REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.387 OF 2004

EZEKIEL OSUGO ANGWENYI……..……1ST PLAINTIFF

EZZYCON COMPUTER COLLEGE ……...……2ND PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LIMITED….DEFENDANT

JUDGMENT OF THE COURT

The Claim

1. The Plaintiffs commenced this suit via an undated Amended Plaint filed herein on **9th October, 2009.** The facts of the suit as alleged by the plaintiffs are that on or about the **16th of May, 1997,** the 2nd plaintiff by way of assignments took over two Hire Purchase Accounts from one Beshmon Ltd being number 42/012551/17 and 42/012552/17 for motor vehicles registration numbers KAG 406T and KAG 407T respectively. Sometime in November, 1997, motor vehicle registration number KAG 407T under agreement number 42/012552/17 was involved in road accident and the said motor vehicle was declared a write off. The said motor vehicle was comprehensively insured with United Insurance Company, an Insurance company of the defendant's choice, with the interest of the Defendant registered therein and Defendant was put on Notice. The plaintiffs' case is that in the circumstances, the contract that existed between the 2nd plaintiff and the defendant on agreement number 42/012552/17 ceased as it was frustrated and become impossible of performing. Sometime in February, 1999 the defendant repossessed motor vehicle registration number KAG 406T and sold the same for Kshs. 1.4 million which price was at a loss. It is the plaintiffs' case that the said repossession and selling were unlawful as the 2nd plaintiff had paid more than three quarters of the purchase price. As a result of the said repossession and damage, the plaintiff suffered loss and damages as the motor vehicle was on contract of transporting goods to and from Mombasa.

Particulars of Loss and Damages

i. Loss of an Income –four (4) trips per week @Kshs. 20,000/- (Kenya shillings twenty thousand) per trip.

ii. Loss of Business

2. Sometime in April, 1998, the 2nd plaintiff made a payment of Khs. 1.8 million and the defendant has not given the said plaintiff due credit for the said amount. The 2nd plaintiff claims the said sum of Kshs.

1.8 million from the defendant together with interest. The plaintiffs' claim is that by misrepresentation of facts, coercion, duress and fraud, the defendant made the 1st plaintiff to sign a charge on his property number L.R. 2250/65 for a sum of Kshs. 8.3 million, without any consideration passing between the defendant and the 1st plaintiff and therefore making the said charge illegal, invalid and fraudulent in that the defendant misrepresented information to the 1st plaintiff that he was giving security for Hire Purchase loans that the 2nd plaintiff was operating but instead went ahead to open a fresh loan account on the said charge. Further there was no consideration that passed from the defendant to the 1st plaintiff, and lastly, the defendant continued to Debit the said loan account opened while knowing quite well that no consideration had passed.

3. The defendant then unlawfully advertised the 1st plaintiff's property for sale for an alleged debt of Kshs. 1,254,503.65, which sum the plaintiffs do not owe the defendant. Further, the defendant has failed to provide proper accounts to hire purchase agreements number 42/012551/17 and 42/012552/17 which account the 2nd plaintiff demands. Accordingly, it is the plaintiffs' case that if the said sale is not stopped, the 1st plaintiff will suffer irreparable loss and damage.

The plaintiffs' therefore pray for orders;

i. That a permanent injunction do issue against the defendant either by themselves or by their servants and or agents restraining them from attaching, advertising, selling, alienating or in any other way dealing with the 1st plaintiff's property known as L.R.NO. 2250/65.

ii. A declaration that no value passed between the 1st plaintiff and the defendant and therefore the charge dated the 14th of July, 1998 is frustrated and null and void.

iii. Release and discharge of title document for LR.NO. 2250/65 held by the defendant herein.

iv. The defendant provides proper and true accounts on hire purchase agreements number 42/012551/17 and 42/012552/17.

v. An order for the refund of all the overpayments made to the defendant.

vi. Costs of this suit together with interest.

vii. General damages.

viii. Special damages

ix. Any other relief that this court may deem fit and just to grant.

The Defence

4. The plaintiffs' claim is controverted by the defendant vide an Amended Statement of Defence and Counter-claim dated **26th October, 2009** and filed herein on **27th October, 2009**. The defendant in its defence denies plaintiffs' suit, and states that the Hire Purchase Agreement herein clearly puts the responsibility of repayment of any shortfall on the existing accounts on the plaintiffs. The defendant further avers that even after the sale of the motor vehicle registration KAG 406T, it still realized a shortfall, and that in any event, it is the defendant's case that the repossession and sale of the said motor vehicle was done because of default in terms of the Hire Purchase Agreement. Furthermore, the defendant avers that any claim for loss of income and business is misconceived and time-barred. Any allegations of misrepresentation of facts, coercion, duress and fraud made are denied and the plaintiffs are put to strict proof thereof. The defendant denies the particulars of fraud alleged and states that they are mischievous and frivolous.

5. In its counter-claim the defendant claims and avers that the 2nd plaintiff fell into huge arrears under the Hire-Purchase Agreements mentioned in paragraph 4 of the Amended Plaint, and it was therefore truly indebted to the Defendant. The defendant further avers that the arrears and indebtedness were admitted by the plaintiffs. Consequent to the 2nd plaintiff falling into arrears, the 1st plaintiff who is a Director of the 2nd plaintiff, procured a loan facility for Kshs. 8.3 million, secured by a legal charge dated 14th July, 1998, over L.R 2250/65, Langata, Nairobi. The purpose of the loan facility was to enable the 1st plaintiff settle outstanding debts which the 2nd plaintiff had with the defendant bank. It was a term of the loan facility that:-

i. The Principal and interest would be repaid over a period of 36 months, commencing one month after draw down.

ii. The principal debt and interest secured by the legal charge shall immediately become payable without demand and the statutory power of sale of the lender shall forthwith become exercisable if the borrower shall breach the agreement for payment of the principal debt and interest.

6. The defendant bank avers that the plaintiffs subsequent to the procurement of the aforesaid loan facility, breached the agreements therein and fell into arrears, which fact was admitted by the plaintiffs. Accordingly, the defendant's statutory power of sale arose and continues to be in place, but efforts to exercise this right have been illegally and wrongfully frustrated as the 1st plaintiff has denied the defendant, its servants, employees and or agents from viewing, valuing, entering and or otherwise making such arrangements as are necessary to facilitate its statutory power of sale.

7. The defendant therefore prays by way of counter-claims against the plaintiffs for orders restraining the plaintiffs and their employees, servants and or agents from interfering with the defendant's exercise of its statutory power of sale, and costs of the counter-claim.

8. The counter–claim was denied by the Plaintiffs.

Case Management

9. Parties complied with pre-trial directions and filed their Bundle of Documents which are on record and a Statement of agreed issues as follows;

a. Was the Charge on the Plaintiff's property obtained by misrepresentation of facts, coercion, duress and fraud?

b. Was there consideration for the creation of the charge over the Plaintiff's property and is the charge illegal and/or null and void for want of consideration:

c. Whether the Contract between the 2nd plaintiff and the Defendant was frustrated as a result of an accident involving Motor Vehicle Registration number KAG 407T and became impossible of performing?

d. Whether the Defendant sold the Motor Vehicle Registration number KAG 407T at a loss?

e. Whether the Defendant's advertisement of the 1st Plaintiff's property for the sale is unlawful?

f. Whether the Defendant has provided proper accounts to the Plaintiff's?

g. Whether the defendant is entitled to exercise its statutory power of sale?

h. What are the orders as to costs?

The hearing

10. The hearing of the suit commenced on **16th November, 2010** and was heard before three (3) judges including myself, and was concluded on **19th May, 2016.**

The Plaintiffs' case and Submissions

11. The plaintiffs called three (3) witnesses, while the defendant called one (1) witness.

12. The plaintiffs first witness PW1, was **Ezekiel Angweny** who is also the 1st plaintiff herein. PW1 gave his evidence in chief and stated that he was a director of the 2nd Plaintiff. He testified that the 2nd Plaintiff took over or was assigned a hire purchase agreement that was previously granted to Beshmon limited. The value of the assignment to the 2nd Plaintiff was Kshs. 8,300,000.00. At the time the assignment was executed Beshmon Limited had an arrears which fact was never disclosed to the Plaintiff. The accounts to the assignment were for motor vehicle registration no. KAG 406T and motor vehicle registration number KAG 407T. Both accounts had arrears of Kshs. 384,920.00 each.

13. As the director of the 2nd Plaintiff on the assignment, they were also required to execute individual guarantees in favour of the Defendant which they duly executed. The assignments and guarantee are documents on page 3 and 4 of the Plaintiffs' bundle of documents dated 2/05/2014.

14. PW1 testified that at the time when the assignment was executed the previous hirer had issued two cheques for Kshs. 384,920/- each towards payment of the arrears on each account and the cheques were returned unpaid. The return of the unpaid cheques was not communicated to the Plaintiffs'. PW1 clarified that initially the 2nd Plaintiff was interested in a loan of Kshs 8.3 million and not through an assignment. The assignment was proposed by the Defendant claiming that it was quicker as opposed to taking a loan. PW1 testified that after the assignment in July 1997, the motor vehicle registration no. KAG 407T was repossessed for arrears amounting to Kshs. 400,000/-. The monthly payments for the hire purchase were Kshs.192, 000/- for each motor vehicle and at the time the vehicle was repossessed on 4/07/1997, the 2nd Plaintiff was up to date with the repayments. After the repossession, PW1 testified that the Defendant agreed to release the motor vehicle after it was agreed that the hire purchase facility shall be rescheduled. During the negotiation for the rescheduling, everything was done in the Defendant's office and a Mr. Gachathi was the one who was handling his account. He testified that the letters and other documents including resolutions were signed in the Defendant's offices.

