice Olga Sewe** took over the file on **30th September 2015** and concluded the Plaintiffs case. Following the transfer of **Hon Justice Sewe** to Eldoret High Court I took over the file and heard the Defendant's evidence. I do wish to apologize to parties for the delay in rendering this judgment. Any inconvenience as a result thereof is sincerely regretted.

THE EVIDENCE

(4) The Plaintiff called two (2) witnesses in support of its case. **PW1 MAHMOOD KASSAM MIYANJI** was a Director of the Plaintiff Company which company was incorporated on **16th December 1961** with the Principal object of carrying on business of dairy farming, milk production and milk pasteurization in the **Bamburi area** of Mombasa. **PW1** told the Court that the Plaintiff had been a customer of the 1st Defendant Bank and that the parties had enjoyed a client –Bank relationship for a period of over twenty (20) years.

(5) **PW1** relied entirely upon his written statement dated **12th March 2012.** He stated that sometime in the year **2001** he and his co-director approached the 2nd Defendant who was the Executive Director of the 1st Defendant Bank, seeking funding to enable the Plaintiff acquire new tractors for its transportation business. **PW1** alleges that the 2nd Defendant in abuse of his position as Executive Director informed him that the Bank would only fund the Plaintiffs acquisition of new trailers if the Plaintiff also obtained a loan from the 1st Defendant to purchase the property known as **LR NO.1196/1/MN** Mombasa (hereinafter the "**suit property**") which property belonged to the 2nd Defendant. **PW1** states that the Plaintiff reluctantly agreed to purchase the suit property purely out of desperation and their need for financial assistance despite the fact that it had not planned for such purchase and did not require the said property.

(6) Accordingly, on **26th April 2002** the Bank offered to the Plaintiff a term loan for a maximum of **Kshs.21 Million** for the purchase of the suit property as well as a Hire Purchase facility for a maximum of **Kshs.59 Million** for the purchase of new trailers. The facilities were granted at an interest rate of **19% per annum.** The borrower (Plaintiff) was also required to pay such commissions and charges on the said facilities as agreed which the Bank had the sole discretion to fix from time to time. The Bank also retained the discretion to revise the applicable rate of interest.

(7) Once the Plaintiff indicated its acceptance of the Offer the bank requested the following:-

- Accepted letter of offer

- Invoices for the purchase of the trailers.

- Resolution of the Plaintiff's Board of Directors authorizing the borrowing of **Kshs.80 Million** and to create securities.

- Sale Agreement for the purchase of **LR NO.1196/1/MN** Mombasa between the Plaintiff and **Akbar K. Kurji** (the 2nd Defendant).

(8) **PW1** further states that the Bank further made it a condition that upon acceptance of the offer several securities would have to be created as follows:-

a. Legal Charge over the suit property for **Kshs.21 Million**.

b. Hire Purchase Agreement and Joint Registration of all trailers being purchased under financing.

c. Fixed specific debentures over the trailer being purchased and all other trucks, trailers and motor vehicles currently held as security by the bank whether in respect of existing hire purchase facilities and whether fully paid up or not.

d. Letter of exclusion from **Akiba Bank Limited** expressly excluding the property and motor vehicle from fixed and floating charges held by them.

(9) **PW1** testified that on **29th April 2002** the Plaintiff duly accepted the letter of Offer dated **26th April 2002** together with all the terms and conditions contained therein. That the total interest due was to be **Kshs.6,711,951.00** and **Kshs.18,857,386.00** respectively. That pursuant to the Plaintiff's acceptance and compliance with the terms of the said Letter of Offer, a charge dated **18th June 2002** was created over the suit property securing the sum of **Kshs.21,000,000** and a Debenture dated **18th June 2002** was also created in favour of the 1st Defendant securing a maximum amount of **Kshs.80,000,000**.

(10) However, **PW1** alleges that the Charge and Debenture dated **18th June 2002** are both null, void and of no legal effect for the following

reasons:-

a. There was no resolution of the Plaintiff's Board of Directors authorizing the creation of the same and affixing the common seal thereto.

b. The Charge does not comply with **Section 46** of the **Registration of Titles Act** as the ingredients set out in Forms J(1) and J(2) are missing.

c. The Charge contravenes the attestation requirements under **Section 3** of the **Contract Act.**

d. The Charge was deliberately under stamped and is therefore a fraud on the revenue.

e. Charge contravenes mandatory requirements under **Section 69(1)** and **(4)** of the **ITPA.**

f. The Charge and registration of the sale of the suit property was fraudulent as the 2nd Defendant abused his office and position of trust as an officer of the Bank to coerce and unduly influence the Plaintiff into acquiring it.

g. The effects of **Section 69** of the **ITPA** were not explained to the Plaintiff by an Advocate and the Charge was not executed by the Plaintiff's directors.

h. The entire transaction contravened the provisions of the **Donde Act.**

(11) **PW1** further claimed that the Debenture dated **18th June 2002** was invalid for the following additional reasons:-

a. There was an existing Debenture dated **14th November 2001** in favour of **Eastern and Southern African Trade and Development Bank** for **UAPTS 2,518,000** which took priority over the assets of the Plaintiff which had not been discharged.

b. The Debenture was not received for registration within 42 days after the date of its execution as required by **Section 96(i)** of the **Companies Act**.

c. The Debenture did not conform with the provisions of the Companies Act.

d. The Debenture was incomplete in that it does not specify the clauses of the **Memorandum and Articles of Association** under which it is created and issued.

(12) Following the execution of the 1st Hire Purchase Agreement Reference **HP/02/3779** dated **7th June 2002** the Plaintiff purchased ten (10) Trailers at a total cost of **Kshs.39,588,480/=** which it claims has been fully repaid thus **PW1** seeks the immediate termination and Discharge of that 1st Hire Purchase Agreement.

(13) Vide a second Hire Purchase Agreement dated **11th June 2002 Reference HP/2/3780,** the Plaintiff purchased a further ten (10) trailers at a cost of **Kshs.39,628,900**. **PW1** states that this second Agreement provided for an interest rate of **48%** contrary to the of **19% per annum** that was indicated in the letter of Offer dated **26th April 2002**. According to the Plaintiff the interest rate provided for in the letter of Offer ought to take precedence.

