



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1492 OF 2000

MAURICE ALDOUS OPAR.....PLAINTIFF

VERSUS

TRINITY PRIME INVESTMENTS LIMITED.....1ST DEFENDANT

ERICK ANANDA.....2ND DEFENDANT

**JOSEPHINE MONGARE T/A J.W. WAMBUA & COMPANY ADVOCATES...3RD
DEFENDANT**

JOSEPH MARPA NJENGA NJOROGE.....4TH DEFENDANT

JUDGMENT

1. The plaintiff in his plaint dated 8th September 2000 claimed of ownership of property on **Land Reference Number 209/11542/3 DIK DIK Gradens**, Kileleshwa Nairobi. The plaintiff herein had taken a loan with Paramount Bank on security of some of his properties one being the subject property but was unable to repay the same. The said bank exercised its power of sale and advertised the said property for sale which took place on 3/09/2009. The plaintiff's claim was dismissed on 29th September 2010 for non-attendance by Justice Sitati. The plaintiff filed the application dated 1/10/2010 seeking to review the judge's order but Justice Sitati struck the same out as the plaintiff was in contempt of its orders issued on 29th September 2010 to pay cost to the defendants. There is no indication that the plaintiff appealed against the said decision. This matter was a part heard before Justice Sitati. This judgment relates to the claim by the 1st defendant in its counter claim. The 1st defendant shall hereinafter be referred to as the plaintiff and the plaintiff in the main suit the defendant.
2. The 1st defendant/ plaintiff in its amended defence and counter claim dated 28/9/2000 claims that it is the registered proprietor of **Land Reference Number 209/11542/3** as Lessee from the Government for a period of 99 years from 1/7/1976 having purchased the same from Paramount Bank Kenya Limited for a consideration of Kshs. 4,000,000/- pursuant to the plaintiff's/ defendant irrevocable power of attorney donated in their favor dated 16th December 1997 authorizing them to sell the said property as part of security agreement between the bank and the plaintiff/ defendant. That the sale proceeds were to be deposited in the plaintiff's account held with the same bank in respect of the plaintiff who had defaulted in his obligations towards the said bank.
3. That the 4th defendant obtained breaking in orders to enable them levy distress on behalf of the 1st defendant. It claims that on or about 10th March 1998 the defendant/plaintiff wrongfully entered and remained on the said parcel of land and has been wrongfully been in possession of the same and is still trespassing thereon depriving the 1st defendant/plaintiff of use and enjoyment of the

same thereby causing it loss and damage reasons it claims for vacant possession of **Land Reference Number 209/11542/3**, damages or mense profit at the rate of Kshs. 60,000/- per month from 10th March 1998 until possession is delivered up. The 1st defendant/plaintiff further claims for Kshs. 1,000,000/- it paid at the instance of the plaintiff to Paramount Bank Limited to redeem the defendant's outstanding liabilities with the said bank, which he was to pay back to the 1st defendant.

- i. **Reasons the 1st defendant/plaintiff seeks that an order that the defendant deliver do deliver vacant possession of Land Reference Number 209/11542/3 to the 1st defendant**
- ii. **Damages and mense profits at the rate of Kshs. 60, 0000/- per month with effect from 10th March 1998.**
- iii. **Kshs. 1,000,000/- on account of sums paid to Paramount Bank (K) Ltd on the plaintiff's account.**
- iv. **Interests on c, e and above**
- v. **Costs and interests**

