REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL ADMIRALTY & TAX DIVISION

CIVIL SUIT NO. 343 OF 2009

TERRY WANJIRU KARIUKI...PLAINTIFF

VERSUS

EQUITY BANK LIMITED..1ST DEFENDANT

EDWARD NYINGI MUKUNDI...2ND DEFENDANT

JUDGMENT

1. The Plaintiff commenced the suit herein against the Defendants vide a plaint dated 18th May 2009, seeking for Judgment against them jointly and severally for the orders as here below reproduced:-

*a) An urgent temporary injunction do issue restraining the **1st** and **2nd** Defendants, their agents, servants, employees and whosoever from interfering in any manner with the Plaintiff's possession and from forcefully evicting the Plaintiff on the site of the suit premises known as Title No. Nairobi Block 91/213, pending the hearing and determination of this suit;*

b) General damages and aggravated damages;

c) An order do issue by this Honourable Court registering a caveat against Title No. Nairobi/Block 91/213 pending the hearing and determination of this suit;

*d) An order do issue hereby cancelling the sale and transfer dated **1st** September 2008, of the property known as Nairobi Block 91/213, by the **1st** Defendant Equity Bank Limited to the **2nd** Defendant Edward Nyingi Mukundi;*

e) Special damages of Kshs 7,749,773.00

f) Interest;

g) Costs of the suit.

2. The background facts of the matter are that, on or about 25th January 2002, the Plaintiff entered into an agreement with the 1st Defendant whereby, she borrowed a sum of Kshs 6,000,000 and charged the subject property known as; Title Number, Nairobi/Block 91/213 (herein referred "the suit property"), in favour of the 1st Defendant.

3. On 17th January 2008, the 1st Defendant advised her that, as at 31st December 2007, the loan account was Kshs. 18,121,470.00 in debit. On diverse dates in May 2008, the amount was Kshs. 22,000,000.00, in debit. However, she strongly denied and disputed the same and instructed the firm of Kamuruci & Associates Auditors, to audit the various loan accounts. That it was discovered that, the 1st Defendant had over-charged her an amounted of Kshs. 7,749,773.00 due to written off interest, and non-existent loan. In the meantime, on or about 14th April 2008, she entered into a sale agreement with the 2nd Defendant, to sell to him by private treaty the suit property, for a sum of Kshs. 30,000,000. The 1st Defendant consented to the sale.

4. She avers that subsequently on or about 10th September 2008, the 1st and 2nd Defendants fraudulently, illegally, unlawfully and in breach

of the sale agreement, caused the suit property, to be transferred to the 2nd Defendant under a purported exercise of the statutory power of sale by the 1st Defendant. She argues that, the 1st Defendant did not act in good faith and did not have regard to her interest as a chargor, but instead colluded with the 2nd Defendant who was its customer to defraud her.

5. That even then, the sum of Kshs. 5,000,000, which was to be paid as a deposit was never deposited, as such she did not benefit in terms of interest that should have been credited into her loan account from 14th April 2008 until 22nd September 2008 at 18% per annum. The Plaintiff further argues that she is entitled to general damages, as she had other purchasers who were willing to purchase the charged property for a total of Kshs. 50,000,000.00, had the 1st Defendant not colluded with the 2nd Defendant to finance the 2nd Defendant and transfer the title illegally and unlawfully.

6. That there was no public auction conducted for the sale of suit property, no auctioneer involved, nor statutory notice issued, or the property advertisement in the daily newspaper. As such, the purported sale of the suit property was null and void ab initio.

7. However, the 1st Defendant filed a statement of defence and denied the Plaintiff's claims. It was averred that, indeed the Plaintiff borrowed a sum of Kshs. 6,000,000.00 vide a loan agreement made on or about 25th January 2002. The loan was secured vide a first legal charge over the suit property, which was executed and perfected. Subsequently, the Plaintiff was advised vide a statutory notice dated 21st November 2007, that as at that date, she was indebted to the 1st Defendant in the sum of Kshs 25,994,612.02 which sum continued to attract normal and default interest of 18% per annum and 6% per annum respectively.

8. That, despite the service of the statutory notice aforesaid, the Plaintiff neglected to pay the debt due, as a result whereof, the 1st Defendant instructed Antique Auctioneers, to proceed with the sale of the suit property by public auction scheduled for 21st May 2008 to recover the amount due of Kshs. 25,994,612.02. The Plaintiff had been served with the notification of sale and acknowledged on 10th March 2008. However after the 1st Defendant had commenced and taken steps leading to the exercise of its statutory power of sale, by public auction, the Plaintiff allegedly opted for the realization of the suit property by private treaty and on or about 14th April 2008, she entered into the sale agreement with the 2nd Defendant, with the consent of the 1st Defendant.

10. It is averred that despite the amount in arrears, the 1st Defendant was willing to accept the sum of Kshs. 22,000,000 as full and final settlement of the actual debt due which offer was made to the Plaintiff, vide letters of 12th and 17th May 2008, accepted vide a letter dated 27th June 2008, and the account adjusted accordingly. The 1st Defendant averred that, however, it became apparent that the removal of the caution upon the suit property was taking long and all the parties agreed and were in agreement that since the rights of the cautioner could not take priority over those of the 1st Defendant's charge, a transfer by chargee's Form be used to transfer the property to the 2nd Defendant. Thus, the transfer was sanctioned by the Plaintiff and undertaken with her full participation and after the sale she accessed and utilized the surplus sale amounts in excess of Kshs 6,751,362.

12. The 1st Defendant denied the alleged breach of the sale agreement dated 14th April 2008, and/or fraudulently, illegally and unlawfully causing the transfer of the suit property to the 2nd Defendant. It was averred that, the 1st Defendant exercised its statutory power of sale through the sale by private treaty not by public auction. The 1st Defendant denied all the particulars of breach of contract, misrepresentation, collusion, fraud, unlawful and illegal actions as set out in the Plaint. Finally, it was argued that, the suit lacks merit and is a gross abuse of the court process, in so far as it is premised on a wrong interpretation or view of law that, the 1st Defendant could only exercise its statutory power of sale by way of public auction only.