(14) Regarding the Plaintiff's purchase of the suit property from the 2nd Defendant. **PW1** states that on or about **23rd December 2002** he and his co-director discovered several issues of fraud and undue influence perpetrated by the 1st and 2nd Defendants in coercing the Plaintiff to purchase the said property and charge it to the 1st Defendant Bank. **PW1** particularized the said fraud, undue influence and coercion as follows:-

a. That the 1st Defendant through the 2nd Defendant who was the registered proprietor of the residential house and the one who the Plaintiff approached with request for lending as an Executive Director to the 1st Defendant put undue pressure and coerced the Plaintiffs by informing them that unless they purchased the house through a loan from the bank then the Hire purchase facility would not be afforded to them.

b. That the 2nd Defendant forged and/or altered the valuation report from **Shelter Alliance Limited** to reflect the value of the house as **Kshs.25million** instead of the original figure of **Kshs.18 Million** as the buying price whereas the property was worth much less.

c. That the bank through its Directors used its position of trust to mislead the Plaintiff into obtaining a facility they did otherwise not need.

d. That save for the 2nd Defendants representations to the Plaintiffs the Plaintiff had no intention of purchasing the said residential house and only did so reluctantly due to their difficult financial constraints.

(15) **PW1** states that although the Sale Agreement provided that the suit property would be sold in the current state to his utter shock at the time of handing over, the property was found to have been vandalized and was as a result uninhabitable. That this unacceptable state of

affairs was duly communicated to the 2nd Defendant vide various letters but no reply was forth coming. As a consequence, the Plaintiff vide a letter dated **23rd December 2003** informed the 2nd Defendant that it had rescinded the Sale Agreement and demanded a full refund of the purchase price. However later the representatives of the Plaintiff and the 2nd Defendant met which meeting was confirmed in the letter dated **12th May 2004.** At the said meeting the parties agreed that the suit property be transferred back to the 2nd Defendant without any conditions with the Plaintiff offering to pay to the 1st defendant an interest free amount of **Kshs.2.5 Million** in 18 equal monthly installment on account of interest on arrears.

(16) **PW1** states that to his utter surprise on **27th May 2004** the Plaintiff was served with an Auctioneers notification of Sale upon instructions of the 1st Defendant. He claims that the 2nd Defendant then coerced the Plaintiff into an agreement that the intended auction be called off and instead the Plaintiff would reschedule the **Kshs.21 Million** term loan to a term loan of **Kshs.29 Million** payable at an interest rate of **14% per annum. PW1** stated that on or about **20th July 2004**, the Plaintiffs Board of Directors acting under duress held a special meeting to pass this resolution but the resolution was not registered therefore according to the Plaintiff the extra **Kshs. 8 Million** amounted to an illegal debit of penal interest and bank charges.

(17) **PW1** testified that the 1st Defendant vide a letter of Offer dated **22nd July 2004** formalized the offer to reschedule the term loan. The Plaintiff accepted the letter of Offer following which an undated Deed of Variation of Charge and Further charge over the suit property was executed.

(18) The Plaintiff challenges the same for not being properly executed and not being duly stamped and registered against the title. Further that the letter of offer sought to increase the interest rate to **29% per annum** contrary to statute and without consent from the Minister of Finance. When the Plaintiff complained, the Bank reissued the letter of Offer dated **30th January 2006** with revised terms to the effect that interest rate would be **14% p.a** but with a penal interest at **19% p.a.** That the Plaintiff under duress accepted the terms.

(19) **PW1** states that the Plaintiff received a Statutory Notice from the Bank dated **22nd November 2007** demanding **Kshs.43,819,151.50**. It is contended that the same is void for reasons inter alia that the Charge secured only the term loan of **Kshs.21 Million** for the purchase of the suit property and was not security for the other facilities, that the sum being claimed was not due as the entire amount had been fully repaid, that the demand contravened **Section 39** of the **Central Bank (Amendment) Act 2000,** and it also contravened **Section 15** of the **Hire Purchase Act** as repossession can only be way of civil suit and court order.

(20) **PW1** claims that the Power of Sale was being used as a tool to coerce the Plaintiff into dropping the accusation of fraud it had made against the Defendants. That in any event the suit property had not been valued in the proceeding one (1) year nor were the mandatory requirements of the **Auctioneers Act 1996** complied with. **PW1** contended that while its application for injunction was being heard in the Court of Appeal, the Defendants sold the suit property by Private treaty to a third party at a price of **Kshs.29 million** while the same had been given an open market value of **Kshs.71 million** and a forced sale value of **Kshs.50 Million.** That this offended **Section 52** of the **ITPA.** The Plaintiff claims that the third party has already charged the suit property and thus the Plaintiff now claims the difference between the market value and the sale price as its damages. Finally, the Plaintiff avers that despite having fully paid up the Hire purchase facility, the Bank still took over of the motor vehicles through its receiver managers. Hence the instant suit.

(21) **PW2 WILFRED ABINCHA ONONO** was a qualified Certified Accountant and a member of **ICPAK**. He was a Financial Consultant and the Managing Consultant of the **Interest Rates Advisory Centre. PW2** told the court that he conducted a financial audit of the Plaintiffs account with the 1st Defendant Bank and he produced his report dated **8th December 2017** as an exhibit in the case. **PW2** stated that upon re-calculation he found that the Plaintiff had overpaid the 1st Defendant interest to the tune of **Kshs.3,170,999.15.** That whilst the Plaintiff borrowed **Kshs.80 Million** it had to date paid to the Bank a sum of **Kshs.105 Million** and had paid interest totaling **Kshs.25,287,000/=.**

(22) On their part the Defendant also called two (2) witnesses. **DW1 BRIAN ASIN** was a legal officer with the 1st Defendant. He relied on his witness statement dated **2nd July 2013. DW1** explains that **Southern Credit Banking Corporation** (the 1st Defendant herein) on **3rd September 2010** changed its name to **Equatorial Commercial Bank Limited.** The witness produced as an exhibit the Certificate of change of name **Pexb2** annexed to the Statement filed on **4th July 2013**.