15. After the motor vehicle was released, KAG 407T was involved in an accident on 22/11/1997 and the 2nd Plaintiff duly informed the Defendant. The motor vehicle was written off and the insured value at that time was Kshs.5, 000,000.00 and the Defendant's interest was duly noted on the insurance policy document.

16. The witness testified that after the accident, the 2nd Plaintiff was unable to service the installments as the income had diminished. PW1 stated that after the accident of one of the motor vehicles, he signed a letter of offer for a loan facility of Kshs. 8.3 million and at that time he was depressed due to what had happened to the 2nd Plaintiff's business. The Defendant, through Mr. Gachathi exercised undue influence and coerced him into signing the letter of offer.

17. PW1 testified that when he signed the letter of offer he expected to receive the money. At that time he did not have a bank account with the Defendant. PW1 averred that he was not asked for bank statements and he was not asked how he would service the loan facility. PW1 stated that when he wrote the letter dated 10/7/1998 which is document no. 8 on the Defendant's list of documents on page 24 he did so while in the Defendant's office. PW1 emphasized that most of the negotiations and signing of documents with regard to the facility were conducted in Mr. Gachathi's office who at that time was handling his account. PW1 stated that hire purchase agreement continued despite him having signed the charge.

The Charge

18. PW1 testified that a charge was registered in favour of the Defendant over his property L.R NO. 2250/65 and that the Defendant had issued him with 2 letters of offer one dated 2/05/1997 and the other dated 13/07/1998. The Letters of offer are documents no. 10 and 12 on page no. 11-12 and 13-14 respectively on the Plaintiff's bundle of documents. The witness testified that the earlier letter of offer dated 2/05/1997 was replaced with the one dated 13/07/1998 and that he read mischief in Mr. Gachathi's replacement of the letter of offer but at this time the Defendant had already taken advantage of his dire situation.

19. PW1 further stated that the title over the property L.R NO. 2250/65 had been held by the Defendant as a simple deposit security. The witness testified that the charge document did not indicate the purpose of the loan facility. Further, he never received any money and therefore did not personally benefit from the loan. The witness testified that the 2nd Plaintiff subsequently lost both its motor vehicles as one was a write off and the other one was repossessed and sold by the Defendant.

20. PW1 testified that he was under undue influence to sell his property and Mr. Gachathi was the one behind the idea that his property be sold and all the letters were written in his office. Subsequently, the Defendant issued a statutory notice for sale of his property demanding Kshs. 10,327,405.00. The statutory notice is document no. 8 on page 9 on the Plaintiff's bundle of documents dated 2/05/2014. The said notice had escalated the interest to 34% per annum and the statutory notice gave a shorter notice than the mandatory 3 (three) months. Subsequently the Defendant through Garam investments auctioneers sent a notice dated 17/05/2004 demanding Kshs. 1,254,503.65/- and the same was attracting interest at the rate of 24% per annum.

21. PW1 stated that the discrepancy in the Notice issued by Daly and Figgs Advocates and Garam Investments both acting on instructions of the Defendant prompted him to file the present suit with the 2nd Plaintiff against the Defendant. PW1 further denies owing the Defendant the moneys claimed and prays that his property be discharged. The plaintiffs further demand compensation for loss, and that Defendant does produce the accounts of the amounts owed by the Plaintiffs.

22. On cross examination, PW1 testified that on assignment it was agreed that the account would be clear of any arrears and the amount that was outstanding on each motor vehicle was Kshs. 4, 150,000/- totaling to Kshs. 8, 300,000.00. He stated that after the accident of the motor vehicle KAG 407T it was the Defendant who was to follow for compensation from United Insurance as evidenced by their letter dated 23/08/1999 which is document no. 18 on page 32 of the plaintiff's bundle of documents dated 2/05/2014.

23. PW1 also stated that all the paperwork and execution of documents was done in the office of the Defendant under the direction of Mr. Gachathi. PW1 referred to the replying affidavit sworn on 21/09/2014 by Reuben Nyangaga which is part of the court record. In the said affidavit there are handwritten comments on the letter which is annexture no. RN-7 dated 4/07/1997 where rescheduling of the facility was done. It is the plaintiffs' case that the Defendant through its agents did not accord and/or advise the 2nd Plaintiff to seek independent financial advice on whether it was necessary to charge the property in addition to the motor vehicles as security.

24. PW1 also stated that he never received account statements between 16/5/1997 and July 1997. He stated that after the write off of the motor vehicle and repossession of the other motor vehicle, it became very difficult to service the installments of the loan facility.

25. PW1 averred that he was duped in getting to charge his property. He stated that debits on the accounts and rescheduling were not backed by any consideration. He testified that up to now he does not know what amount was owed by 2nd Plaintiff on the hire purchase facility. He was not aware whether the insurance paid the claim since it was the responsibility of the Defendant to follow up.

26. PW1 stated that the Defendant demanded extra security for the hire purchase facility arrears and that is why he gave his property as a security. He denied that the 2nd Plaintiff was in arrears and he confirmed having received the statutory notice. He stated that interest charged had changed and the penalties were erroneously exaggerated and that is why the facility was rescheduled. The witness testified that no

accounts had been rendered to him by the Defendant on the facilities.

27. PW2 was the 2nd Plaintiffs' witness, being the motor vehicle assessor. He produced the assessment report and confirmed that the motor vehicle registration no. KAG 407T could be repaired but it would not make economic sense since the cost of repair would be over 60% of the value of the motor vehicle and therefore it was prudent that the same be written off. He confirmed that he took photographs of the motor vehicle and he had a firsthand view of the motor vehicle. The defendant did not challenge the assessor's evidence and report or provide a rebuttal thereof.

Defendant's Case

28. The Defendant called one witness, Mr. Maina hereinafter DW1 who gavehis evidence in chief on behalf of the Defendant.

29. He testified that the 2nd Plaintiff executed an assignment for 2 motor vehicles registration no. KAG 406T and KAG 407T and a director's guarantee was also executed by the directors of the 2nd Plaintiff. He averred that after some time, the 2nd plaintiff defaulted in payment of the hire purchase installments and as such the facility fell in arrears and attracted interest and penalties. The witness testified that the calculation on the penalties and arrears was in accordance to the terms and conditions of the assigned hire purchase agreement.

30. DW1 testified that as a result of the arrears, the Defendant repossessed motor vehicle no. KAG 406T and sold the same to recover the arrears. He stated that they did not receive any payment from the insurance for KAG 407T because it was the responsibility of the hirer to pursue the insurance claim.

31. DW1 testified that once the Defendant realized that the arrears were increasing they requested the 1st Plaintiff to release his title as a security for the facility. He stated that the title of the 1st Plaintiff was charged and the proceeds of the loan facility was applied against the arrears of the hire purchase on account of the 2nd Plaintiff.

32. The witness testified that the 1st Plaintiff never paid a single cent of the facility and his arrears *"were amounting to about Kshs. 20,000,000.00"*. He stated that the 1st Plaintiff made promises through letters but he never paid. As a result of the default, the Defendant instructed its Advocates to issue a statutory notice of sale of the charged property. He stated that the 1st Plaintiff had frustrated the sale of the property.

33. On cross examination by the Plaintiff's Advocates regarding the issue of the hire purchase by the 2nd Plaintiff, the witness admitted that the 1st and 2nd Plaintiffs are separate legal entities. He stated that the 1st Plaintiff is a director of the 2nd Plaintiff and he was a guarantor.

34. DW1 was unable to state how much interest was chargeable on the facility. He was also unable to explain why the Defendant didn't inform the 2nd Plaintiff that the cheques issued by the previous hirer for Kshs. 384,920/- had been returned unpaid. He admitted that as a result of the bounced cheques, the 2nd Plaintiff was in arrears. He admitted that by 17/06/1997 and 17/07/1997, the 2nd Plaintiff was not in arrears.

35. DW1 testified that when the 2nd Plaintiff's securities failed and the account was in arrears, the Defendant requested the 1st Plaintiff to release to the Defendant his Title over L.R NO. 2250/65 as security. Subsequently, the 1st Plaintiff charged his property to the Defendant for a loan facility of Kshs. 8.3 million which was used to offset the debts owed by the 2nd Plaintiff. The loan facility was used to clear the accounts of motor vehicle registration no. KAG 407T to a tune of Kshs. 6,100,000.00 however, the account for motor vehicle registration no. KAG 406T did not clear as the arrears and the balance was Kshs. 3,328,418.00. The Defendant therefore repossessed and sold motor vehicle registration no. KAG 406 T for Kshs. 1, 400,000.00 and thereafter the account had an outstanding balance of Kshs.1,

132,982.00.

36. DW1 was unable to show who bought motor vehicle registration no. KAG 406T, the valuation of the said motor vehicle and the reserve price.

37. DW1 testified that the 1st Plaintiff had admitted he owed the Defendant and has never paid a single installment over the loan facility advanced as a result of the charge.

