



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 492 OF 2002**

**PELESIA ATIENO WAMIDHA.....PLAINTIFF**

**- VERSUS -**

**THE CO-OPERATIVE BANK OF KENYA LTED.....1<sup>ST</sup> DEFENDANT**

**HERITAGE BUSINESS SOLUTION LTD.....2<sup>ND</sup> DEFENDANT**

**ANNE MUENI NDEMWA.....3<sup>RD</sup> DEFENDANT**

**CONSOLIDATED OF TITLES.....4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES**

**(DISTRICT LAND REGISTRY) MOMBASA.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiff, **PELESIA ATIENO WAMIDHA**, was the owner of the suit property, **L.R. No. 6676/SECTION 1/MAINLAND NORTH, MOMBASA**, as at 1996.
2. She offered the suit property as security to the 1<sup>st</sup> Defendant, **THE COOPERATIVE BANK OF KENYA LIMITED**, in respect to financial facilities which the said Bank advanced to **RICHARD B.O. ABIERO**, who traded under the business-name **HODUCTS ENTERPRISES**.
3. The plaintiff charged the suit property to the bank, as security for financial facilities not exceeding Kshs. 500,000/-.
4. It was the plaintiff's case that on or about 24<sup>th</sup> December 1996, Co-operative Bank granted a further facility to **HODUCTS ENTERPRISES**. The said further facility was in the sum of Kshs. 65,000/-.
5. As a result of the said further facility, the plaintiff points out that facility provided to **HODUCTS ENTERPRISES** amounted to Kshs. 565,000/-.
6. The plaintiff did not have prior knowledge of the further facility, nor did she consent to it.
7. And as the Co-operative Bank had, therefore, provided the borrower with financial facilities whose value exceeded what the plaintiff's security had covered, it was the plaintiff's case that that constituted an unlawful variation of the contract between the bank and the plaintiff.
8. In the light of the foregoing, the plaintiff's position was that the court should declare that she was discharged from any liability under the charge.
9. The second claim by the plaintiff was that Co-operative Bank had already advanced money to **HODUCTS ENTERPRISES** before the plaintiff had executed the charge. I therefore understand

- the plaintiff to be asserting that Co-operative Bank did not give consideration for the charge.
- 10.If that be the position, the plaintiff asserted that it would be a further basis for a declaration that the charge was discharged.
  - 11.The third claim made by the plaintiff was that the Statutory Notice dated 22<sup>nd</sup> January 1999 was null and void *ab initio*. The reason why the plaintiff considered the Notice to be void is that the period of the said Notice was said to have started running from the date of the Notice.
  - 12.The plaintiff emphasized that it was a legal requirement, that the period of 3 months, in the Statutory Notice, should start running from the date of service.
  - 13.In that respect, Co-operative Bank conceded, that the period must ran from the date of service. Therefore, no issue arises for determination, with regard to the Statutory Notice dated 22<sup>nd</sup> January 1999.
  - 14.The fourth issue taken up by the plaintiff was in relation to the sale which had been scheduled for 24<sup>th</sup> April 2002. The plaintiff termed that sale as illegal because a requisite notice had not been served upon her, in terms of the Auctioneer's Act.
  - 15.That sale was put-off, by consent of the two parties i.e the plaintiff and Co-operative Bank. Indeed, the said parties recorded a consent order, pursuant to which the Co-operative Bank was required to issue a fresh Statutory Notice.
  - 16.Having agreed to issue a fresh Statutory Notice, Co-operative Bank could not thereafter have been allowed to rely on the Statutory Notice which preceded the auction that had been scheduled for 24<sup>th</sup> April 2002.
  - 17.In the plaint, the next issue which was raised by the plaintiff was that the transfer of the suit property, to the second defendant, **HERITAGE BUSINESS SOLUTIONS LIMITED**, was invalid, null and void *ab initio*.
  - 18.It was on 28<sup>th</sup> July 2009 that the plaintiff learnt of the said transfer. And she was shocked because Co-operative Bank had not served her with a Statutory Notice.
  - 19.Obviously, if it was true that Co-operative Bank did not serve a fresh Statutory Notice, that would imply that the bank had failed to honour the terms of the consent order dated 21<sup>st</sup> May 2002.
  - 20.The plaintiff complained that the suit property was sold to **HERITAGE BUSINESS SOLUTIONS LIMITED** in secrecy, and at a price which was well below the prevailing market value.
  - 21.The sixth issue raised by the Plaintiff was that the Co-operative Bank had clogged her equitable right of redemption. The bank is said to have demanded moneys which were not due or payable.
  - 22.The plaintiff viewed the demands by Co-operative Bank as nothing more than unreasonable and oppressive efforts calculated to bring pressure to bear on the plaintiff, so that she could pay money which was not due.
  - 23.The plaintiff's perception of Co-operative Bank was that it had acted fraudulently.
  - 24.Therefore, the plaintiff said that she took steps to register a caveat against the suit property, with a view to safeguarding her rights.
  - 25.However, when she was at the Lands Office in Mombasa, on 23<sup>rd</sup> November 2010, the plaintiff learnt that the suit property had been transferred to the 3<sup>rd</sup> defendant, **ANNE MUENI NDEMWA**.
  - 26.As far as the plaintiff was concerned, the transfer to **ANNE NDEMWA** was illegal, because it amounted to a breach of Section 52 of the Transfer of Property Act, and also a breach of the Court Order made on 23<sup>rd</sup> November, 2010.
  - 27.The plaintiff requested this court to declare the transfer of the suit property from **HERITAGE BUSINESS SOLUTIONS LIMITED** to **ANNE MUENI NDEMWA**, as a nullity.
  - 28.The plaintiff wished to have that transfer cancelled by the court.
  - 29.After the suit property was transferred to **ANNE NDEMWA**, she offered the Title to the **CONSOLIDATED BANK OF KENYA LIMITED**, (*the 4<sup>th</sup> Defendant*), as security for some financial facilities. The suit property was then charged to **CONSOLIDATED BANK**.
  - 30.The plaintiff asked the court to declare as illegal, the charge which Consolidated Bank registered against the suit property.
  - 31.The plaintiff also asked for orders to compel the **REGISTRAR OF TITLES, DISTRICT LAND REGISTRY MOMBASA** (*the 5<sup>th</sup> defendant*) to give effect to the orders of this court.
  - 32.Finally, the plaintiff prayed for General Damages as well as the costs of the suit.

