REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC. NO. 15 OF 2017

KENWOOD PROPERTY DEVELOPERS LIMITED.....PLAINTIFF

-VERSUS-

FAMILY BANK LIMITED.....DEFENDANT

AND

ONESMUS NGIGE MUNYAMBU.....1ST INTERESTED PARTY

ROSE ACHIENO OBIRIKA.....2ND INTERESTED PARTY

JUDGMENT

By a Plaint dated **25th January 2017,** the Plaintiff sought for judgment against the Defendant and prayed for:-

a) A declaration that the service of the Auctioneer's 45 Days Redemption Notice and Auctioneer's Notification of Sale upon the Plaintiff was a nullity in law as the Defendant had not issued the requisite statutory notices under the Land Act No. 6 of 2012.

b) A declaration that the usurious and exorbitant rates of interest and penalty interest charged by the Defendant on the Plaintiff's accounts is unlawful and unconscionable and in the result should be set aside.

c) An Order directing the Defendant to render true and full accounts to the Plaintiff.

d) An Order directing that the suit property be valued by an independent valuer to ascertain its current market value.

e) Permanent Injunction restraining the Defendant, its agents and/or servants or any other person acting under its authority from selling, dealing, interfering, alienating or disposing of the properties known as L.R No. 8361/30 (Original No. 8361/3&4) I.R No. 142084, KENWOOD VILLAS by public auction or otherwise howsoever interfering and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the Plaintiff's interest in the said property in any way other than in accordance with the law.

f) Consequent to the above, all such consequential orders and directions as are necessary to be given.

g) Costs of the suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant.

In its claim, the Plaintiff averred that it is the registered owner of the Suit Property. It was its contention that on **1st September 2011**, it obtained a loan from the Defendant amounting in aggregate to the sum of **Kshs. 93,400,000/=** for purposes of developing **13 residential units**, on a portion of the suit property which is family land. The loan facility was advanced under a facility letter dated **1st September 2011,** which provided inter alia that the loan was to be repaid directly from an **escrow account** and **current account** after a **moratorium** of **12 months,** and thereafter to be repaid in full within **12 months**.

The Plaintiff averred that the **moratorium** was extended with the consent of both parties and through several addendums to the original facility letter dated **1st September 2011**, with the last addendum extending the moratorium by a further 18 months with effect from **23rd April 2015**. That the loan facility was approved in **2011,** but only disbursed in tranches in the year **2013,** after completion of an amalgamation process of the two original parcels of land. To offer the loan, the Defendant Bank demanded that the project first avail **15%** of

the construction costs in order to provide the principal amount borrowed being **Kshs. 93,400,000/=.** Once this was accomplished, the Plaintiff averred that the Defendant began disbursing the loan in accordance with the Certificate of Works raised by the Project Architect.

Further that the loan facility was to be repaid using the gains from the sale of the **residential units** and the Plaintiff thereafter continued development of the suit property. It was the Plaintiff's assertion that the Defendant was in breach of the loan agreement between the parties and has been fraudulent in its dealings with the Plaintiff and the operation of its accounts. The Plaintiff in its Plaint particularized the Defendant's breach of contract and fraud under paragraph 10 of the Plaint. The Plaintiff further particularized negligent misrepresentation at Paragraph 11. It also averred that due to the Defendant's breach of duty of care, it suffered a shortfall in funds as the entire loan disbursements were allegedly depleted while the project was still at **75%** completion.

The Plaintiff alleged that the Defendant purported to serve it with an Auctioneer's **45 Days** Redemption Notice, despite the Defendant refusing to render proper accounts in order to reconcile and establish how much was disbursed to the Plaintiff. It was the Plaintiff's further contention that the Defendant's statutory power of sale had not accrued, as Plaintiff had not been issued with the requisite **Statutory Notices of Sale** provided under **Section 90(1) and 96 (2) of the Land Act 2012,** nor carried out a transparent **forced sale** valuation of the suit property for purposes of the threatened sale by public auction. The Plaintiff also stated that it had already sold 13 units to buyers who are not before the court and whose investments now hang in the balance.

The suit is contested and the Defendant filed its Defence on **13th July 2017,** and denied all the averments contained in the Plaint. It further averred that the loan facility was to be repaid in full within **24 months** from the date of the first drawdown. Further that one of the conditions of sanction was that all business proceeds of the Plaintiff were to be channeled through the Defendant Bank and payments to be made as they fell due and any defaults would lead to recovery. That around **31st July 2014,** upon the Plaintiff's default and a subsequent request for extension of the grace period for the repayment of the loan facility, the Defendant approved an extension of 6 months only after which the normal repayment of the loan was to continue in terms of the existing arrangement until maturity of the loan on **7th March 2015.** It averred that on **24th April 2015,** upon the Plaintiff's defaulted and upon further request for extension of the loan repayment period, the Defendant approved the said request upon the terms and conditions as set out in paragraph 9 of their statement of defence.