4. The defendant/plaintiff in his reply to amended statement of defence and counter claim dated 26th May 2006 claims that the 1st defendant's registration as a proprietor of **L.R. 209/11542/3** was through acts of fraud and misrepresentation as the said registration was solely for purposes of holding the interest for the benefit of the plaintiff and it was to re-transfer it to the plaintiff upon repayment of the redemption monies plus interest.
5. The defendant further denies being a tenant to the plaintiff/1st defendant. The defendant denies ever giving any power of attorney to Paramount Bank Limited as part of security for the said loan as alleged. That the fraudulent power of attorney issued by the plaintiff in reliance to fraudulent misrepresentation of the second defendant. The defendant seeks that the plaintiff's claim and counter claim be struck out adding that the claim as raised is a mis-joinder of causes of actions. Further that the suit can only be understood in the overall context of the dispute between him the 1st and 2nd defendants who provided him with bridging finance to save his properties known as **Land Reference Number 2/436(Original 2/231/5) Muringa Road Kilimani and L.R. Number 209/11542/3 Dik Dik Gardens Kileleshwa** from being auctioned on the understanding that interest in the said properties be transferred from Paramount Bank Limited to the 1st defendant while the plaintiff/ defendant arranges for alternative finances to repay the 1st and 2nd defendant funds that were to pay Paramount Bank Limited plus interest attracted by the same. It was agreed that upon repayment of the said sum plus interest the 1st and 2nd defendant were to re-transfer the said properties to him. As a show of good faith, the defendant/plaintiff had given the 1st and 2nd defendant the logbook of his Mercedes Benz E 200 KAG 450X.
6. On the basis of the said agreement he introduced the 1st and 2nd defendant to Paramount Bank as potential buyers invoking to exercise disposal of the properties by private treaty of which he gave his approval regardless that public auction would fetch a high price and executed a Power of Attorney to Paramount bank to facilitate disposal of the said property to the first defendant to facilitate raising funds with various financial institutions to redeem his account. That it is only in 1998 that the plaintiff/ defendant came to learn that the 2nd defendant had transferred two of his properties **L.R. Number 2/436 Muringa Road Kilimani and L.R. Number 209/11542/3 Dik Dik Gardens Kileleshwa** to the company by the name Trinity Prime Investments limited and had used the documents to secure a facility with City Finance Company Limited. The plaintiff/ defendant avers that the 1st defendant is estopped from denying the defendant's residual title and entitlement over **L.R. Number 2/436(Original 2/231/5)Muringa Road Kilimani and L.R. Number 209/11542/3 DikDik Gardens Kileleshwa** adding he is in breach of trust, inequitable adding that the 1st defendant seeks to succeed from fraudulent misrepresentation by the first and 2nd defendant.

Evidence on the counter claim

7. PW1, **Erick Ananda** testified that he was the principal share holder and the managing director of the 1st defendant company, Trinity Divine investment company and was conversant with the issues in dispute particularly 1st defendant's claim is in respect to a property situated in Kileleshwa land reference **L.R 09/11542/3**. He stated that the 1st defendant were also claiming mense profits from lost revenue from March 1998. Further in addition they were claiming an additional sum of 1 million paid to Paramount Bank Limited which was over and above the agreed purchase price. He stated that there were two properties and their purchase price was 6.5 million. That the other property L.R 21436. L.R 209/1154/3 was registered in the name of Maurice Opar and the 2nd one in was in the name of Nyabina Express Cargo Services and the purchase price was 4 million for L.R 209/11542/3 and 2.5 million for L.R. 2/436. He stated that his counter claim was in respect of L.R 209/11542/3. Adding that initially there were 3 properties and that the 3rd property L.R 303/1062 was acquired through public auction and the same belonged to Maurice Opar the plaintiff while the other 2 properties were acquired through a private treaty. That Njoka and Karuiki Auctioneers limited had been instructed by Paramount Bank Limited and that the suit property was amongst the properties listed to be sold in the Daily Nation newspaper of 24/4/97 but was later was withdrawn by the bank from being sold by auction. He stated that he believed that the plaintiff must have reached an agreement with the bank. That in on 29th July 1997 the 2 properties were again advertised for auction by Njoka and Karuiki Auctioneers and the auction that was set on 22nd August 1997. That a day before the auction the plaintiff Maurice Opar approached the 1st defendant and requested that the same be sold on a private treaty arrangement and since there was no such agreement they requested he does the request in writing and certify the same for them which he did on 21st August 1996. That after the request was done they instructed their lawyer to whom the letters were copied to process a banker's cheque for 2 million shillings and have the same forwarded to Paramount bank. That thereafter their lawyers obtained from Mr. Opar a formal authority for both properties adding that the letter forwarded to paramount bank stated that none was in excess of 6.5 Million and that both properties would be paid by the 1st defendant and the same be accounted for. That as per the said letter they indicate that the agreed amount payable would be Kshs. 6.5 million and they initially paid Kshs. 2 million and later on paid another Kshs. 5.5 million which totaled to Kshs. 7.5 million for the properties which Kshs. 1 million over and above the agreed purchase price their lawyer obtained powers of attorney from Mr. Opar and a board resolution in respect of the property registered under Nyabina Cargo Services Limited. That the purpose of the power of the attorney was to authorize the bank who was holding the documents as security for amounts that had been borrowed to execute the transfers on his behalf in their favour and the land was transferred to the 1st defendant and registered on the 10th March 1998. That the 1st defendant did not take possession of land because the plaintiff had made a request verbally to continue residing on the property on rental arrangement as he tried to get alternative accommodation for his family. That they initially the pays Kshs. 50,000/- and the same was to be reviewed after a month but after the said oral agreement he never paid the rent and this prompted the 1st defendant to instruct their advocates the firm of m/s Lutta and Aswani advocates to demand for the same which they did on the 3/7/1998 and 5/10/98. That the letter dated 3/7/98 rent was to demand that he grants possession and vacate the premises which he did not do so immediately but wrote to the defendant on the 7/10/98 requesting he be allowed to repurchase the property at 15.5 million. That they had no problem with the same but he gave a timeline he would give money starting with Kshs. 500,000 the following day which he did not do but continue to stay in the said premises and had indicated that he had indicated that he had gotten an alternative financier who was willing to pay 20 million for the 2 properties as per the letter was addressed to city finance bank limited and they had advised the bank to accept. He stated that their claim for mense profits was based on rent valuation from Lloyd Masika who stated the rent payable. He stated that the plaintiff claimed the transaction was fraudulent and reported the same to the police who carried out investigations and they responded on the 16/3/01 stating that they did not establish any fraudulent transaction in the 2 properties.

