REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERICIAL AND ADMIRALTY DIVISION

CIVIL CASE 237 OF 1998

ALLAN SYMON NJUGI MAINA……..……..1ST PLAINTIFF

CHARITY WARIGIA MAINA ……. 2ND PLAINTIFF

VERSUS

DEVELOPMENT FINANCE COMPANY

OF KENYA……1ST DEFENDANT

SMALL ENTERPRISES FINANCE

COMPANY LIMITED……2ND DEFENDANT

JUDGEMENT

1. The 1st and 2nd Plaintiffs who were at all material times Directors of a Company known as Quality Millers Kenya Limited (hereinafter Quality Millers) bring the suit against the Defendants in respect to a transaction that was initiated by a Loan Agreement dated 23rd September 1983.

2. In the said Agreement, the 1st Defendant agreed to advance a sum of Kshs.600,000 to Quality Millers on terms and conditions set out in the said Agreement. The Plaintiffs assert that the loan was to be repaid over a period of seven months which included a two year grace period. Another hallmark of the Agreement was that the total interest payable was agreed at the sum of Kshs.303,361 thereby making the total amount to be repaid to be Ksh.903,561.

3. The loan was to be secured as follows;-

1. A first floating Debenture covering all the assets of the project i.e. Machinery and equipment, furniture, motor vehicle and net current assets.

2. A guarantee by the Plaintiffs backed by a second mortgage over a developed residential plot L.R No.209/8536/10 in Parklands, Nairobi, which is currently mortgaged to Housing Finance Company of Kenya Limited.

3. Personal guarantees by the Plaintiffs.

4. The loan was duly disbursed and the Plaintiffs assert that as at 20th April, 1994 Quality Millers had paid to the 1st Defendant and to the 2nd Defendant as agents of the 1st Defendant the sum of Ksh.1,017,137.20. This reflected an overpayment because the total agreed sum to be repaid was Kshs.903,561. And so the overpayment was in the sum of Kshs.113,576.20.

5. It is the Plaintiffs' case that prior to the aforesaid date and sometimes in the year 1986, the 1st Defendant unilaterally and without the consent of Quality Millers and/or the Plaintiffs purported to alter the terms of the loan Agreement by a Deed of Assignment of the loan to the 2nd Defendant. The Plaintiffs were and are particularly aggrieved by clause 2 of the Deed of Assignment which is said to have contained a provision to the effect that in default of the Principal Borrowing, it would be repayable on the amount in default at 18% p.a. It is the argument of the Plaintiffs that clause 2 fundamentally altered the terms of the agreement between the Company and the 1st Defendant to the Company's detriment. For that reason Quality Millers and its Shareholders rejected the terms of the Deed of Assignment and declined to execute it. It is therefore averred that the Deed of Assignment is null and void and not binding upon the Company.

6. The Plaintiffs complain that on diverse dates between the years 1988 and 1990 the Defendants imposed the terms of the unilateral and unlawful Deed of Assignment by charging interest at the rate of 18% p.a and having deemed Quality Millers to be in default attempted to realize the securities. This prompted the Company and the Plaintiffs to file separate legal action in an attempt to stop the Defendants proceeding with the threatened realization. The Court cases are HCCC NO.2072 of 1994, HCCC NO.5064 of 1988 and HCCC NO.379 of 1990.

7. One action taken by the 2nd Defendant, presumably on behalf of the 1st Defendant, was the appointment of a Receiver over the Milling Project, closure of the factory and advertisement of the machinery for sale. In the Civil suit No. 2072 of 1994, Quality Millers filed a Chamber Summons seeking to restrain the Defendants from selling the machinery and to lift the Receivership. The Plaintiffs aver that the said Application was heard inter parties on 16th June 1994 in which the Court made orders for status quo to be maintained in the following manner:-

i) If the Machinery has not been sold, it should not be sold;

ii) If the Machinery has been sold the same should not be removed from the premises until the hearing inter parties on 30th June 1994.

The Application was subsequently heard and dismissed in a Ruling delivered on 19th September 1994.

