REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 511 OF 2012

BETH WANJIRU MWANGI ..... 1ST PLAINTIFF

IDEAL MATUNDA LIMITED ..... 2ND PLAINTIFF

IDEAL BUSINESS LINK LIMITED ..... 3RD PLAINTIFF

VERSUS

EQUITY BANK LIMITED ..... 1ST DEFENDANT

ANTIQUE AUCTIONS LIMITED ..... 2ND DEFENDANT

TRADE LIGHT EXPRESS LIMITED ..... 3RD DEFENDANT

CHARLES MWANGI ..... 4TH DEFENDANT

JOHN ANTHONY RAVEL ..... 5TH DEFENDANT

R U L I N G

1. The Application for determination by this Court is the Plaintiffs' Notice of Motion dated 9 August 2012 brought under Certificate of Urgency, the general inherent provisions of the Civil Procedure Act as well as **Order 40 rules 1, 3, 4 (1), (2) & (3)** of the *Civil Procedure Rules*. The Orders sought of the court included a temporary injunction restraining the 3rd Defendant from transferring or in any way alienating or disposing of the property known as Villa No. 9 on L. R. No. 29/03/6, Nairobi as well as a temporary injunction restraining the 4th Defendant from transferring or in any way alienating or disposing of motor vehicle registration number KAR 883Q Toyota pending the hearing of the Application and the hearing and determination of the suit. Further a temporary injunction was requested in respect of motor vehicle registration number KAM 559V, Nissan Urvan as above. The Application was based on the following grounds:

"1. Between the 28th day of September 2007 and the 23rd June, 2010, vide several secured Overdraft cum loan facilities, the 1st defendant/ respondent lent various amounts of monies to the plaintiffs/applicants.

2. By a letter dated the 23rd day of June, 2010 the 1st defendant/respondent extended a Loan Facility amounting to Kshs.40,000,000 to the 2nd plaintiff/applicant. It was an integral aspect of the said Loan Facility that it would first be used to satisfy all subsisting loan facilities extended to the 2nd and 3rd plaintiffs/applicants through a cross-section of Bank Accounts.

3. As a consequence thereof, the only subsisting loan instrument after the 23rd day of June, 2010 was singularly extended to the 2nd plaintiff/applicant as under the specific terms and conditions as particularized in the said letter, as under "the Laws of the Republic of Kenya" (clause 16 thereof) and partially guaranteed by the USAID (Clause 6 thereof).

4. An integral aspect of the said Loan Facility was the repayment schedule, which was specifically agreed upon as 60 monthly installments of Kshs.888,778.

5. The 1st defendant/respondent however gradually and irregularly increased the quarterly installments and by the 11th day of July, 2011 the quarterly loan repayment installments stood at Kshs.3,509,076, amounting to monthly installments of Kshs.1,169,692 and the interest rate stood at 16% up from 12%.

6. The 2nd plaintiff/applicant consistently sought for more reasonable terms from the 1st defendant/respondent but all pleas fell on deaf years, with no hope of satisfying the now astronomical quarterly installments and suffering heavy financial constrains, the 2nd plaintiff/applicant started accumulating arrears.

7. By a letter dated the 20th day of January, 2012, the 2nd plaintiff/applicant offered a structured formula for both the clearance of the loan arrears as well as the regularization of the loan facility, the same was received and acknowledged by the 1st defendant/respondent on the 21st day of January, 2012 but did not elicit any response from the 1st defendant/respondent.

8. Instead, on the 2nd day of April, 2012; in disregard to any and all provisions of Law relating to financial instruments, foreclosure and property laws the 2nd defendant/respondent citing instructions from the 1st defendant/respondent proceeded to alienate all of the 1st plaintiff/applicant's movable property, including household furniture, beds and other personal effects.

9. The said 2nd defendant/respondent also proceeded to unlawfully dispose off the 1st plaintiff/applicant's real property better known as All that Villa No. 9 on L.R. No. 209/403/6 and its title and interest transferred to the 3rd defendant/respondent.

10. It is noteworthy that the said mortgage instrument to all that Villa No. 9 on L.R. No. 209/403/6 regarding the loan instrument dated the 10th day of June, 2010 was never drawn executed and/or registered. In any event, the 1st plaintiff/applicant was only a guarantor and not *per se* a direct party to the said loan agreement thus any foreclosure on the said property under the premises and/or pretext of the said loan instrument is under all circumstances, irregular and unlawful thus null and void and/or voidable.