33. The 1<sup>st</sup> Defendant, **THE CO-OPERATIVE BANK of KENYA LIMITED**, denied the allegation that prior to the execution of the legal charge, the bank had already advanced money to **HODUCTS ENTERPRISES**.
34. As regards the Statutory Notice dated 22<sup>nd</sup> January 1999, Co-operative Bank asserted that that the matter was otiose. By that I understood the Bank to be saying that whether or not the letter dated 22<sup>nd</sup> January 1999 was a Statutory Notice, that would serve no useful purpose in the case.
35. The Co-operative Bank's position is that issues emanating from that Statutory Notice were already overtaken by events, pursuant to the Consent Orders of 21<sup>st</sup> May 2002.
36. The bank denied the contention that the transfer of the suit property, to **HERITAGE BUSINESS SOLUTIONS LIMITED** was illegal.
37. If anything, the Bank's view was that the Statutory Power of Sale conferred upon it, by the Charge and Section 69 A of Transfer of Property Act, had arisen and had been exercisable.
38. Co-operative Bank insisted that it extended an overdraft facility upto a limit of Kshs. 500,000/-, which was in line with the charge instrument executed by the plaintiff.
39. According to Co-operative Bank, provided that the total value of the facility accorded to **HODUCTS ENTERPRISES** did not exceed the sum of Kshs. 500,000/-, there had been no amendment of the terms of the charge.
40. Therefore, Co-operative Bank insists that they were right to have sold the suit property, in the exercise of the bank's statutory power of sale.
41. And after applying the proceeds of sale towards the reduction of the debt owed to it, Co-operative Bank still had a further claim of Kshs. 2,783,112/80, against the plaintiff. Therefore, in its counter-claim, Co-operative Bank has asked the court to grant it judgement against the plaintiff for the sum of Kshs. 2,783,112/80, together with interests from 6<sup>th</sup> October 2010. The 1<sup>st</sup> defendant also asked for the dismissal of the plaintiff's claim, together with the costs of the suit.
42. In her testimony, the plaintiff said that she had given the suit property as security for a loan of Kshs. 500,000/-, and that that sum was disbursed on 1<sup>st</sup> June 1996. Therefore, when the bank later advanced Kshs. 65,000/-, the financial facilities accorded to **HODUCTS ENTERPRISES** exceeded the sum secured by the charge.
43. The plaintiff testified that the security she provided to Co-operative Bank was for a loan, not for an overdraft facility. She therefore did not understand why the bank consolidated some two accounts.
44. However, the plaintiff acknowledged receipt of a letter from Co-operative Bank, showing that as at 29<sup>th</sup> March 1999, the outstanding balance was Kshs. 1,121,844.25/-.
45. During cross-examination, the plaintiff conceded that, pursuant to the terms of the charge, the bank was entitled to debit interest on the facility which it gave to **HODUCTS ENTERPRISES**. That concession was significant because initially the plaintiff had said that the facility ought not to have attracted any interest.
46. However, even if the plaintiff had not made that concession, that would not have altered the fact that the Charge instrument expressly stipulated that the financial facility accorded to **HODUCTS ENTERPRISES** would attract commission fees, the usual banking charges, as well as interest.
47. The plaintiff confirmed that on 21<sup>st</sup> June 1999, Co-operative Bank credited the account of **HODUCTS ENTERPRISES** with Kshs. 500,000/-. The effect of that credit was that the account had a credit balance of Kshs. 354,042.75/-.
48. The plaintiff also confirmed that those funds were released after she had signed the charge instrument. Consequently, the plaintiff must be deemed to have abandoned her claim, that the bank had released funds before the charge was signed.
49. Meanwhile as regards the Statutory Notice dated 22<sup>nd</sup> January 1999, the plaintiff testified that she did not receive it although her postal address was P.o. Box 90182, **MOMBASA**.
50. Upon further cross-examination, the plaintiff confirmed that on 19<sup>th</sup> April 1999 she wrote to the Co-operative Bank. By her letter, the plaintiff expressly acknowledged having received the Statutory Notice dated 22<sup>nd</sup> January 1999.
51. The plaintiff approached Merende & Company Advocates, and requested them to give their professional undertaking to the bank, with regard to the recovery of the debt payable to the bank.
52. On 11<sup>th</sup> April 2001, Marende & Company Advocates wrote to the Co-operative Bank,

