



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 505 of 2008

MUIRI COFFEE ESTATE LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANKDEFENDANTS

RULING

Application dated 8/9/2008 filed by Gichuki Kingara & Co. Advocates for the plaintiff/applicant. The application came first under certificate of urgency and was heard by Justice Kimaru ex parte on 8/9/2008.

The application is brought under **Order 39 rules 1, 2, 3 and 9 Civil procedure Code, Section 3A of Civil Procedure Act, Section 52 of the Indian Transfer of Property Act 1882) Section 100 Banking Act** and all enabling provision of law.

Orders sought pending determination of this suit:- A temporary injunction be issued restraining the first and 4th defendant/respondent, their servants or agents from further advertising for sale, disposing of, selling by private treaty or otherwise, howsoever charging, leasing, letting or otherwise howsoever interfering with the plaintiff's possession, an occupation, use or ownership of title to and/or interest in the land. "All that parcel of land known as LR No.10075 of Thika area. And an order be made under Section 52 of Transfer of Properties Act 1882 that during the pendency of this suit ALL FURTHER registration, or change of registration in the ownership, leasing, subleasing, allotment user occupation or possession or in any kind of right. Title or interest in ALL that parcel of land known as LR10075 Thika with any Land registry, Government department and all other registered authorities be and is hereby prohibited.

The application is grounded on the basis that at all material times the suit property LR10075 Thika measuring 443 acres has been fraudulently transferred by 1st and 3rd defendants to the 4th defendant. And that the suit property valued at Kshs.693,365,000/= was disposed of at the gross under-sale of Kshs.70,000,000/=. And that the sale and transfer is fraudulent particulars of which are set down under paragraph (iii) (a) – (f).

The suit property was offered as security for an overdraft facility which the second defendant had requested from the bank (first defendant). Two of the plaintiff's directors without a duly processed resolution by the board of directors of the plaintiff purported to charge the suit property to the first defendant to secure a sum not exceeding the sum of Kshs.4,500,000/= to be made available to 2nd defendant. Consent of Ruiru Land Control Board or any other Board was not sought or obtained prior to the said charge. The charge was shown as having been executed before Edith W. Gachamba Advocate who does not appear on the list of advocates issued with practicing advocates certificates for the year 1988.

Two further changes were created – second change to secure Kshs.7,000,000/= dated 25/5/1989. Further charge dated 13/7/1990 for Kshs.4,500,000/= granted. The purported charges are defective and incapable of taking effect for failure to comply with the registration of **Transfer of Property Act** and the law of **Contract Act**.

Furthermore, the securities purported to secure Kshs.70,000,000/= while the advances were for Kshs.11,500,000/=. The principle debtors property has not been sold and the amount of debt would be fetched from a sale of the same. The plaintiff/applicant as guarantor is fully and completely discharged of all its obligations under the charge because of material departure by first defendant from its agreement with plaintiff. Furthermore, the lending is illegal contrary to **Section 44 of the Banking Act** and **Section 46 of Registration Of Titles Act**. How did the guaranteed sum of Kshs.11,500,000/= move up to Kshs.70,000,000/=. It is submitted that plaintiff has prima facie case with high chances of success which suit will be rendered nugatory if orders are not granted. The applicant is willing to give an undertaking for damages if ordered by court. The application is supported by affidavit of James Ngegi Muigai who is described as director of the plaintiff company. He narrated on oath how the land was developed and that in 1988 USAID of America offered funds to Kenyans which funds were channeled through the first defendant's bank. The second defendant approached the first defendant for advances. The security was parcel No.LR12411/1 and parcel No.LR12411/2 and guarantor (plaintiff charged its property LR No.10075 "**the suit property**"). The valuation of the property is exhibited and estimated to be between Kshs.1 billion and Kshs.700,000,000/=. The alleged sum of Kshs.70,000,000/= is undervalue.