11. The said 2nd defendant/respondent also proceeded to unlawfully dispose off the 1st plaintiff/applicant's motor vehicle registration number KAR 883Q and its ownership and interest transferred to the 4th defendant/respondent despite the fact that the principal, being the 1st

defendant/applicant herein did not have any drawn and/or registered instrument regarding the said motor vehicle relating to the said loan instrument; any foreclosure on the said property under the premises and/or pretext of the said loan instrument is under all circumstances, irregular and unlawful thus null and void and/or voidable.

12. The said 2nd defendant/respondent also proceeded to unlawfully dispose off the 1st plaintiff/applicant's motor vehicle registration number KAM 559V and its ownership and interest transferred to the transferred to the 5th defendant/respondent despite the fact that the principal, being the 1st defendant/respondent herein did not have any drawn and/or registered instrument regarding the said motor vehicle relating to the said loan instrument thus any foreclosure on the said property under the premises and/or pretext of the said loan instrument is under all circumstances, irregular and unlawful thus null and void and/or voidable.

13. The 1st defendant/respondent has had a longstanding and mutually beneficial business relationship with the plaintiffs/applicants which is evident in the fact that the 1st defendant/respondent gradually increased the monies loaned out to the said 2nd and 3rd plaintiff's/applicant's singularly and severally culminating in the loan facility issued on the 23rd day of June, 2010: the sudden move to foreclose was therefore premature and reeks of malice and reprehensible abuse of due procedure.

14. Under the circumstances of the said Loan facility, moreso in regard to the absence of any specific security instruments registered as against the chattels of the respective plaintiffs/applicants, it was unavailable for the 1st defendant/respondent to foreclose, or in any other way dispose any chattels belonging to any of the plaintiffs/applicants without litigation and/or arbitration.

15. Had proper foreclosure procedure been duly followed, the 1st, 2nd and 3rd plaintiffs/applicants would have gotten a proper opportunity to exercise their equitable right of redemption which is an integral factor in foreclosure. Indeed the manner in which the 1st defendant/respondent foreclosed on the assets of the respective plaintiffs/applicants was maliciously and circumspectly designed to extinguish their capacity to invoke and or implement their equitable right of redemption as by law provided.

16. The acts and omission of the defendants/respondents singularly and severally are in breach of basic human rights as envisaged in the Constitution of Kenya, 2010, principles of natural justice and local & international property laws.

17. THAT it is in the interest of justice for the Orders sought to be granted as the respective plaintiffs/applicants will suffer irreparable loss and damages in the alternative".

2. The Plaintiffs' Application was supported by the Affidavit of **Beth Wanjiru Mwangi,** the first Plaintiff, sworn on 9 August 2012. The deponent stated that she was a director of both the second and third Plaintiffs and authorised to swear the said Affidavit on their behalf as well as on her own part. She stated that she had a long-standing and mutually beneficial business relationship with the first Defendant since its inception as a building society and later when it became a fully-fledged bank. The deponent gave a history of the borrowing from the first Defendant by the second and third Plaintiffs. She maintained that there had been an original lending of Shs. 5 million by a facility letter dated 13 June 2009. Later, by a facility letter dated 23 June 2010, the borrowing of the second and third Plaintiffs, was extended to an amount of Shs. 40 million. As a result of the second facility letter, the deponent maintained that both she and the second and third Plaintiffs were discharged of their obligations to the first Defendant:

"save for those vested in the Loan instrument issued vide the letter dated the 23rd day of June, 2010 with my personal obligations being limited only to those of a guarantor."

The first Plaintiff maintained that the integral aspect of the loan facility was the repayment schedule therefore which had been specifically agreed upon by way of 60 monthly instalments of Shs. 889,788/-.