That the Plaintiff defaulted in paying the installments due under the facility and as a result, the Defendant acquired a valid and legal interest over the subject property and ought to be allowed to realize the same to safeguard its interests and those of its depositors and shareholders.

On the **14th of May 2020**, the Court allowed the interested parties Application to consolidate the instant suit together with **Thika ELC 74 OF 2019 (O.S)** in which the Court allowed the following orders as sought;

> ***1) That the Court be pleased to consolidate the instant suit with ELC No. 15 of 2017, which relates to the same subject matter for final determination of all issues relating to the suit land.***
>
> ***2) That this Honourable Court be pleased to adopt the Replying Affidavit filed on 2nd October 2018 by the 2nd Respondent as the formal Reply to the Applicants instant suit as the two applications are similar save for the orders on consolidation.***

The issues that are still pending as per **Originating Summons** dated **24th April 2019,** as sought by the Interested Parties herein are :-

> ***1) That the Honourable Court be pleased to declare that the Respondents ought to partially discharge all that parcel of land contained in Villa No. 1 and Villa No. 6 of Kenwood Villas, developed on parcel of land known as LR NO. 8361/3 and 8361/4 (Grant Number 81149 and 81150).***
>
> ***2) That the Honourable court be pleased to direct the Respondents to discharge all that parcel of land contained in Villa No. 1 and Villa No. 6 of Kenwood Villas, developed on parcel of land known as LR NO. 8361/3 and 8361/4 (Grant Number 81149 and 81150).***
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> ***3) That upon discharge all that parcel of land contained in Villa No. 1 and Villa No. 7 of Kenwood Villas be considered free of any encumbrances.***
>
> ***4) That Onsemus Ngige Munyambu and Rose Prieto Obirika the Applicants herein be declared the legal owners of Villa No. 1 and Villa No. 6 respectively of Kenwood Villas developed on parcel of known as LR NO. 8361/3 and 8361/4 (Grant Number 81149 and 81150).***
>
> ***5) That an Injunction do issue restraining the Respondents, their employees, and or agents from selling and/or transferring in any way interfering with the Applicants exclusive enjoyment and use of all that parcel of land contained in Villa No. 1 and Villa No. 6 of Kenwood Villas.***
>
> ***6) That the court do direct the Respondents to complete the construction of the Villas as per agreements signed between the Applicants and the 1st Respondent.***
>
> ***7) That costs of this application be provided for.***
>
> ***8) Any other order that this Honourable Court may deem fit to grant.***

The 1st Applicant (Interested Party) in his Supporting Affidavit dated **24th April 2019,** averred that together with his wife, they accepted an offer to purchase one of the properties to be developed by the 1st Respondent(Plaintiff) known as **Villa Number 1** for **Kshs. 27,000,000/=,** on parcel of land known as **LR No. 8361** and **8361/4.** That they then signed the **letter of offer** and the **sale agreement** and began the periodical payments of the purchase price.

That in the year **2017**, the 1st Respondent's(Plaintiff) representatives informed them that they had taken out a loan facility with the 2nd Respondent(Defendant) for the construction of the Villas and the same had been secured by the subject parent title on which the Villas had been developed on. Further that the 1st Respondent (Plaintiff) had allegedly defaulted on repayment terms and the 2nd Respondent was intent on exercising its statutory power of sale. He averred that at the time the dispute arose between the Respondents, he had already paid **Kshs. 26,300,000/=** and was in the process of finalizing the acquisition of the Villa. However, he has been unable to make any further payments as the question of entitlement is still unanswered. That he has been prejudiced by the halting of the project as he is unable to use the villa.

It was his contention that the amounts he paid for the Villa was capable of partially discharging the portion of land from the entire charged parcel of land and freeing his Villa from any encumbrance.

He further averred that if the court finds in favour of the Respondents, he was ready and willing to deposit the balance of **Kshs.700,000/=** to the Defendant Bank, subject to the court ordering completion of the Villa and accordingly grant him possession and all necessary completion documents including the title to **Villa No. 1.**

The Originating Summons was contested and the Plaintiff through its Director **Caroline Muchendu**, filed their Replying Affidavit on **17th June 2019** and averred that it is the registered proprietor of the suit property. It was her contention that the Plaintiff informed the Applicants that it would take a loan facility with the 2nd Respondent for purposes of construction and that monies paid by the Applicants towards acquisition of the units would also be channeled for construction. She further averred that the 1st Respondent (plaintiff)obtained from the 2nd Respondent(Defendant) a loan facility in the sum of **Kshs. 93,400,000/=** which loan facility though approved in **2011,** was only disbursed in tranches in the year **2013.**

She further contended that the 2nd Respondent had given a moratorium period that was extended on 3 occasions, the effect of which was that the repayment of the principal amount was to begin as from **October 2016**. However, the 2nd Respondent breached the same and began deducting loan repayments from the disbursed monies as early as **30 days**, after the disbursement of the monies which were to be utilized in the construction of the apartments.