It is also sworn that the auction was not conducted but there was irregularities. Furthermore upon a search in the companies registry the fourth defendant was a private company with capital of only Kshs.100,000/= only incorporated in year 2006 and with two directors Padul Dilesh Bid and Kunal Kamlesh Bid. The transfer executed by Shah was null and void according to principles of company law.

Furthermore, the consent of Ruiru Land Control Board is not valid. The Commissioner of Lands has not granted consent to the transaction and provisions of the **Auctioneers Act** and **Rules** were not followed. Property is leasehold title.

In the plaint the prayers are permanent injunction against 4th defendant. A declaration that the sale of suit property is illegal, null and void. Cancellation of the said conveyance in favour of 4th defendant a declaration that the charges enumerated are null and void and of no effect. A declaration that the first defendant's remedy is against the second defendant . Damages for fraud against the first, third and 4th defendants.

The plaintiff's application dated 8/9/2008 is opposed by first defendant, Kenya Commercial Bank Ltd/Chargee.

The first defendant has caused a replying affidavit to be sworn by one Chris Theuri described as a Relationship Manager of the first defendant. He swears that he has dealt with the plaintiff in course of his duties and also the 2nd defendant account and he is conversant with facts pertaining to the account and all issues raised in this matter. He swears that he has been advised that this application is fatally and incurably defective, incompetent and an abuse of court process and the whole suit and application ought to be struck out for being **Res Judicata** and **Sub Judice**. On 3rd August, 1989 the first defendant granted financial facilities to 2nd defendant which were secured by LR No.12411/1, and LR 14916/1 both in Nyandarua and LR No.10075 Kiambu. The said facilities were extended to the second defendant strictly in accordance with Banking Act Cap 488.

It is sworn that the charge documents dated 2/5/1989 and 13/7/1990 were properly executed as by law required and are valid and proper in all respects. There was a consent recorded between plaintiff and second defendant in Nairobi HCCC No.1219/1992. the issue cannot be raised after the first defendant has exercised its chargees power of sale. Statutory notices were served upon plaintiff and 2nd defendant after default of payments. Sale by auction was scheduled for 5/3/1992 and before that day plaintiff and 2nd defendant commenced suit No.HCCCNo.1219/1992. Exhibited as "CTI". Then a consent decree was

made as exhibited "CT2". The consent was not complied with by plaintiff and 2nd defendant. Another sale was scheduled for 23/1/1992. Before that date another suit was filed being HCCC No.285 of 1993 and ex parte interim injunction was obtained. The plaintiff and 2nd defendant persisted in default and another sale was scheduled to take place on 26/6/1996 but before the said date the plaintiff filed HCCC No.1520 of 1996 against the first defendant. Sale was stopped. The suit was dismissed. Evidence "CT5" exhibit. Then HCCC No.1611 of 1996 was filed on 2/7/1996. The suit was struck out on 26/1/1998. the security was advertised for sale on 7/2/1997, a suit HCCC No.24 of 1997 was filed in Nyeri but the suit was struck out on 9/5/1997.

In August 1999 the plaintiff and second defendant filed HCCC 1576 of 1999 seeking orders that they be provided with a statement of account. This suit was finally effectually heard on its merits at a condonable length and judgment given. This matter went to Court of Appeal. The HCC 337/2006 was filed against the first defendant which was truck out on 16/3/2007. Constitution petition was filed under Section 75 of the constitution which petition was truck out as an abuse of court process. Thereafter a suit was filed HCCC No.122 of 2007 against 1st defendant and 3 others. It is admitted that the first defendant undertook a feasibility standing but the study was for net projected profit of Kshs.863,317,998/=. The success of the project does not depend on the feasibility standing but on other factors. It is sworn that the plaintiff and 2nd defendant mismanaged the project. The total amount advanced was released to 2nd defendant according to agreement but the 2nd defendant failed to make its 40% contribution to the project as agreed.