Submissions

38. From the pleadings and testimonies of witnesses, the plaintiff submitted that the Hire Purchase Agreement between the 2nd Plaintiff and the Defendant was mismanaged and there was an element of misinformation, fraud, illegal debits, interests and penalties to the detriment of the 2nd Plaintiff's account. The Defendant was thus negligent in the manner in which it operated the 2nd Plaintiffs' account.

39. It was submitted that by 17th June, 1997 there was no arrears in the plaintiffs' account. The facility was assigned to the 2nd Plaintiff on 16th May, 1997 and as shown from the statement there are no arrears. However, cheques issued by the former hirer were returned unpaid 5 days later on 21st May, 1997 and this resulted in the 2nd Plaintiff's account being debited and therefore falling into arrears coupled with penalties and interests.

40. The 2nd Plaintiff's account fell into larger arrears as a result of motor vehicle registration no. KAG 407T being involved in accident in November 1997. The Defendant at the same time had repossessed motor vehicle registration no. KAG 406T as a result of the arrears.

42. Since the 2nd Plaintiff was facing difficulties in repaying the loan coupled with the fact that the bounced cheques were never brought to the attention of the 2nd Plaintiff, under the influence of the Defendant's Representative Mr. Gachathi, its request that the facility be rescheduled by the Defendant for 24 months from August 1997 was approved.

42. The rescheduling was done after motor vehicle registration no. KAG 406T was repossessed and released. Subsequently, upon release of motor vehicle registration no. KAG 406T, motor vehicle registration no. KAG 407T was involved in an accident and the burden of repaying the hire charges continued. It is noteworthy that since the facility was taken over in May 1997, motor vehicle registration no. KAG 406T was repossessed in July 1997 and subsequently motor vehicle registration no. KAG 407T was involved in an accident in November 1997. In a space of less of less than 6 months the 2nd Plaintiff was faced with a demanding task to meet its obligations. The 2nd Plaintiff's case is that the Defendant frustrated the Plaintiff and it could not be able to properly manage the facility due to illegal debits on the accounts including but not limited to the bounced cheques and applying interest which was higher than that was agreed in agreement being 19% per annum as opposed to 21% that PW1 stated in his evidence. Due to the accident on motor vehicle registration KAG 407T, the Defendant was to pursue compensation from insurer. There was no way the 2nd Plaintiff on its own could have been paid the insurance claim in the absence of the Defendant as both parties were joint registered owners as per **Clause 2.10 (iii)** of the Hire Purchase agreement (*refer to page 4 of the Defendants bundle of documents*) which states that:

> ***"… for which purposes the hirer hereby irrevocably appoints the owner to be his sole agent for receipt of any insurance money and for any negotiation or compromise with the insurance company"***

43. It was submitted that the Defendant had a substantial interest in motor vehicle KAG 407T which required it to follow the Insurance Company to either have it repaired or if written off, recover the insured sum or salvage.

44. The Defendant also sold off motor vehicle registration no. KAG 406T for Kshs.1, 400,000.00. The arrears as demanded in the letter are Kshs. 1,132,982.40.00 and Kshs. 912, 446.00 being past interest bringing the total arrears to Kshs. 2,095,428.00. The total outstanding before sale was therefore Kshs. 3,445,428.00. The Plaintiff submitted that the hire purchase agreement was purportedly terminated on 8th March, 1999. The Plaintiff submitted that the sale of motor vehicle registration no. KAG 407T for Kshs. 1, 400,000.00 is contested as there is no evidence of valuation of the motor vehicle yet the insured value was Kshs. 5,000,000 and however the same was sold for Kshs.1,400,000.00.

45. In light of the above, the plaintiffs submitted that this court has a duty to appropriately blame the Defendant for failing to take the interest of the Plaintiffs into account. The Plaintiff cited **Civil Appeal No. 99 of 2008** ***Diamond Trust Bank Kenya Limited Versus Evans Nyauncho Osinde*** **[2016]** ***eKLR*** where the judges of appeal as they were then noted that;

> ***"We are satisfied the above findings by the learned judge are well founded, the appellant was either negligent or was simply an active participant in a fraud by their own conduct in this matter. The respondent was for all intent and purposes a customer of the appellant, if the bank expected him to repay the loan according to the hire purchase agreement, the bank owed him a duty of care to at least ensure he was supplied with a motor vehicle worth Kshs 3.5 million which was the amount advanced. If the respondent was not supplied with a vehicle worth the said sum, or anywhere close to that value, it would have been unconscionable to expect him to faithfully repay the said loan with interest and costs… The appellant as the lender had an absolute upper hand over the respondent as the borrower, being the one that drew the terms of the chattels mortgage and the hire purchase agreement, had the power of control and a duty of care created under common law. Although the respondent signed the security document that was not a carte blanche for the appellant to act unreasonably… The appellant could not offer any explanation how a vehicle it had financed 7 years earlier could pass for the value of 3.5 Million 7 years later and more importantly none of their witnesses could vouch for the valuation report done by a water drilling company."***

46. The Plaintiff submitted that at paragraph 16 of the Plaint, it required accounts from the Defendant. Throughout the testimony of DW1 the Defendant did not provide any such accounts. It was submitted that the Plaintiff having challenged the amounts claimed by the Defendant, it was necessary that the Defendant provides accounts for the sum demanded.

47. The Plaintiff submitted that the Defendant does not know how much money and for which account did the Plaintiff owe it. It was submitted that the importance of accounts was emphasized in **Civil Appeal No. 282 of 2004** ***Margaret Njeri Muiruri Versus Bank Of Baroda (Kenya) Limited [2014] eKLR*** where the learned Judges in the Court of Appeal as they were while determining the issue of accounts stated that;

> ***"… Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank*** and ***for what periods? What is the amount that was repaid by the borrower or the guarantors and when? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance."***

48. The Plaintiff submitted that the Defendant was unable to show the court how much money was justly owed during the trial. Further the 1st Plaintiff contends that the charge created against his property was illegal and therefore void, and that the Defendant cannot claim any money from it under the Hire Purchase Agreement if it failed to sue for the same. The same is barred by the Limitation of Actions Act.

49. On the charge, the Plaintiffs submitted that the 2nd Plaintiff was the customer of the Defendant.

However, the 1st Plaintiff was a guarantor. The 1st Plaintiff did not apply for a loan. The Defendant forced the 1st Plaintiff to take a loan to pay the debts of the 2nd Plaintiff. The Defendant has not shown or produced any letter of application for the loan purportedly advanced to the 1st Plaintiff on 12th July 1998. A letter of offer was drawn by the Defendant addressed to the 1st Plaintiff offering a facility of Kshs. 8,300,000.00 *(refer to the letter dated 12/07/1998 which is document no. 10 on page 11 of Plaintiff's bundle of documents).* The purpose of the facility was to settle the 2nd Plaintiff's debts with the Defendant. The amount of outstanding debt is not disclosed in the letter and this is curious. It was submitted as noteworthy, that at this time, the 1st Plaintiff was not a customer of the Defendant and did not have a bank account with them. In the Hire Purchase facility, the 2nd Plaintiff had submitted documents and bank statements to the Defendant to be accorded the assignment**.** In the case of the 1st Plaintiff, no such document or bank statement were demanded or supplied. The Plaintiffs submitted that from the foregoing the following questions abound regarding the Defendant's conduct. How was the Defendant able to assess the 1st Plaintiff's ability to service the loan; why was the amount of debts not disclosed in the letter of offer to the 1st Plaintiff; would the 2nd Plaintiff's business have survived if say the arrears were more than the sum advanced; why was the 2nd Plaintiff not made the borrower since the loan facility was to be utilized in its business and lastly, how was the 1st Plaintiff going to service the loan?

50. It was submitted for the Plaintiffs that the Defendant being a bank was more interested in recovery of its moneys by purporting to obtain further security by way of charge of the 1st Plaintiff's property **L.R NO. 2250/65.** It was submitted that it was totally unnecessary and morally wrong for the Defendant as a bank to charge the 1st Plaintiff's property to advance him a loan to pay another bad loan which was not being repaid.