(23) **DW1** confirms that the Plaintiff was at the material time a client of the 1st Defendant Bank. He further confirms that on **15th March 2002** the Plaintiff approached the Mombasa Branch office of the 1st Defendant seeking Hire Purchase Facility of a maximum of **Kshs.59 Million** to enable it purchase new/reconditioned trucks and **Kshs.21 Million** to enable it purchase the suit property. He produces a copy of the Plaintiffs letter of application dated **15th March 2002 Pexb3**. That the 1st Defendant responded with the letter of Offer dated **26th April 2002.**

(24) **DW1** goes on to state that the borrowing by the Plaintiff was duly approved by the Directors of the Plaintiff as evidenced by the Company Resolution dated **29th April 2002 (Pexb"6").** That in pursuance of the above the 1st Defendant created a 1st legal charge dated **18th June 2002** over **LR NO.1196/1/MN Mombasa (Pexb10)** which Mortgage was registered on **18th June 2002** (Pexb11).

(25) **DW1** asserts that all the dealings and transactions between the Plaintiff and the 1st Defendant were normal commercial banking transactions between a willing customer and a willing Banker. The 1st Defendant denies the allegations of fraud, duress and coercion made by the Plaintiff and states that the same are in any event time barred. That the suit cannot be sustained as the Plaintiffs directors have a duty to act diligently and to exercise their duty of care in their fiduciary capacity in the best interest of the Plaintiff Company and not to engage in criminal activities. That the Plaintiff had a law firm **Messrs Ghalia & Ghalia Advocates** acting for them and they at all times received appropriate legal advice. Finally, that the Plaintiffs had failed to repay the loan thus necessitating the sale of the suit property which **DW1** clarifies was sold for **Kshs.45 Million** and not **Kshs.29 Million** as alleged by the Plaintiff.

(26) **DW2 AKBAR K. KURJI** was the 2nd Defendant. **DW2** confirms that at the material time he was the Executive Director of the 1st Defendant Bank. **DW1** categorically denies having coerced the Plaintiff into purchasing the suit property. **DW2** states that the Regional Manager of the Banks Mombasa Branch a **Mr. LALJI** informed him that **PW1** was looking for a large residential property to purchase in the Nyali area of Mombasa as he had a large family. **DW2** reiterates that all dealings with the Plaintiff were above board and lawful. That the sale of the suit property was lawful and was occasioned by the Plaintiffs failure to service the term loan. He confirms that the proceeds of said sale were used to offset the loan.

(27) Both **DW1** and **DW2** state that the Plaintiff has now settled all its liabilities towards the 1st Defendant and urge the court to dismiss the suit with costs.

ANALYSIS AND DETERMINATION

(28) I have carefully considered the submissions filed by both parties in this matter. Several issues arise for determination as follows:

(i) Was the Plaintiff coerced into obtaining a loan facility from the 1st Defendant Bank for purposes of purchasing the property known as **LR NO.1196/1/MN** Mombasa?

(ii) Was the transaction legal in light of the "**Donde Act**" and were the charge, Debenture and Deed of Variation valid?

(iii) Did the 1st Defendant Bank properly exercise its statutory power of sale of the suit property and confiscation of the trailers?

(iv) Is the Plaintiff entitled to damages as claimed in the Amended Plaint dated **30th June 2010**?

(29) It is trite law that he who alleges must prove. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act** provides as follows:-

"**Burden of proof**

(1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

(i) Coercion, Fraud and Undue Influence

(30) The Plaintiff claims that although they had purposed to seek a loan facility from the 1st Defendant Bank for purposes of purchasing new trailers for their business, the Plaintiffs had no intention at all of purchasing the suit property. **PW1** in his evidence told the court that the 2nd Defendant who was the Executive Director of the Bank indicated that the Bank would be willing to advance to the Plaintiff the monies it required on condition that the Plaintiff also obtained a facility from the Bank for purpose of purchasing the suit property which property belonged to the 2nd Defendant. **PW1** states that the Plaintiff reluctantly agreed to this arrangement as it was desperate to secure facilitation to purchase new trailers for its business. It is the Plaintiff's position that these actions of the 2nd Defendant amounted to undue influence and coercion against the Plaintiff and further it is contended that the 2nd Defendant who held a senior position in the Bank and had authority to approve or reject the Plaintiffs loan application abused his fiduciary duty as a Director of the 1st Defendant Bank. That it was wrong for the 2nd Defendant as a senior official with the Bank to advance monies from the same Bank to finance the purchase of his own property.

(31) Coercion is defined in **Black's Law Dictionary** as:-

"compulsion, constraint, compelling by force or arms or threat."

It is to compel a person to do an act which is against his will, or a situation where one person is under a state of subjection to another person so that he is constrained to do what his free will would refuse. It is sometimes also referred to as duress.

(32) Duress in contract law relates to a situation where a person enters an agreement as a result of threats:

Black's Law Dictionary defines duress as follows:

"Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would). [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand to which he would not yield if acting as a free agent."

(33) "**Undue Influence**" is described in **Black's Law Dictionary** as:

"Persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or

purposes of the dominating party."

(34) The circumstances under which a court may set aside or nullify a transaction on account of coercion and/or undue influence was set out in the case of **LTI KISII SAFARI INNS LTD & 2 OTHERS –VS- DEUTSHE INVESTITIONS –UND ENWICKLUNGSGELLSCHAFT (Deg") & others [2011]eKLR**, where it was held as follows:-

[46] The distinction of the doctrine from common law duress and its application is succinctly stated in Halsbury's Laws of England 4th Ed.

Re-Issue Vol. 9(1) at **page 467 para. 712** thus:-

> ***"A court of equity will set aside a transaction entered into as a result of conduct which, though not amounting to actual fraud or deceit it is contrary to good conscience. Many of the cases in which undue influence arises relate to gifts, but the same principles apply to contracts and unconscionable bargains. Whilst the common law doctrine of duress was originally justified on ground of interference with consent, the equitable doctrine of undue influence has been said to be based on "constructive fraud".***
>
> **In the field of contract, the doctrine has been defined as the unconscientious use by one person of power possessed by him in order to induce the other to enter into a contract. It applies even where the person benefitted by the transaction is a different person from the one who exerted undue influence to bring it about ……………."**

[47] In Royal Bank of Scotland PLC –Vs- Etridge (No.2) [2002] 2AC 773 on which the appellants heavily rely, Lord Nicholls undertook an exhaustive analysis and learned exposition of the doctrine.

> **In that case Lord Nicholls agreed that the test whether undue influence has arisen is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type and continued:-**
>
> ***"Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instances cases where, a vulnerable person has been exploited. Indeed there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endevour to encapsulate the essence; trust and confidence, reliance, dependence, or, vulnerability on one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place."***
>
> **……**

[49] The case of National West Minister Bank PLC –Vs- Morgan [1985] IAC 686 is also relevant.