It is admitted that the suit property was sold on 19/9/2007 by public auction. It is exhibited notices issued to the plaintiff, exhibit "CT18". Notice dated 11/1/2005 was written "**Take Notice that unless the said sum (Kshs.70,00,456.75) together with interest thereon is paid in our offices within three months of the date of service of this notice**". The point here is that 3 months statutory notice was not given. Similar notice was issued on the same date to second defendant worded similarly "**Within three (3) months**". It is to be noted that most of what Mr. Theuri swore was hearsay. He was not personally involved.

The parties filed written submission. The plaintiff submitted that the plaintiff has made a prima facie case with a probability of success on the grounds that the sale was conducted in an irregular, unlawful and fraudulent manner. The statutory power of sale had not arise, sale was fraudulent, illegal and tainted with fraud. This is fortified by the further affidavit sworn by Kungu Muigai on 2/10/2008 who swears that at paragraph 2 to 5 that the first defendant has never rendered accounts to the second defendants despite demands. It was not possible to tell on what basis the first defendant was making demands for payment from the plaintiff. The 2nd defendant owns two properties LR12411/1 and LR 12411/2 Nyandarua measuring 70 acres and valued at Kshs.46,600,000/= annexture "KM1" as at 2/10/2008. These properties were charged to the first defendant but first defendant proceeded to sell the guarantors security intending to cripple the operations of the plaintiff.

Furthermore the statutory notice was invalid. I have already said the period of 3 months had not expired. This suit property is registered under Registration of titles Act and a chargee who wants to exercise its statutory power of sale must comply with Section 69A of Indian Transfer of Property Act which provides "a mortgagee shall not exercise the mortgagee power of sale unless and until (a) Notice requesting payment of the mortgagee money has been issued on the mortgagor or one on two mortgagors and default has been made. The mortgage may or part thereof for three months after service or some interest under the mortgage is in owners and unpaid for two months after becoming due or there has been a breach of some provisions contained in the mortgage instrument or in this Act, and or part of the mortgagor or of some person concerning in making the mortgage to be observed or performed other than and besides a consent for payment of the mortgage money or interest thereon. The chargee must satisfy itself that it has made a lawful demand. A demand on request of the lawful interest and default charges. In the case of Simiyu versus HFCK **Justice Ringera** had an opportunity to consider the issue of the effect of want of service of statutory notice. Inadequate statutory notices, notification of sale of a public auction of charged land registered under **Registered Land Act** and be concluded that "**.....without compliance with the statutory demand, demands, there can be no valid exercise of the power of sale**

and accordingly, it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof". The demands made by 1st defendant on this case were on:-

- (1) 17th July, 1995 was a demand of Kshs.3,492,934/=.
- (2) On 8/3/1996 demand was Kshs.44,358,583/= after 8 months
- (3) And later same statement showing Kshs.2,711,020/= as the outstanding amount.

It is submitted that these are baseless claims calculated to clog and fetter the second defendants equity of redemption. Further it is submitted that there was no service of notification of sale and statutory notice **Rule 15(c)** and **(d) Auctioneers Rule 1997** was not complied with. The deponent Chris swears on 18/9/2008 at paragraph 49, that he has been advised by his advocates on recorded that the auction was conducted according to law. He was not present and he does not know the law. He should have been given the information by the auctioneer and this piece of affidavit is simply hearsay. Another account of the happenings at the auction was given by Mr. Rahmil Dilesh in his replying affidavit sworn on 17/4/2008. In paragraphs 12 and 13 of his affidavit where he swears that he attended the auction on behalf of 4th defendant. Service of notice were denied. 45 days notice has to be served before advertisement for auction sale. The documents produced by Chris Theuri labeled statutory notice, the redemption notice, advertisement among others at paragraph 49. it is sworn that statutory notice was sent to Muiri Coffee Estate through Post Office Box 57457 Nairobi. The plaintiff has never had such address and therefore the notice has never been received and there is no evidence to the contrary. The statutory notices dated 21/3/2007 and 22/8/2007 and notification of sale of dated 21/3/2007 and 22/8/2007 were never served upon plaintiff or its directors. It is not demonstrated that there was attempt to serve on the plaintiff or the directors or that the notice was served on the property physically. Such service is not valid in law and is of no legal authority. The notices were not of 3 months period. They were for payment **"within three months period"** not after expiration of 3 months. The plaintiff further submits that the sale was illegal. The chargee's power of sale can only arise where the chargee has acted within the law and the chargor is in breach of legal preliminaries, only after the chargor is in default and valid statutory notice has been served upon him.