8. PW2 **Charles Migwe**, a valuer with Llyod Masika Ltd acknowledged knowing Mr. Ananda as a client having received instruction from him to carry out a valuation on L.R 209/11542/3 sometime

in June 2009. They inspected the property on the 26/9/09 and were to assess rent payable from March 1998 to June 2009. After the physical inspection, they confirmed the description as a 4 bedroom house with a guest unit. After carrying out a research they obtained comparable rentals and we were able to come up with average rents per year which totaled to 8,110,000/- as the rental is for March 1997 to 2009. The said report was updated as at June 2012 came to a sum of 11,320,000/-.

9. PW4, **Patrick Lutta Odongo** advocate testified that sometime in August 1992 Mr. Ananda introduced him to Mr. Opar with whom he had dealings with and wanted him to act for Mr. Opar. His role was to salvage Mr. Opar's properties from auction by getting Mr. Ananda to make payments to the bank with an arrangement that if Mr. Opar was not able to pay the properties could as well be sold to him. Other than this Mr. Opar instructed him to act for his company in the transaction with the Paramount Bank. He acknowledged he knew of the dated 22/8/97 which set the terms of conditions of the sale. This he says happened prior to a discussion between Mr. Ananda and Opar relating to some funding that was to be done before the auction but later they agreed that the transaction would be like a sale. It was agreed that Mr. Ananda would pay off the bank. Mr. Ananda condition was that he wanted Mr. Opar to instruct the bank to execute the transfer. This he stated was additional authority that the bank was authorized to transfer the property on behalf of Mr. Opar. The property was transferred and Mr. Ananda paid all the monies paid to the bank. The outstanding amount at the time was Kshs. 6.5 million. Later on in 1998 the property was transferred to Trinity Prime Investment and during the said transaction he prepared the transfer. He disputed the document from LSK stating that he paid for a practicing certificate in 1997 adding that he would not have been issued with a practicing certificate for 1998 if he did not have one and become a commissioner for oath in 1996. He stated that the power of attorney was an additional leave as the bank had already been authorized to sell the house by Mr. Opar. That later in 2007 Mr. Opar instructed him on 2 other transaction on sale of 2 other properties which ended up in court.
10. DW1, **Maurice Opar Aldous** testified he bought the property in 1993. That he had a business account at Paramount bank and he also had an overdraft with the said bank which he secured with his three properties including the suit property. That the bank invoked the right to advertise the suit property. They negotiated with the bank since the suit property was their matrimonial home and the sale was postponed to enable him redeem the situation. The bank instructed that the properties be valued and the valuations were done on the 6th February 1996 and L.R No. 21435 and L.R 209/11542/3 each property was valued at Kshs. 8 million each. Confronted with the value given they were not sure the funds they needed could come and so they looked for alternative funding. This is when they met Trinity agreed to give them bridging finance. he met was introduced to their lawyer Mr. Patrick Lutta to handle the transaction for them. Trinity was to provide bridging finance and they were going to pay the bank interest. They were to borrow Kshs. 12.50 million which the bank wanted them to pay off. Patrick Lutta told them they would give them the funds but they needed security for their money. He asked them to ask the bank to give them the titles as the money was transferred to the bank.