> **There, the House of Lords held, inter alia ,that the principle that justified the setting aside a transaction on the ground of undue influence was the victimization of one party by another; and that evidence of mere relationship of the parties was not sufficient to raise the presumption of undue influence, without, also, evidence that the transaction itself had been wrongful in that it had constituted an advantage taken of the person subject to the influence, which failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it."**[own emphasis]

(35) The Defendant on the other hand strenuously denies having coerced or in any other manner having pressurized the Plaintiff to purchase the suit property using facilitation secured from the Bank. **DW3** denies having used his position as Executive Director to influence the Plaintiff in any way. **DW3** states that other than being present during negotiations between the parties in his position as a senior officer of the Bank, there was no personalization of the Plaintiffs transactions with the Bank and asserts that all dealings were conducted in the normal Bank – Client manner. The Defendants relied on the decision in **PAO & OTHERS –VS- LAN LIU & ANOTHER [1979] 3 ALL ER** where the Privy Counsel stated that:-

> **"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent........................In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".** [own emphasis]

(36) **PW1** gave very scanty evidence regarding his claims of coercion and/or undue influence. He appeared not to recall many of the pertinent facts. **PW1** was unable to recall exactly when the coercion, fraud and undue influence occurred, how it was perpetrated or even where the alleged incident occurred. It is difficult for this court to buy the theory that the Plaintiff having had no intention of purchasing a high end property in the Nyali area of Mombasa could have been coerced into taking a loan (thereby incurring financial liability) to do so. If the term or conditions being offered by the 1st Defendant in exchange for a loan were so unpalatable the Plaintiff had a plethora of other Banks to approach for the loan facility. The 1st Defendant certainly was **not** the only Bank in town.

(37) Further the Plaintiff purchased the suit property on or about **29th April 2002,** yet **PW1** stated that he only discovered the coercion, fraud and undue influence in **December 2003** more than a year later. This beggar's belief. I find that the Plaintiff have failed to prove the allegations of coercion, fraud and/or undue influence on a balance of probability and as such I dismiss this limb of the Plaintiff's claim.

(ii) <u>Legality of Transactions and Validity of the security Documents</u>

(38) It is common ground that pursuant to the Plaintiffs acceptance of the letter of Offer dated **26th April 2002** a Charge dated **18th June 2002** was created over **LR NO.1196/1/MN**. **Mombasa** (the suit property herein) securing the sum of **Kshs 21,000,000** and that a Debenture of even date was also created in favour of the 1st Defendant securing a maximum amount of **Kshs.80,000,000.**

(39) The Plaintiff alleged that the Charge dated **18th June 2002** was void for the following reasons:-

a. That there was no registered resolution of the Plaintiff's Board of Directors authorizing the creation of the same and affixing the common seal thereto.

b. That Charge did not comply with **Section 46** of the **Registration of Titles Act** as the ingredients set out in form **J(1)** and **J(2)** are missing.

c. That the Charge contravened the attestation requirements under **Section 3** of the **Contract Act**.

d. That the Charge was deliberately under stamped and is fraud on the revenue.

e. That the Charge contravenes mandatory requirements under **Section 69(1)** and **(4)** of the **ITPA.**

f. That the Charge and registration of the sale of the suit property was fraudulent as the 2nd Defendant abused his office and position of trust as an officer of the Bank to coerce an unduly influence the Plaintiff into acquiring it.

g. That the effects of **Section 69** of the **ITPA** were not explained to the Plaintiff by an Advocate and the Charge was not executed by the Plaintiff's directors.

h. That the entire transaction contravened the provisions of the **Donde Act.**

(40) The Plaintiffs further contended that the Debenture dated **18th June 2002** was similarly void for the same reasons given for invalidity of the charge and that additionally the Debenture was void for the following reasons:-

a. That there was an existing Debenture dated **14th November 2001** in favour of **Eastern and Southern African Trade and Development Bank** for **UAPTS 2,518,000** which took priority over the assets of the Plaintiff which had not been discharged.

b. That the Debenture was not received for registration within 42 days after the date of its execution as required by **Section 96 (i)** of the **Companies Act**.

c. That the Debenture did not conform with the provisions of the **Companies Act Cap 486 Laws of Kenya.**

d. The same is incomplete in that it does not specify the clauses of the Memorandum and Articles of Association under which it is created and issued.

(41) It goes without saying that any contract which is illegal is invalid and ought not be enforced by the courts. In **STANDARD CHARTERED BANK KENYA LTD –VS- INTERCOM SERVICES LTD & 4 OTHERS [2014] eKLR**, the Court of Appeal held as follows:-

> **"Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indicable offences. <u>No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if that illegality is duly brought to the notice of the court</u>, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."**
>
> **It will be observed that the above case of Mistry Aman Singh vs Kulubya was heard and decided many years after the case of North Western Salt Company Vs. Electrolytic Alkali Company Ltd – in fact after forty nine years. I do feel that the law in Kenya is as is spelt out in the case of Mistry Aman Singh vs Kulubya which was later followed by the case of Heptula vs Noormohamed [1984] KLR 580 where it was held that:**

"<u>No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality</u>."[own emphasis]

(42) Therefore, the position in law is that once an illegality has been brought to the notice of the Court, then the Court is duty bound to investigate the same.

(43) The Plaintiffs position is that **Section 39** of the **Central Bank No.10 of 2018** and **Section 44** of the **Banking Act Cap 488 laws of Kenya** forbade any increase in interest rates without the prior approval of the Minister of Finance.

(44) The Defendant however counters that the interest rates charged by the 1st Defendant were the rates which were indicated in the letters of Offer and the rescheduling documents which represented what was voluntarily agreed upon between the parties themselves.

(45) It is trite law that court cannot and will not rewrite contracts entered into between parties. However, where a contract is tainted with illegality then the court is at liberty to step in as the court ought not sanction an illegality. The key question here is whether the transactions entered into between the Plaintiff and the Defendants were illegal.