In the case of **Cuckmere Brick Co. versus Mutual Finance**, the Court of Appeal held that in exercising the power of sale mortgagee was not merely under a duty to act in good faith, honestly and without recklessly disregarding mortgagors interest but also to take reasonable care to obtain whatever was the time market value of the mortgaged property. It was also held that a mortgagee was liable to the mortgagor for any damage by reason of the negligence, of the mortgagee's agent. Supporting affidavit paragraph 25 demonstrate that the purported auction was not conducted in accordance with **Auctioneers Act**.

Chris Theuri exhibits a list showing bidders names, bid number and amount. No evidence of the maker of document has been produced. Attendance register has been disclosed. But who is the maker of the two documents? The evidence of the person who was present, Stephen Ndungu Njonjo is stronger and more reliable than that of Theuri which was hearsay.

In **Triple Eight Investment (K) Ltd versus City finance Bank Ltd and another**, the Bank was in blatant disregard of court order issued against it to maintain status quo proceeded to transfer the suit property. The amount in determining the right of the purchaser of the property held **"Granted the applicant right not have been aware of such orders a buyer for value but the illegal act undertaken by the bank in direct contravention of a court order, cannot constitute a legal act against which one can seek cover or protection behind the said section of the Transfer of Property Act and the Registration of Titles Act"**.

In the case of **Isaac Kamau Ndirangu versus Commercial Bank of Africa** the Court of Appeal stated **"Any party who purchases property in a sale tainted with illegality is not justified in claiming that he is an innocent purchaser for value without notice"**. The court found that the interested party (purchaser) was an active player on the stage he could not claim that he was innocent for value without notice.

Akiwumi Judge in the KTD Corporation said the same and exercising inherent powers under **Section 3A of Civil Procedure Act** invalidated the sale and declared it of no legal effect. He has only filed a statement of defence. According to valuation report dated 4/2/2008 the suit property is valued at Kshs.693,365,000/=. The same was sold for Kshs.70 million only.

In the case of **Kenya Agencies Ltd. versus Barclays Bank & 5 others**. The auctioneers collected 25% deposit two days after sale. The Court of Appeal granted orders and restrained the sale of the appellants two other properties.

In this case there was gross under sale for Kshs.70,000,000/= when value was Kshs.693,365,000/=. There was undervalue. In the case of **Mbuthia versus Finler Credit Ltd.** where – **Platt J. A.** held *“in those circumstances the question for the trial court would be whether the plaintiff could show that the defendant had exercised his powers in a fraudulent way. He could rely on price alone if he thought that at a little over half the true value. It was evidence in itself of fraud. It would be matter of evidence whether the sale price of Kshs.200,000/= was in fact a little over half of the true value of Kshs.375,000/= as really valued relied on by the plaintiff. There was a dispute of fact to be resolved”*. In this case the value was Kshs.693,365,000/= yet the bank purported to sell at Kshs.70,000,000/= which is a little over 9th of its value. **Platt JA** would have said it was fraudulent. In the case of **Kenya Commercial Bank versus Osebe**, the plaintiff’s property was sold for Kshs.20,000/= at a public auction in March, 1980. In September, of the same year the property was valued at kshs.160,000/= and sold at Kshs.180,000/= with the bank financing at Kshs.160,000/=. Court set aside sale saying the interest of the chargor were not taken into consideration. In **Industrial Commercial Development Corporation versus Kariuki Gathecha** it was held:-

“A mere contract of sale between the appellant and purchaser did not extinguish the right of redemption of the respondent. The contract of sale was only a personal contract between the mortgagee and the purchaser and not create any interest in the property of the purchaser”.