The first Plaintiff said that gradually and irregularly the first Defendant had increased the amount of the monthly instalments as well as the interest rate upon which the loan was based and by 11 July 2011, the monthly instalments had been increased to Shs. 1,169,692/-and the interest rate from 12% to 16%. The deponent stated that she had realised that such repayments were beyond the capability of the second and third Plaintiffs and on 20 January 2012, she wrote a letter to the first Defendant on behalf on the second Plaintiff detailing proposals to regularise the second Plaintiff's loan account, to which no reply had been received. The deponent then recorded that the second Defendant, upon instructions from the first Defendant, proceeded to alienate her movable property, as she put it, as well as proceeding to dispose of her real property being Villa No. 9 on L. R. No. 209/403/6, Nairobi. The first Plaintiff had been advised by her advocates on record that foreclosure by the first Defendant on her movable and real property on the pretext of the loan agreement dated 23 June 2010, was under all the circumstances, irregular and unlawful.

3. The matter came before my learned brother Mutava J. in vacation on 10 August 2012 and the Judge granted a temporary injunction restraining the 3rd Defendant from disposing of the first Plaintiff's property being Villa No. 9 aforesaid as well as restraining the same Defendant from selling and disposing of the first Plaintiff's two motor vehicles registration numbers KAR 883Q and KAM 559V. pending the hearing and determination of this application *inter partes*. Thereafter, one **Purity Kinyanjui** who described herself therein as the General Manager and Head of Debt Recovery at the Four-ways Branch of the first Defendant, swore a Replying Affidavit on behalf of the first and second Defendants dated 12 September 2012. The first matter that the deponent raised in the Replying Affidavit was that the suit herein was incompetent in so far as it had been filed without a copy of the second and third Plaintiffs' resolutions under seal, authorising the filing of the same as well as authorising the first Plaintiff to swear and file the verifying affidavits or indeed any other affidavit herein. As regards the change in the interest rates with respect to the loan made to the Plaintiffs, such had been affected by changes to the Central Bank of Kenya rate as set by that institution after periodic review of market developments. There was no requirement for the first Defendant to notify the Plaintiffs of any change in the interest rate under the Loan Agreement between the parties dated 23 June 2010 (Clause No. 4). Ms. Kinyanjui pointed to paragraphs 12 and 13 of the Affidavit in support of the Application and, more notably, the letters dated 4 March 2011 and 20 January 2012 written by the first Plaintiff to the first Defendant, in which the loan arrears were admitted, along with proposals as to how the Plaintiffs' intended to regularise their accounts with the first Defendant. As such, the first Defendant maintained that the Plaintiffs had not disclosed a *prima facie* case as against the Defendants as regards the issue of any injunction. The deponent maintained that the first Defendant had exercised a valid statutory power of sale by private treaty in accordance with the law and more specifically section 69 of the Indian Transfer of Property Act, 1882. The first Defendant had also obtained a valuation of the property being Villa No. 9 aforesaid. As regards the two motor vehicles, the deponent detailed that such had been repossessed in March 2011 with the full knowledge and participation of the Plaintiffs who had voluntarily delivered up the said vehicles to the second Defendant auctioneers. The Application to now seek injunctive relief in respect of the vehicles, almost a year after they had been sold, in the opinion of the deponent to the Replying Affidavit, was brought in bad faith after such a long delay and the Plaintiffs were guilty of laches.

4. The *inter-partes* hearing of this Application was scheduled for 26 October 2012 but unfortunately this Court was unable to sit on that day. This led to a further Application by the Plaintiffs by way of Notice of Motion dated 26 October 2012, to extend the interim orders made herein. Such were so extended by Ougo J. on that date. Prior to that date, the Plaintiffs had made an Application for substituted service of the Summons herein on the third, fourth and fifth Defendants. Although I was prepared to grant that Application with respect to the fourth and fifth Defendants as individuals, I directed on 27 September 2012 that the third Defendant be served at its Registered Office, which in fact was accomplished by the Plaintiffs. Thereafter, the firm of Muchoki Kangata & Co., advocates came on record for the third Defendant. One **Njama Wambugu**, a director of the third Defendant, swore a comprehensive Replying Affidavit on 29 November 2012 plus a Further Replying Affidavit on 17 December 2012. He noted that the first Plaintiff had mortgaged what he termed "the suit premises" in favour of the first Defendant to secure the facilities as alluded to in its pleadings. He exhibited a copy of the Mortgage dated 28 September 2007 as between the first Plaintiff and the first Defendant for the amount of Shs. 5,250,000/-. He commented that the averment that the suit premises had not been offered as security and therefore not

available sale, was not only false and misleading but calculated to invite confusion in what was otherwise a very clear matter.