11. He testified further that he was not aware that there was a sale of the property between Trinity Bank and Prime Bank. Though they did not talk of any sale when they met with Mr. Lutta. They were informed that there was going to be interest to be paid however they were not going to take long they aimed to secure a loan with another bank. He stated that he never made any agreement on interest rate payable. He wrote to the bank to explain what he had done and went with Lutta to the bank as he needed the titles so that the bank could release the money. Patrick Lutta got the documents and they agreed the money to be paid was Kshs. 6.5 million which included his fees. He demanded an account of the money paid to-date or and inquired if there were other charges but no such accounts has been given. He admitted to giving an undertaking to repay the money. That they approached HFCK and City Finance Bank for a loan and were given letters of offer to pay off Trinity. City Finance Bank and Guilders Bank agreed to give me the money on a long time basis and they appointed lawyer Patrick Mutuli who gave an undertaking to City Finance and he wrote to have the document prepared for the bank to release the funds. However for some reason Trinity refused to release the documents to the bank stalling the whole progress as were going to use the documents to secure a loan. He stated that he wrote to the 1st defendant through his lawyers Patrick Lutta countless times to release the documents to no avail. He has not been told the

- amount he was to pay. He states that that is where his children have grown up and live however despite his efforts they say they bought the property. He stated that he inquired from LSK about Mr. Lutta's standing as at 1997 only to be informed that Mr. Lutta had no practicing certificate in 1997.
12. On cross examination he stated that he put up 3 properties as security adding that he bought property No. 2/436 for Kshs. 10 million however, the same was valued at Kshs. 8 million. He stated that he left Paramount Bank when their business was finished and that any lender was obliged to give you accounts. That he had no issue with Paramount Bank as they acted very legally. That the reserve price for 3 properties was Kshs. 12 million. He stated that he read in the press that the bank is not allowed to sell a property without a valuation and did not understand why they set the price at Kshs. 12 million if they had valuation reports. He stated that the 1st defendant bought property no. 330/1062 at Kshs. 5.2 million. That they had an agreement it was fair that he gives him a helping hand and agreed to sell at Kshs. 2.5 million and the loan was supposed to be Kshs. 6.5 million, Kshs. 4 million and Kshs. 2.5 million which would total to Kshs. 6.5 million. He claims not to know what the client paid since he did not get information despite demanding to get the information. He stated that the balance was Kshs. 4.5 million adding that the client must have paid the sum of Kshs. 5.5 million but could not confirm that. The deposit for the sale was Kshs. 2 million and the bank was to confirm upon receipt of the said money from Tanzania would come. There was confirmation that the bank received Kshs. 5.5 million and he undertook to pay the balance. He admitted to owing the defendant Kshs. 1 million as he had been given time by the bank as the transaction went on.
13. He stated that Mr. Lutta acted for them and took instructions to set aside some money. He paid Mr. Erick Ananda some money. That though he had a complaint against Lutta he had it suspended. He testified that Mr. Lutta acted for both of them in the transaction. But LSK said Lutta was not qualified to work in 1997. He stated that he was not informed that his property had been transferred to anyone and could not confirm if Lutta was qualified in 1998. He testified that though he had a tenant in the said house goons went and chased them away. He stated that he was not aware that his application to reinstate the suit was dismissed. He admitted to signing the documents the suit property and authorizing the bank. That there was a charge document in place and the bank had authority to execute and transfer wanted to repurchase the property that efforts to try having the property released was blocked.
14. He stated that there was a separate suit in respect of the bank Civil suit No. 480/01 and a consent was recorded in that suit and he paid Kshs. 900000/- but he refused to issue him with a receipt. He stated that he was not aware that on the 29/10/09 Justice Muga Apondi confirmed that he failed to meet his side of the consent nor is he aware that it was marked as compromised and that he was ordered to pay costs. That though he reported the same to the police no banking fraud was established. He stated that he did not know the situation of the properties and that he was not aware that the 2nd defendant has been paying for land rates of the said properties.
15. I have read and considered the parties evidence submission and authorities cited. Issues for determination are;