Mcheng versus Union Bank of Canada. It was said *“It is well settled law that it is the duty of a mortgagee when realizing the mortgage property by sale to believe in conducting such a realization as a reasonable man would believe in the realization of his own property so that the mortgagor may receive credit for the fair value of the property sold.”*

It is submitted that it is doubtful whether the 4th defendant assuming he was the owner of the suit property could have allowed it to be sold at a price it did.

In the case of **Cuckmere Brik Co. versus Mutual Finance Salmon L.** Judge stated *“I accordingly conclude both on principle and authority that a mortgagee on exercising his power of sale does owe a duty of care to take reasonable precaution to obtain the true market value of the mortgage property at the date on which he decides to sell it*

Bearing this situation of the suit property it is clear that Kshs.70,000,000/= as stated in paragraph 21 of the plaintiff’s supporting affidavit was not near the market value of 443 acres developed. Now the court is being asked to grant an injunction after a transfer has been effected. Further affidavit of Stephen Ndungu Njonjo of 22nd September, 2008 advances the plaintiff argument that no auction took place on the date and time mentioned . In the case of **Mwathi versus Kenya Commercial Finance Co. Ltd.** **The Court of Appeal** granted an injunction to restraint the respondent from registering the property to the auction purchaser since the auctioneer and another purchaser had not complied with conditions of sale.

In the case of **Marijit Singh Settlement & Others versus Paramount Universal Bank, Waweru Judge** granted orders against eviction. The court found that the balance of convenience tilted towards the preservation of suit property pending determination of suit on merit. In the case of **Darwood Khan versus EABS** the argument among which the court allowed the application was that the highest bidder was declared purchaser but did not pay the 25% deposit. The auctioneer demanded. The property was sold to another party being after auction sale.

In the case of **Panel Etemeri Nandebekwa versus Simon Kitui Wakape**, it was held that a void sale cannot support claim for property interest. Where the plaintiff bought a property in an auction which was tainted with illegality by failure to issue statutory notice. The claim of the purchase was dismissed on the ground of illegality of sale process and the status quo in the register relating to the property before the sale was maintained.

In the case of **Nyanyilo Ochieng versus Fanuel Ochieng**, the court held, “*in our view a sale which is void does not entitle the purchaser of such sale to obtain proprietorship or title to the land so sold.*” The court was of the view that the Bank ought to have been more careful in proving service of the statutory notice where service was disputed.

Again in the case of **Joseph Siro Musiona versus HFCK & 3 others**, the court faulting chargee action held that a sale by public auction would attract a better price than a sale by private treaty.

In view of the above authorities, the plaintiff submits that for reasons of defendants breach and flaws, it cannot be compensated in damages and the said sale ought to be declared null and void and of no legal effect.

It is also submitted that the plaintiff only guaranteed Kshs.11,500,000/= and its suit property was charged to first defendant to enable the 2nd defendant to service a loan of Kshs.23,175,000/= but the first defendant only released a sum of Kshs.10,200,000/= contrary to the agreement.

Between 1988 and 1990 2nd defendant took Kshs.10,200,000/=. On 19/9/2007 the first defendant made claim of Kshs.70,000,000/= from the plaintiff as purported debt due and owing from 2nd defendant. This was not first time the first defendant was making unfounded claims.

On 18/7/1995 it demanded Kshs.3,492,934/= and on 18/3/1996 the demand was Kshs.44,358,583/=. At the material time the rate of interest up to 1st August, 2005 to 30th April, 2007. the interest rates were registered by the **Banking Act** as indicated in paragraph 33 of the plaint.

Section 44 of the Banking Act still in force stated “*No financial institution shall increase the rate of Banking or other charge except by power of approval of minister*”.