That the moratorium ended in **October 2016,** and in **November 2016,** the 2nd Respondent served upon the 1st Respondent with a Redemption Notice and an advertisement was placed in the Daily Newspapers of **11th January 2017,** indicating a different auction date from the one cited in the Redemption Notice.

She alleged that the Applicants are yet to pay the full purchase price and therefore no prejudice will be occasioned to them and should the Applicants settle the balance of the purchase price, then there would be no objection to a discharge made in favour of the Applicants. She stated that the construction of the **13 units** is almost complete with the project being at **75%** completion and the irregular deduction of monies for construction have led to the dispute with 2nd Respondent and the project stalling.

On **29th May 2019,** the 2nd Respondent, through its Senior Legal Officer **Lawrence Anthony Ouma**, swore a Replying Affidavit. He averred that the 2nd Respondent (Defendant) offered to the 1st Respondent a financial facility for the sum of **Kshs.93,400,000/=** for construction of **13 residential units** on **L.R No. 8361/3 and 8361/4 (Thika**). That the 1st Respondent accepted the offer and a legal charge was registered against the suit property on **8th February 2013**. He reiterated the contents of the Defence.

He further contended that as a result of the 1st Respondent failing to fulfill its obligations under the legal charge, the 2nd Respondent acquired a valid legal interest over the subject properties which interest can only be extinguished upon the 1st Respondent fulfilling its obligations under the agreement.

He also stated that the alleged part payments by the Applicants(Interested parties) with respect to **Villa No. 1 and Villa No. 6** were made directly to the 1st Respondent, contrary to the conditions in the letter of offer and that the 2nd Respondent was not privy to their agreement. It was his contention that the prayer of discharge is misconceived and that any claim by the Applicants can only lie against the 1st Respondent(Plaintiff) and not the 2nd Respondent(Defendant).

He further contended that the agreements for lease executed between the Applicants (Interested parties) and the 1st Respondent, states that any dispute between them is subject to arbitration and must be resolved as such and that the 2nd Respondent cannot be a party to such arbitral proceedings. It was averred that the instant **Originating Summons**, is **incompetent, frivolous, incurably defective** and an **abuse** of the **court process.**

The matter proceeded by way of ***Viva Voce*** evidence wherein the Plaintiff called two witnesses, the Defendants called one witness and the Interested parties called two witnesses

PLANTIFF'S CASE

PW1 Caroline Muchendu, adopted her witness statement dated **25th January 2017 and** testified that she is a Director in the Plaintiff Company. That the suit property belongs to the Plaintiff and it consists of **13 residential Villas**. It was her testimony that the Plaintiff took a

loan facility from the bank and signed a letter of offer dated **1st September 2011,** to which the Plaintiff was advanced **Kshs.93,400,000/=** to be repaid within **24 Months** with **12 months** moratorium indicating that they were not to pay anything . She produced the letter of offer as Exhibit 1. That the moratorium began after the disbursement of the loan and that the loan was disbursed on **7th March 2013,** and therefore it was to end on **7th March 2014**.

It was her testimony that the Plaintiff moratorium was extended by a further **6 months** and was to end in **September 2014**. That the letter was signed on **31st July 2014,** and six months would have ended in **January 2015**. She produced the letter dated **31st July 2014,** as **exhibit 2.** Further that Plaintiff applied for extension of loan repayment for a further **18 months** period and the bank approved through letter dated **24th April 2015**.She produced the letter as exhibit 3. She produced her bundle of documents as Exhibit 4. She told the Court that an amount of **Kshs. 106,000/=** was deducted on **6th April 2014,** one month after the loan was disbursed.

Further that in the month of **May 2014,** there was another deduction of **Kshs.236,950/=** being loan interest payment. She testified that the Initial Principal amount was disbursed on **7th March 2013,** which was **Kshs. 16,456.281/=** and that there were loan repayment deductions shown thereon as the bank continued to deduct the loan repayment during the period of the moratorium. It was her further testimony that their bank statement and the one that was given by the bank are not the same. She further testified that there is a Newspaper Advertisement and Auctioneers Notice of sale of **Kenwood Villas** and that the public auction was slotted for **11th January 2017.** She acknowledged that they had received a **Redemption Notice** on **2nd November 2016,** and that the Plaintiff was not served with any other Notice as its address is **16760-0100 Thika,** as per the **Letter of Offer** and that the address on the **Statutory Notice** and **Notice of intention** to sell were sent to was a **Nairobi address**. It was her testimony that the Letter of Offer did not provide for any adhoc changes and that when they referred the matter to the **Interests Rules Advisory Centre, (IRAC)** a report was given which showed something amiss in the Defendant's calculations. Further that the Defendant committed acts of breach of the agreement when they began the deductions during the moratorium period. She told the Court that the rates were never reviewed and that the bank never disclosed the prevailing rates as the Plaintiff was charged in both **escrow** and **Mortgage** accounts on **7th March 2013,** in breach of the moratorium.