51.The Plaintiffs referred to the Hire Purchase Agreement, and regarding termination clause thereof, noted as follows:

> ***TERMINATION BY OWNER***
>
> ***7.1 the owner may on the happening of any of the events specified in Clause 7.2 below by Notice in writing terminate the hiring and there upon this Agreement and the hiring thereby constituted shall determine and the hirer shall no longer be in possession of the Goods with the consent of the Owner and, subject to the provisions of clause 8.2 below to the Owner's right to retake possession of the goods and any pre-existing liabilities of the hirer hereunder neither party shall have either rights against the other.*** **7.2 The following are the events referred to in clause 7.1 above:-**
>
> > **(i)** ***any Rental or other sum payable hereunder by the hirer to the owner remaining unpaid after the expiry of 14 days of becoming due;***
> >
> > ***(ii) A breach by the hirer of any provision of this agreement***
>
> **LIABILITY OF HIRER ON TERMINATION**
>
> ***8.2 if the hiring is determined under clauses 6 or 7 above the hirer shall become liable to pay to the owner (In addition to all other sums[if any]) in respect of which the hirer shall be indebted to the owner):-***
>
> > ***(i) The arrears of rental accrued up to the date of termination,***
> >
> > ***(ii) The cost of all repairs required to be done to the goods to put them in a condition consistent with the performance of the hirers obligation hereunder, and***
> >
> > ***(iii) Damages (if any) for prior breach thereof***

52. Going by the above clauses of the Hire Purchase Agreement the Defendant had reserved itself some rights with regard to the two lorries. It was submitted for the Plaintiffs that the Defendant ought to have avail itself the remedies under the hire purchase agreement at the earliest opportunity to enable it secure its hire purchase debt(s). There was no need for the Defendant to wait for a long time and have the arrears shoot through the roof before repossessing the 2nd motor vehicle upon noticing the 2nd Plaintiffs failure to pay. Similarly the Defendant was free to sue the 1st (as guarantor) and the 2nd Plaintiff (as Hirer) for damages. It was totally unnecessary for the defendant to saddle the 1st Plaintiff with a charge when it had the remedies aforesaid availed to it. There was no conceivable method the 1st Plaintiff was going to employ to repay the loan on his property if he had been unable to repay the hire purchase loan. The Plaintiffs submitted that the principle upon which a bank advances any borrowed money is the ability of that borrower to repay. The ability to repay is then supported by the security for repayment in the event of default. It was submitted that if a bank was to advance any borrower money simply because that borrower has a reasonable security then the bank will have 'ceased' being a banker properly so called and could not be any different for a "shylock" or those known as "loan sharks". Shylocks or Loan Sharks advance money knowing that the borrowers are unlikely to repay and end up keeping or selling the borrower's property at the point the borrower defaults. It was submitted that the conduct of the Defendant cannot be construed to be any different from this.

53. The Plaintiffs submitted that the Defendant did not act in good faith and with the intention of assisting the 1st Plaintiff. Had it done so, it would have advanced him enough money to clear the two (2) hire purchase debts so that the ownership of the motor vehicles is transferred free of any encumbrances. At this time of advancing the loan facility, one truck KAG 406T had long been involved in an accident and had been written off. It was submitted that the Defendant went to great lengths to secure a security for the recovery of arrears, if any. The Plaintiffs referred the court to Paragraph 6 of the replying affidavit sworn on 21/09/2004 by Reuben Nyangaga and filed on 21/09/2004 which shows the intended borrower was the 2nd Plaintiff and not the 1st Plaintiff. The court was also referred to the letter of offer dated 2/05/1997 which is document no. 12 on page 13-14 where the 1st Plaintiff was giving his property as a security but not as a borrower. The Plaintiffs referred the court to paragraph 14 of the Replying Affidavit sworn on 21/09/2004 by **Reuben Nyangaga** and filed on 21/09/2004, where the deponent stated

> "***that the title was a simple deposit and after the bank noted that the Plaintiff's financial situation was deteriorating the bank charged the 1st Plaintiff's property to serve its interests and improve loan recovery chances***".

54. The Plaintiffs submitted that no evidence has been shown during the trial in support of the allegation by the Defendant that there was an instrument executed between the 1st plaintiff and the Bank for the alleged simple deposit. Further it was submitted that there was no consideration when PW1 charged his property to the Defendant and this can be seen from the contents of the aforesaid Affidavit sworn on by Reuben Nyangaga. The Plaintiffs submitted that the charging of the 1st Plaintiff's property was not supported by any considerations and/or canons of prudential lending.

55. It is thus the 1st Plaintiff's submission that since there was no proper consideration for that charge and since the Defendants and its agents played trickery on him, the charge on **L.R NO. 2250/65** be declared illegal null and void and of no effect on account of deceit and the titles be surrendered to him properly discharged.

56. It was submitted that the two (2) loans exposed the Plaintiffs to two (2) sets of interest. The Defendant failed in making a suitable arrangement to manage the loan accounts. From the Account statements in the Defendant's Supplementary list of documents, as at 13/10/1998, the amount owing is Kshs. 13,347,230/- the property was charged for Kshs. 8,300,000.00 on 14/07/1998. It is curious that in three months, the amount owed was excessive. This, it was submitted, is an aspect of illegal interest and penalties that can be termed as fraud. The interest agreed at the time of charging was 20.23% and as at the time of issuing the statutory power of sale, the interest quoted is 34% and in the auctioneer's notice of sale is 24%. The Plaintiffs submitted that this begs the question, what interest was agreed and applied up to the time this suit was filed? The answer submitted is that it can only be known if the Defendant prepared an account

of the same.

57. On the issue of the Defendant Bank following the prudential guidelines of lending and taking into account the business interest and benefits of a facility the plaintiffs relied on the case of ***National Bank of Kenya versus Isaac A. Ogettah (1999) eKLR*** where the court stated the basic principles and tenets of lending.

58. It is submitted that the Defendant was concealing information that the 1st Plaintiff would not benefit under the facility, and that the facility if granted would not clear all the debts of the 2nd Plaintiff.

59. The Plaintiffs submitted that the Defendant did not conduct any assessment of the 1st Plaintiff's ability to service the loan when they requested him to apply for the facility, hence offending the principles established in the National Bank of Kenya case above. In that case, the court observed that a banker lending money to a borrower had the duty to enquire into eight issues, being:

- Purpose of the requested advance
- Amount of the loan
- Source of funds the would be borrower has already provided
- Period of loan
- Source of repayment
- Profitability of the venture
- Security for the loan

60. Applying the above principles, the Plaintiffs submitted that in the case at hand, after the sum of Kshs. 8,300,000.00 was applied, the business of the 2nd Plaintiff was still in arrears; the 2nd Plaintiff's business expectation of business growth was nonexistent as the facility had failed; and the source of funds for repayment of the loan facility was also nonexistent. Further, the Plaintiffs submitted that taking into consideration the financial circumstances of the Plaintiff after the repossession and write off of the motor vehicles, the Defendant took undue advantage and influence over the Plaintiffs. The scribblings and the agreements that were entered are clear that the Plaintiffs were unduly influenced in agreeing to the proposal of rescheduling and charging of the property. The Defendant repossessed motor vehicle registration no. KAG 406T on 4/07/1997 before its anniversary and the 2nd Plaintiff was not in arrears.

The Plaintiffs' relied on legal writings in ***Halsbury's Fourth edition volume 3(ii) paragraph 301,*** and Halsbury's Fourth Edition Volume 20 paragraph 133.

61. It is submitted that there was a relationship of trust and confidence in which the Defendant advised the 1st Plaintiff to his detriment. The 1st Plaintiff did not charge his property freely; PW1 stated that he had given his title to the Defendant to hold as a simple deposit, clearly indicating that his intention was not to charge the said property to the Defendant.

62. The Plaintiffs also submitted that the Defendant had put up different figures, and it is not clear the amount, if any, they owed to them. The Statutory Notice of M/s Daly & Figgis Advocates dated 2nd May, 2004 Kshs. 10, 327, 405/- with interest at 34% per annum. The notification of sale dated 17th February, 2004 from M/S Garam Investment demanding Kshs. 1, 254, 503.65 with interest at 24% per annum. At the trial on 19th May, 2016 DW1 testified and gave the court any amount due and owing. All he stated is that *"At the time of issuing the statutory notice the outstanding sum was in excess of Kshs. 20,000,000/="*

Again he added;

> *"As at the time of filing suit in 2004, Ezekiel Angwenyi owed in excess of Kshs. 20,000,000/=".*

63. It was submitted that in view of the different figures stated above, it was necessary for the Defendant to provide an account to the Plaintiff. This would have been done before or during the trial herein. Accounts were not rendered by the Defendant over the 2nd Plaintiff's hire purchase facility and the

payments made, penalties, and interest charged in the period was not disclosed. In fact when the Defendant's witness was asked how much money was owed he remarked 'over Kshs. 20,000,000.00'. This is a blanket statement, he did not clearly say how much was owed under the Hire Purchase by the 2nd Plaintiff and how much was owed under the charge by the 1st Plaintiff. There were about four different interest rates that were applied and the Defendant's witness on his own account stated 22%. But as noted the Hire Purchase Agreement shows 19% on the charge letter of offer shows 20.27%, the Statutory Notice of sale 24%, and the auctioneers' notice of sale 34%. It was submitted that it is impossible to know how much is owed by the Plaintiffs more so that even the Defendant did not counterclaim for the sums owed and the Defendant's witness did not explain why that was omitted.

64. It was submitted that the Defendant seeks to shroud the amounts due in secrecy so that in the event that the Plaintiffs suit is dismissed, it comes up with unimaginable claims allegedly due from the Plaintiffs and to seek to recover the same by selling the Plaintiff's charged property. The Plaintiffs submitted that with no accounts rendered, the sums owed by the Plaintiff's if any, are not known and will never be known.

65. The Plaintiffs submitted that in view of the fact that the charge was illegal, the Defendant cannot benefit from the sum of Kshs. 1,254, 503.00 currently deposited in Defendant's account which is the sum stated in the Notification of Sale by the auctioneers. The same ought to be refunded to the 1st Plaintiff with earned interest from the date of deposit. The Plaintiffs also prayed that the Court should award both general damages and special damages for loss suffered on account of negligence and professional misconduct by the Defendant with costs of the suit.

Defendant's Prayers in the Counter-Claim

66. It was submitted that the Defendant is not entitled to the prayers as set out in its Defence and Counter Claim which are;

> ***i. An order restraining the Plaintiffs and their employees, servants and or agents from interfering with the Defendant's exercise of its statutory power of sale and;***
>
> ***ii. Costs of the Counter Claim.***

67. The Plaintiffs submitted that the Defendant failed to include the monetary value claimed in counter claim which omission is fatal to their claim. This would have enabled the Plaintiffs ascertain their indebtedness, question the same and challenge any of the Defendant's demands.