(46) **Section 39(1)** of the **Central Bank Act** as amended by the **Amendment Act no. 4 of 2001** provided as follows;

> **(I) The maximum rate of interest which specified banks or specified financial institutions may charge on loans or advances shall be the 91-day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest published 91-day Treasury Bill rate, plus four per-centum:**

Provided that the maximum interest chargeable under this subsection shall not exceed the principal sum loaned or advanced and <u>provided further that this subsection shall only apply to contracts for loans or advances made or renewed after the commencement of this section</u>. [own emphasis]

Section 44 of the **Banking Act** provides;

> **"Restrictions on increase in bank charges**
>
> **No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."**

(47) It is important to note that in the case of **KENYA BANKERS ASSOCIATION & OTHERS –VS- MINISTER FOR FINANCE & ANOTHER [2002] KLR**, the Court did on **24th January 2002** declare the **Amendment** to the Central Bank Act void in so far as it made criminal and penalized actions or transactions, that were **not** offences at the time when they took place, contrary to **Section 77** of the **Constitution of Kenya** (repealed).

The Court in that case held thus:

> **"This enactment with retrospective operation is not sanctioned by Section 46(6) of the Constitution of Kenya because it creates offence out of acts or omissions which did not constitute offences at the time they took place before the Act's date of commencement and the overriding section 77 (4) expressly states that such criminalization of formerly lawful and innocent acts or omissions is not permitted."**

(48) Therefore, the said Amendment was not applicable to the transaction between the Plaintiff and the Bank. In any event this issue cannot be deemed to have gone to the root of the matter given the provisions of **Section 52** of the **Banking Act** which provides:-

> **"(1) For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act (Cap 491) shall affect or invalidate in any way any contractual obligation between an institution and any other person.**
>
> **(2)The provisions of subsection (1) shall apply with retrospective effect to the Banking Act (now repealed) and the Central Bank of Kenya Act (Cap 491)**
>
> **(3)This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the Central Bank of Kenya Act."**

(49) In the case of **KESHAVJI JIVRAJ SHAH –VS- KANWAL SARJIT SINGH DHIMAN [2019] eKLR, Hon Justice A. Makau** held as follows:-

"65. In the instant suit, the defendant further in support of the "illegality tag" alleged that the Plaintiff had no right of place to lend him money on the terms and in the circumstances he did. Yet, it was the Defendant's own oral evidence that he is the one who sought out the Plaintiff for the loan and they even became friends! A loan similar to the one in this case was approved of and enforced by Ringera J (as he then was) in Morjaria v Kenya Batteries (1981) Ltd & 2 others [2002] 1 KLR 406. His Lordship's holding in the matter is apt and relevant. He held at page 409 lines 8-30 –

> **"a) Interest was not to be charged if the borrower paid on due date and any adverse consequences arising from levying of interest on the loan were self-inflicted and the borrower could not be heard to complain.**
>
> **b) <u>It is not the business of the Court to re-write contract for parties. If the parties have negotiated and agreed on a genuine pre-estimate of the loss one would suffer if the other did not honour its part of the bargain, the defaulting party cannot be heard to complain that the estimate is too high</u>."**

66. This court notes, that the defendant has come to this court urging that he wants a court determined rate of interest notwithstanding that the other plaintiff has signed on the rate of interest. The holding in the headnote in Shah v Guilders International Bank Ltd [2002] 1 EA 269 puts paid to the search for justice on those terms, especially since the Defendant readily agreed and admitted the rate of interest and willingly signed for that interest rate. The Court of Appeal held:-

"Where the parties to a dispute had not agreed on the rate of interest payable, section 26(1) of the Civil Procedure Act, conferred on the court the discretion to award and fix interest rates with regard to decrees for the payment of money. Where the rate of interest has been agreed, the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent."[own emphasis]

(50) The Plaintiff relied on the evidence of **PW2 Mr Abincha Onono**, a consultant with **IRAC** whose report indicated that the 1st Defendant had misapplied the interest rates chargeable on the facility. However, under cross-examination by counsel for the Defendant **PW2** admitted that he omitted some of the Plaintiffs accounts and instruments such as the Further Charge and the Hire Purchase Facility in preparing his report. **PW2** stated that he was not availed a copy of the Further Charge.

(51) The opinion of an expert witness is just that - an opinion. It is not binding on the court. In the case of **DOMITILAR MUENI MULI –VS- PAN AFRICA CHEMICALS LTD [2018] eKLR,** the Court observed as follows:-

So what's the place of expert opinion in courts?

11. In Shah & Another -vs- Shah & Others (2003) I EA 290, the court held:

"The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so---"

12. It further went onto state that:

"---if there is a conflict of expert opinion, acceptance of the expert evidence is the responsibility of the court – properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach his own opinion."

13. In Dhalay -vs- Republic (1997) KLR, the Court of Appeal rendered that:

"It is now trite law that while the courts must give proper respect to the opinion of experts, not, as it were such opinions are binding in the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and congent basis for rejecting the expert opinion, a court would be perfectly entitled to do so." *[own emphasis]*

(52) Therefore, in a case such as the present one where **PW2** admitted omitting certain crucial documents in his audit, then I find that his Report is not of much assistance to the Court.

(53) The Plaintiff further claims that the Defendant failed to obtain consent from the Minister of Finance as required then by law before changing the rate of interest from **14%** as provided in the letter of Offer dated **30th January 2006** to **29% per annum.** The Plaintiff cited the case of **SAMUEL NDIBA KIHARA & ANOTHER –VS- HOUSING FINANCE COMPANY OF KENYA & 2 OTHERS [2018] eKLR**, where the Court in holding that the onus was upon the Bank as financial institution to prove compliance with **Section 44** of the **Banking Act** stated as follows:-

It is generally true that he who asserts must prove. That much is contained in Section 107 of the ***Evidence Act.*** **However,** ***Section 112*** **of the Evidence Act further provides that:**

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

In the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009) this Court, differently constituted held that:

"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

In the appeal before us, it was the respondent bank which fell within *Section 112* and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because *Section 44* of the *Banking Act* places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from the Minister?

To illustrate this point, we find persuasive authority in the High Court case of John Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 Of 2001) where Sergon J. found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with *Section 44* of the *Banking Act.* A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal."[own emphasis]

(54) It is therefore clear that the variation of interest rate chargeable on the facility without the sanction of the Minister of Finance was in fact illegal and therefore invalid. The 1st Defendant was only entitled to charge the interest rates indicated in the letter of Offer dated **30th January 2006** being **14%** per annum.