13. Similarly, the 2nd Defendant filed its statement of claim and argued that, the suit property was sold to him by the Plaintiff with the express consent of the 1st Defendant by private treaty and not at a public auction. Thereafter the Plaintiff gave him vacant possession. Therefore the subject agreement was fully performed and completed by all the parties, as such the Plaintiff has no cause of action whatsoever against him arising there from. That he paid the Plaintiff the whole purchase price, part of which was financed by the 1st Defendant and secured by the suit property.

14. The 2nd Defendant also denied the allegations of breach of contract and the particulars of fraud. He averred that, the transfer of the suit property by the Plaintiff was lawful and proper. That although the Plaintiff duly executed the Transfer of Lease dated 25th June 2008, the Transfer Form by the Chargee dated 1st September 2008, was lawfully used with the express and or implied consent and knowledge of all parties involved. Therefore the transfer was valid, proper and neither fraud nor illegality was involved.

15. At the hearing of the case, the Plaintiff reiterated the averments in the Plaint arguing that, she was not served with any statutory notice indicating that she was in arrears. Further that, she did not know that the property was to be sold until she got a notification of sale. That although she pleaded with the 1st Defendant to give her time to sell the property to the various persons who had shown interest therein, the 1st Defendant forced her to sell the property to the 2nd Defendant, and subsequently transferred the property to him without her knowledge. As a result thereof, she obtained an injunction order from court to stop further transactions in the suit property.

16. She testified that, she has never rescinded the sale agreement with 2nd Defendant. The agreement being valid, the 1st Defendant could not sell the property by public auction and that the transfer of the suit property was not based on the initial sale agreement. That she was dubbed into signing the sale agreement. She maintained that, the 1st Defendant used the wrong document to transfer the property to the 2nd Defendant and subsequently she and/or her tenant were forcefully evicted from the suit property. As a result she has been psychologically affected and prays that the sale transaction be revoked.

17. The 1st Defendant called a witness, one Purity Kinyanjui, the Head of Debt Recover who similarly reiterated the content of the statement of defence and stated that the Plaintiff was allowed to sell the suit property by private treaty due to her social status in the society and

reputation with the 1st Defendant. That after the sale, she signed transfer form, the Bank agreed that the transfer would be effected from the vendor to the purchaser. She conceded that the balance of the purchase price was not paid for within the 90 days and neither was there an agreement to extend the time. She further conceded that the bank was not a party to the sale agreement. However, she denied the allegation that the 1st Defendant exerted duress on the Plaintiff to sell the property.

18. The 2nd Defendant testified on his own behalf and similarly reiterated the content of the statement of defence filed and stated that he learnt of the sale of property from Brokers and later met the Plaintiff, who took him to view the property. He denied the suggestion that the 1st Defendant had introduced him to the Plaintiff. That initially he offered the Plaintiff Kshs 27,000,000 for the property and after paying the Plaintiff signed a transfer form transferring the property to him. That he immediately embarked on the development of the property but was stopped when he was served with an order of injunction. He denied the allegation that he pressurized the Plaintiff to sell the suit property. That he could not pay the balance of the purchase price as there was a caution on the property, although he knew of it when he was signing the sale agreement.

19. At the conclusion of the hearing of the case, the parties filed their respective submissions and subsequently highlighted the same. The Plaintiff's Learned Counsel Mr. Adera submitted that, although the 1st Defendant was not a party to the sale agreement, it unduly interfered with the same as the sale agreement did not empower the 1st Defendant to convey the property to the 2nd Defendant. That only the Plaintiff who was the seller had the power to transfer the property. Neither was there an agreement for the 1st Defendant to convey the property through the chargee's power of sale. That to effect a transfer by the exercise of chargee's power of sale, the chargee had to comply with the conditions precedent as provided for under Sections 74 and 77 of the Registered Land Act (RLA), the applicable law at all material time being;

a) *There must exist a charge between the Plaintiff and the 1st defendant securing the money the 1st Defendant lent to the Plaintiff;*

b) The charge must have a clause referring to Section 74 of the RLA;

c) The charge must bear a certificate issued by a designated person attesting to the effect that the Plaintiff acknowledges the signature in the charge to be hers and that she has understood the import of, inter alia, Section 74 of the RLA;

d) There must be a default on the part of the Plaintiff and such default must continue for one month whereupon the 1st Defendant must serve a statutory notice, in writing demanding payment of the money/rectifying the default;

e) The Plaintiff must fail to comply with the demands contained in the statutory notice within three months of the date of service of the statutory notice on her.

18. Therefore, it is only upon the compliance and fulfillment of these conditions that the 1st Defendant could rightlyfully, lawfully and legally exercise its power of sale over the suit property. Similarly, the sale must have been by public auction, subject to a reserve price and the 1st defendant must have acted in good faith. That in the instant case, the 1st Defendant has failed to demonstrate these conditions to the court, let alone demonstrate that they had complied with them and the 1st Defendant cannot do so now. Neither did the 1st Defendant produce any document to prove the same but relied on those produced by the Plaintiff and the 2nd Defendant.

20. It was further submitted that, the notice of notification of sale was fatally defective and so of no consequence because it could only come into effect upon service of the statutory notice on the plaintiff and not refer to the Plaintiff's charged property. Even then, the notification of sale was withdrawn by the 1st defendant on or about 12th May 2008, and a withdrawn document is ineffective and is as good as non-existent.

22. The Plaintiff submitted simply, that the 1st Defendant transferred a book debt from the Plaintiff to the 2nd Defendant, and the 1st Defendant will have to wait for perhaps some years to get the Kshs.25,000,000 it lent to the 2nd defendant, which is the money it demanded from the Plaintiff. The transfer was *termeda*s void *ab initio* and therefore all subsequent dealings on and/or in the suit property was *a fortiori* null and void and should be vacated.

23. Further that, although the documents produced in evidence state that the property was sold at Kshs 30,000,000, a document produced at page 164 of the bundle documents, that the property was sold at Kshs 35,000,000. Finally it was submitted that the Plaintiff has not used her valuable land since September 2008. Thus the court should grant her both general and exemplary damages.