8. That in a letter dated 3rd May 1995, M/S Meenye & Co. Advocates acting for Quality Millers informed the Defendants' Advocates that as the Defendants had indicated that they had found a buyer for the Machinery and had received the sum of Khs.850,000 in that regard then asked the Defendants needed to lift the Receivership and discharge the landed collateral.

9. In reply the Advocates for the 1st Defendant, in a letter dated 26th June 1995, stated that the offer for the Purchase of the Machinery had been retracted as a result of the injunction application and consequential Orders of Court and that the account had not been redeemed. In addition, the Advocate advised that the amount due and owing by the Company as at 31st May 1995 was Kshs.1,232,031.50.

10. Sometime passed and by a letter dated 8th October 1997 written by the 2nd Defendant the following was stated,

i) The Machinery was not sold for Kshs.850,000.00 as the purchaser who had paid this amount demanded a refund of the same due to the injunction issued by the Court restraining the release of the Machinery.

ii) The Machinery was eventually sold in May 1997.

iii) The Company was indebted to the 2nd Defendant in the sum of Kshs.1,416,018.35 as at 30th June 1997 which amount continued to attract interest at the rate of 11% per annum until payment in full.

11. The Plaintiffs assail the Defendant for failing to explain how the sale of the Machinery was conducted, the price it fetched, why it took so long to sell and efforts made to sell the Machinery as soon as possible. The Plaintiffs' case is that the loan has been fully paid and the they are entitled to unconditional discharge from the 1st Defendant of all securities held.

12. In addition, the Plaintiffs resist the attempt by the 2nd Defendant to sell the charged property not only on the ground that any sums owed by Quality Millers have been repaid but also that the property is charged to the 1st Defendant and not the 2nd Defendant. In addition that the purported assignment of the loan Agreement between Quality Millers and the 1st Defendant to the 2nd Defendant could not legally affect the Company and its Directors who declined to sign it.

13. Lastly the Plaintiffs beseech the Court to restrain the Sale of the property which is said to be the residential home of the Plaintiffs in which they have lived together with their children for over fifteen years. The Plaintiffs state that the property is of great sentimental value to the Plaintiffs and they cannot be compensated in Damages.

14. The prayers sought by the Plaintiffs are against the Defendants jointly and severally for the following orders:-

a) A declaration that the loan to the 1st Defendant is fully paid and the Plaintiff is entitled to an unconditional discharge of all securities held by D.F.C.K limited.

b) A declaration that the Assignment of the Loan agreement by D.F.C.K Limited to SEFCO is unilateral, illegal and does not bind the Plaintiff at all.

c) Damages for trespass, illegal receivership and loss of business.

d) Costs of the suit.

15. Both Defendants have denied the allegations raised in the Plaint. The 1st Defendant takes the position that the Plaintiffs' suit is incompetent and does not lie in Law because the matters in issue are directly and substantially in issue to the three suits named in the earlier part of this decision.

16. The 1st Defendant also states that Quality Millers failed to comply with the contracted repayment schedule and did not repay the loan as anticipated. In respect to the Deed of Assignment, the 1st Defendant explains that it assigned the Plaintiffs' debt (together with all the Rights and obligations in respect thereof and the Debenture, Guarantee and legal charge) to the 2nd Defendant. It denies that the Deed of Assignment altered the terms and conditions under which the money was lent to the Principal Borrower. In particular that the interest charged was at 11% per annum and not 18% per annum as alleged by the Plaintiffs.

17. In regard to the purported sale of the Machinery, the 1st Defendant states that the sale was frustrated by the injunction obtained in HCCC. NO.2072 of 1994 and the purchase price refunded to the Purchaser. That subsequent attempts to sell the Machinery did not bear fruit and when the sale was finally successful, the Machinery was sold for a much lesser sum because it had become obsolete and the economic condition in the Country had worsen.

18. In support of the position taken by the 1st Defendant, the 2nd Defendant states that Quality Millers has made several payments directly to it and communicated with it and have therefore by implication and conduct acknowledged and accepted the validity of the Deed of Assignment and are thus estopped from challenging its credibility.

19. It is contended by the 2nd Defendant that it is entitled to realize the security it owes being Land parcel known and described as LR.209/8536/10 to offset a debt which stood at Kshs. 1,416,018.55 as at 30th June, 1997 and which continued to attract interest at the rate of 11% per annum until payment in full.