complaining that although Garam Auctioneers had served the plaintiff with a 45 days' Notice to auction the suit property, there had not been issued a Statutory Notice.  
53. By that letter, the plaintiff's lawyers made it clear that;

***“...the debt constituted principally of a loan and overdraft advanced to HODUCTS ENTERPRISES”.***

54. In the light of that clear statement from the plaintiff's advocates, I find that the plaintiff cannot now be heard to say that the suit property was not offered as security for any overdraft facility.
55. On the 12<sup>th</sup> of April 2001, (which was the very next day after Marende & Company Advocates wrote to the bank), the plaintiff also wrote directly to the bank.
56. She offered to pay Kshs. 100,000/- by 31<sup>st</sup> May 2001, and further promised to remit monthly payments of Kshs. 10,000/- thereafter, until payment in full.
57. However, during cross-examination the plaintiff admitted that she did not make any payments.
58. Surely, when the plaintiff failed to make any payments, and when the **HODUCTS ENTERPRISES** also failed to make payments, it should have been obvious that the bank would take steps to realize the security. And that is what the bank did.
59. The plaintiff testified that on 22<sup>nd</sup> April 2002, she learnt that the Co-operative Bank was auctioning her property. She promptly instructed her lawyers, who then filed this case.
60. On 21<sup>st</sup> May 2002, the plaintiff and Co-operative Bank consented to an order, which stopped the sale. The said order was in the following terms;

**“By consent the Defendant to issue fresh Statutory Notice and comply with all the provisions of law with regard to the exercise of power of sale without prejudice to the plaintiff”.**