24. The 1st Defendant on its part submitted that, the agreement for sale of the suit property dated 14th April 2008, cannot be impugned on account of the fact that, both parties entered into it freely and on their own volition for the stated value, with the consent of the 1st Defendant. That once faced with the issue of delayed removal of caution and the possibility of losing an opportunity to recover its monies from the Plaintiff, the 1st Defendant opted to use the "form R.L. 4", essentially to bypass a lengthy process whereby it would first discharge the property as per the agreement of sale and then have the transfer done after the removal of the caution which had irregularly been placed over its overriding interest as a chargee.

25. That the Form RL No.4 used by the 1st Defendant to transfer the charged property is duly recognized as a prescribed instrument of land conveyance under the third schedule of the Registered Land Act. The same instrument was duly registered on 10th September 2008. The Plaintiff therefore cannot purport to claim this was the wrong Form and pray for the entire transaction to be nullified. The issue that Form R.L No 4 was used instead of R.L. 2 is non-issue. What the Court has to consider and satisfy itself is the substance of the instrument used.

26. The 1st Defendant relied on the cases of; *Kenya Commercial Finance Company Ltd vs Kipng'eno Arap Ngeny & another (2002) eKLR* and *Milimani Motors (K) Ltd vs Kenya Commercial Bank Ltd (2014) eKLR* where the Court in light of Section 72 of the Interpretation and

General Provisions Act, Cap 2 Laws of Kenya (IGPA), considered the substance of the document rather than the form.

26. The 1st Defendant submitted that there was no intention to mislead the court in any way as the parties to the sale agreement agreed on consideration of Kshs. 30,000,000.00 and all statutory payments were made to the relevant authorities by the 2nd Defendant. The transferee paid the stamp duty for the transfer as evidenced by the bankers cheque. As such no issues of fraud or misrepresentation can be said to have arisen.

27. It was further submitted that although the Plaintiff claimed that she was under duress to enter into the said agreement, she however did not plead the same in the plaint, therefore she cannot purport to raise the issue during trial. She is bound by her pleadings. That had the issue been pleaded in the Plaint originally, the 1st Defendant would have had ample opportunity to avail documentation and tender evidence to the contrary.

29. It was argued that, due to the Plaintiff's own admission that there was consensus ad idem between her and the 2nd Defendant, the Court cannot re-write the agreement and/or find that the agreement was either void or voidable. The parties therein were satisfied as to the agreement and the bargain and had a solidified intention to transfer proprietorship of the property on the said terms.

30. The 1st Defendant reiterated that the Plaintiff suffered no loss in relation to the facts in issue in this suit, as the suit property was sold and transferred to the 2nd Defendant as intended for the consideration of Kshs. 30,000,000, as agreed. It ultimately paid the loan arrears with the 1st Defendant and as per the principles of contact law, the Plaintiff has not ascertained and proved what expectation of loss or reliance loss she suffered.

31. It was submitted that, the special damages of Kshs. 7,749,773, have not been proved. That it is trite law that special damages must be pleaded and proved. In this particular instance, the Plaintiff did not prove how the sum of Kshs. 7,749,773 was arrived at, as the report from Kamuruci & Associates Auditors pleaded in paragraph 8 of the Plaint was not availed or produced in evidence.

32. The 1st Defendant relied on the decision of the Court of Appeal in the case of; _Sande vs Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)_ quoted in _Delta Haulage Services Ltd vs Complast Industries Ltd & Another (2015) eKLR_ where it was stated that:-

> "*As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law.*"

33. The 1st Defendant submitted that, the fact it kept a 'close eye' on the transaction is understandable as the Banker-Customer relationship that existed during the pendency of the debt was one of a creditor and debtor, in that the Plaintiff's account was in debit, the 1st Defendant was now the creditor and the Plaintiff was the debtor. It was incumbent on the 1st Defendant to monitor the transaction as its main obligation was to recover its debt from the Plaintiff. It could not just step aside and watch its sufficient interest dissipate. Therefore there was nothing out of the ordinary with the 1st Defendant's conduct.

34. The 2nd Defendant on his part submitted that having already willingly executed the transfer form and full consideration tendered with her permission, the Plaintiff cannot be heard to complain that, a different transfer form was used to realize her contractual objective, to have the property transferred to him on payment of the purchase price. The Court must look at the substance rather than form. That two principles of equity are applicable, which are;-

(a) *Equity looks at intent rather than form. It looks at the substance of the transaction rather than its form*

(b) *Equity imputes an intention to fulfill obligation and is in a general sense associated with notions of fairness morality and justice and is an ethical jurisdiction*

35. As regards the prayer for cancellation of the transfer to the 2nd Defendant, the 2nd Defendant submitted that the Plaintiff cannot in equity approbate and reprobate, the sale the subject of this suit. She is legally estopped from challenging the validity of the transfer as she has admitted the sale agreement and utilized its proceeds. Reliance was placed on the extract from the Law of Estoppel and Res-Judicata by M. Mohir & A.C. Moitra, 4th edition where the learned authors stated that:

> "*A party cannot be allowed to blow hot blow cold; fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract, or a conveyance, or of any order, he is estopped from denying the validity of or the binding effect of such contract or conveyance or order upon himself.*

36. That the same principle was discussed in the case of; _Republic vs Institute of Certified Public Secretaries of Kenya (Exparte Mundia Njeru Geteru) (2010) eKLR_ where the Court stated that:

> "*It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in _Evans vs Bartlam (1973) 2 ALL ER 649_ at page 652, where Lord Russel of Killowen said; The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit. Again in _Banque De Moscou vs Kendersley (1950) ALL ER_ 549, Sir Evershed said of such conduct. This is an attitude of which I cannot approve, nor do I think in law the defendants are*

entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating or, in the more homely English phrase blowing hot and cold."

38. Further, in the case of; Abedare Freight (supra) J. Nyamu held that an applicant could not be allowed to approbate and reprobate at the same time and the Court of Appeal in Behan & Okero Advocates vs National Bank of Kenya (2007) was of the same view that a party cannot be allowed to blow hot and cold at the same time.