20. Counsel for the Parties agreed on issues that required determination and they are:-

1. Whether the Plaintiffs' suit is incompetent in view of the existence of other previously instituted suits, that is, HCCC No. 379 of 1990, HCCC No. 2072 of 1994, and HCCC No. 5064 of 1988.

2. Whether the debt due to the Defendants by Quality Millers (K) Ltd (the Company) has been paid in full and whether there is any amount of money due to the Defendants by the Company, and if so the amount thereof.

3. Whether the Deed of Assignment dated 29th March 1985 is binding upon the Company and the Plaintiffs.

4. What rate of interest has been applied in calculating the amount due to the Defendants by the Company in the loan account?

5. What were the circumstances of the sale of the machinery belonging to the Company?

6. What amount of money was recovered from the sale of the machinery?

7. Does the Plaint disclose any cause of action against the Defendants?

8. Are the Defendants entitled to realise the security charged to the 1st Defendant being L.R No. 209/8536/10?

9. Who should bear the costs of this suit?

Some of the issues overlap and will be dealt with together.

21. Seen by the Parties as a prefatory issue is whether these proceedings are incompetent in view of the existence of the following Civil suits:-

a) HCC No. 2072 of 1994 – Quality Millers (Kenya) ltd vs. Small Enterprises Finance Company Ltd.

b) HCC No. 5064 of 1988 – Allan Symon Maina & Charity W. Maina vs. Development Finance Company of Kenya.

c) HCC No. 379 of 1990 – Allan Symon Maina & Charity W. Maina vs. Development Finance Company of Kenya Limited.

22. There is no contestation that this Suit was filed after HCC No. 2072 of 1994. What is striking about that Suit and the current Suit is the similarity of the Cause of Action in the two suits. The Defendants in that Suit are the same Defendants here. However the Plaintiff in the earlier action is the Principal Debtor, that is Quality Millers.

23. The subject matter in that suit is the loan granted by the 1st Defendant to Quality Millers through an agreement of 23rd September 1983. That is the loan which is under controversy in these proceedings. In HCC No. 2072 of 1994, Quality Millers (Kenya) ltd asserts that it has not only paid the loan in full but has in fact overpaid it by some Kshs.204, 439/=. A similar averment is made herein with one overpayment being put at Kshs. 113,576.20/=.

24. Quality Millers has a second complaint in HCC No. 2072 of 1994 and it is in respect to the Deed of Assignment. I would do no better than reproduce the averments made by Quality Millers on its own Pleadings:-

"*7. In or about 1986 the 1st Defendant, unilaterally and without the consent of the Plaintiff, or its Directors, puported to alter the*

terms of the original agreement by a Deed of Assignment of the said Agreement to the 2nd Defendant. The purported Assignment, which the Plaintiff shall refer to during the hearing hereof for its full tenor and meaning, fundamentally altered terms of the lending and both the Plaintiff and its Directors rejected the same and never executed it and were never party thereto and are not bound by any terms thereat.

8. Between 1988 and 1990 the Defendants, on diverse dates, attempted to realise the security referred to in paragraph 4 hereof on the basis of the unilateral and illegal assignment referred to in paragraph 7 hereof and the Directors of the Plaintiff filed suits to block such moves, to wit HCCC No. 5064 of 1988 and 379 of 1990 which suits are still pending before this Court and which suits the Plaintiff shall also sniffer to during the hearing hereof".

25. The Principal Debtor was therefore aggrieved by the appointment of a Receiver over its project and had sought the following prayers in that suit:-

a. A declaration that the loan to the 1st Defendant is fully paid and the Plaintiff is entitled to an unconditional discharge of all securities held by D.F.C.K limited.

b. A declaration that the Assignment of the Loan agreement by D.F.C.K limited to SEFCO is unilateral, illegal and does not bind the Plaintiff at all.

c. Damages for trespass, illegal receivership and loss of business.

d. Costs of the suit.

26. There are two issues that are a replica in the two suits. These are that the entire debt has been paid by the principal Debtor and that it should be fully discharged. Secondly that the Deed of Assignment is invalid.