5. The Plaintiffs filed their submissions herein on 30 November 2012. They set out the Orders sought by the Application before court and cited the case of **Giella v. Cassman Brown & Co. Ltd (1973) EA 358** as to the principles upon which an injunction application may be granted. They then gave what they termed a brief background to the dispute between the parties detailing the said loan of Shs. 40 million to the 2nd Plaintiff and the loans to the other Plaintiff's totalling Shs. 47,500,000/-. The Plaintiffs maintained that the main cause of action by way of this Application was as regards the nature and form of the foreclosure by the first and second Defendants. The Plaintiffs maintained that foreclosure was a specific legal process in which a lender attempted to recover the balance of a loan from a borrower who has stopped making payments to the lender, by forcing the sale of the asset used as collateral for the loan. In formal terms, a mortgagee or other lien holder obtained a determination of the mortgagor's equitable right of redemption, either by Court order or by operation of law after following a specific statutory procedure. The Plaintiffs maintained that the first Defendant had arbitrarily increased the rates of interest to the Plaintiffs which had been unreasonable and pointed to the case of **Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1947) 1KB 223** with reference to the Master of the Rolls **Lord Greene** finding that:

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".

Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another".

6. In the Plaintiffs' opinion, while they were engaged in negotiations with the first Defendant, having been arbitrarily lumbered with an interest rate increase so as to cripple the Applicants' business undertakings, the first Defendant had acted unreasonably by foreclosing. They noted that as far as the sale of the said motor vehicles was concerned, they had been notified of such through newspaper advertisements which the Plaintiffs considered was unreasonable on the part of the first Defendant. As regards the suit premises Villa No. 9 on L. R. No. 2/9/403/6, the Plaintiff commented that the loan instrument dated 10 June 2010 was never drawn, executed and/or registered. They noted that the first Plaintiff, who was the registered owner thereof, was only a guarantor and not a party to the said loan agreement. In this regard, the Plaintiffs maintained that any foreclosure in relation to the suit premises under the provisions of the said loan instrument was under all the circumstances, irregular and unlawful and thus null and void. They maintained that there were no registered instruments (by which I presume they meant chattels mortgages/charges) as against the movable properties and consequently the sale by public auction of the said motor vehicles and personal household goods had been unlawful under the express provisions of the Auctioneers Act. Further, they rather confusedly submitted that the suit premises were also not available for disposal without the existence of "an instrument registered against each specific property". They maintained that their contention that the sales were unlawful were premised on the maxim of **Nemo dat quod non habet** in that the purchase of a property from someone who has no ownership rights therein denies the purchaser of any title to ownership. They maintained that the first Respondent did not have title to the properties that were transferred to the third, fourth and fifth Defendants. Consequently this court should preserve the said properties pending the hearing and determination of the suit. Finally, the Plaintiffs maintained that, on the balance of convenience, it would

be in the best interests of all parties that the suit premises and immovable properties were best retained in their current position as no party was likely to suffer prejudice.

7. The submissions of the first and second Defendants were filed herein on 25 February 2013. The said Defendants detailed the background to the matter emphasising that on 28 September 2007 the first Plaintiff had executed a mortgage with a continuing security over L. R. No. 209/403/6 in favour of the first Defendant for a sum of Shs. 5,250,000/-. Further on 13 June 2009, the first Defendant had advanced to the second Plaintiff, a loan facility of Shs. 5 million secured by a LPO and by USAID. Then on 23 June 2010, the first Defendant had advanced a further sum of Shs. 40 million to the second Plaintiff secured by a personal guarantee of the first Plaintiff supported by the mortgage as above. The second Plaintiff had also executed a debenture over the said motor vehicles and over the company assets in favour of the first Defendant to cover the Shs. 40 million loan. There had been a further guarantee from USAID for Shs. 20 million as well as the director's personal guarantee for Shs. 40 million. The first and second Defendants identified the issues for determination as:

a. Whether the first and second Defendants had the right to exercise their statutory power of sale?

b. Whether the first and second Defendants had the right to increase the interest rate on the loans advanced?