38. At the end of submissions and in considering the entire case, I note that the parties agreed and filed the following joint issues for consideration:-

a) Whether or not the 1st and 2nd Defendants breached the terms of the agreement for sale dated 14th April 2008.

b) What was the loan balance as at 21st may 2008?

c) Whether the 1st Defendant had served on the plaintiff the notice in writing to pay any monies or to perform and observe any terms or conditions of the agreement between them relating to Nairobi/Block 91/213

d) Whether the transfer of the said Nairobi/Block 91/213 by the 1st Defendant to the 2nd Defendant was fraudulent, illegal and unlawful.

e) Whether the court should order the cancellation of the sale and/or the transfer of the said Nairobi/Block 91/213 by the 1st Defendant to the 2nd Defendant effected on or soon after 10th September 2008 or thereabout.

f) Whether the Plaintiff is entitled to damages, special and aggravated damages against the 1st and 2nd Defendants jointly and/or severally and what is the quantum thereof.

g) Whether the Plaintiff is entitled to all other prayers sought.

h) Whether the 1st and 2nd Defendants are entitled to the prayers sought.

i) The cost hereof.

39. However, I have considered the evidenced in total and the submissions tendered and condense the issues that have arisen for consideration as follows:-

a) whether there was a valid sale agreement between the Plaintiff and the 2nd Defendant;

b) whether the sale of the suit property if valid was based on the private treaty agreement between the Plaintiff and the 2nd Defendant or on the 1st Defendant's exercise of statutory power of sale;

c) whether there was a valid transfer of the property and more so by the 1st Defendant to the 2nd Defendant;

d) whether the Plaintiff has proved a case on the balance of probabilities to warrant the grant of the prayers sough for herein; and

e) who should bear the costs of the suit (if any)

40. It suffices to note that prayer (a) and (c) which were seeking for an eviction order and registration of caveat on the suit property, have been spent having been sought for pending the hearing and determination of the suit.

41. Be that as it were, I find that the Plaintiff and 2nd Defendant entered into a sale agreement for the sale of the suit property to the 2nd Defendant for consideration of Kshs 30,000,000. The 1st Defendant gave consent for the same. Indeed the suit property has already passed into the possession of the 2nd Defendant.

41. I further note that, it was a term of the said agreement that the 2nd Defendant would pay a deposit of 10 percent being Kshs 3,000,000, to the 1st Defendant and the balance of Kshs 27,000,000, was payable after a period of 90 days from the date of execution of the agreement and/or upon registration of the transfer of the title whichever was earlier.

42. From the evidence and in particular a letter dated May 12th 2008, written by the 1st Defendant to the Plaintiff, it is evident that the the 2nd Defendant paid a deposit of Kshs 3,000,000. Therefore the balance of the purchase price should have been paid, on or before 14th July 2008. Further, the evidence adduced and in particular a letter dated 25th June 2008. , from the Firm of Kahuthu and Kahuthu Advocates, indicates that, as of the date of the letter, the balance of the purchase price had not been paid. In response to this letter, the 1st Defendant wrote to the said law firm and stated that, it was holding Kshs 5,000,000 in fixed deposit account in its name and that of the 2nd Defendant. The question arises: when then was the balance of the purchase price paid?

43. I note from the letter the Plaintiff wrote to the 1st Defendant on 29th July 2008, she complains that her lawyer was pushed by the 1st Defendant to finalize the necessary documents for the transfer of the property and caused the transfer to be executed, as the 1st Defendant had promised that the 2nd Defendant would pay full amount into her account within 90 days. That she signed the necessary documents in good faith, but the balance of the price had not been paid. In the same letter she enquired as to whether the 2nd Defendant was still desirous to continue with the sale or seek extension. From the content of this letter, it does appear that the 90 days had expired before the 2nd Defendant completed his obligation to payment of the balance of the purchase price as stated under the sale agreement.

43. Subsequently on 22nd September 2008, the 1st Defendant wrote to the Plaintiff advising her that, the process of transferring of the suit property to the 2nd Defendant as per the sale agreement executed on 14th April 2008 had been finalized. It is noteworthy that this letter came long after the 90 days. The evidence on record also revealed that, on 1st September 2008, a charge was executed and registered over the suit property in favour of the 1st Defendant by the 2nd Defendant, effectively the property changed ownership from the Plaintiff to the 2nd Defendant. Again this was long after the 90 days period.

44. Indeed, the Plaintiff seems to have been upset in the manner in which the 1st Defendant had handled the entire process of realization the suit property and transfer to the 2nd Defendant. In a strong worded letter dated 9th December 2008, she stated inter alia as follows:-

> "*We entered into a agreement with Edward Nyingi Mukundi who never fulfilled the condition of the sale agreement within three (3) months and neither did the bank forward the original documents to Kahuthu & Kahuthu Advocates despite communication to that effect. My account is short of over Kshs 3 Million and I am not going to part with vacant possession until these issues are resolved. Edward N. Mukundi can file a suit for eviction if he so wishes. I am equally going to challenge the fraudulent transfer which was irregular as you transferred the property purportedly exercising power of sale whilst ours was a sale agreement but not through public auction which condition have not been satisfied. I consider your action fraudulent and I must take action unless of course it is remedied.*"

45. It is also evident from the letters dated 29th July 2008 and 9th December 2008, that the balance of the purchase price had not been paid at the time of transfer of property to 2nd Defendant, vide a document known as "transfer by chargee" presented to Lands Registry on 10th September 2008. The belated transfer of title and presentation of documents to Lands Registry on 10th September 2008 seems to have been a "panic mode action" after the Plaintiff's a letter dated 29th July 2008, which raised the issue of delayed execution of the sale agreement by the 2nd Defendant and in particular payment of balance of purchase price, (which was payable on or before 14th July 2008), but had not been paid. It therefore follows from the content of all these letters that the balance of the purchase price was not made within 90 days. Accordingly to the Plaintiff, the sale agreement between her and the 2nd Defendant became invalid and tainted with fraud. The question is: What action did she take?