The Defendant's Submissions

68. The defendant referred to the history of the matter and submitted that Beshmon Limited (Beshmon) was at the heart of the relationship between the Plaintiffs' and the Defendant. By an Assignment of Hirer's Rights and Liabilities dated 16th May 1997 made between Beshmon of the first part, the 2nd Plaintiff of the 2nd part and the Defendant of the 3rd part, the 2nd Plaintiff took over all the rights, benefits, obligations, duties and liabilities of Beshmon pertaining to Hire Purchase Agreements relating to purchase of motor vehicle registration numbers KAG 406T and KAG 407T dated 18th April 1996. Paragraph 2 of the said assignment placed the obligation of making loan repayments pertaining to motor vehicle registration numbers KAG 406 T and KAG 407T whether due, in arrears or as the same may become due in the future upon the 2nd Plaintiff. The said assignment was further supported by personal guarantees of the 2ndPlaintiff's Directors one of whom was the 1st Plaintiff. In their guarantees, the Directors of the 2nd Plaintiff sought to indemnify the Defendant in the event that the 2nd Plaintiff defaulted in servicing its liabilities with the Defendant. In the guarantee, the 1st Plaintiff confirmed that the statement of the 2nd Plaintiff would be sufficient proof of the 2nd Plaintiff's liabilities. At the time of the assignment, Hire Purchase Numbers 42/012551/17 and 42/012552/17 were each in the sum of Kshs. 4,614,005/-. This was the status notwithstanding the fact that the cheques issued by Beshmon in the sum of Kshs. 384,920/- for each of the foregoing accounts had not cleared. The Defendant submitted that in

effect what the assignment meant was that no new accounts were opened for the 2nd Plaintiff as they continued where Beshmon left.

69. On 21st May 1997, the two cheques of Kshs. 384,920/-for the assigned Hire Purchase accounts bounced. In the premises, the Defendant debited the two accounts in the sum Kshs. 384,920/- each on the strength of assignment which provided that the 2nd Plaintiff had inherited the past, current as well as future liabilities of Beshmon.

70. Upon being debited, the two accounts each now stood at the sum of Kshs. 5,002,775/-.

71. The Defendant submitted that by a letter dated 4th July 1997 received by the Defendant on 6th August 1997 the 1st Plaintiff approached the Defendant requesting a rescheduling of the loans facilities to 24 months with effect from August 1997. Prior to rescheduling the loan from the original 36 months (running from 18th April 1996) to 24 months from the date of the request, the Hire Purchase Agreements for the two accounts above provided for a monthly instalment of Kshs. 192, 260/- for each of them. Upon restructuring on 11thAugust 1997, the accounts were rescheduled, arrears and charges recapitalized.

72. In the case of 42/012551/17 (KAG 406T), the 2nd Plaintiff was given a rebateof sum of Kshs. 842,247/- and the sum of Kshs. 1,814,648/- being Hire Purchase charges recapitalized on 14th August 1997.

73. The said charges were computed at the rate of 20.95% for 26 months being 25 monthly instalments of Kshs. 223, 560/- and the last one of Kshs. 224,903/-.

74. On the other hand in 42/012552/17 (KAG 407T), the 2nd Plaintiff was given a rebate of sum of Kshs. 842,247/- and recapitalized in the sum of Kshs 2,342,176/- on 14th August 1997.

75. Similarly, the recapitalization was computed rate of 20.95% for 30 months being 29 monthly instalments of Kshs. 227, 140/- and the last one of Kshs. 228,551/-.

76. The Defendant acknowledged the rescheduling by signing against the workings as did the Defendant for the two accounts.

77. Having done so subsequent to his application for rescheduling, the defendant submitted that it cannot be said that the 1st Plaintiff was coerced, unduly influenced or dominated. The letter by the 2nd Plaintiff addressed to the Defendant negates any presence of undue influence in the meeting culminating in the rescheduling. It was submitted that the 2nd Plaintiff knowingly sought for restructuring. By signing as he did, he became bound to the new terms as stated therein.

78. The Defendant submitted that the rescheduling resulted in rebates being given to the 2nd Plaintiff prior to the recapitalization thus diluting what penalties had been levied on account of arrears as a result of the bounced cheques.

79. In any event, it was submitted, the 2nd Plaintiff did not clear the loan balances. Additionally, that the letter seeking rescheduling of the loans was dated 4th July 1997 rends credence to the notion that the Plaintiffs' knew the bad state of their accounts and anticipated tough times ahead.

80. The Defendant submitted that the totality of the rescheduling is that liability in 42/012551/17 (KAG 406T) increased by the sum of Kshs. 1,209,228 from Kshs. 4,603,175/- to Kshs. 5,812,403/-) which amount continued to accrue interest owing to default by the 2nd Plaintiff. Similarly, liability in 42/012552/17 (KAG 407T) increased in the sum of Kshs. 1,769,886/- from Kshs. 5,044,225/- to Kshs. 6,814,111/- which amount continued to accrue interest owing to default by the 2nd Plaintiff. The Defendant submitted that the increase in the liabilities in the two accounts can thus be attributed solely to

the Plaintiffs as they are the ones who sought for rescheduling and defaulted thereafter.

81. Despite requesting for rescheduling of the facility as above, the 2nd Plaintiff only made one payment towards the accounts in the form of two cheques in the sum of Kshs. 200,000/- on 8th October 1997 for each of the two accounts. Thereafter, save for a bounced cheque dated 21st January 1998 in the sum of Kshs. 100,000/- which was returned unpaid, the 2nd Plaintiff did not attempt to settle its liabilities with the Defendant prompting the Defendant to repossess Motor Vehicle Registration Number KAG 406T on 2nd February 1998 before releasing it again to the 2nd Plaintiff in March 1998.

82. By its letter dated 7th July 1998 the 2nd Plaintiff informed the Defendant that motor vehicle registration number KAG 407T was involved in an accident in November 1997 and was undergoing repairs. This was the first time the 2nd Plaintiff informed the Defendant of the accident a whole Nine (9) Months after the accident and only after motor vehicle registration number KAG 406T had been repossessed by the Defendant. In its letter dated 22nd February 1999 addressed to the Defendant, the 2ndPlaintiff stated that repairs to KAG 407T had surpassed the Kshs. 1.0 Million in repairs.

83. The Defendant submitted that in Action Plan 5 on page 48 of the Defendant's Bundle, the 2nd Plaintiff posited that it was following up a claim with United Insurance for the sum of Kshs. 1.2 Million with respect to KAG 407T. The Defendant submitted that the 1st Plaintiff had undertaken to follow up on the payment of insurance sum. However, the 1st Plaintiff never followed up, and the Defendant was never paid the said insurance sum. In any event the Defendant submitted that under condition 2.4 of the Hire Purchase Agreement (HPA) dated 18th April 1996 inherited by the 2nd Plaintiff from Beshmon, the 2ndPlaintiff was obligated to repair motor vehicle registration number KAG 407T in the event that the insurance company failed to settle the claim. This is the position attending pursuant to condition 2.10 of the said HPA.

84. The position attending notwithstanding, the Defendant as a sign of good faith and in a bid to resolve the problematic account wrote to United Insurance Company Limited (United) on 3rd June 1999 and on 23rd August 1999 pursuing compensation. This shows that the defendant went beyond the call of duty to assist, but the onus remained with the plaintiffs to pursue the claim. Despite its diligence on this front, nothing was paid by United Insurance to the Defendant. The Defendant submitted that the 2nd Plaintiff only reported the accident to the Defendant on 7th July 1998 whilst the accident occurred in November 1997. This was in breach of the terms of the HPA which enjoined the 2nd Plaintiff to inform the Defendant (condition 2.4) of such repairs and to procure the approval of the Defendant before commencing repairs.

85. Owing to the 2nd Plaintiff's conduct in this matter, the Defendant submitted that there was secrecy in handling the accident of KAG 407T and that the totality of the said secrecy is that it is not proven that accident took place, or that the car was written off. Neither is it shown what would have been the value of the claim under total loss, or whether it was advisable to repair it and that any repairs were done.

86. As for motor vehicle registration no. KAG 406T, the Defendant submitted that following an advertisement appearing in the Daily Nation on 8th April 1999 (page 52 of the Defendant's Bundle) and in the East African Standard on 13th April 1999 (page 53 of the Defendant's bundle), KAG 406T was advertised for sale and sold at a public auction for the sum of Kshs. 1.4 Million. The funds realized were applied towards reducing the liability in the account and the same was communicated by the Defendant to the 2nd Plaintiff vides the Defendant's letter to the 2nd Plaintiff dated 19th July 1999. The 2nd Plaintiff was free to participate in the auction which it did not. The sale was to the highest bidder as is with the auctions.

The charge on Land Reference Number 2250/65

87. The Defendant submitted that prior to the assignment, the 2nd Plaintiff had sought for a loan facility from the Defendant in the sum of Kshs. 8.3 Million which had been approved by the Defendant. However the Plaintiffs abandoned this financing option in favour of assignment from Beshmon. At the same time, the 1st Plaintiff had surrendered his Certificate of Title with the Defendant to hold the same as simple security in addition to the security provided under the takeover assignment. By a letter dated 10th July 1998, the 1st Plaintiff wrote to the defendant seeking reissuance of the abandoned loan facility in the sum of Kshs. 8.3 Million to be utilized towards offsetting the 2nd Plaintiff's loan accounts with the Defendant.