- i. **Whether the 1st defendant has proved its counter claim over ownership of the suit property?**
- ii. **Whether the plaintiff has proved his claim of fraud misrepresentation by the defendants?**
- iii. **Whether the power of Attorney relied on by Paramount Bank Limited was null and void having been made by an advocate without a practicing certificate?**
- iv. **Whether the 1st defendant/ plaintiff is entitled to the mense profits?**
- v. **Is the Defendant entitled to any interest ?**
- vi. **Who should bear cost?**

Determination

11. Whether the 1st defendant has proved its counter claim over ownership of the suit property?

It is not in dispute that the plaintiff/ defendant claim that he had secured a legal charge and mortgage against properties *L.R. 209/11542/3* and *L.R. 330/1062* belonging to Mr. Maurice Aldous

Opar and legal Charge on **L.R. 2/436** belonging to Nyabina Express Cargo Services Limited. It is evident that the said facility was in arrears as per the letter dated 25th November 1996 from M. A. Khan advocate acting on behalf of Paramount Bank who had through the said letter issued a 3 months' notice on compromise of the said properties should the plaintiff fail to honor his obligation in paying the outstanding amounts. Upon the lapse of the said three months' notice the advocate proceeded to instruct Njoka & Kariuki (Kenya) Limited to advertise the same for auction in the daily Nation dated 24th April 1997. Via a letter dated 25th April the defendant/ plaintiff wrote to Mr. Khan requesting him to instruct the auctioneers to postpone the auction of **L.R. 209/4541/3** and **L.R.330/1062** to 30th May 1997 and made an undertaking to liquidate the outstanding amount before 30th May 1997. On the receipt of the said letter Mr. Khan on the same date wrote to the auctioneers requesting them to suspend the auction of the two properties and further instructing that the said properties be auctioned on 30th May 1997 at a reserve price of Kshs. 12 million which was revised via the letter dated 19th May 1997 to Kshs.13 million.

16. On 30th May 1997 **L.R. No. 209/11542/3** and **L.R. No. 330/61/5** properties belonging to the defendant /plaintiff were auctioned to Mr. Eric Ananda Jackson at the condition price of Kshs. 5.5 million after having paid a deposit of 1.375 million. The purchaser Mr. Eric Ananda Jackson issued two bankers cheques, banker's cheque no. 118664-40 for Kshs. 118,664.40 and bankers cheque number 4125000-0 for Kshs. 4,125,000/- the same were forwarded to Mr. Khan for onward transmission to Paramount Bank.
17. Via the letter dated 27th March 1998, P.L. Mutuli acting on behalf of Guilders International Bank Limited wrote to City Finance Bank Limited informing them that they intended to give the defendant/plaintiff bridging finance on security of **L.R. No. 2/436(original 2/231/5)** Muringa road, Kilimani Nairobi and **L.R. No. 209/11542/3 Dik Dik Gardens**, Nairobi supposedly held by them in trust of the defendant /plaintiff. City Finance bank Limited in their letter dated 4th April 1998 sought their undertaking before 30th April 1998. However, Lutta & Eshiwani acting on behalf of Trinity prime Investments Limited in their letter to the plaintiff claimed ownership of the said house and sought to have the defendant/plaintiff vacate and hand over possession of the said house within 14 days. This letter went unanswered and the said advocate made a follow up letter giving them till 9th October to vacate the premises. The defendant/plaintiff in his letter dated 7th October 1998 re-affirmed his commitment to re-purchase the property from Trinity prime Investments Limited at a price of Kshs. 15.5 million and Gave a breakdown of the payments to be made on diverse dates between 8th October to 15th October 1998. However, it appears that the plaintiff did not keep his word and as per his letter dated 10th October 1998 the defendant/ plaintiff through his advocates frowned upon Trinity Prime Investments actions of attempts to evict him from the said premises terming the said attempt illegal, as no court order had been obtained by Marchet Auctioneers and advised that the plaintiff was intent on redeeming the said properties despite the various obstacles by Trinity. From the foregoing I find that the 1st defendant has proved ownership of the suit property.
18. **Whether the plaintiff has proved his claim of fraud misrepresentation by the defendants?**