46. In conclusion, I find that based on the evidence adduced, it is clear that the Plaintiff and the 2nd Defendant entered into the subject sale agreement dated 14th April 2008. However, the question remains as to whether the agreement was valid. The Plaintiff alleges that she was forced by the 1st Defendant to sell the property to several persons whom the 1st Defendant introduced to her. That eventually the 2nd Defendant was introduced to her by the 1st Defendant and she agreed to sell the property to him. She alleges that the sale was executed under duress.

47. However in my considered opinion the sale agreement was not executed under duress. The Plaintiff was represented by a legal counsel being the law firm of Kahuthu and Kahuthu Advocates. She conceded that she signed the sale agreement. In her evidence she admitted that she signed the sale agreement and maintained that she has not rescinded it. She did not plead duress nor prove the same. In her own evidence and pleadings, she admits the will and intention to sell the property to the 2nd Defendant. Therefore, I dismiss the plea of duress as a factor that can vitiate the contract herein.

48. She also alleges that the amount of Kshs 30,000,000 paid as purchase price indicates that the property was undervalued. However as stated the Plaintiff signed the sale agreement voluntarily and had a Legal Counsel to guide her, therefore presumably, the purchase price was negotiated. Even then as per the letter dated 29th March 2007, the property was to be sold to one Rajesh Rughani at Kshs 25 Million. I therefore find no basis in the argument that the sale was an under value and neither is there a prayer for payment of a deficit (if any).

48. However, the question that arises is: If the balance of the purchase price was not paid in time, what is the legal effect of the payment of the balance purchase price after 90 days on the validity of the sale agreement?. I have looked at the agreement for sale signed by the Plaintiff and the 2nd Defendant and I find that under clause 6 and 21, it is stated that "time is of essence for all the purpose of this Agreement".

49. The Court of appeal in the case of; *National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited and Another [2002] 2 EA 503* held that a court of law cannot re-write a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.

50. Similarly in the law of Contract textbook by; Chitty on Contracts 27th Edition volume 1: General Principles, Sweet and Maxwell, 1994 page 1026, it states that:

> "*At law, time is always of the essence of the contract when any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will be for breach of it…stipulations as to time were generally of the essence of the contract, so that a party could treat the contract as repudiated , if the other party's performance was not completed on the date stipulated by the contract.*"

51. As already held, the purchase price was not paid in time, the Plaintiff was entitled to repudiate the contract due to non performance thereof and effluxion of time. The question is, did she? It does appear she did not as certain events took place in this matter after the expiry of the 90 days. The payment was made subsequently and as per the 1st Defendant's letter dated 22nd September 2008, the proceeds of sale were applied as follows;

(a) *Agreed purchase price---------------Kshs 30,000,000*

(b) Less loan due to Equity---------------Kshs 22,000,000

(c) Land rent-----------------------------Kshs 1,178,757.95

(d) Rates (NCC)--------------------------Kshs 69,680.00

Total ---------------------------------------Kshs 23,248,437.95

Amount credited into Plaintiff's

(e) Account No. 0010101202737 ---------- Kshs 6,751,562.05

52. It is stated that the Plaintiff utilized the sum of Kshs 6,751,562.05

that had been deposited to her account. The Plaintiff did not dispute the same. Is this conduct inconsistent with a party who has rescinded a contract?. Even then when she wrote the letter dated 29th July 2008, she stated "Please advise us as soon as possible so that we can finish this matter one way or the other as soon as possible"

53. I therefore find that although the contract was subject to repudiation as aforesaid, the Plaintiff did not repudiate it nor intimate to the 2nd Defendant the same, but by her conduct continued engagement of the 1st and 2nd Defendant on the same. The Plaintiff cannot plead that there was no valid contract due to breach by the 2nd Defendant's delayed payments of the balance of the purchase price. The doctrine of estoppels will apply.

54. Having held that the sale agreement was valid, the next issue is whether there was a valid transfer of title to the 2 nd Defendant. From the evidence adduced, it reveals the Plaintiff signed a Transfer Forms on 25th June 2008, (before the expiry of 90 days within which the 2nd Defendant should have paid the balance of the purchase price). She alleged that she signed in good faith hoping that the 2nd Defendant would pay the balance of the purchase price in time.

55. According to the sale agreement, it was agreed that upon the completion date, the vendor was to deposit with the purchaser's Advocate documents listed under clause 3, which included a duly executed but undated instrument of transfer in triplicate in favour of the purchaser and/or nominee. The purpose of this document was to transfer the legal ownership of the property from the vendor to the purchaser. The said document was signed and retained by the vendor's lawyer and it is evident it was not used at all to transfer title from the Plaintiff to the 2nd Defendant.

56. In a letter dated 25th June 2008, Mr. G. J. Kahuthu of Kahuthu & Kahuthu Advocates, requests the Head Debt Recovery Unit to confirm whether the purchaser had deposited the balance of the purchase price as both parties (the vendor and the purchaser) had executed the transfer documents. A copy of this transfer was produced by the Plaintiff. However, for one reason or another as stated above, the transfer document was not used. Instead the 1st Defendant went ahead and transferred the property to the 2nd Defendant vide a document described as "transfer by chargee in exercise of power of sale".

57. This document was executed on 1st September 2008 and has raised several contentious issues. First and foremost, it indicates that the 1st Defendant is the "transferor" and the 2nd Defendant is the "transferee". The document states further as follows:

> "*WE EQUITY BANK LIMITED, for the purposes hereof of Post office Box Number 75104, Nairobi 00200 having exercised the power of sale conferred upon us by the charge shown as entry Number C 1 in the encumbrances section of the register of the above mentioned title" (emphasis mine)*

58. From the content of the document, it presupposes that, the property was sold pursuant to the 1st Defendant's exercise of its statutory power of sale. The question is: Did the 1st Defendant exercise the power of sale over the suit property. According to the pleadings and the evidence adduced, the sale was by "Private Treaty." The 1st Defendants avers under paragraph 7 of the statement of defence states as follows:

> *" Paragraph 5 of the Plaint is true, save to add that it was after the 1st Defendant had commenced and taken steps leading to the exercise of its statutory power of sale by public auction, that the plaintiff opted for the realization of the charged property in exercise of the 1st Defendant's statutory power of sale by "Private treaty." This way by entering into the sale agreement with the 2nd Defendant on or about 14th April 2008 with the consent of the 1st Defendant." (emphasis mine)*

59. The 2nd Defendant on the other hand avers in his statement of defence under paragraph 5 as follows:

> *"The suit property was sold by the plaintiff to the 2ndDefendant and with the express consent of the 1st Defendant by private treaty and not at a public auction. The Plaintiff utilized the surplus proceeds after settlement of her loan with the 1st Defendant. The allegations of breach of contract and the particulars of fraud as alleged by the Plaintiff against the 2nd Defendant are hereby denied and the Plaintiff is put to strict proof thereof." (Emphasis mine).*

60. The Plaintiff in her pleadings and evidence has maintained the sale was by private treaty. It therefore follows that all parties are in agreement that the sale of the property was by private treaty. However ironically and in contradiction to what it has averred in paragraph 7 of its statement of defence reproduced above, the 1st Defendant avers as follows under paragraph 10 of the same defence.