88. The application for the loan was approved vide an offer letter dated 13th July 1998 in which the 1st Plaintiff signified acceptance by signing on the same on 14th July 1998 together with a charge over the same.

89. Upon registration, the sum of Kshs. 8.3 million was credited into the 2nd Defendant's account 42/012552/17 (KAG 407T) in the sum of Kshs. 6.1 Million on 12th October 1998 and 42/012551/17 (KAG 406T) on the same date in the sum of Kshs. 2.041,635.70 upon deduction of legal costs, administrative costs et al. The Defendant submitted that despite the accounts being credited aforesaid, 42/012551/17 (KAG 406T) was still in arrears which stood at Kshs. 1,112,280/- as at 6th January 1999 which continued to accrue interest prompting the Defendant to repossess and to sell motor vehicle registration number KAG 406T.

90. The Defendant submitted that the Plaintiff, in an attempt to salvage his dwindling financial empire, promised to sell plots in Mtwapa and Ongata Rongai to repay the loan. These proposals would be made by the 1st Plaintiff whenever one of the trucks had been repossessed by the Defendant and it is not hard to see that it was always a ploy to secure the release of the truck. On 15th February 2000, the 2nd Plaintiff wrote to the Defendant seeking to dispose of the charged property at the sum of Kshs. 7.5 Million.

91. This offer was accepted by the Defendant since the Plaintiffs were now in arrears in excess of Kshs. 13.5 million as the Plaintiff's had not made any effort to service the accounts. The charging of the suit property is significant in several ways and the allegations of coercion and duress do not hold water; firstly it was the property whose title document the 1st Plaintiff had surrendered to the Defendant to hold as a simple security. Secondly, whereas the 2nd Plaintiff alleged to have had other properties that could easily be used as security, it did not at any one time present any of them to be held as security. Additionally, the 1st Plaintiff was a guarantor of the facilities of the 2nd Plaintiff and any default on the part of the 2nd Plaintiff would inevitably have impacted on the 1st Plaintiff who was the de facto face of the 2nd Plaintiff.

92. The Defendant submitted that it carried out due diligence prior to charging of the suit property. The Defendant submitted that the 1st Plaintiff in his letter of 10th July 1998 (see page 24 of the Defendant's bundle) alluded to an existing valuation that had been undertaken by the Defendant earlier on pointing to diligence on the Defendant's part. Regarding the ability of the 1st Plaintiff to repay the loan, the Defendant submitted that the 1st Plaintiff owned a matatu registration number KAG 519G which was in business thus bringing daily income. Further, the 1st Plaintiff's had dues as a director of the 2nd Plaintiff which had several business ventures thus removing any evidence of lack of due diligence. By the time of charging, the 1st Plaintiff had in effect become a customer of the Defendant and needed no further introduction.

93. The Defendant also submitted on the alleged undue influence, coercion, duress and fraud. It was submitted that the Plaintiffs' claim under coercion must fall at the cropper as the same offends the mandatory tenets of **Order 2, Rule 10** of the **Civil Procedure Rules** which require particulars of the same to be itemized. No such particulars have been given in the Plaint. The Defendant submitted that coercion is defined in Black's Law Dictionary as:

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

94. It was submitted that the 2nd Plaintiff applied for the loan, the directors of the 2nd Plaintiff gave a board resolution for the loan, the Plaintiffs placed the land title with the defendant willingly. There can never be any element of duress and coercion. The offer letter was issued by the bank and the 2nd Plaintiff accepted the terms thereof. This negates all allegations under the above heading.

Statutory Notice

95. The Defendant concedes that there was an error both in the content and service of the Statutory Notice but contends that the process can be initiated afresh as the 1st Plaintiff has still not cleared its loan with the Defendant.

96. The Defendant submitted that as a whole, the Plaintiffs have not demonstrated a case for permanent injunction or reason why the property in question should be discharged. The Plaintiffs have not denied owing the Defendant and their only protestation on the amount owed was flawed with inaccuracy. The Defendant submitted that the statements in the Defendants bundle clearly demonstrate that the accounts were not serviced which means the debt is still owing. The accounts have not been challenged and under the hire purchase agreement, the statements are proof of indebtedness.

97. In the premises the Defendant prays that the Plaintiffs' suit be dismissed with costs and the Defendant is allowed to commence the sale of the charge property.

Counter-claim

98. As the Plaintiffs obstructed the last attempted sale, the defendant seeks an order injuncting the Plaintiffs from interfering with its statutory power of sale.

The Determination

99. I have carefully considered the pleadings and submissions of the parties. I have also reconsidered the issues raised by the parties, and in my view the following issues are relevant in orders to determine the matter.

i. Was the Hire Purchase Agreement between the plaintiffs and the Defendant mismanaged and fraught with misinformation, fraud and other allegations?

ii. Was the subsequent charge registered between the parties defective on account of lack of consideration, due diligence, undue influence, coercion, duress and fraud, or any one of the above factors?

iii. Was interest regime applied lawful and transparent, and was there consistent statements of account to show the true status of the plaintiffs' debt.

iv. Was Statutory Notice validly served to lay a proper foundation for the auction of the suit property?

v. What amount of money, if any, is owed to the defendant by the plaintiffs and is this determinable from the Statutory Notice.

vi. Can the court allow the defendant's counter-claim?

vii. Order on costs

100. On the first issue, it is the evidence of the plaintiffs that the assignment of Hire Purchase Agreement from Beshmon to the 2nd Plaintiff was not transparent and was mismanaged from the word go when the defendant failed to disclose the existence of two cheques which were earlier issued by Beshmon, but

which were dishonoured upon presentation to the bank. This fact was never brought to the attention of the plaintiffs, who assumed that the assignment was without any existing arrears.

101. The two cheques which were dishonoured were each in the sum of Kshs. 384,920. The Defendant on its part submitted that the plaintiffs had inherited the past, current as well as future liabilities of Beshmon, and that on that strength the defendant debited the Plaintiffs' accounts with the value of the dishonoured cheques. According to the plaintiffs, this is where their financial woes began, causing them to ask for the reschedulement of the accounts. The rescheduling request was accepted by the defendant, but again the Plaintiff fell into arrears. These arrears continued and was exacerbated by the accident of motor vehicle registration no. KAG 407T and a repossession by the bank of motor vehicle registration no. KAG 406T.
It is the defendant's case that all these developments took place with the concurrence, or connivance of the Plaintiffs, and that it is them to blame for their financial predicament. The position of this court on the matter of the dishonoured cheques is however, that those dishonoured cheques were not brought to the notice of the plaintiffs. At the time of assignment of the Hire Purchase Agreements, the Plaintiffs were not aware of the bounced cheques and they could not be held responsible for action which was not their doing and notice of which they did not have. It is clear that the Plaintiffs' problems started right at the time of assignment of the Hire Purchase Agreements. When the matters went out of hand, the Defendant, through its agent Mr. Gathathi goaded, persuaded or influenced the 1st Plaintiff to take more loan of Kshs. 8.3 million and to give the bank a further security vide a charge registered over LR.NO. 2250/65. What is notable about this charge is the haste with which it was entered into, by a person who had no account with the Defendant. Again for this charge there were two letters of offer, one dated 2nd May, 1997 and the other dated 13th July, 1998. The later letter of offer replaced the former one. The security was initially held by the bank as a simple deposit but which was later turned into a charge. The charge document did not indicate the purpose of the loan facility. Further, the 1st Plaintiff did not receive the said loan money. In submitting that there was a case for undue influence, the Plaintiffs stated that instead of the defendant trying to settle the issues within the Hire Purchase Agreements, the defendant instead offered to give more loan to the Plaintiffs, under a charge, without bothering to find out whether or not the Plaintiffs would be in a position to repay the loan under the charge, while they had failed to repay the loan under the said Hire Purchase Agreements. The amount which was outstanding on each motor vehicle was Kshs. 4,150,000= totaling to Kshs. 8,300,000=, the amount which was advanced to the 1st Plaintiff under the charge. Given that the Plaintiffs had failed to repay the loan under the Hire Purchase Agreements, what due diligence did the Defendant do to ensure that the Plaintiffs would be able to repay the loan under the charge? It is noteworthy that even after the said loan of Kshs. 8,300,000= was granted and applied to the Plaintiffs account on 6th January, 1999, there was still outstanding arrears of Kshs. 1,112,280 which continued to accrue interest prompting the Defendant to repossess and to sell motor vehicle registration number KAG 406T. The same issue still arises – was there due diligence by the Defendant to ensure that the Plaintiffs, who had defaulted to repay the loan under the Hire Purchase Agreements, were going to do so under the charge? To answer this question the Defendant submitted that indeed there was due diligence, and that the Plaintiffs owed a matatu KAG 519G which was in business thus bringing income. However, that income level is not stated. The Defendant also stated that the 1st Plaintiff as a director of the 2nd Plaintiff had income. Again, that income level is not disclosed. The issue which this court must concern itself is this:

i. How was the Defendant able to assess the 1st Plaintiff's ability to service the loan?

ii. How would the 2nd Plaintiff's business have survived if say the arrears were more than the sum advanced?

iii. Did the bank follow the prudential guidelines of assessing a customer and viability of the business the facility was to support?

iv. Why was the 2nd Plaintiff not made the borrower since the loan facility was to be utilized in its business?

v. How was the 1st Plaintiff going to service the loan?