As regards a. above, the first and second Defendants referred to clause 3.1 of the Mortgage Deed dated 28 September 2007 executed in favour of the first Defendant, the security therein being a continuing one. They maintained that the said immovable property Villa No. 9 had been sold by private treaty in favour of the third Defendant and a Transfer of Lease was executed on 4 January 2012 as between the first Defendant and the third Defendant. The first Defendant maintained that it had every right to sell the suit premises to recover the money due and owing to it under clause 9 of the said Mortgage as well as clause 8 (a). To this end, the first and second Defendants referred and quoted the provisions of **section 69** of the *Transfer of Property Act*, which provided for sale both by way of auction and private treaty.

8. The first and second Defendants noted that the first Plaintiff had maintained that no statutory notice was served upon her in respect of the suit premises. They referred to a demand notice issued on 4 January 2011 for the repayment of the debt standing at over Shs. 40 million. After the first Plaintiff had failed to repay the debt which stood at Shs. 47,007,837.67 as at 4 January 2011, the first Defendant had issued to the first Plaintiff a notice to exercise its statutory power of sale. They noted that this was a continuing security and that the first Defendant was at liberty to exercise its statutory power of sale. The first and second Defendants then commented as to the validity of the Mortgage instrument which the Plaintiffs had contended was not valid, as it had not been executed nor was it registered. The first and second Defendant's maintained that the said mortgage deed was executed in favour of the first Defendant and such had been admitted by the Plaintiffs in letters dated 4 March 2011, 18 July 2011 and 20 January 2012. The first and second Defendants submitted that if the validity of the Mortgage Deed was ever in issue, the first Plaintiff would have complained in writing rather than admit the debt. As regards the sale of the said motor vehicles, the first and second Defendants submitted that the repossession and sale of the same in March 2011 was done with the full knowledge and participation of the first Plaintiff vide a letter dated 4 March 2011. It was evidenced that the first Plaintiff, at least, was notified of the sale of the said motor vehicles. Upon sale, the motor vehicles were transferred to the 4th and 5th Defendants herein.

9. As regards the first Defendant's ability to increase the interest rate in respect of the loans advanced to the Plaintiffs, it submitted that the variation in interest rates was affected by changes to the Central Bank of Kenya rates under the monetary policy. Such changes were made after periodic review of the market developments in relation to *inter-alia* information, exchange rate stability and private sector credit growth. The allegation by the Plaintiffs that the increase in interest rates by the first Defendant was unreasonable, was unfounded. Further, provision for the increase in interest rates was detailed in the Loan Agreement dated 23 June 2010 – clause 4. The said Loan Agreement also provided that there was no obligation on the part of the first Defendant to notify the Plaintiffs of any such increase in interest rates. Finally, the first and second Defendants concluded that money had been borrowed by the Plaintiffs under a continuing mortgage in favour of the first Defendant. When such money was not repaid, the amount

escalated due to interest charges over the years. The Orders sought by the Plaintiffs herein had already been spent since the said movable and immovable properties have already been transferred to third parties being the third, fourth and fifth Defendants.

10. The third Defendant filed its submissions on 5 February 2013. It embarked upon detailing the facts in respect of the sale of the suit premises to it after the first Defendant herein had availed itself of its statutory power of sale. After the sale had taken place by private treaty, the third Defendant, upon payment of the purchase price in full, had been registered as the proprietor of the suit premises. As for the first and second Defendants, the third Defendant referred the court to **section 69B** of the *Transfer of Property Act* and maintained that upon a plain reading of the same, the Plaintiffs' claim against the third Defendant was untenable and the essentials for the granting of injunctive orders as per the **Giella** case had not been made out. The third Defendant then referred the court to the cases of **Priscillah Grant v. Kenya Commercial Finance Company Ltd & 2Ors - HCCC No. 227 of 1995 (unreported)**, **Downhill Ltd v. Harith Ali El-Busaidy Civil Appeal No. 254 of 1999 (unreported)** and **Ze Yu Yang v. Nova Industrial Products Ltd (2003) 1EA 362**. The third Defendant concluded that court processes must come to an end and that this court must jealously guard its process from abuse, mischief and manipulation.