> *"…the 1st Defendant exercised its statutory power of sale through the sale by private treaty in accordance with the law and with the full and voluntary participation of the plaintiff." (emphasis mine)*

61. The 1st Defendant further stated under paragraph 13 of the statement of defence that it exercised its power of sale by way of private treaty and not public auction. How is it possible that the 1st Defendant could exercise its power of sale through the private treaty? Under what circumstances could the 1st Defendant have been deemed to have exercised its statutory power of sale?

62. In further justification of its action, the 1st Defendant's witness statement at paragraph 10 states as follows;

> *"In the meantime, when it became apparent that the removal of the caution was taking long all the parties agreed and were in agreement that since the rights of the cautioner could not take priority over those of the 1st Defendant charge, it was agreed that a transfer by chargee Form be used to transfer the property to the 2nd Defendant."*

63. It suffices to note that this averments are repeated verbativelly by the 2nd Defendant n his statement under paragraph 8 as follows;

> *" When it became apparent that the issue of removing the caution by Leo Investments Limited was stalling the registration of transfer and this having been essentially a sale by private treaty at the instance of the Plaintiff and the 1st Defendant, a chargee whose rights superseded that of the cautioner and the Plaintiff having signed the transfer of lease dated 25th June 2008, it was agreed by the parties that transfer by chargee Form be used to transfer the property (see document no. 8) to circumvent the removal of caution."*

64. It does therefore appear that according to the 1st and the 2nd Defendant the Plaintiff conceded to the use of the impugned Transfer Form signed by the Defendants to transfer the property. However that does not seem to be the case as the Plaintiff states the contrary based on the content of the letter dated 9th December 2008, in which she states as follows:

> *"I am equally going to challenge the fraudulent transfer which was irregular as you transferred the property purportedly exercising power of sale whilst ours was a sale agreement but not through public auction which condition have not been satisfied. I consider your action fraudulent and I must take action unless of course it is remedied."*

65. Indeed, I find no evidence that the Plaintiff sanctioned the transfer of the property by the 1st Defendant to the 2nd Defendant by use of the Transfer Form signed by the Defendants. The sale was not done pursuant to the exercise of power of sale or by Public auctions.

66. Even then, the sale could not have been by auction as the 1st Defendant testified that, the plaintiff was served with a default demand letter dated 30th October 2003, a statutory notice dated 21st November 2007, and Antique Auctioneers instructed to sell the property. However these instructions were withdrawn through a letter dated 12th May 2008, signed by one Ambrose Ngari an employee of the 1st Defendant where he wrote that: "we confirm that the notice served by the Auctioneer earlier on has been withdrawn". In the same letter the Plaintiff, was requested to expedite the signing of the transfer forms to enable the 1st Defendant conclude the matter as soon as possible.

66. The question that arises is: why didn't the 1st Defendant use the transfer form signed by the Plaintiff? Why was the 1st Defendant in a hurry to transfer the property to the 2nd Defendant who had not even paid the balance of the purchase price? The argument that, the removal of the caution was taking too long and stalling the process has with utmost due respect no substance. This is informed by the fact that, under clause 22 of the sale agreement, it was stated that:

> *"Immediately on the signing of this agreement the Vendor and Equity Bank Ltd will write to the commissioner of lands requesting the removal of the caution by Leo Investments Limited claiming a purchaser's interest in the property and will ensure the caution is removed before completion date"*

67. It is therefore clear that, it was the responsibility of the Plaintiff and 1st Defendant to cause the removal of the caution as far back as 14th April 2008 when the agreement was signed. Even then, it is on record that the firm of Kahuthu & Kahuthu Advocates wrote to the 1st Defendant and informed them that the caution could not take priority over the legal charge in favour of the 1st Defendant. Further, there was no need for transfer by the chargee in that the 30 days the cautioner had been given had expired on 28th August 2008. In the given circumstance, I find that there was no justification for the 1st Defendant to purport to be a "Transferor" of a property sold by private treaty

and not under the exercise of its statutory power of sale.

68. I therefore find that, the purported transfer of the suit property by the 1st Defendant to the 2nd Defendant has no legal basis in law and therefore invalid for all intent and purpose. A valid transfer could only have been based on the transfer forms signed by the Plaintiff and the 2nd Defendant, which was left in the custody and remains in the custody of the lawyers of the parties to the sale agreement.

69. I shall now consider whether the Plaintiff has proved its case to warrant the grant of the other orders sought. Before I consider the specific prayers I wish to deal with one or two other issues raised by the Plaintiff. The first issue concerns the amount claimed by the 1st Defendant as being due on the loan account and the allegation that she was overcharged. There is no dispute that the plaintiff borrowed a sum of Kshs 6,000,000 vide an agreement made on or about 25th January 2002. According to the 1st Defendant the Plaintiff account reflected a debit entry of Kshs 25,994,612.02 as at 21st November 2007. That the Plaintiff allegedly acknowledged the same on 10th March 2008.

70. Be that as it were, the Plaintiff avers that she commissioned the firm of Kamuruci & Associate Auditors who found that she had been overcharged by a sum of Kshs 7, 749,773. However, the Auditors who prepared the report did not adduce evidence in support thereof. But further still the Plaintiff and the 1st Defendant agreed the account would be settled at Kshs 22,000,000 in final and full settlement of the debt. More so, there is no prayer in the main suit for taking of accounts. In that regard, I find the argument of overcharge not proved.