27. Without a shadow of doubt, the two issues raised in HCC NO.2072 of 1994 are in issue as those set up in the current suit save that in this suit it is the Guarantors who take up the mantle on behalf of the principal. In addition this suit is in respect of events that happened post the appointment of the Receiver.

28. The fate of HCC No. 2072 of 1994 was unknown until this Court prompted Parties herein to make some further submissions in respect to certain matters. It turns out, and there is consensus, that civil suit No. 2072 of 1994 was dismissed on 3rd June 2008 for want of prosecution at the instigation of the 2nd Defendant's Application of 8th February 2008. As a matter is res judicata when it has been heard and finally decided, this plea may not be available here because HCC No. 2072 of 1994 met a premature end through a Dismissal Order for Want of Prosecution. The matter was not heard and finally decided as the Court had not exercised its judicial mind on it. So that even if it were to be held that the Plaintiffs herein were litigating on behalf of the Company, this suit would not run afoul the much harkened policy of res judicata. That, however, is not to say that this Suit cannot be held to be an abuse of Court process.

29. But a more fundamental issue emerges. The Plaintiffs are Guarantors and it is clear that they will not succeed in their action in respect to the two matters unless it is affirmed that the Company has fully paid its Debt or as against the 2nd Defendant, that the Deed of Assignment is invalid. Yet these are prayers that would ordinarily belong to the Company and cannot be taken up on its behalf by the Guarantors. (See the Decision in Robert Njoka Muthara and another vs. Barclays Bank of Kenya Limited and another [2017] eKLR. This was indeed the spirit of the final submissions of Counsel for the 1st Defendant. It had agitated that the Plaintiffs are strangers to the contract between it and the Principal Debtor and they had no capacity to take up the matters raised on behalf of the principal Debtor.

30. The Plaintiffs felt ambushed by this argument and submitted that issue of locus ought to have been set up at the earliest instance to allow the Parties to address it. The Plaintiffs sought to find shelter in the Court of Appeal Decision in Olive Mwihaki Mugenda and another vs. Okiya Omtata Okoiti and 4 others where the Court held:-

"*75. The issue of locus standi of the 2nd appellant was not an issue raised before the trial court; it is also not an issue raised in any ground of appeal and there is no cross appeal on the locus of the 2nd appellant in this matter, it cannot therefore be validly introduced through submissions, no matter how eloquent. In order not to pre-empt the judgment of the trial court; and for a smooth, orderly and hierarchical determination of contested issues, and to avoid simultaneous and potentially conflicting determinations by the trial court and this Court, we hereby decline to pronounce ourselves on the issue of locus standi of the 1st respondent to apply and maintain the Petition before the trial court. Likewise, we do decline to determine the question of defacto officer doctrine and locus standi of the 2nd appellant to maintain the instant appeal and Petition before the trial court. Upon delivery of the judgment in the Petition as amended, any party shall, as always, be at liberty to institute an appeal against that judgment citing locus standi of either party as a ground of appeal if the same was in the pleading".*

By citing this Decision the Plaintiffs miss the point. The holding does not support their argument that the issue of Locus must be raised at the earliest instance in proceedings. What the Supreme Court was saying was that as the issue of Locus was not raised at all before the Trial Court then it could not be raised at Appeal! Simply that!

31. Besides, it does not seem to this Court that the question is so much the capacity of the Plaintiffs to bring this Suit but whether it inheres in them the legal authority to argue that the debt has been fully paid by the Company when the Company is not joined to these Proceedings. To be able to assert their Claim herein the Plaintiffs would have as a fundamental to satisfy this Court of that authority. He who asserts must prove and if a Party desires any Court to give Judgement as to any Legal Right which is dependent on the existence of set of facts which the Party asserts, then the Party must prove those facts (Section 107 of The Evidence Act). Locus is not the same thing as the primary obligation

of a Party to demonstrate a cause of action. The Court of Appeal has distinguished Locus standi and a Cause of Action as follows:-

"*Lack of locus standi and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; literally it means a place of standing - see Jowitt's Dictionary of English Law (2nd Edn). To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to".*

(Alfred Njau & others vs. City Council of Nairobi [1982-88] IKLR 229)