The defendant's /plaintiff's assertion is that the 1st defendants'/plaintiff's' acquisition and transfer of the suit premises was smacked of fraud and illegalities. In the case of **Koinange & 13 others v Koinange [1968] KLR 23** it was held that, ***"allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do."***

19. The plaintiff through his advocate had made a complaint with the Central Bank of Kenya, Banking Fraud Investigation department and had sought investigation on alleged fraudulent transfer of the L.R. No. 2/436 and L.R. 209/11542/3. Central Bank upon carrying out their

investigation wrote to the plaintiff via a letter dated 16th March 2001, informing the plaintiff of the outcome of the investigation. In their findings they found that the Mercedes Benz Registration No. KAG 450X which they reported had been impounded at Customs department for non-payment of duty and further that they did not establish any fraudulent transfer of L.R. No. 2/436 and L.R. 209/11542/3 and advised he to seeks civil court's intervention if dissatisfied with their findings. In the case of ***Westmont Power (Kenya) Limited v Westmont Power (Kenya) Limited [2003] eKLR*** the court in addressing the issue of pleading fraud as a defence stated that, ***“Setting up one's case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence and show the structure of the case of defence intended to be pursued ...”***

20. From the bundle of documents adduced by both parties. Nyabina Express Cargo in their board resolution of a meeting held on 21st August 1997 agreed that property ***L.R. 2/436*** be sold to Trinity – Prime Investment Limited for a sum of Kshs. 2,500,000/- and that Paramount Bank be authorized to execute all the discharge and transfer documents on its behalf with any extra monies above the same being paid by purchasers on reimbursement basis. As at the time of the said sale, Mr. Khan tabulated the outstanding amount, which translated to Kshs. 4,991,235. The plaintiff via letter dated 21st August 1997 wrote to Paramount Bank informing them that he had secured Trinity Prime Investments limited as buyer for ***L.R. 209/11542/3*** for Kshs. 6.5 million shilling and urged Paramount Bank to instruct their advocates accordingly. Mr. Lutta advocate acting for Trinity Prime Investments Limited forwarded a down payment of Kshs. 2 million as per the said agreement. Via a letter dated 22 August 1997 the plaintiff authorized Prime Investment Bank to execute sale agreement, transfer and all other documents necessary for the transaction in relation to ***L.R. No. 209/11542/3***. It is in this regard that the plaintiff on 16th December 1997 executed an irrevocable power of attorney in regards to ***L.R. 209/11542/3***, which authorized Paramount bank to execute and sign any deeds of agreement contract conveyance and instruments of any nature for purposes of facilitating the said sale and to receive payments in regards to the same. The said power of Attorney was duly stamped and registered on 22nd December 1997. Paramount bank on registration of the said power of attorney proceeded to re-convey the said ***L.R. NO. 2/231/5*** the same indicated that the defendant /plaintiff had made all the necessary repayments of monies owing plus interest and as such sought to re-convey the property to him. The same was duly stamped and registered on 17th March 1998. Further Paramount bank on the same date registered an indenture made on 4th March 1998 supporting that the defendant/ plaintiff had agreed to sell to Trinity Prime Investments Limited ***L.R. Number 2/436*** for a consideration of Kshs. 2,500,000/-. From the foregoing, I find that the parties had followed due process and no issue raises eyebrows on the sale and transfer of the said suit premises. The said sale to the defendants was actuated via a series of contracts made by the defendant/plaintiff Paramount Bank Limited and the defendants. The same revolved round the discharge of charge and transfer of the same to the defendants. The defendant/plaintiff claims that the said transfer was temporary as the defendants were to provide bridging services to him as he tried to secure alternative bridging financing from other financial institutions. Other than his word he has not adduced any documentary evidence to prove the same, neither has he adduced sufficient evidence of fraud against the defendants, as it stands the plaintiff is bound by the contracts he put in place necessitating the discharge and transfer of the suit properties to the defendants. I find that the defendant/plaintiff has not proved fraud misrepresentation against the defendants he has failed to adduce any evidence to support the claim and as such, the same cannot stand. The defendant's/plaintiff's claim that there was no way he could have sold his property to the defendant at the said price is neither here nor there as parties are allowed to enter into contracts of their own free will and as per the terms they may agree on, the court in this regard cannot dictate the terms or re-write the contract for the parties nor can a party be allowed to avoid a contract because he realizes that he made a bad bargain. In the case of ***Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003*** it was held that: ***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve***