(55) Finally, the Plaintiff has challenged the validity of the security documents calming that the charge dated **18th June 2002** was void for the following reasons. Firstly, the Plaintiff submit that there was no resolution of the Board of the Plaintiff Company authorizing the creation of the charge and Debenture and Variation of Deed and that neither was there common seal offered on all the documents. That the Charge did not comply with **Section 46** of the Registration of **Titles Act** which stipulates that the charge shall be executed by the proprietor of the lease as the requisite **Forms JI and J2** of the First Schedule were missing.

(56) The Plaintiff further contended that the Charge contravenes **Section 3(3)** of the **Law of Contract Act, Section 109** and **110** of the Registered **Land Act** and **Section 58(4)** of the Registration of **Titles Act**. That according to the execution requirements for a company under the **Companies Act**, the common seal of the company shall be affixed in accordance with the Memorandum and Articles of Association of said company. It was further contended by the Plaintiff that the charge was understamped as there was no company seal and it was the responsibility of the Bank to ensure that all legal requirements relating to the charge have been met. It was submitted that **Article 80** of the Plaintiffs **Memorandum and Articles of Association** as read together with **Rule 113 Table A** of the **Companies Act** required that each charge and Debenture to which the company seal was affixed was to be signed by two directors and/or two persons appointed in writing by the Directors. Thus the Plaintiff contends that the security documents were not properly executed.

(57) The Defendants position is that since the said security documents were created under the **Government Lands Act Registration of Titles Act** and the **Indian Transfer of Property Act**, then those would be the applicable statutes notwithstanding the fact that the said statutes have now been repealed. The Defendants submit that the law of **Contract Act** is not applicable in this case. The Defendant cited the case of **JOHN MWENJA NGUMBA & ANOTHER –VS- NATIONAL INDUSTRIAL CREDIT BANK LIMITED (NIC) & ANTHER [2013] eKLR**, where the Court held thus:-

> **"The court therefore rejects the Plaintiffs submissions that the Mortgage Instrument was invalid by virtue of the fact that it was not attested by two (2) witnesses and upholds the Defendant's submission that the said Mortgage Instrument was valid for all purposes and intents. The court also finds that the provision of the law of Contract were not applicable in this case as was argued by the 1st Defendant."**

I do agree with the Defendants that the applicable statutes in this transaction were the **Government Lands Act**. The **Registration of Titles Act** and the **ITPA** (now repealed). The law of Contract Act was not applicable.

(58) Regarding the Plaintiff's claim that no Advocate attested the security documents, the 1st Defendant asserts that the mortgage Instrument was drawn in accordance with the law, and was signed and attested by an Advocate **Mr.Chigiti** as required by **Sections 69(1)** and **(4)** of the **FTPA** and as such were deemed properly registered.

(59) However, a keen look at the evidence on record reveal that the Plaintiffs allegations have no factual basis. Regarding the lack of a Company Resolution, the Defendants have exhibited at Page 18 of their Bundle of Documents filed on **24th May 2013** Minutes and Resolutions of the Plaintiff Directors dated **20th July 2004** authorizing the creation of the charge. The said Resolution which was duly signed by the Directors reads as follows:-

> **<u>DIRECTORS' RESOLUTION</u>**
>
> **MINUTES OF THE MEETING HDLE OF DIRECTORS ON 20TH JULY 2004 AT THE REGISTERED OFFICE OF HUSSEINI DAIRY LIMITED**
>
> **<u>PRESENT</u>**
>
> **MR MAHMOOD KASSAM MIYANJI DIRECTOR**
>
> **MR ESMAIL KASSAM MIYANJI DIRECTOR**
>
> **In accordance to clause No.3 (29) of the Memorandum of Association and clause No.77 borrowing powers of the Articles of Association, it was unanimously agreed to borrow by way of rescheduling the existing Term loan, a sum of Kshs.29,000,000/= (Kenya shillings Twenty Nine Million only) from SOUTHERN CREDIT BANKING CORPORATION LIMITED (herein agreed to as the "Bank")**

IT WAS RESOLVED that;

> **The above amount of Kshs.29 million to be borrowed from Southern Credit Banking Corporation Ltd was to be secured by variation of existing charge of Kshs.21 Million to kshs.29 Million over a Residential House on Plot No.L.R No.1196/Sect.1/MN.**
>
> **It was also agreed that the above facility will be secured by personal guarantee of Directors and right to set off against securities for other facilities granted to us."**

(60) **PW1** further in his evidence admitted that the Plaintiffs Board authorized the borrowing. Under cross-examination by counsel for the

Defendants **PW1** says:-

> **"I received this letter (reference to the letter of Offer dated 26th April 2002) and we passed a resolution as a company accepting the terms of the offer. By April 2002 we had a facility to the tune of Kshs.80 Million from the Defendant Bank…"**

(61) On the Plaintiffs allegations on facility execution and attestation, it is manifest that the claims or objections come too late in the day. The Plaintiffs did not raise any objection at the time the charge was due for execution. The said allegations are now non - starters. In **NOOR BEGUM FAZAL** (suing as a holder of power of attorney in favour of **NADRA HUSSEIN FAZAL) –VS- DIAMOND TRUST BANK [2015] eKLR,** the court stated:-

> ***The court thus found itself in agreement with the Defendant that the new assertion of the invalidity of the Charges was merely an afterthought as the Plaintiff ought to have demonstrated that she had raised the issue previously or at all the material times she had sought to stop the sale of the subject property by way of public auction.***
>
> ***Alleging that the Chargor was not present at the time the Charges were executed was not enough particularly after the Borrower had enjoyed the benefit of the financial accommodation that was accorded to her by the Defendant. If indeed, the Charges were not validly executed, the Borrower ought not to have taken the loan, which has been outstanding since 2009. Abetting an illegality would not confer any benefit or defence upon a person who would want to avoid the consequences of his default.***
>
> ***Indeed, the onus was on the Borrower to demonstrate that the Chargor could not have been present at the time the said Charges were being executed. Her acquiescence of the alleged illegality, if at all the same was true, amounted to a waiver to object and for which the court could not be persuaded to grant an injunction on this ground."*** *[own emphasis]*

(62) The Defendant submitted that the charge document fully complied with the provisions of **Section 69(4)** of the **ITPA** which provide thus:-

(4)This section shall apply only-

> **(a) if the mortgagor's signature to the mortgage instrument has been witnessed by an advocate and if the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of subsection (1) of this section and he was satisfied that the mortgagor understood the same; and**
>
> **(b) if and as far as a contrary intention is not expressed in the mortgage instrument; and**
>
> **(c) if the mortgage instrument executed after the commencement* of the Indian Transfer of Property Act (Amendment) Act, 1959.** [own emphasis]