61. On 3<sup>rd</sup> August 2005 the Co-operative Bank issued a fresh Statutory Notice. In her testimony, the plaintiff denied receipt of the said Notice.
62. On 29<sup>th</sup> August 2005 the bank issued another Statutory Notice to the plaintiff. However, the plaintiff denied receipt of that Notice, too.
63. Those two Statutory Notices were both sent to the postal address **P.O. Box 90182 Mombasa**.
64. The plaintiff confirmed that that used to be her postal address. She also confirmed that that was the address which she had given to the bank.
65. According to the plaintiff, when she testified on 20<sup>th</sup> May 2014, she changed her address in the year 2009. Her new postal address was **P.O. Box 83011 Mombasa**.
66. However, the plaintiff confirmed to the court that she did not notify the Co-operative Bank about her change of address.
67. Notwithstanding the change of her address, the plaintiff said that in the year 2012, she still used **P.O Box 90182 Mombasa**. She used it when she instructed Value Consult to carry out a valuation of the suit property.
68. In the result, I find that whether or not the plaintiff changed her postal address in the year 2009, she also continued using the address which she had given to the bank. As she did not notify Co-operative Bank of the change of her address, I find that the bank could not have been expected to send the Statutory Notice to any other address, apart from **P.O Box 90182 MOMBASA**.
69. By sending the Statutory Notice to the plaintiff's last known address, the Co-operative Bank discharged its obligation, which was to give notice to the charger that the charges would exercise its statutory powers if sale of the chargor did not pay the debt within 3 months of service of the notice.
70. It is sufficient that the chargee sends the notice to the chargor's last known address.
71. **PW2, THOMAS MUKHWANA**, was a Valuer who practiced under the name and style of **VALUE CONSULT**.
72. He valued the suit property at Kshs. 9,500,000/- on 22<sup>nd</sup> August 2009.
73. Thereafter, on 2<sup>nd</sup> July 2012 PW2 valued the land at Kshs. 25,500,000/-.
74. After Mr. Mukhwana testified, the plaintiff closed her case.
75. DW1, **JOHN MARTIN CHEGE**, was an employee of Co-operative Bank. He testified to the

fact that the maximum principal amount loaned, as per the charge instrument executed by the plaintiff, was Kshs. 500,000/-.

76. He went on to say that on 20<sup>th</sup> June 1996, the sum of Kshs. 500,000/- was credited to the account of **HODUCTS ENTERPRISES**.

77. Apart from that credit, Mr. Mukhwana said that on 4<sup>th</sup> January 1997, a sum of Kshs., 65,000/- was debited to the account of **HODUCTS ENTERPRISES**.

78. Mukhwana testified that the plaintiff was not a signatory to the arrangement which led to the bank to debit the account of **HODUCTS ENTERPRISES** with Kshs. 65,000/-.

79. At that stage, it did appear that the bank did provide financial facilities amounting to Kshs. 565,000/-. If that be the case, it would imply that whereas the plaintiff's security was for a sum not exceeding Kshs. 500,000/-, the bank exceeded that limit.

80. However, Mukhwana explained that the sums being claimed from the plaintiff did not ever include the sum of Kshs. 65,000/-. In fact, Mukhwana's evidence was that the sum of Kshs. 65,000/- was never disbursed by the bank to **HODUCTS ENTERPRISES**. He explained that that overdraft facility was available to the customer.

81. In order to keep the loan separate from the overdraft facility, DW1 explained that the bank had four accounts for the customer. The said 4 accounts were;

- a. **Principal Loan Account;**
- b. **Interest Arrears Account;**
- c. **Principal Arrears Account; and**
- d. **Current Account**

82. He said that the Principal Arrears Account and the Interest Arrears Account were opened when the bank had noted that the borrower was defaulting in payments due to the bank.

83. **DW2, PETER NJOROGE GICHUKI**, is the proprietor of a firm of auctioneers called **SPORTLIGHT ENTERPRISES KENYA**.

84. On 18<sup>th</sup> February 2008, he issued notices to both the plaintiff and the borrower. The said Notice informed the plaintiff and the borrower that if the debt was not paid within 45 days, the suit property would be sold by public auction.

85. Although Mr. Gichuki was aware that the auctioneer needed to serve a Notification of Sale upon the plaintiff, he did not produce in court, a copy of the Notification of Sale which was allegedly served upon her.

86. **DW3, ANNE MUENI NDEMWA**, is the 3<sup>rd</sup> Defendant. She testified that she brought the suit property in January 2011. Before buying the property from the 2<sup>nd</sup> defendant, Ms. Ndemwa's lawyer conducted a due diligence search on the title.

87. As there was no encumbrances registered against the title, the 3<sup>rd</sup> defendant believed that she had acquired a good title.

88. It is noteworthy that the 3<sup>rd</sup> defendant was not cross-examined at all.

89. **DW4, JULIUS MWANIKI GIKONYO**, testified on behalf of the **CONSOLIDATED BANK OF KENYA LIMITED**. He testified that the bank offered to the 3<sup>rd</sup> defendant, an overdraft of Kshs. 6.0 million and an asset finance facility of Kshs. 3.7 million.