a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

21. Whether the power of Attorney relied on by Paramount Bank Limited was null and void having been made by an advocate without a practicing certificate?

The defendant/plaintiff claims that the advocate Mr. Lutta who drafted the Power of attorney that was relied on by Paramount Bank in executing the transfer of the suit property had no valid practicing certificate at the time. The Law Society of Kenya via their letter dated 28th July 2009 confirmed that the though Mr. Lutta took out a practicing certificate for 1998 he did not take out a practicing certificate for the year 1997. During his testimony before this court the said advocate Mr. Lutta claims that he did take out a practicing certificate in the said year 2007 however, he did not adduce any evidence to contravene the letter from Law society of Kenya dated 28/7/09 stating otherwise.

22. The Power of Attorney in question was drawn by Mr. Lutta Advocate on 16th December 1997 and presented for registration on 2nd December 1997. The 1st defendant in its defence submit that the defendant/plaintiff cannot attack the said power of attorney without involving the bank as the same would be tantamount to impeachment of the bank's exercise of statutory power of sale. They further submit that he has no complaints against the bank and this they argue amounts to him ratifying the sale by private treaty and does not annul the rights of the bank to exercise the same. Mr. Bwire waived his right to cross-examine Mr. Lutta and before the judgment was read made no application to recall him for cross examination even though he reserved the right to do so. The supreme Court in a recent decision Petition No. 36 of 2014 held that , ***National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKlr***, it was held that, ***"...no instrument or document of conveyance becomes invalid under section 34(1) only by dint of it having been prepared by an advocate at the time was not holding a current practice certificate."***

23. This being the case the said Power of Attorney so executed was valid despite having been drawn by an advocate who did not have a practicing certificate as at the time he drew the power of attorney. This then has the effect of validating any consequent transactions arising from the authority of the said power of attorney and any subsequent transactions. The defendant further seeks on the application of the common law doctrine of estoppel and equity that equity treats that as done which ought to be done. The re-conveyance of ***L.R. No. 2/436*** was drawn on 4th March 1998 the same stated that the mortgage registered on 4th September 1996 by the plaintiff securing Kshs. 10.5 million had been paid and the bank sought to release and convey the parcel of land back to the mortgagor. A look at the page 2 of the title document for ***L.R. No. 209/11542/3*** indicates that after the registration of the Discharge of Charge on 10/3/98 there are two subsequent registrations one a transfer to Trinity Prime Investments for Kshs.4,000,000 in support of this there is a duly executed transfer dated for the year 1998, by the Paramount Bank Limited on behalf of the plaintiff as per the authority derived from the irrevocable Power of attorney dated 16th December 1997 by the plaintiff to Paramount Bank Limited. From the said transactions, the title to the said property had changed hands to the Bank, hence they are the owners of the said property having paid for the same and transfer having passed to them.