(63) From the records availed in court is a copy of the Charge dated **18th June 2002** bearing a certificate signed by **JM CHIGITI** Advocate (Page 65 of Defendant Bundle of documents filed on **4th July 2013**) which certificate reads as follows:-

> **"I CERTIFY that I have explained to the Director(s)/Secretary of the chargors the effect of sub-section (I) of Section 69 of the Indian Transfer of property Act 1882 and that I am satisfied that they understood the same.**

Beneath the certificate is an acknowledgment duly signed by a director of the Plaintiff Company which reads as follows:-

> **"I/we the undersigned confirm that we have had read and had explained to us the above section and confirm that I/we understand the same."**

(64) Indeed, **PW1** admitted that the Director of the Plaintiff Company executed the Charge and that the same was witnessed by the said **J M Chigiti** Advocate and was duly sealed. The Deed of Variation of Charge and further Charge dated **16th December 2004** was also duly sealed and was witnessed by the Director and Secretary of the Plaintiff namely. (see page 104 of the Defendant's Bundle of Documents) A certificate to this effect was issued by **A.J KINGI** Advocate for the Plaintiff.

(65) In the case of **AL-JALAL ENTERPRISES LIMITED –VS- GULF AFRICAN BANK LIMITED [2014] eKLR, Hon Justice Ogola** while considering a similar issue of cited the Ruling of **Hon Justice Richard Kwach** (Retired) in **MRAO LTD –VS- FIRST AMERICAN BANK [2003] KLR** as follows:-

> **On the alleged invalidity of the securities (just in the present case);**
>
> **"At no time in the course of argument did Mr Wasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back a single cent. When First American asked for payment the Appellant rushed to a Court of equity and in effect told the judge, it is true I took the money. I have not paid it back but First American is precluded from realizing its security because both the charge and Debenture are invalid…this kind of attitude, prima facie shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a clear case of default, and as the appellant admitted this there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American. I have looked at the charge document and on the face of it I cannot**

detect anything wrong with it."

On the duty to get legal advice in large borrowing transactions:

"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, Banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters."

Justice Ogola went on to observe that:-

"In my view the Mrao case is the *locus classicus* on the injunctions and is on all fours with the present circumstances we now face in the pending suit.

<u>Further the absence of past allegations raised concerning the validity or otherwise of the charge gives the impression that the current allegations are an afterthought. This issue has been addressed by the Court of Appeal since 1966 where the court has found no sympathy for debtors who after executing valid security instruments later turn around and challenge the validity years later when the bank commences the sale of the securities. In the present case, it is unconscionable to turn and purport to use any baseless excuse to frustrate the bank from realizing its security after it has lent money to the Plaintiff</u>.

The first Court of Appeal case that addressed this issue is Coast Brick & Tiles v Premchand [1964] 187 at page 198 paragraphs E-I. This matter went on appeal to the Privy Council [*see Coast Brick & Tiles Limited & Others v Premchand Raichand Limited [1966] EA 154*] which upheld the decision of the Court of Appeal. The Court of Appeal addressed the effect of registration of land under the Registration of Titles Ordinance [which became the Registration of Titles Act]:

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

(66) This case is on all fours with the above. This facility was granted to the Plaintiff way back in the year **2002**. The facility was disbursed to the Plaintiff who made use of the same. At no time did the Plaintiff take issue with the validity of the securities. It is only six (6) years later in the year **2008** when this suit was filed that the Plaintiff suddenly awakens to the fact that the securities may have been invalid. This is clearly an afterthought and a red herring being raised **after** the Plaintiff has enjoyed the facility in question.

(67) The Plaintiff claims that the charge and Debenture are defective as they did not have affixed to them the Plaintiffs common seal contrary to **Section 58(4)** of the **Registration of Titles Act Cap 28 laws of Kenya** which provides:-

"(4) An instrument executed by a Company within the meaning of the Companies Act shall be executed by means of the company's common seal affixed in accordance with the Memorandum and Articles of Association."

(68) The Plaintiff further claims that the security Documents did not comply with **Article 80** of the **Articles of Association** of the company in that there was no relevant resolution of the Board.

Article 50 of the said **Articles of Association** provide as follows**:-**

"The common seal will only be used by the Authority of its directors or such other persons as the directors may in writing appoint for purposes and every instrument to which the common seal is affixed will be signed by a director and countersigned by a second director or by some other person appointed by the directors for that person."

(69) The above are all obligations which lay with the Plaintiff Company itself and were not the obligation of the Defendant. It is ironic that the Plaintiffs would be in court seeking to rely on their own negligence and omissions to invalidate the security Instruments. In **P.N GICHOHO NGUGI –VS- COUNTY GOVERNMENT OF LAIKIPIA & ANOTHER [2017] eKLR, Hon Lady Justice Kasango** held:-

"Can the defendant seek to obtain benefit of its own default?

The following cases show that a defaulting party cannot rely on its fault. ALGHUSSEIN ESTABLISHMENT v ELTON COLLEGE (1991) 1 All ER 267, it was held:-

"<u>A party who seek to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his breach to avoid a contract and thereby escape his obligations</u>."

The House of Lords in the decision above, relied on a speech by Lord Diplock *in* ***CHEALL Vs ASSOCIATION OR PROFESSINAL***

EXECUTIVE CLERICAL AND COMPUTER STAFF (1983) 1 ALL ER that:-

"This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract as having terminated a contract by frustration is often expressed on broad language as " <u>A man cannot be permitted to take advantage of his own wrong</u>." *[own emphasis]*

(70) The Plaintiff by their argument are seeking to benefit from their own wrongs or faults. This the court will not countenance.