She further testified that the Plaintiff has made five proposals towards liquidating the current debt, but the bank has not agreed to any and despite the request for the interests to be waived, no penalties have been waived. That as per the Letter of Offer, the amount extended was **Kshs. 93,400,000/=** to be repaid in **3 years**. Further that as per clause 1 the interest rate was **15%** per annum pegged on base rate and an additional interest in default of payment of any sum of **6%** and the subject property was used to secure the facility.

It was her testimony that the interest was to be paid during the period of moratorium and that **Ksh. 8 million** was to be deposited in the Escrow Account for servicing of the Interest. She further testified that when buyers paid in any money, it went to the escrow Account and that the Plaintiff deposited **Kshs. 8,000,000/=** to the Escrow Account and all other monies were to be channeled thereon.

Further that the Plaintiff approached the Defendant to restructure the loan as the contractor extended the time and the bank gave them an offer on **31st July 2014,** and that the terms of the extension was only **6 months.** That Plaintiff requested for another extension with effect from **23rd April 2015,** which request was approved in **2015,** and the interest accrued was to be paid. She acknowledged that the Principal balance was to be cleared within expiring of **8 months,** but Plaintiff did not comply with the second addendum as it was not able to repay the loan by **October 2016**. She further confirmed that the last time the facility was repaid was in **2016**. Further that a valuation was allegedly done and the property was valued at **Ksh. 147,000,000/=** but that she had never seen the Valuation Report.

That a contract was entered into on **2nd March 2011,** with the 1st and 2nd Interested parties and the Interested Parties made payments to the Plaintiff. However, by then the Plaintiff had not entered into a loan agreement with the Defendant. She confirmed that the interested parties were not to assist into the loan repayment. Further that the Interested parties were to deposit money into the Vendor's account and the amount was to go towards construction of the project. She further testified that the 1st and 2nd Interested parties honoured their payments without fail and that they were ready to complete the Villas to their logical conclusion.

Further that the Interested parties paid monies to the Family Bank account of **Kenwood properties** and the bank deducted interest and penalties from the said account and that the addendum dated **31st July 2014, and 23rd April 2015**, did not indicate any default. That the last loan repayment was done on **31st July 2014,** and the Interest charged was **Ksh. 400,000/=** and the amount debited on **31st May 2016** was **Ksh.1,535,407**.

PW2 Wilfred Abicha Onono the Managing Director of Interest Rates Advisory Centre stated that the Plaintiff contracted him to which he prepared a report dated **25th September 2018**. That he did recalculations based on the terms contained in the **Offer letter** for the facility and the charge and compared with the Interest charged by the bank and found some differences between the one by the bank and their recalculated interest amounting to Kshs. **31,457,471/82** being interest overcharge. Further that there were two entries for **14th March 2017,** adhoc charge **Kshs. 6,249,085/65** and on **4th May 2017,** there was also a adhoc charge of **Kshs. 2,335,000/=** amounts described as additional disbursement which was not entered into current account and he found that the said entries was not existing in the current account. He further testified that the disbursement was made first in **2013**, with a repayment amount of **Kshs.244,839/93** on **7th May 2013**. Further there was also repayment of **Kshs.236,949/=.** That the period of moratorium was not supposed to have the bank debiting the Plaintiff's account as only interest rates was to be paid. He further testified that he treated all the repayments as Interest and that the computation by the bank was not correct, resulting to the difference of **Kshs. 3 million**. He produced the report as Exhibit 4.

He further testified that he never approached the Defendant and that the report is prepared using the documents signed by the parties. It was his evidence that he was in agreement that the moratorium was to be paid in full within a period of 12 months. He confirmed that the base rates was to be agreed between the parties and that it fluctuates from time to time and that there was an additional **6%** in case of failure to pay. He confirmed that **Kshs.41,596,762/=** was the total interest charged by Family Bank and what had been collected is the Interest to be charged. Further that **Kshs.14 million** includes penalty, because the borrower did not pay on time. That the monthly interest was **Kshs. 244,839/93** and the second figure was **Kshs.236,949/93** and that the entry on **7th April 2013,** the description is loan repayment amount of

Kshs. 244,849/93 and on **7th May 2013,** it was **Kshs. 236,949/93/=.** He testified that he relied on the said figures which he itemized as interest.

He acknowledged that the entire amount of **Kshs.93,000,000/=** was disbursed to the Plaintiff and the Defendant complied with the conditions in the addendum and that the bank has earned the penalty and interests. That the penalties were paid as per the documents and that the Principal was not cleared. It was his testimony that there were entries without interest and that the interests are based on the accruals and there were no payments until when the bank stopped charging Interests. Further he confirmed that the Plaintiff had paid **Kshs. 17 Million**.

Further that the loan repayment amount normally captures the interest and part payment of the Principal and that the loan repayment is normally done in instalment.