32. In Robert Njoka Muthara & another vs. Barclays Bank of Kenya Limited & another [2017] eKLR, two Guarantors to a facility granted by a Bank to a Company in which the Appellants were Directors brought a Suit against the Company resisting the enforcement of the Guarantee on among other grounds, that the overdraft had been paid in full. The Company was not joined to the Suit. The Court of Appeal held:-

> "28. *Whether the company had repaid the entire overdraft, called for the examination of the terms of the overdraft agreement between the 1st respondent and the company. The appellants were not privy to the said agreement and could not enforce or base a claim thereunder. See* ***Kenya National Capital Corporation Ltd vs. Albert Mario Cordeiro & another [2014] eKLR****. It is only the company that could maintain a claim that it had paid the entire amount under the facility. The appellants could not rightly make the said claim on behalf of the company which has a separate legal personality from its directors and shareholders. See* ***Salmon vs. Salmon (1897) A.C. 22.***

and concluded,

"*In the circumstances the proper Party to question or take issue with the interest applied by the 1st Respondent in the overdraft facility would have been the Company*".

33. The Court of Appeal had also made this observation,

> "31. *In our understanding, the appellants were not claiming that their liability under the guarantee had been discharged on account of either the 1st respondent committed repudiatory breach of its contract with the company; or that the 1st respondent acted in bad faith against them or connived with the company in respect of the overdraft facilities; and/or the 1st respondent and the company carried out dealings without their consent, which dealings were prejudicial to them. See* ***Lalji Karsan Rabadia & 2 others vs. Commercial Bank of Africa Limited [2015] eKLR***.
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> *32. Instead, the appellants stepped into the company's shoes and were litigating on its behalf to the extent of the issues relating to repayment of the overdraft by the company and the interest applied in the overdraft. The trial Judge correctly observed as much but she should have gone a step further to strike out the issues advanced on behalf of the company which was not a party, which we hereby do. We find that the trial Judge erred in entertaining and making a finding on the aforementioned issues*".

34. The matter before Court bears some similarity with Robert Njoka Muthara (*supra*). A substantial part, not whole, of the Plaintiffs claim is that their liability as Guarantors has not arisen because the debt was not properly assigned and that in any event has been paid in full. Matters which could only be ordinarily raised by the principal Debtor.

35. The Plaintiffs have attempted to persuade this Court that it could properly bring those claims because the Company could not protect itself following the appointment of the Receiver. That it was the Receiver who failed to prosecute Civil Suit NO. 2072 of 1994 and therefore the Plaintiffs as Guarantors of the Company had locus to do something on behalf of the Debtor.

36. This Court can think of circumstances when a Guarantor, even without joining the Principal Debtor, can on his/her own bring a Suit on the ground that it liability has not arisen because the principal debt has been paid in full.This is where for some legal impediment, the Principal Debtor cannot be joined to the Suit or where the Principal Debtor is reluctant or has refused to join the Suit. The non-action of the Principal Debtor should not be allowed to imperil the Guarantor.

37. But what are the circumstances here? The Plaintiffs are the Directors of Quality Millers. Prior to the filing of this suit, in fact about 4 years earlier, Quality Millers had filed suit (Civil Suit No. 2072 of 1994) against the Defendants resisting the realization of this debt on at least two grounds. That is, the debt had been fully paid and that the purported assignment of the debt from the 1st Defendant to the 2nd Defendant was unlawful. Those are matters that the Principal Debtor had tasked itself to question. The Plaintiffs now say that they could not press on with that claim because the appointment of the Receiver handicapped them as the Directors of the Company. This is what Counsel for the Plaintiffs submitted,

> "*My Lord, the appointment of the Receiver handicapped the powers of the Directors of the Company to protect its interest. With this very definite role described by the respectable Lords, we do not shy away to submit that the (sic) as the guarantors of the Company herein, the Plaintiffs, have locus to "do something" on behalf of the Debtor as against the Creditors, the Defendants. They have locus to file Suit and as part of its obligation affirm that the debtor made good his debt to the Creditors*".