71. The other issue relates to payment of land rates: the Plaintiff avers in a letter dated 9th December 2008, that she had negotiated the rates with NCC and applied to pay directly to NCC where she would have been given a rebate. She then seeks to be given receipts as evidence of payment of the sum claimed. I have noted from the documents produced by the 2nd Defendant that, the rates were paid for and receipts issued. The issue therefore is not who paid but whether the amount paid was the correct amount. In my considered opinion this cannot be ground to invalidate a sale. It is an issue of accountability.

72. Finally the Plaintiff raised the issue of interest that accrued on the fixed deposit account opened in the names of the Defendants, in which the deposit paid by the 2nd Defendant was credited. She avers that the interest should have been accounted for and interest thereon credited on her account. I entirely agree. However, that issue can be dealt with through reconciliation of accounts.

73. I shall now deal with the specific prayers. As already stated prayer (a) and (c) stated herein are already spent. Prayer b) seeks for general damages and aggravated damages, while prayer (e) seek for special damages. I shall first deal with the prayer for general and aggravated damages. I find that at paragraph 13 of the Plaint, the Plaintiff states as follows:

> "*The plaintiff is entitled to general damages as the plaintiff had other purchasers who were willing to purchase the charged property for a total of Kshs 50,000,000 had the 1st Defendant not colluded with the 2nd Defendant to finance the 2nd Defendant and transfer the title illegally and unlawfully so as to defraud the Plaintiff.*"

74. And in her submissions she states as follows:

> "*As regards damages, the Court should (sic) consider that the plaintiff has not had the use of her valuable land since September 2008. I urge you to grant her both general and exemplary damages.*"

74. In response to this allegation, the Defendants averred that, they are total strangers to these allegations and therefore cannot respond to the same. However, the 1st Defendant submitted that, the Plaintiff did not suffer any loss as the property was sold and the loan arrears cleared. The 2nd Defendant submitted that, the Plaintiff did not plead or lead any evidence to assist the court assesses any damages.

75. I have considered the evidence adduced and I find that, there is no evidence that the Plaintiff had another buyer for the property offering who was offering a sum of Kshs 50,000,000. As already stated herein, she entered into the agreement of sale voluntarily and an earlier attempt to sell the property was not to any known buyer for Kshs. 50,000,000, but one of Kshs 25 million as herein stated.

76. She cannot have opted for a lesser offer if she had a better one. Similarly, I find that the issue of lack of use of her land, depends on whether the sale agreement was valid or invalid, and whether the transfer was valid or not. I have already ruled the sale was valid and enforceable, as it was never repudiated. I have ruled the transfer was unlawful. Therefore, the non-use of her land will be dealt with in the final orders herein.

77. As regards special damages it is trite law that they must be specifically pleaded and proved, I have already ruled, no evidence was adduced to prove the same as the report relied on was not produced and/or subjected to cross-examination. I therefore decline to grant the same.

76. As regards prayer (d) which seeks that, sale and transfer of the suit property be cancelled, I have found that, first and foremost, there is no legal basis for cancelling the sale which was entered into by the parties voluntarily. The only issue faulted as stated herein is the form used to transfer the property, whereby she alleges that the sale was influenced by illegality and fraud. The Defendants on their part argue that the court must look at the substance rather than the Form. Reliance was placed on the principles of Equity and the need to uphold substantive justice as provided for under article 159 (2) (d) of the Constitution of Kenya.

77. On its part, the 2nd Defendant submitted that:

> "*The Plaintiff herein had actually performed her contractual obligation and executed the transfer form and thus discharged her*

duty. <u>In the circumstances of this case, it is immaterial whether or not her preferred transfer form was used to convey the property provided that her demonstrable will to transfer the property was legally achieved.</u>

76. With due utmost respect to the learned counsels appearing for the Defendants, the relationship between the Plaintiff and the 1st Defendant was a banker-customer relation. The nature of the bank-customer relationship is contractual. It is most easily understood when one examines the nature of agreement between the parties. Accordingly, the essence of the banker-customer contract is the bank's right to use deposits for its own purposes and its understanding to repay an amount equal to that deposited, with or without interest, either at call or at a fixed time.

77. The House of Lords in *<u>Foley vs Hill (1848)2 HLC 38 (HL)</u>*, held that the banker customer contract was fundamentally a contract between a debtor/borrower and creditor. When the customer's account is in credit, the bank is the debtor and the customer a creditor and when bank lends money to the customer, the customer becomes a debtor and the bank a creditor.

78. Thus, a legal mortgagee (the bank) has the following remedies against a defaulting mortgagor:

a) The right to take possession of the land. This right stems from its status as lessee of the mortgagor and thus is theoretically not dependent on the debtor being in default although in practice a bank will only contemplate possession in such circumstances;

b) A statutory power to appoint a receiver in order to collect any income the land is producing. This will be an attractive remedy only if the bank wishes to continue with the mortgage and the land is income-producing;

c) A statutory power of sale. This power 'arises' and is 'exercisable' in the same circumstances as the power to appoint a Receiver noted above. Once it becomes clear that the mortgagor is likely to remain in default of his obligations, this is the remedy most often sought by banks (in conjunction with obtaining vacant possession beforehand). The proceeds of sale are held by the mortgagee in trust, the surplus after satisfying the mortgagees being due to the mortgagor;

d) The right to foreclose the mortgage. It is a right inherent in all mortgages available to the bank. This requires a court order, whereby the court extinguishes the right of the mortgagor to redeem the land and conveys the land to the mortgagee. It is rarely used and only if the value of the outstanding debt is equally to (or less than) the value of the interest in the land. Otherwise the Court will order a sale.

e) A right to sue the mortgagor on the personal covenant.