DEFENCE CASE

DW1 Dennis Githinji Thumbi, the branch Manager of the Defendant Bank adopted his witness statement dated **28th February 2018**. He produced the Defendant's list of documents filed on **3rd July 2013,** as exhibit 1 to 12. He further produced the supplementary list of documents dated **28th February 2019,** as **Exhibit 13**. He testified that the amount disbursed was **Kshs.16,456,281/=** interest was charged on **31st March 2013,** and that interest accrued on a daily basis. Further that the loan repayment came after one month and it was credit at **Kshs 244,839/=** to repay the Interest as per the moratorium. It was his testimony that the money deducted was purely for Interest payment and that the amount was taken from the Client's account. That the facility was for **Kshs. 93,400,000/=** and the amount was disbursed in tranches with the final amount being disbursed on **29th May 2015,** and that the Principal amount has never been repaid.

Further that the interest to be paid was **Ksh.41,596,762/=** and the amount paid was **Kshs 17,230,932/=**. He further testified that as per the adhoc charges on **14th March 2017**, the amount is **Kshs.6,249,085/=** and that it was inclusive of interest for the months of **November 2016**, **December 2016**, **January 2017, February 2017** and upto **14th March 2017**. That the adhoc charges relating to legal fees on the instant suit were made on **4th August 2017,** and that their compilation on legal fees is based on accrual basis.

That the Principal amount was disbursed on **7th March 2013, being Ksh.16,456,281/93** and interest was charged on **31st May 2013,** and that there was loan repayment of **Kshs. 244,839/=** and that the two have different amounts and the loan repayment is more than the Interest. Further that the loan repayment charges continued for a period of 12months from **7th March 2013** to **13th March 2014,** That on every month, the bank credited some loan repayment amount, there was default. That the entry on **6th April 2013,** was an account to account transfer and **Kshs. 106,000/=** was taken and that the amount was from the Escrow Account to the Client's account for loan repayment. That in total the amount deducted was **Kshs. 244,839/=** and the escrow account had **Kshs.3,893,700/=** after the deductions. It was his testimony that money was moved from the escrow account to the Client's loan disbursement account at the request of the Client.

He acknowledged that there was no letter communicating variations of Interest. Further that the approval for the extension of the moratorium was subject to payment of accrued Interest and penalties and that though the Interest continued to accrue, the letter dated **31st July 2014,** did not state that there was accrued Interest. He confirmed that as per the **Letter of Offer**, the address was **P.O BOX 1676-0100, Thika,** but that the address on **Statutory Demand** is **P.O BOX 1676-0100 Nairobi,** and that the Certificate of address was for **Nairobi** and not **Thika**. He confirmed that the date of the registration of the charge is **8th February 2013,** but that the value of the charge is not given. That the **Redemption Notice** was served personally to the Director of the Company. He further confirmed that the Defendant did not have any authority from the client for the transactions of in and out of **Kshs.4,000,000/=.** He confirmed that the Plaintiff had made several proposals to pay the loan and that the same were never acceptable as the said proposal did not meet the threshold.

That the Defendant communicate to the Plaintiff that the proceeds were to be channeled through the Defendant's Bank and that there was a site visit to the construction, and a valuation was done. That the amount owing to the Defendant was **Kshs. 118,723,487/=** as at **October 2016,** but that with interest, it came to **Kshs.124,972,573/18.** However, that the bank has suspended interest and the amount is bordering the whole property.

That the Interest accrued was Interest owed and not paid. It was his testimony that the adhoc charges were Interest from **November 2016, to March 2017,** and the draw down was in the **March 2013.** Further that the Interest continues to accrues as the Principal sum has not been paid. That there were no discussions between the bank and the Interested Parties.

INTERESTED PARTIES' CASE

I.P 1 Onesmus Ngugi Munyambu, adopted his witness statement dated **25th February 2019,** and testified that he bought House No. 1 in the **year 2015**, from the Plaintiff. He produced the sale agreement dated **21st September 2015,** as Exhibit 1. Further that he bought the House at **Kshs.27,000,000/=** and that he had already paid **Kshs.26,300,000/=.** It was his testimony that the Villa was valued at **Kshs.27 Million**. He urged the Court to discharge the Villa and the same released to him as he has paid for 98% of the house and he was willing to pay the balance. That he knew he was purchasing the Villas as the project had started and that he signed to show that he understood whatever he was signing. Further that upon completion, he was to enter into a formal lease agreement. Further that he had orally given the Vendor the **Notice** to complete, though it was to be in writing. He acknowledged that the agreement required them to try and solve disputes in good faith, and failure to which they were required to move for arbitration. Further that the lease completion was to be on **30th June 2015,** or upon issuance of occupation certificate by Municipality of Thika.

That he did not have any dispute with the Plaintiff as the construction was going on well and he has never received notice from the Plaintiff over failure to pay the balance. That he did not know whom to pay to the balance since there is a dispute between the Plaintiff and the Defendant herein.