102. What emerges from the evidence herein is a picture of a lending bank determined to lend money to a borrower regardless of whether or not the borrower was able to repay the loan. Amazingly, the borrower having failed to repay the loan, the bank employs most vicious way to get back its money. In the view of this court the Defendant was more interested in recovery of its moneys by purporting to obtain further security by way of charge of the 1st Plaintiff's property **L.R NO. 2250/65.**

103. It was totally unnecessary for the Defendant as a bank to charge the 1st Plaintiff's property to advance him a loan to pay another bad loan which was not being repaid. I say this because the bank had its remedy with the Hire Purchase Agreement. The Hire Purchase Agreement provided as follows as far as determination is concerned:

TERMINATION BY OWNER

> ***7.1 the owner may on the happening of any of the events specified in Clause 7.2 below by Notice in writing terminate the hiring and there upon this Agreement and the hiring thereby constituted shall determine and the hirer shall no longer be in possession of the Goods with the consent of the Owner and, subject to the provisions of clause 8.2 below to the Owner's right to retake possession of the goods and any pre-existing liabilities of the hirer hereunder neither party shall have either rights against the other.*** **7.2 The following are the events referred to in clause 7.1 above:-**
>
> **(i)** ***any Rental or other sum payable hereunder by the hirer to the owner remaining unpaid after the expiry of 14 days of becoming due;***
>
> ***(ii) A breach by the hirer of any provision of this agreement***

LIABILITY OF HIRER ON TERMINATION

> ***8.2 if the hiring is determined under clauses 6 or 7 above the hirer shall become liable to pay to the owner (In addition to all other sums[if any]) in respect of which the hirer shall be indebted to the owner):-***
>
> ***(i) The arrears of rental accrued up to the date of termination,***
>
> ***(ii) The cost of all repairs required to be done to the goods to put them in a condition consistent with the performance of the hirers obligation hereunder, and***
>
> ***(iii) Damages (if any) for prior breach thereof.***

104. Going by the above clauses of the Hire Purchase Agreement this court finds that the Defendant had reserved itself some rights with regard to the two lorries. The Defendant ought to have avail itself the remedies under the hire purchase agreement at the earliest opportunity to enable it secure its hire purchase debt(s). There was no need for the Defendant to wait for a long time and have the arrears shoot through the roof before repossessing motor vehicle KAG 406T upon noticing the 2nd Plaintiff failure to pay. The Defendant was also at liberty to repair motor vehicle KAG 407T which had been involved in an accident and charge the 2nd Plaintiff. The Defendant alleges that the notice of the accident was given to it nine (9) months after the accident. However, the question is what did the Defendant do upon having notice of the accident?

105. Similarly the Defendant was free to sue the 1st Plaintiff (as guarantor) and the 2nd Plaintiff (as Hirer) for damages. These were readily available remedies but the Defendant instead preferred to have the Plaintiff charge his property to secure the Defendant's rights.

106. In this scenario it was totally unnecessary for the Defendant to saddle the 1st Plaintiff with a charge where it had the remedies aforesaid available to it. As stated above there was no conceivable method the 1st Plaintiff was going to employ to repay the loan on his property if he had been unable to repay the hire purchase loan.

107. The principle upon which a bank advances money is the ability of borrower to repay. The ability to repay is then supported by the security for repayment in the event of default. It was submitted by the Plaintiffs, and approved by this court, that if a bank was to advance any borrower money simply because that borrower has a reasonable security, the bank will have 'ceased' being a banker properly so called and could not be any different from a "shylock" or those known as "loan sharks". Shylocks or Loan Sharks advance money knowing that the borrowers are unlikely to repay the money. Their overriding objective is to sell the borrower's security at a profit to themselves. They are never interested in the wealth of borrowers. The conduct of the Defendant cannot be construed to be any different from that of a shylock lender.

108. It is clear from the documents on record and the testimony by DW1 that the Defendant went to great lengths to secure a security for the recovery of arrears if any. The Plaintiffs referred the court to Paragraph 6 of the replying affidavit sworn on 21/09/2004 by Reuben Nyangaga and filed on 21/09/2004 which clearly shows the intended borrower was the 2nd Plaintiff and not the 1st Plaintiff.

109. The plaintiffs referred the court to paragraph 14 of the Replying Affidavit sworn on 21/09/2004 by **Reuben Nyangaga** and filed on 21/09/2004, where the deponent stated

> *"**that the title was a simple deposit and after the bank noted that the Plaintiff's financial situation was deteriorating the bank charged the 1st Plaintiff's property to serve its interests and improve loan recovery chances**".*

110. While he bank has every right to charge a property which had been deposited by a borrower to secure the bank's interests, the charging must be validly done. The bank must carry out due diligence and establish whether or not the borrower is able to repay the loan.

111. It cannot be overemphasized that a bank is obligated to follow the prudential guidelines of lending and to take into account the business interest and benefits of a facility to a borrower. This was settled in the case of ***National Bank of Kenya versus Isaac A. Ogettah (1999) eKLR*** where the court observed on page 5-10 the basic principles and tenets of lending. These are:

> *1.. **Sizing up the would-be borrower**. The lending manager must (1) assess the character and basic integrity of the customer who wishes to borrow the money he asks for. This assessment must be based on:*
>
> *(a) The manager's knowledge of the customer (would-be borrower),*
>
> *(b) The track record and honour of obligations (if any) of the would-be borrower, and*
>
> *(c) The ability of the applicant to articulate on financial aspects of his business or line of interest on which he intends to employ the funds; (2) in addition, assess the ability and experience of the would-be borrower in his field of work, his will, enthusiasm and capacity to work hard to achieve his objective, and where they are pertinent, also his managerial skills and financial acumen; (3) develop a personal knowledge of the customer's business activities, and personally observe his efficiency, organizational ability, staff relations and the product of his exertions, and make a general assessment on these matters even though you, as a bank manager you may not be an expert on the particular enterprise of your encounter; (4) have a clear knowledge of the local reputation of the people generally as well as the type of business or project to be financed from the requested borrowing.*
>
> ***2. Purpose of the requested advance.** On being requested for a loan or overdraft facility for a*

business or other project, uppermost in the lending manager's mind must be the question whether the venture will succeed. If the proposition is speculative the risk is high, especially in speculative property transactions, speculative purchase of shares or precious metals…

3. Amount of the loan. *There are very crucial considerations regarding the amount of money sought and to be advanced. The manager must find out the adequacy of the requested funds, and to make sure that those funds if advanced, will indeed be adequate for all eventualities, and he will have to advance only a realistic amount. The concern of the manager should not be confined to whether the sum asked for is covered by the security; in addition, he must be sure that such amounts as he lends will, in fact be enough to complete the project to generate funds to repay the loan, or so that the borrower does not employ his own funds which he should have used to repay the loan, and divert it to topping up the advance which leaves a shortfall…*

4. Source of funds the would-be borrower has already provided*. If the intending borrower intends to have a partial funding, then the amount either to be provided or already provided by himself and its sourcing is an important factor in the elements to be considered. It is to his credit if the applicant is drawing on what he has been saving…*

5. Period of the loan. *The period of the advance sought is important in considering an application…*

6. Source of repayment. *There must be information to satisfy the lending manager that the would-be borrower will achieve his promises to repay, and that repayment is feasible.*

7. Profitability. *A bank is, of course, in business, and it will want to make a profit on its lending to enable the business grow and provide the bank owners with adequate return on their capital…*

8. Security for the loan. *It may be possible, although it is not a common occurrence in this country, to lend money of the public on the strength of the borrower's personal integrity or customer's balance sheet and the overall financial strength of the applicant, will influence his decision to lend or to decline an advance.*

112. Applying the said observations to this case it is the finding of this court that after the sum of Kshs. 8,300,000.00 was applied, the business of the 2nd Plaintiff was still in arrears. The 2nd Plaintiff's business expectation of growth was nonexistent as the facility had failed. The source of funds for repayment of the loan facility was also nonexistent. Further, DW1 did not know whether the 1st Plaintiff was financially assessed by the Defendant to ascertain whether he had the ability to repay the loan. DW1 was not aware which documents the 1st plaintiff supplied to the Defendant to enable him secure the facility. DW1 was unable to explain why the 1st Plaintiff was required to borrow and yet he was a guarantor for the 2nd Plaintiff. DW1 was further unable to explain why the 2nd Plaintiff was not allowed to borrow yet it had an account with the Defendant.

113. DW1 stated that instead of calling for the guarantee, the Defendant took the shortest route which was to realize the property of the 1st Plaintiff as recalling the guarantee would take longer He testified that the consideration for the charge was that the 1st Plaintiff was a director of the 2nd Plaintiff and therefore could benefit. On being cross examined on how much was owed by the Plaintiff's DW1 testified that over Kshs. 20, 000,000.00 was owed. However, he could not explain the disparities from the auctioneers? notice of sale and the statutory notice of sale. DW1 clarified and stated that the Defendant later realized that the auctioneers' notice of sale issued to the 1st Plaintiff was erroneous.

114. DW1 did not explain why the Defendant did not counterclaim for the 'over' Kshs. 20,000,000.00' he claimed is owed by the Plaintiffs.