90. Those 2 financial facilities were secured by a charge which was registered against the title to the suit property.

91. Gikonyo pointed out that before Consolidated Bank agreed to give the 2 financial facilities to the 3<sup>rd</sup> defendant, the bank had conducted due diligence against the title of the property which was going to be the security.

92. After Gikonyo testified, the whole case came to a close. In effect, the Registrar of Titles at the District Lands Registry in Mombasa, did not call any evidence.

93. In determining this case, I will start with the 4<sup>th</sup> and 5<sup>th</sup> Defendants. I find that the plaintiff had made no adverse claims against them. And during the trial, no evidence was led to demonstrate any wrong-doing by those 2 defendants.

94. On her part, Ms Anne Ndemwa demonstrated that she bought the suit property for the sum of Ksh. 8.0million. Before buying the property, Ndemwa conducted a search against the title, which revealed that there were no encumbrances.

95. The transfer of the Lease from **HERITAGE BUSINESS SOLUTIONS LIMITED TO ANNE MUENI NDEMWA** is dated 12<sup>th</sup> January 2011. The said Transfer was registered on 8<sup>th</sup> February 2011.
96. None of the actions of Ms. Ndemwa were faulted by the Plaintiff. I therefore find that Ms. Ndemwa was a bona fide purchaser for value, without notice of any error in the title.
97. On its part **CONSOLIDATED BANK OF KENYA LIMITED** cannot be faulted for accepting the suit property as a security for the loan and other financial facility which the bank gave to Ms. Ndemwa. I so find because a search which was conducted by Consolidated Bank revealed that there were no encumbrances against the title of the suit property.
98. The Plaintiff stated, at paragraph 7 of her submissions, that she executed the charge over the suit property:

**“...in consideration of the first Defendant affording an overdraft facility of upto a limited of Ksh.500,000/- to Richard B.O. Abiero trading as Hoducts Enterprises...”**

99. On its part, the Co-operative Bank has demonstrated that as at 20<sup>th</sup> June 1996, the current account of Hoducts Enterprises had a Debit Balance of Ksh. 145,951/=. In other words, the account was overdrawn to that magnitude.
100. On 21<sup>st</sup> June 1996, the bank credited the current account with Ksh.500,000/=:, resulting in an overall credit of Ksh. 333,942/=:.
101. At no time did the bank give to the customer an overdraft whose limited exceeded Ksh. 500,000/=:.
102. The Plaintiff submitted that on 4<sup>th</sup> January 1997, the sum of Ksh. 65,000/=: was debited to the account of Hoducts Enterprises pursuant to the further overdraft facility which the bank gave to the customer. A perusal of the statement of account shows that on 4<sup>th</sup> January 1997, the account balance was Ksh. 1,480.55DR. The account was overdrawn.
103. So, when the customer wrote a cheque No. 00915976, for Ksh, 65,000/=:, he did not have sufficient funds in his account from which the bank could make payment. However, the bank honoured the cheque, resulting in an overdraft of Ksh.66,450.55/=:.
104. Obviously, that overdraft did not exceed Ksh. 500,000/=:.

Therefore, the Plaintiff has failed to prove that the Co-operative Bank did allow Hoducts Enterprises to have an overdraft exceeding Ksh. 500,000/=:.

105. I hold the view that when the Plaintiff offered the suit property as security for an overdraft facility not exceeding Ksh. 500,000/=:, that could not be a bar to the bank negotiating with Hoducts Enterprises about other financial arrangements. For instance, if the customer wished to apply for a loan, he could have done so, even if the loan was for over Ksh. 500,000/-, **provided** that the chargor (*whose liability was capped in the charge instrument*) could not be called upon to meet any liability in excess of the terms of the contract.
106. I am not suggesting that the guarantor would remain liable to the creditor even after the guarantee was varied as between the creditor and the principal debtor.
107. I recognize the fact that;

**“Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the debtor.....” – per Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol.30 of paragraph 253”.**

108. In the case of **JOSEPH MATHENGE KANYORO Vs WAKARWA PRINTERS LIMITED & ANOTHER HCCC. NO. 3052 OF 1986(O.S)** J.B. Ojwang J. (*as he then was*) said;