79. Where the mortgagee elects to exercise the statutory power of sale, the power, must be exercised in good faith for the purpose of obtaining repayment and not purely for some ulterior motive (see *Downsview Nominees Ltd vs First City Corp. Ltd (1993) BCLC 36 (CA).* In the exercise of the power it must be borne in mind that the mortgagor retains the right of redemption. This is informed by the fact that in a contract of security the bank only receives a right to acquire an interest in the property and there is no legal transfer of ownership of the property to the bank. It cannot therefore be argued that, the transfer of property by the Mortgagee under sale by public auction is similar to the transfer by the Mortgagor under a private treaty. If the Bank has to use the form used herein, it should have followed all the procedure laid down for sale by public auction following the exercise of statutory power or sale. It did not.

79. In that case, the purported transfer herein by the bank in the given circumstances cannot be termed as a mere technicality or be dismissed as stated by the 2nd Defendant that, the form used is immaterial and the Defendants cannot merely disregard both statutory and procedural requirements of law and invite the court to consider substance than form. Further, it must be appreciated that one of the principles of Equity states that, "Equity looks in that done which ought to be done". The sale was therefore either "pure public auction or pure private treaty" Transfer of ownership in land is a serious legal issue that cannot be dismissed as a mere formality. The transfer confers serious legal right in the property to the exclusion of all other persons.

80. Therefore, the principle of; "Nemo dat quod habet" applies. The 1st Defendant had not acquired legal ownership legally through exercise of powers to become a transferor of the property to the 2nd Defendant. I therefore declare that the purported transfer of the title from the 1st Defendant to the 2nd Defendant was and is null and void as aforesaid herein.

81. The question that arises is; where does this leave the parties? In my considered opinion, where they were before the transfer of the title to 2nd Defendant. In that regard, it is not in dispute that the Plaintiff borrowed money from the 1st Defendant and has not fully repaid the same, whether there is any dispute as to the amount owed or not. The money has to be fully repaid before the security is released. The cancellation of the transfer therefore means that the suit property reverts back to the 1st Defendant who remains a legal chargee, so long as the amount borrowed has not been paid. To redeem the property the Plaintiff must pay the outstanding amount plus any interest that has accrued thereon.

82. The Court cannot also lose sight of the fact that she has benefited from sale profits basically by her loan being repaid to an agreed sum of Kshs 22,000.00 and the retention of the balance. Thus if she were to be given the title back, then she has to pay not just the amount outstanding as at the time transfer plus interest at the agreed rate, to the date of full repayment, but also all payments made as outgoing in relation to the sale and refund the surplus of the proceeds of sale which she was given in the sum of Kshs. 6,751,437.95 plus any interest it would have earned.

83. As regards the 1st Defendant, I find that it basically triggered the situation in this matter by purporting to execute a transfer document it had no power to. In that regard, it is responsible for natural and probable consequences of its action. If the 2nd Defendant has suffered any loss, then, the 1st Defendant is squarely to blame. It therefore follows that, if the title reverts back to the 1st Defendant, the 2nd Defendant

will be left with a property without a title. The 2nd Defendant will therefore be entitled to recover any sums of money associated with the transfer, which, the 1st Defendant must recover from the Plaintiff and reimburse him. Further, any sums of money paid in relation to perfection of the security offered to the 1st Defendant by the 2nd Defendant over the subject property must be refunded to him by the 1st Defendant.

84. On the other hand, if the 2nd Defendant were to acquire a clean title to the property, then the plaintiff must transfer the property to him on the basis of the transfer form that the parties, that is, the Plaintiff and the 2nd Defendant signed. In my considered opinion, since the Court has ruled that the contract between the Plaintiff and the 2nd Defendant is valid, the 2nd Defendant's recourse is to hold the Plaintiff liable on the same. The contract subsists, as it was not rescinded or repudiated. It is therefore important in this matter, that as each party explores its position, they need to appreciate the repercussion on the their action.

85. In my considered opinion, it will serve the interest of justice, if the current status quo is maintained save for the 1st Defendant to withdraw the transfer documents signed and the same be replaced with the document that was signed by the Plaintiff and the 2nd Defendant. That the 1st Defendant, who in my considered opinion mainly responsible for the prevailing circumstances herein, together with the 2nd Defendant should "bite the bullet" and compensate the Plaintiff for any loss suffered. This includes the delay in payment of the balance of the purchase price within the agreed time of 90 days and the subsequent loss that may have been suffered as a result of the illegal transfer of her property to the 2nd Defendant. The parties may consider calculating the appreciation value of the property less the development thereof, and compensate the Plaintiff accordingly since all through the 2nd Defendant was on the property. A valuation of the property as of the date of this Judgment will be guideful and the Court will be willing to supervise the subsequent amicable settlement of the matter. This is informed by the fact that, if the Plaintiff were to repay the loan with interest and redeem the physical possession on the same, she cannot levy claims on the development thereon.

83. In conclusion I find and make the following orders;

a) Prayers (a) and (c) of the Plaint are spent;

b) Prayer (b) of the Plaint is not allowed;

c) Prayer (d) of the Plaint is not allowed in so far as the cancellation of the sale is concerned and the Plaintiff is at liberty to treat the agreement of sale as repudiated and /or rescinded and refund the deposit and all other sums she has benefited from with interest at court rates from the date of payment to the date of full refund, or conclude the sale agreement by lodging and registering the transfer form she signed in favour of the 2nd Defendant. However prayer (d) is allowed in so far as transfer dated 1st December 2008 over the suit property is concerned; The 1st Defendant is at liberty to pursue recovery of the arrears if any procedurally and lawfully;

d) Prayer (e) and (f) of the Plaint are not allowed. No interest is payable in view of the fact that no damages have been awarded;

e) In view of the surrounding circumstances of this case, and in particular the findings that; the Plaintiff still has liability to repay the loan in arrears in favour of the 1st Defendant and that the Defendants caused the illegal transfer and the 2nd Defendants did not pay the balance of the purchase price in time, I find that each party has a portion of blame to bear and I order that each party meets its own costs.

84. It is so ordered.

Dated, delivered and signed in open Court on this 20th day of November 2018.

G. L. NZIOKA

JUDGE

<u>In the presence of;</u>

Mr. Adere for the Plaintiff

Mr. Kariuki for the 1st Defendant

Mr. Mungla/Ms. Kingari for the 2nd Defendant

Dennis--------------------Court Assistant