IP 2 Rose Achineg Obirrika adopted her witness statement dated **25th February 2019,** and testified that she entered into an agreement to purchase unit **No. 6,** with the Plaintiff. She further testified that she conducted a search and found that the suit property belonged to **Stephen Muchendu and Lucy Mumbi** and that there was no loan on the property. That she was given a guarantee document to show that the property would be transferred to Kenwood property. It was her testimony that the Villa was going for **Kshs.12million** and she had so far paid **Kshs 11,575,477/=** amounting to **98%**. Further that she knew about the loan in **September 2011,** and that she had bought the house on **2nd March 2011,** and that when the loan was taken, she did not receive any notice. That she did not have any dispute with the plaintiff and that the completion was to be **31st January 2012,** and that she discussed the same with the Plaintiff, who promised to complete. Further that she was instructed to pay the Defendant and so far she has paid **Kshs.3,575,347/=** by **28th February 2015**. That the monies paid was to fund the construction and that the Vendor was to grant a lease upon completion.

Further that the payment obligations under the lease were not to occur until all the obligations had been satisfied. She acknowledged that she had not given any completion Notice and also acknowledged that ownership was upon completion of payment of purchase price.

Further that she did not register her interest as a purchaser on the suit property and that a Certificate of occupation has not been issued and the dispute mechanism clause has not been triggered.

That she had paid **3 million** to Family Bank, and that the said monies were never rejected by either the Plaintiff nor the Defendant.

After the viva voce evidence, the parties filed written submissions which the Court has carefully read and considered and renders itself as follows;-

In its submissions, the Defendant submitted that the Court does not have jurisdiction to deal with the instant suit as the issue in dispute is the amount owing in respect of the facility. It was its contention that issues pertaining to accounts are reserved for the High Court. It was the Plaintiff's contention that the Defendant has submitted on new issues which were not pleaded and therefore the Defendant is barred from claiming the same.

The Court concurs with the Plaintiff that parties are bound by their pleadings and are barred from raising issues that were never pleaded. However, the Defendant has raised an issue of Jurisdiction and the Plaintiff has responded to the same in its Supplementary submissions. It is trite that Jurisdiction is everything and without it, the Court has no options but to down its tools. In this instant, though the issue of Jurisdiction was never pleaded, the same has been raised and the Court has no option but to deal with it as the Court cannot confer jurisdiction to itself, if it does not have. Therefore, it is the Court's considered view that issues for determination are;-

1. ***Whether the Court has jurisdiction to deal with the instant suit***

2. ***Whether the Requisite Notices issued were a nullity***

3. ***Whether the Plaintiff is entitled to the orders sought***

4. ***Whether the Interested Parties are Entitled to the orders sought***

5. ***Who should bear the Costs of the suit.***

1. <u>Whether the Court has jurisdiction to deal with the instant suit.</u>

It is the Defendant's contention that the Court does not have Jurisdiction to deal with the instant suit as the charge document is not in issue and the dispute is the amount owing to the Defendant making the instant suit an accounting problem question which the **Environment & Land Court,** has no jurisdiction of. Having gone through the pleadings by the parties together with the Consolidation of the Originating Summons by the Interested parties, the Court notes that indeed there is an accounting issue in dispute herein but it is not the only issue in dispute as there are other issues such as whether the **Statutory Notices** were served upon the Plaintiff before the Redemption Notice was served upon the Plaintiff.

The Environment & Land Court has its root in **Article 162(2) (b) of the Constitution** which provides as follows;-

(2) ***Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -***

a. Employment and labour relations; and

b. The environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

To give effect to **Article 162 (2) (b)** of the **Constitution**, Parliament enacted the **Environment and Land Court Act Section 13** of the said Act which provides as follows:

(1) ***The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.***

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes relating to environment and land, including disputes-

a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and

contracts, choses in action or other instruments

granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

(3) –

(4) –

(5) –

(6) –

7) – In exercising of its jurisdiction under this Act, the court

shall have power to make any order and grant any relief as the court deems fit and just, including –

a) Interim or permanent preservation orders including

injunctions;

b) Prerogative orders;

c) Award of damages;

d) Compensation;

e) Specific performance;

f) Restitution;

g) Declaration; or

h) costs.

Heavy reliance has been placed by the Defendant in the Court of Appeal decision in the case of Cooperative Bank of Kenya –v- Patrick Kangethe Njuguna (2017) wherein the Court of Appeal held that the High Court was the only one seized with the Jurisdiction to deal with accounting problems. The Court notes that in its Plaint, the Plaintiff has sought for orders for declarations that the Defendant charged exorbitant rates and penalty and an order directing the Defendant to render true and full accounts. To this end, as per the decision in the above stated case, the Court finds and holds that it does not have jurisdiction to deal with the said prayers.