<u>(iii) Exercise of Statutory Power</u>

(71) The Plaintiff takes issue with the manner in which the 1st Defendant Bank exercised its statutory power of sale in respect of the suit property. The Plaintiff states that vide a Statutory Notice dated **22nd November 2007** the 1st Defendant demanded an amount of **Kshs.43,819,181.50**. The Plaintiffs contention is that the said Statutory Notice was null and void as it had already paid the amount due to the 1st Defendant in full. Further the Plaintiff's position is that according to the recalculation of interest done by **IRAC** it had even overpaid the 1st Defendant by a sum of **Kshs.3,170,999.15.**

(72) The Plaintiff also complains that in the said Statutory Notice the 1st Defendant threatened to repossess its trailers yet the Plaintiff had already repaid more than two-thirds of the amount due on the Hire Purchase facility. The Plaintiff relies on **Section 15(1)** of the **Hire Purchase Act** which provides that:-

> **"Where goods have been ..under a hire purchase agreement and two-thirds of the hire-purchase price has been paid, whether in pursuance of the agreement or of a judgment or otherwise, or has been tendered by on behalf of the hirer or a guarantor, the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by suit."**

(73) The Plaintiff points out that the 1st Defendant never instituted a suit to repossess the said trailers as required by the above provision of the law. According to the Plaintiff this renders the Statutory Notice of **22nd November 2007** a nullity.

(74) The Plaintiff is further aggrieved by the fact that the suit property was sold by way of private treaty as opposed to through a public auction. That the sale was fraudulent as no valuation was conducted as required. The Plaintiff states that it commissioned a valuation on the suit property which returned an open market value of **Kshs.60 Million** and a forced sale value of K**shs.53 Million** and that the sale of the suit property by private treaty at **Kshs.29 Million** was a clear undervalue which prejudiced the Plaintiff.

(75) It is common ground that the suit property was sold to a third party and transfer to the purchaser had already occurred by the time the hearing of this suit commenced having been transferred on **25th November 2009.**

(76) The 1st Defendant denies having illegally and/or improperly exercised its statutory power of sale. The Defendant claims that as at **29th December 2003** the Plaintiffs facility was in arrears of **Kshs.28,282.435.** On **22nd July 2004** a letter re-scheduling the loan was written in which arrears were stated to be **Kshs.29,000,000**. By executing the said letter the Plaintiff can be deemed to have confirmed the outstanding amount. Under **Section 69(1)** of the **ITPA** the Bank asserts that all requisite statutory notices were served upon the Plaintiffs. That the Plaintiffs despite being given ample time failed to settle the amount due to the Bank.

(77) The Plaintiff does not deny having received the statutory notices sent to it by the Bank, the said statutory notices are not impeached in any way. **Section 69 (1)** of the **ITPA** which empowers a Bank to realize its security and this can be done by way of public auction or by private treaty. Section **69 (1)** provides:-

> (1) **A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, <u>shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract,</u> subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby**;[own emphasis]

(78) The Court of Appeal in the case **Jose Estates Limited v Muthumu Farm Limited & 2 others [2019] eKLR** dealt with the dual issues of sale by private treaty and undervaluation. The Court held;

> **<u>The 3rd respondent was not obliged to sell by public auction. Sale by private treaty was an option also as long as the 3rd respondent acted in good faith.</u> From the record before us, the 3rd respondent acted in good faith as it involved the 1st and 2nd respondents in the process of finding a suitable purchaser. The 3rd respondent gave due allowance to the 1st and 2nd respondent to exercise their equity of redemption by calling off several public auctions at their behest and also allowing them to bring on board suitable purchasers. One such purchaser was Aberdare Creameries Limited who had offered to pay Kshs. 15,000,000 for the suit property. However, the 3rd Respondent sold the suit property to the appellant who offered to buy it at Kshs.15,500,000 which was higher than what Aberdare Creameries Limited had offered. The ball of contention was that what was credited to the borrower's account was Kshs.14,000,000. The explanation given for the difference was that Kshs. 1,500,000 was paid to Mereka & Co. Advocates and finders fees and on account of legal fees and commission. The explanation sounds logical to any reasonable person. In the case of Mbuthia Vs Jimba Credit Finance Corporation and Another [1986-1989] EA 340; [1988] KLR 1 this Court stated thus: "<u>A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in</u>**

itself evidence of fraud." *[own emphasis]*

(79) Therefore the duty imposed upon the Bank was to obtain the best possible price for the suit property taking into account the prevailing market conditions and the fact that this was a forced sale. If as it claims the Plaintiff had fully cleared the entire amount due on the loan facility, nothing would have been easier than for them to tender proof of such payment. This they did not do.

(80) The Plaintiff claimed that the suit property was sold at a gross undervalue and referred to a valuation it had commissioned. The Plaintiff did not call the valuer who prepared this Report as a witness neither did it present the said report as an exhibit in this suit. This therefore remains an unproven allegation.

(81) The Plaintiff purchased the suit property for **Kshs.21 Million** in **April 2009** the same was sold for **Kshs.29 Million** (according to the Plaintiff). According to the Defendant the suit property was sold for **45 Million**. However, no documents to prove the sale price were produced in court by either party. Whatever the case the property was clearly sold at a higher price than it had been purchased for. The property had obviously appreciated and fetched a higher price even at a forced sale. I find no evidence of fraud or undervalue and dismiss this limb of the Plaintiffs suit.

DAMAGES

(82) The Plaintiff sought for damages in the amount of **Kshs.104,170,109.15**. This figure consists of the alleged overpayment of interest amounting to **Kshs.3,170,999.15**, the value of the trailers which the Plaintiff claims were illegally taken over by the receiver/manager appointed by the Bank valued at some **Kshs.59 Million**. The sum claimed as damages also included the difference between what the Plaintiff claims toe the market value of the suit property and the amount for which it was eventually sold.

(83) As I found earlier the allegation of fraud was not proved. Further the Plaintiff also failed to adduce evidence in support of its contention that as at **November 2009** the market value of the suit property was **Kshs.71 Million**. Lastly in my view the evidence of **PW2** did not prove the overpayment of **Kshs.3,170,999.15** given that he did not take into account all relevant documents. Accordingly, I find that this claim for damages had not been proved on a balance of probability and I dismiss the same.

CONCLUSION

Given my finding that the variation of interest rate was null and void (see para 53 of this judgment). I hereby make the following **Orders**

(a) That the Interest due on the facility be re-calculated with the applicable rates of interest being **14%** per annum in line with the letter for Reschedulement of Existing Hire Purchase dated **30th January 2006.**

(b) Prayers (a), (b), (c), (d), (e), (f), (g) and (h) are found to have no merit and are hereby dismissed.

(c) Costs follow the event. As such the Plaintiff will pay the costs for the 2nd Defendant. However the 1st Defendant will meet its own costs.

It is so ordered.

Dated in Nairobi this 4th day of September, 2020

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Justice Maureen A. Odero