38. Is this really the position? Is the helplessness narrative valid? It needs to be pointed out that even at the time the Company presented Civil Suit No. 2072 of 1994, the Receiver had been appointed. This could never be clearly than the Pleading in paragraph 9 of that Plaint:-

"*9. Inspite of the loan, and interest having been paid as pleaded above the 2nd Defendant, presumably on behalf of the 1st Defendant, has appointed a Receiver over the project, closed the factory and stationed guards at the premises thereby denying the Plaintiff access and has invited tenders for Sale of the Machinery therein, thus causing the Plaintiff loss and damage*".

39. I understand the law to be that Directors and Shareholders of a Company under Receivership can be permitted to maintain an action in the name of the Company to question the validity of the Instrument that provides for the appointment of the Receiver or the circumstances or Deed appointing the Receiver. The Supreme Court of Zambia in Avalon Motor Limited (in Receivership) v. Bernard Liegh Gadsden Motor City Limited (1998) S.J 26 (S.C) held,

"*However, whenever a current receiver is the wrongdoer (as where he acts in breach of this fiduciary duty or with gross negligence) or where the directors wish to litigate the validity of the security under which the appointment has taken place or in any other case where the vital interests of the Company are at risk from the Receiver himself or from elsewhere but the Receiver neglects or declines to act, the directors should be entitled to use the name of the Company to litigate.*

Our Supreme Court held a similar view in Samuel Kamau Macharia & another vs. Kenya Commercial Bank & 2 others [2012] eKLR. In applying that Decision, the Court of Appeal in Kenya Sugar Board vs. Mumias Sugar Company Ltd & 2 others [2016] eKLR held,

"37. In the circumstances of the matter that was before the trial court, did BSC really require consent or approval of the Receiver to commence the appeal" In SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR, the Supreme Court delivered itself as hereunder:

"The question as to whether the receiver's power to commence or defend proceedings in the name of a company under receivership is exclusive has received judicial attention in foreign jurisdictions. While it remains the position that a receiver and manager supplants the board of directors in the control, management and disposition of the assets over which the security rests, it is also acknowledged that the receiver and manager does not usurp all the functions of the company 's board of directors. The extent to which the powers of the directors are supplanted will vary with the scope of the receivership and management vested in the appointee. Directors have continuing powers and duties. Their statutory duties include: the preparation of annual accounts; the auditin g of those accounts; calling the statutory meetings of shareholders; maintaining the share register and lodging returns. (See HAWKESBURY DEVELOPMENT COMPANY LIMITED V LANDMARK FINANCE PTY LTD [1969] 2 NSWR 782) "

38. The Supreme Court went on to cite the case of NEWHART DEVELOPMENTS LIMITED V CO-OPERATIVE COMMERCIAL BANK LIMITED [1978] 2 ALLER 896 (CA) where it was held that:

"the power given to the receiver to bring proceedings was an enabling provision so that he could realize the company 's assets and carry on business for the benefit of the debenture holders. The provision did not divest the directors of the company of their power to pursue a right of action if it was in the company 's interest and did not in any way impinge prejudicially upon the position of the debenture holders by threatening or imperiling the assets which were the subject of the charge. "

39 In the circumstances of the case that gave rise to this appeal, we do not think that the Receiver could have filed or sanctioned the filing of an appeal which would have had the effect of challenging his own actions. The board of directors of BSC was not divested of its power to pursue an appeal that was in the company 's interest and did not prejudice the interests of KSB, the debenture holder. Mr. Magare, learned counsel for KSB, supported the appeal in principle, save for his reservations regarding its competence".

40. In filing Civil Suit No. 2072 of 1994 the Directors of the Company had brought a Suit in the name of the Company so as to pursue what it perceived as a Right of Action in the Company's interest. There is no evidence that the manner in which the Company had proceeded was questioned. What seems to have happened is that the Company was not agile in the Prosecution of the Suit and so it suffered a dismissal for Want of Prosecution.

41. The Plaintiffs, as Directors of the Company, were not handicapped! They were lethargic! This Court will not allow its process be abused by a Plaintiffs attempting to litigate the two issues that had been presented for litigation by the Company and which only properly belong under the purview of the Company. The issues relating to the repayment of the debt and the assignment of Debt are hereby struck out.

42. The outstanding issue would then be whether the 2nd Defendant should be injuncted from selling the charged property in exercise of its power of sale as Chargors for the reason put forward by the Plaintiffs that:-

a) That the property is charged to the 1st Defendant and not the 2nd Defendant.

b) The Statutory Notices required by law have not been served.