However on the issue of whether the Auctioneer's **45 Days** Redemption Notice and Auctioneer's Notification of Sale upon the Plaintiff was a nullity in law, the issue of valuation and the permanent injunction sought , it is the Court's considered view that the said prayers fall within the jurisdiction of the **Environment & Land Court**. The Land Act & Land Registration Act also provide for the Jurisdiction of the Environment & Land Court as the two Acts address the land transactions and dispositions of land. The process through which a chargor can exercise its statutory power of sale is found in the said Acts and therefore the Jurisdiction of the Environment and Land Court (ELC) in dealing with the same is justified. See the case of **Lydia Nyambura Mbugua …vs…Diamond Trust Bank Kenya Limited & another [2018] eKLR** where the Court held that;-

"It will thus be seen from the above that it is the ELC and the empowered subordinate courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. The process of sale

by chargee, which is what is questioned in this case, is a process that is laid down in the Land Act and Land Registration Act, (formerly in the Registered Land Act now repealed) and these statutes provide that the court with jurisdiction is the ELC. You see, the sale of a charged property by chargee, is really no different from a sale by one private individual to another (see the case of Stephen Kibowen –vs- Agricultural Finance Corporation (2015) eKLR). Both sales involve title and the process of acquisition of title to land. If one argues that the ELC has no jurisdiction to hear a dispute over the process of sale by a chargee, then it can as well be argued that the ELC has no jurisdiction to hear a dispute over a sale of land by one individual to another, which argument, I believe, will sound absurd. Let me reiterate again, that the process of sale of a charged property is governed by the Land Act and Land Registration Act, and these statutes provide that it is the ELC and the empowered subordinate courts which have jurisdiction."

Further in the case of **Alphose Yankulije …Vs… One Twiga Road Limited & 2 others [2019] eKLR** the Court held that;-

"Other statutes that give the Environment and Land Court jurisdiction are the Land Act, 2012 and the Land Registration Act, 2012. Part of what these statutes address are land transactions and dispositions including charges.

In assessing the decision of the Court of Appeal in the case of Cooperative Bank of Kenya –v- Patrick Kangethe Njuguna (supra), I wish to associate myself with the decision of Munyao Sila, J in the case of Lydia Nyambura Mbugua –v- Diamond Trust Bank & Another (2018) eKLR in which he stated as follows:

"My own understanding of the above decision, is that the Court of Appeal was of opinion that the particular dispute was more in relation to accounts of which the High Court had jurisdiction to hear. I do not think that the Court of Appeal was holding the position that once the Environment & Land Court (ELC) sees the word "charge" mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what the Constitution under Article 162 (2)(b), Parliament under Section 13 of the Environment and Land Court Act No.19 of 2011, have prescribed as being the jurisdiction of the ELC. This would also go contrary to the Supreme Court decision in the case of R Karisa Chengo & 2 Others (2017)eKLR where the Supreme Court stated as follows at paragraph 51 of its decision:-

"…in this instance, the jurisdiction of the specialized courts is prescribed by parliament, through the said enactment of legislation relating, respectively to the ELC and ELRC."

Therefore, it is the Court's considered view that this Court has jurisdiction to deal with the question whether the Redemption Notices are a nullity, valuation of the land and the permanent injunction.

2. <u>Whether the Requisite Notices issued were a nullity</u>

It is not in doubt that vide a loan facility dated **1st September 2011,** the Plaintiff was issued with a loan facility amounting to **Kshs.93, 400,000/=**. Though there is a dispute on the interest that was charged, and whether there was breach of Contract by the Defendant, in seeking to deduct the loan repayment while there was a moratorium in place, it is not in doubt that the

Plaintiff has only repaid a sum of **Kshs. 17 million** and that it has on several occasion defaulted in repaying its loan.

The Law at this instant then allows the Defendant to exercise its statutory power of sale. However, in exercising its statutory power of sale, the law requires the Defendant to comply with certain provisions, including issuing the Plaintiff with Statutory Notice and the Notification of sale. The Defendant has averred that due process was followed as the Plaintiff was served with the requisite Notices. However, it is the Plaintiff's contention that they were never served with the Statutory Notice and Notice to Sell, but were only served with the Redemption Notice, which was served upon one of its Directors personally.

The Court has perused the Statutory Notice and Notice of Intention to Sell that have been produced before it. The Court has also considered the Evidence adduced by the witnesses. It is not in doubt that the Plaintiff's address as provided in the Offer letter is P.O **Box 1676-00100 Thika**. However, the Notices and the Certificate of postage confirm that the Notices were sent out to **P.O Box 1676-00100 Nairobi.** Therefore, it is not in doubt that these two addresses are different and the contention by PW1 that they never received the said Notices is merited. Once a Chargor alleges non receipt of the Notices, it becomes incumbent upon the Chargee to prove that the Notices were sent out. In the instant case since the Notices were sent out to the wrong address, it is evident that the said notices are a nullity as the Defendant has failed to prove that the Plaintiff received them. See the case of **<u>Nyagilo Ochieng & Another …Vs…Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260</u>** where the Court of Appeal while dealing with section 74(1) of the repealed ***Registered Land Act*** held that:

"It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the Registered Land Act (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor's receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such

proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the "villain in the matter". In the absence of proof of such posting the Court is constrained to hold that the sale by auction was void. The learned Judge fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P. O. Box 120, SARE…In coming to the conclusion, the Court has reached, it cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties."