**“The question whether the variation involved in the instant case was a material one,**

**is a matter of fact.”**

109. In this case, there is no evidence at all that Co-operative Bank did at any time seek to impose upon the guarantor, the liability in respect to the overdraft facility of Ksh. 65,000/=. It does appear that the bank made every effort to keep several accounts so that the principal liability of the Plaintiff never exceeded the sum of Ksh. 500,000/=.
110. Therefore, I find that the charge instrument which was executed by the Plaintiff was not discharged as asserted by the Plaintiff.
111. The next issue to be addressed relates to the consent Order dated 21<sup>st</sup> May 2002. If, as the Plaintiff asserted, there was no Statutory Notice which was served upon her after that date, then the bank would have violated the consent Order.
112. The Bank insists that it did serve a Statutory Notice.
113. However, the Notices dated 28<sup>th</sup> May 2002 and 3<sup>rd</sup> August 2005, both indicate that the 3 months period commenced from the date of the respective notices. Those notices fall short of the requirements of Section 69(1) of the Transfer of Property Act, which stipulates that the Notice should run from the date of service.
114. On 29<sup>th</sup> August 2007 the Co-operative Bank sent a Statutory Notice to the Plaintiff. That Notice was at page 142 of the bank's Bundle of Documents.
115. The Notice dated 29<sup>th</sup> August 2007 was compliant with the law, because it specified that the 3 months period, would run from the date of service of the notice.
116. In her submissions, the Plaintiff raised issues about the Notification of Sale which was issued by the auctioneer.
117. However, in the Pleadings the Plaintiff had not raised any issues concerning the Notification of Sale. It cannot therefore have become an issue in contention, when it was raised in the final submissions.
118. In relation to the Statutory Notice, I find that the same was served through Registered Post on 29<sup>th</sup> August 2007.
119. The Plaintiff presented evidence to show that the value of the suit property was Ksh. 9.5 Million in the year 2009. The value had jumped to Ksh. 25.5 Million by 2<sup>nd</sup> July 2012.
120. However, the property was sold for Ksh. 3.2 Million, in May 2008.
121. After crediting that sum to the account, there was still an outstanding balance of Ksh. 2,783,112.80. The Co-operative Bank lodged a claim against the Plaintiff for that sum, together with interest from 6<sup>th</sup> October 2010.
122. The Co-operative Bank did not challenge the valuation Reports presented to court by **THOMAS MUKHWANA** of Value Consult, Mombasa. That would imply, that as at May 2008, the value of the suit property was most probably much higher than the sum of Ksh. 3.2 million which it was sold for.
123. Regrettably, the Plaintiff did not provide a Valuation Report showing the value as at May 2008. Therefore, the court cannot pinpoint the value of the suit property as at the date of the sale. Nonetheless, in all probability, the value was much higher than Ksh. 3.2 million.
124. Of course, a Chargee is not expected to sell the charged property at the Market price, if the sale is at a public auction. But the market value of the property is always a good guide, where there was no forced sale value assessed by a valuer.
125. The bank was not obliged by law, at the material time, to have the property valued before it was auctioned. But prudence dictates that a Chargee ought to act in a fair and just manner, even if not under a statutory compulsion.
126. In the light of the huge disparity between the sum realized at the auction and the value of the suit property, I find that the bank failed to act in a fair and just manner, by selling off the suit property for Ksh. 3.2 million.
127. I find that if the bank had taken into account the interests of both the Chargee and the Chargor, the property would have fetched a higher price.
128. In the circumstances, I hold the considered view that it would be unjust to the Plaintiff, who has already lost the suit property, to also have to pay the bank a further sum of Ksh. 2.7million plus interest from 6<sup>th</sup> October 2010.
129. In the result, the Plaintiff's claim fails, and is dismissed. The Counter-claim of the 1<sup>st</sup> Defendant

is also dismissed.

130. The Plaintiff and the 1<sup>st</sup> Defendant will pay their own costs. However, the Plaintiff will pay costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of July 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Judgement read in open court in the presence of**

Wairegi for Adipo for the Plaintiff

Orare for McCourt for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Orare for Nyoike for the 3<sup>rd</sup> Defendant

No appearance for the 4<sup>th</sup> Defendant

No appearance for the 5<sup>th</sup> Defendant.

Collins Odhiambo – Court clerk.