11. As regards the suit premises, the Mortgage as between the first Plaintiff and the first Defendant was dated 28 September 2007 for the amount of Shs. 5,250,000/-. In the recitals, there is no reference to the second or third Plaintiffs as the said sum was advanced to the first Plaintiff solely. The Mortgage Deed clearly sets out **section 69 (1)** and **100A (1)** of the *Transfer of Property Act 1882*. There is a certificate signed by Geoffrey Wekesa, an advocate of this court, in which he maintains that he explained the effect of the above two sections to the Mortgagor. Further, the advocate has witnessed the signature of the Mortgagor on page 21 of the document, the same has been stamped and duly registered on 18 January 2008. The consent of the Lessor and Manager of L. R. No. 209/403/6 is clearly endorsed on the document. I have also perused the letter dated 22 January 2011 addressed by the first Defendant to the first Plaintiff at pages 61/62 of the Exhibit to the first Plaintiff's Supporting Affidavit dated 9 August 2012. That was the statutory notice which was forwarded by registered mail to the first Plaintiff. I am satisfied as to the validity of that notice under the provisions of **section 69 (1)** of the *Transfer of Property Act*. Attached to the Replying Affidavit of the first and second Defendants is a valuation carried out by Paragon Property Valuers Ltd dated 10 June 2011 giving an open market value for the suit premises at Shs. 16.5 million and a forced sale value of Shs. 14 million. I am satisfied that the sale of the suit premises to the third Defendant was properly undertaken by way of private treaty which the first Defendant had the authority so to do under the Mortgage deed. As a consequence, I find no evidence of irregularity in the sale of the suit premises by the first Defendant through the offices of the second Defendant.

12. In respect of the rate of interest, as per the second Schedule to the Mortgage deed, such commenced at 14% per annum and under clause 2 (b) the first Defendant reserved the right to vary the rate of interest from time to time. Again, I can find no fault on the part of the first Defendant in that regard and I don't think that it has acted unreasonably. Finally under this heading, I did not quite understand the Plaintiffs' submissions in relation to the maxim of **Nemo dat quod non habet**. Having perused the documentation I am quite satisfied that the first Plaintiff did have ownership of the suit premises otherwise she would not have been able to mortgage the same to the first Defendant.

13. Turning to the sale of the said motor vehicles,I have perused the facility letter dated 23rd of June 2010 addressed to the directors of the second Plaintiff offering facilities of Shs. 40 million. Quite apart from the personal guarantee required of the first Plaintiff supported by the existing mortgage over the suit premises, the first Defendant required joint registration and a specific debenture over motor vehicle registration numbers KAZ 503B and KAM 559V as well as a fixed and floating debenture over the second Plaintiff's assets for Shs. 40 million. The facility letter would seem to have been executed in acknowledgement under the signature of the first Plaintiff on 26 June 2010, although her signature is not witnessed. Unfortunately, no documentation has been put before this court as to either the debenture over the said motor vehicles or the fixed and floating debenture over the second Plaintiff's assets. However, I have perused the letter dated 4 March 2011 referred to in the first and second Defendant's submission at

page 50 of the exhibit to the Supporting Affidavit of the Application. That letter is under the hand of the first Plaintiff and reads in the third paragraph thereof:

"As explained during the meeting, we needed to take the Motor vehicle for inspection. We needed a certified copy of the log book for inspection purposes. Although we started asking your Corporate branch of the same since last week, we only got it on Monday. The vehicle was inspected yesterday and it will be delivered to your Auctioneers today."

To my mind that letter, which was headed "Motor Vehicle KAM 595V" quite clearly indicated that the first Plaintiff, at least, was fully aware of the repossession of the said motor vehicles and the sale thereof.

14. The up-shot of the above is that the Plaintiffs have come nowhere near satisfying this court that their Application merits any sort of injunctive order to be given. Both the suit premises and the motor vehicles have long since been sold by the first Defendant, through the second Defendant and there has been considerable delay in the Plaintiffs bringing their Application before court. To this end, the Plaintiffs have failed to demonstrate in any way that they have a *prima facie* case with any probability of success. What the Plaintiffs appear to be asking this Court in their Application is to make retrospective injunctory orders which under any circumstances the Court is unable and has no power to sanction. In any event, if the Plaintiffs were, by any chance, successful in this suit, they can be adequately compensated for, in damages. As indicated, I do not consider that the first Defendant has acted in any way unreasonably so that this Court could come to the Plaintiffs' assistance as envisaged by the **Associated Provincial Picture Houses** case (supra). Accordingly, I dismiss the Plaintiffs' Notice of Motion dated 9 August 2012 with costs to the first, second and third Defendants.

DATED and delivered at Nairobi this 9th day of May, 2013.

J. B. HAVELOCK
JUDGE