Further in the case of **Martha Khayanga Simiyu …Vs…Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540** the Court held that:

"…The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice…Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargor's remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor…"

Section 90 and 96 of the land Act provides;

"90. (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

96. (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell

Therefore, it follows that as the Statutory Notice and Notification of sale as contemplated under section 90 and 96 of the land Act, were never served on the Plaintiff, it is the Court's considered view that the Auctioneer's Redemption Notice is a nullity in law **.**

3. Whether the Plaintiff is entitled to the orders sought

As already held by the Court, this Court has no jurisdiction to handle the issues that relate to accounts with regards to the loan facility. Therefore the Court finds and holds that it has **no** jurisdiction to deal with prayers **b** and **c** of the Plaint dated **25th January 2017**.

However the Court having found that the proper Statutory Notices were **never** sent out and hence held that the Auctioneer's Redemption Notices were a nullity in law, then it finds that prayer **no. (e)** is merited in terms of granting a permanent injunction as the proper Notices were never sent out. The Defendant are thus barred from selling the suit property by way of public auction at this stage.

The Plaintiff has also sought to have an independent Valuer to value the property. As the Court has held that the Redemption Notice is a nullity, it is the Court's considered view that the said prayer is merited as the Plaintiff will have chance of participating in the Valuation process.

4. Whether the Interested Parties are entitled to the orders sought

In their Originating summons, the Interested Parties have sought for a discharge of **Villas No. 1** and **6**. Further the Interested Parties have also urged the Court to find that they are the legal owners of the said Villas, and that the court grants them a Permanent Injunction against the Plaintiff and Defendant. Further that the Villas are free from any encumbrances. While the Defendant had contended that the agreement between the Plaintiff and the Interested parties required them to seek for arbitration before they come to Court, the Court notes that the Defendant is not a party to the said agreement had no *locus standi* to contend on how it is to be effected. Further the Interested parties have rightly pointed out in their evidence that they do not have any dispute with the Plaintiff and that their dispute arose only because the **Villas** they had bought are about to be sold by a third party who was not a party to their agreement. From the available evidence, the court is satisfied that there is no way the dispute can be referred to arbitration while there is another dispute involving the same properties in Court. If the same was to happen, there is a risk that different determinations might be made, which the said different determinations might cause conflict and confusion.

Though the Defendant has contended that the Interested Parties do not have any interest in the suit property, the Court notes that there is acknowledgment that the said Interested Parties were to be buyers of the Villas and the proceeds were to be deposited in the Defendant bank. This means that the bank was aware that third parties would also have rights over the suit property because the only way a person could acquire rights was by purchasing the said property and thus acquire interests. It is evident that the interests that the Interested Party have

over the Villas cannot be wished away.

The Interested parties have sought for partial discharge of the Villas **No.1** and **6**, but the Court notes that they are yet to complete payment of the said Villas. They have made substantial payments towards the same and they have testified that they are ready and willing to pay the entire balance of the purchase price. However, the Court has already held that the Auctioneer's Notice as authorized by the Defendant is a **nullity** and therefore the Plaintiff at this stage still has the ownership of the said Villas. The court finds and holds that in order for the Interested parties to have unchallenged interest over the said Villas, they need to complete payment of the purchase price.

Therefore, this court cannot order partial discharge of the Villas until all the obligations of the Interested Parties have been fulfilled. The Court acknowledges that the Interested Parties were protecting their interest and there was confusion on where to pay the balance of the purchase price. However, the parties are now properly guided. Consequently, the court holds and finds that the prayers by the interested parties are not merited at this juncture and the said prayers are disallowed entirely.

5. Who should bear the Costs of the suit.

It is very clear that **section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. Though the successful party is always entitled to the costs of the suit, the court is also guided by the circumstances of the case, in considering whether to grant costs or not. In this instant, the Plaintiff has partially succeeded in its claim. However, it is not lost to the Court that the plaintiff is still in default of the facility granted to it by the Defendant. Therefore, it is the courts considered view that the Plaintiff should not benefit from its default. Taking into account the circumstances of this case, the court finds and holds that each party should bear its own costs.

The Upshot of the foregoing is that the Plaintiff has partially succeeded in its claim vide the Plaint dated **25th January 2017.** Consequently, the Plaintiff's claim is allowed in terms of prayers **No. a, d and e**. However, the Originating Summons dated **24th April 2019,** is **not** merited and the same is dismissed entirely in terms of the prayers that were to be determined in this Judgment. Further each party herein to bear its own costs.

It is so ordered.

Dated, signed and **Delivered** at **Thika** this **18th** day of **June 2020.**

L. GACHERU

JUDGE

18/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of ;

No Consent for the Plaintiff

M/s Mukele Moni and Company Advocates for the Defendant

No Consent for the interested parties

L. GACHERU

JUDGE

18/6/2020