115. The Defendant made elaborate submissions dismissing the Plaintiffs allegations of duress or undue influence. However, after considering all factors of the case this court finds that the Plaintiffs already lost two motor vehicles under the Hire Purchase Agreement. The Defendant bank then purported to charge

the 1st Plaintiff's security which the bank had held on a simple deposit, without bothering how the Plaintiff would repay the loan. The bank was only interested to secure itself.

116. PW1 testified that Mr. Gachathi called him to their office and all the letters by the Plaintiff were written and sealed in the Defendant's office. The Replying Affidavit of Reuben Nyangaga lays bare communication between the 2nd Plaintiff and the Defendant where the Defendant's agent scribbled on the letters by pen indicating what was discussed between themselves. *(refer to annexture RN4 being the letter dated 4/07/1998 and annexture RN7 where the Defendant agreed to reschedule the loan).*

117. Undue influence is not a commodity that can be measured with certainty in all circumstances. It is a factual experience which can be very passive most of the time. But it can also be inferred from the conduct of parties. ***Halsbury's Fourth Edition Volume 3(ii) paragraph 301,*** states thus on undue influence:

> ***….where it is observed that where the relation of banker and customer is not one which ordinarily gives rise to a presumption of undue influence; …The relationship of banker and customer may however become one in which the banker acquires a dominating influence, if he does and a manifestly disadvantageous transaction is proved, there is then room for the court to presume that it resulted from the exercise of undue influence…."***

118. This court is satisfied that the Defendant exerted undue influence over the 2nd Plaintiff and took advantage of his dire financial situation. In ***Halsbury's Fourth edition volume 20 paragraph 133,*** it was observed that:

> ***… in cases of presumed undue influence, the complainant has to show in the first instance that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction.***

119.This court finds that there was a relationship of trust and confidence in which the Defendant advised the 1st Plaintiff to his detriment. The 1st Plaintiff did not charge his property freely; PW1 testified that he had given his title to the Defendant to hold as a simple deposit, clearly indicating that his intention was not to charge the said property to the Defendant.

120. The issue of undue influence was also visited in the case of ***Royal Banks Of Scotland Vs. Etridge (No.2) 2 AC 773*** as quoted in the case of ***Lti Kisii Safari Inns Ltd And Two Others Versus Deutsche Investitions-Und Enwicklungsgellschaft (Deg) & Others (2011) eKLR*** where the court observed that the circumstances under which the Appellants executed the documents in favour of the Respondents for the facility manifested dominance by the Respondent and undue influence and it was stated as regards the proof required to demonstrate undue influence as follows:-

> ***"Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence vests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient; failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of those two facts is prima facie evidence that the defendant abused the influence be acquired in the parties relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is***

for him to produce evidence to counter the inference which otherwise should be drawn."

121. As has been observed earlier in this Judgment, the Plaintiffs' problem began when their account was debited by amounts of two cheques which were dishonoured. However, the bank did not bring to the Plaintiffs' notice this fact, yet the Plaintiffs were not the drawers of those cheques. Yet these two cheques were important as they formed the basis of the original bargain. That these cheques cold be dishonoured yet the Plaintiffs were not aware is yet a clear indication that the Defendant did not care a thing about the Plaintiffs hence a continuous process of undue influence. **Sections 48, 49** and **50** of the **Bills of Exchange Act, Cap 27** sets out the law on the issue of a valid and effective notice of dishonor of Cheque. **Section 48** of the said **Act** provides as follows:-

> *"**Subject to the provisions of this act, when a bill has been dishonoured by non-acceptance or non-payment, notice of dishonor must be given to the drawer and each endorser, any drawer or endorser to whom such notice is not given is discharged."***

122. Further, the 1st Plaintiff did not have an opportunity to seek independent financial advice in executing the charge documents. Given that there was originally the issue of the two Hire Purchase Agreements under which the Plaintiffs had lost two motor vehicles, it was important and necessary that before the Defendant purported to charge the Plaintiffs' property, the Plaintiff was allowed to seek independent legal opinion on the issue.

123. The other issue is that of regime of interest applied, whether the same was transparent and consistent to show the true status of the alleged debt. The Plaintiffs as customers to the bank were at all time entitled to statements of accounts. These accounts must be seen to be consistent, and the amount claimed at every stage must be shown and the interest applicable. In the instant case, there was no consistent regime of interest applied. The Defendant has not also, at any one time, demanded a known sum of money from the Plaintiff. Even in the Statutory Notices issued, there was no certain claim by the Defendant. Sample these demand notices from the Defendant:

> i. The Statutory Notice of M/s Daly & Figgis Advocates dated 2nd May, 2004 Kshs. 10, 327, 405/- with interest at 34% per annum.
>
> ii. The notification of sale dated 17th February, 2004 from M/S Garam Investment demanding Kshs. 1, 254, 503.65 with interest at 24% per annum.
>
> iii. At the trial on 19th May, 2016 DW1 testified and gave the court no specific amount as due and owing. All he stated is that *at the time of issuing the statutory notice the outstanding sum was in excess of Kshs. 20,000,000/=. He added that as at the time of filing suit in 2004, the 1st Plaintiff owed in excess of 20,000,000/=.*

124. In view of the different figures stated above, it was necessary for the Defendant to provide an account to the Plaintiff. This would at least have been done during the hearing. The Plaintiffs were entitled to know which entries had been made to their loan accounts, interests applied and applicable penalties. It is thus clear that with no accounts rendered, the sums owed by the Plaintiffs', if any, are not known and will never be known. Indeed, this is why the Defendant's witness carelessly testified that they were owed in excess of the Kshs. 20,000,000. It is therefore true that any amount alleged to be due to the Defendant by the Plaintiffs is a result of guesswork. A court of law cannot determine issues of account based on guesswork, and any bank which fails to keep proper records of account cannot make ascertainable claim against a customer. Banks must keep proper records of account. It is on the basis of such record that a claim for or against a bank can be determined. Since between a bank and a borrower the former is the one obligated to keep a more dependable record and to avail statements of account, a bank, like in this case, which cannot keep and avail accountable record will be disqualified from making any claims against a borrower, and would be hard put to discharge any such claims by a borrower.

125. As to whether a Statutory Notice was served, the Plaintiff denied that the same was served, or if one was served, then its contents were not true. The Defendant concedes to this allegation and states that

indeed there was an error both in the content and service of the Statutory Notice, but submitted that the process can be initiated afresh as the Plaintiff has still not cleared its loan to the Defendant. This is a lame and invalid excuse. The Defendant cannot be allowed to auction the Plaintiffs' property pursuant to a defective charge. Further, there is no known money claim the Defendant demands from the Plaintiffs and in fact the alleged Statutory Notices, do not disclose the sum, and how the same is arrived at, for which the Defendant may be allowed to sell the Plaintiffs' property. The court cannot give a blank cheque to the Defendant to do as it pleases with the plaintiffs' property. Failure to make a monetary counter-claim, and failure to provide account statements showing clearly what the Plaintiffs owe the Defendant, are a clear indication that the Defendant is not sure of its claims, if any, against the Plaintiffs. The Defendant cannot purport to exercise its statutory power of sale to recover unknown or uncertain debt. There is therefore no justification for the Defendant to exercise its statutory power of sale and/or to continue withholding the Plaintiffs' title.

126. It is the finding of this court that any claims the Defendant may have had against the Plaintiffs were pursuant to the Hire Purchase Agreements. Those claims were also substantially, if not fully, repaid when the Defendant repossessed and sold motor vehicle registration number KAG 407T, and negligently forfeited its rights to claim insurance compensation upon the accident suffered by motor vehicle registration no. KAG 406T.

127. The Plaintiffs also prayed for general and special damages allegedly suffered, and a refund of all the monies overpaid to the defendant under the Hire Purchase Agreements. However, the alleged general or special damages were not proved. Neither were the alleged over payments proved. In any event, the Hire Purchase contracts were taken over by the charge facility, which charge has been declared null and void by this court. Any remedies under the said Hire Purchase Agreement are time barred, and no party has in any event proved before this court that they are entitled to any remedy under the Hire Purchase Agreements.

128. For the foregoing reasons, the Defendant's counter claim is dismissed with costs to the Plaintiffs, and Judgment is entered for the Plaintiffs against the defendant in the following terms;

iv. A permanent injunction is hereby issued against the defendant either by themselves or by their servants and or agents restraining them from attaching, advertising, selling, alienating or in any other way dealing with the 1st plaintiff's property known as L.R.NO. 2250/65.

v. It is hereby declared that no value passed between the 1st plaintiff and the defendant and the charge dated the 14th of July, 1998 is null and void, and of no effect.

vi. The title document for LR.NO. 2250/65 held by the defendant herein is discharged and an order hereby issues directing the 1st Defendant to prepare, sign and deliver to the 1st plaintiff a Discharge of Charge over the property known as L.R. No. 2250/65.

vii. Kshs. 1,254,503= held by the defendant in fixed deposit account shall be within seven (7) days from today released to the 1st plaintiff with interest accrued thereon as agreed as from the date of the deposit. The amount due shall attract interest at court rates from the date of this Judgment.

viii. The costs of the suit and interest therein at court rates shall be for the plaintiffs.

That is the Judgment of the court.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

LADY JUSTICE G. NZIOKA

JUDGE