43. It is not controversial that a second charge over LR. NO. 209/8536/10 was granted by the Plaintiffs to the 1st Defendant through an instrument of charge dated 23rd September 1983 and registered on 10th October 1983 (1st Defendants Exhibit pages 35-50). In the instrument the parties to are set out as follows:-

"THIS INSTRUMENT OF SECOND CHARGE is made the 23rd day of September 1983 BETWEEN ALLAN SYMON NJUGI MAINA AND CHARITY WARIGIA MAINA both of Post Office Box Number 73802 Nairobi in the Republic of Kenya (hereinafter called "the Chargors" which expression shall where the context so admits include their personal representatives and

assigns) of the one part and DEVELOPMENT FINANCE COMPANY OF KENYA LIMITED a company incorporated in the said Republic and having its registered office at Finance House Loita Street P.O Box 30483, Nairobi aforesaid (hereinafter called "DFCK" which expression shall where the context so admits include its successors and assigns) of the other part AND IS SUPPLEMENTAL to a Loan Agreement (hereinafter referred to as "the loan Agreement") dated 23rd day of September 1983 and made between DFCK of the one part and QUALITY MILLERS (K) LIMITED (hereinafter referred to as "the Company") of the one part AND IS FURTHER SUPPLEMENTAL to a Guarantee dated the 23rd day of September 1983 (hereinafter called "the Guarantee" executed by the Chargos in favour". (*my emphasis*)

44. The 1st Defendant is referred as DFCK which expression would include its successors and assigns. The 2nd Defendant is an assign of the debt from the 1st Defendant, an assignment which has not been successfully challenged.

45. On the question of service of the Statutory Notice, the evidence of George Wachira Wahinga, the Finance Manager of both Defendants was that a Statutory Notice was served on the Plaintiffs vide a letter of 6th February 1986 (1st Defendant's Bundle page 84). The Notice is reproduced:-

"6 February 1987

Mr. Allan Symon Njugi Maina

and

Mrs. Charity Warigia Maina

P.O. Box 73802

NAIROBI

Dear Mr. & Mrs. Maina,

RE: STATUTORY POWERS OF SALE UNDER SECTION 69(1) OF TRANSFER OF PROPERTY ACT, 1882 – LAND REFERENCE NUMBER 209/8536/10, NAIROBI.

We hereby require you to pay to us the sum of Shs.599,346.20 being the Principal money and interest now owing under a second charge dated 23rd September 1985 and made between yourselves of the one part and ourselves of the other part. Interest continues to accrue on the principal sum of Shs. 501.927 at the rate of 11% per annum from 1st January, 1987(now past).

TAKE NOTICE that if the said sum of Khs.599,540.20 together with all accrued interest is not paid before the expiration of three months from the service hereof, we shall sell the property comprised in the said Second Charge without further Notice to you.

Your faithfully,

Signed

Advocate for and on behalf of

DEVELOPMENT FINANCE COMPANY OF KENYA LTD

46. That letter, though not copied to the Company, was responded to just 7 days later by Quality Millers under the hand of the 1st Plaintiff (see Annexture 1st Defendant's Bundle page 85 & 86). There can be no doubt therefore that the 1st Plaintiff received it and for the 2nd Plaintiff she never testified at all. She was therefore unable to prove that she did not receive the Notice. I have to find that the Notice was duly served.

47. The charged property was Land registered under the Repealed Registration of Title Act and so the Statutory Notice was issued under the provisions of Section 69(1) of the Indian Transfer of Property Act, 1882 which are:-

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

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage- money, or of part thereof, for three months after such service;".

The Notice issued complies with those statutory requirements and cannot be faulted.

48. On the overall the Plaintiffs have failed to make out a case with merit. This Suit is dismissed with costs to the Defendant.

Dated, delivered and signed in open Court at Nairobi this 15th day of November, 2018.

F. TUIYOTT

JUDGE

Present:-

Mr. Rutere for 1st and 2nd Plaintiff

Mwangi h/b Ngige for 2nd Defendant

Kiura for 1st Defendant

Nixon - Court Assistant