24. Whether the plaintiff is entitled to the mense profits?

The Civil Procedure Act Cap 21 Laws of Kenya defines *mense profits*, in relation to property means:- ***"Those profits which the person in wrongful possession of such property actually received on might with or ordinary diligence have received therefore, together with interest as such profits but does not include profit due to improvements made by the person in wrongly possession."***

Order 21, Rule 13 of Civil Procedure Act provides;

"(1) where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree - For the possession of the property. For the

rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits. Directing an inquiry as to rent or mesne profits from the institution of such suit until:- The delivery of possession to the decree-holder. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or the expiration of three years from the date of the decree, whichever even first occurs.

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

Mesne profits are special damages which not only need to be pleaded, In the Court of appeal case of ***Malcom Bell vs. Daniel Torotich and another 2012 Eklr***, where the appellant had sought mense profits in a case of trespass it was held that, ***“the appellant sought orders of mense profits in the appeal, but there was no satisfactory evidence to support both the claim for mense profits or the claim for general damages.”***

The letters exchanged between the plaintiff, the advocate representing Paramount Bank and the defendants point towards a sale agreement. Subsequently there is a transfer executed on behalf of the plaintiff by Paramount Bank in the year 1998 and registered as per the notes on 10th March 1998. The plaintiff has not adduced any documents to prove that there was a parallel contract supporting a bridging contract between the parties nor has he adduced any evidence proving otherwise, as such the title of the suit property belonging to the defendants remains unchallenged, and as such they are entitled to both proprietary rights and interests on the suit properties. In the case of ***Alice Atieno Ochieng –vs Monica Juma Apela& Anr Kisumu HCCC No. 365 of 1996*** the court held that ***“the plaintiff having proved that she was the registered owner of the suit land which contention was not rebutted and that the defendants occupy /use the land without the plaintiffs consent /authority the defendants are thus in trespassers”***

The Court of Appeal of decision of ***East Africa in RIOKI ESTATE CO. (1970) LIMITED –VS- KINUTHIA NJOROGE (1977) KLR 146*** where the court referred to the definition of “mesne profits” in section 2 of the Civil Procedure Act. The section provides: ***“Mesne profits, in relation to property, means those profits which the person in wrongful Possession of such property actually received or might with ordinary diligence have received there from, together with interest on such Profits, but does not include profits due to Improvements made by the person in wrongful possession.”***

This court therefore finds that the defendant’s counter claim succeeds and they are entitled to mense profit.

25.Are the defendants entitled to Interest?

Section 26 provides that, ***“(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”***

I find that the defendants are indeed entitled to interests at court rates.

26.Who should bear cost?

On issue of costs section 27 of the Civil Procedure Act provides that, ***“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what***

property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

In the case of *Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai & 4 others [2014]* eKLR it was held that: **“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit.”**

In the case of *Diamond Trust Kenya Limited v Motorways Kenya Limited & another [2015]* eKLR it was held that, **“the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation..... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”.** I find that 1st defendant case is successful and in my view the circumstances of this case merit award of costs to the 1st defendant.

27.The plaintiff shall deliver vacant possession of Land Reference Number 209/11542/3 to the 1st defendant within 30 days from the date of this judgment. The 1st defendant shall have mense profits at the rate of Kshs. **60,000/-** per month as per the valuation report by Lloyd Masika dated 30th June 2009 with effect from 10th March 1998 to the date of this judgment. This translates to 216 (months)*60,000= Kshs.**12,960,000/-**. The plaintiff shall also pay Kshs. **1,000,000/-** by expended by the 1st defendant on his behalf to Paramount Bank (K) Ltd. I therefore enter judgment for the 1st defendant/plaintiff against the plaintiff/ defendant in the sum of Kshs. **13,960,000/**, with interest at court rates from the date when the same accrued until payment in full. The defendants shall also have cost of the suit. It is so ordered.

Dated, signed and delivered this 3rd day of February 2016.

R. E. OUGO

JUDGE

In the presence of:-

.....**Plaintiff**

.....**1st Defendant**

.....**2nd,3rd and 4th Defendant**

Ms. Charity Court Clerk