By **LN No.4939 of 1989** interest rates now brought for loans over 3 years was linked to the ceiling of a maximum of 18%. Then LN No.1458 of 1990 placed the ceiling to a maximum of 19% per annum on loans exceeding 3 years.

The 1st defendant charged altered the rates of interest without obtaining the consent of the minister which act was in contravention of the law and a charge of the chargee equity of redemption.

In the case of **Samaki Industries versus Southern Bank Ltd. HCCC No.485 of 1999**, the issue of valuation of interest at the discretion of the lender was considered and the effect thereof on the contract of borrowing. **Hayanga Judge** (now retired) said, “*the term for interest here provides interest will be 36% but the Bank has the right to vary the rate of interest without notice to the borrower.....This kind of claim is a deviation on from the very principles of standard contract imposed by economically stronger party on the weaker party..... to take or leave it, these terms make a mockery of the principles of freedom of contracting because they are not open to negotiations*”.

The issue also arose in **HCCC No.450 of 2006** Prof. David Musyimi Ndeti. The court in granting injunction observed “*it also appears, prima facie that the defendant raised increments in Bank charges and ledger fees without proper material approved as required by statute.*” The dispute is therefore not merely over accounts. It is whether the defendants statutory power of sale has accrued and whether the defendant has acted contrary to the contract between parties and law.

Similarly in **Givan Okatho Ingari & another versus HFCK** there was challenge of the propriety of

charges and interest levied on the grounds that they were illegal and uncontractual. The court said ***“equity is not the interest to let defendant to milk the plaintiffs, dry and draw all blood form them. The court exists for the sole purpose of determining as to who is entitled to what.***

In my view the defendant cannot be allowed to engage in acts or omissions which are in contravention of the law.....”

Further submissions is that the charge documents dated 2/11/1988 on LR 10075 was to service Kshs.4,500,000/=. A second charge dated 25.5.1989 for Kshs.7,000,000/= and a further charge dated 13/7/1990 to service Kshs.4,500,000/= are invalid in law. The documents do not comply with **Section 46 RTA**. The documents do not comply with the prescribed forms provided under that Act where specific rate of interest is envisaged. The repayment time by which will be repaid and specific repayment dates. The statutory powers are contained in **Indian Transfer of Property Act Section 100A**. For a charge to apply powers of sale under **Section 69 Indian Transfer of Property Act**, it must comply with **Section 46 of RTA**. Therefore failure to comply with **Section 46 RTA** there is no validity of the charge and there are no powers of sale. The charges in this case do not comply with legal powers above and are therefore null and void.

In the case of **Nyanyi versus Kenya Commercial Finance Co. Ltd.** the court stated ***“Charge on LR No.631/525 Kericho is also said to be defective.....That it does not on its own specify the interest payment on the loan..... The charge document and debentures are not only meant to protect one party but both parties and must thereafter strictly comply with the law. The documents in that case could not be relied on by the defendant to exercise its power of sale”***. On appeal counsel for the Bank conceded that one charge was defective.

Then there is the case of **Anthony Athnes Ngotho versus national Industrial Credit Bank Ltd.** **Azangalala Judge** found the validity of the charge questionable. “The apparent defect shows a prima facie case with a probability of success. The validity of mortgage/charge may concern the execution of the same. In this case Edith Gachamba does not appear among the advocates who held practice certificate for the year 1988 but it is immaterial that Edith was not yet struck off or was plaintiff’s own advocate. The statutory power of sale can only the exercised if there is a valid certificate.

On the issue of **Section 52 of Indian Transfer of Property Act**, the Section states:- ***“During the action prosecution in any court having authority in British India or established beyond the limits of British India..... of a contentious suit or proceeds in which any right to immovable property is directly and specifically and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under a decree or order which may be thereon except under the authority of the court.”***

The case of **Ruaha Concrete versus Paramount Universal Bank** identifies the ingredients necessary before an order can be made.

The court said by applying **Section 52** this court is only staying the exercise pending the hearing of the suit. In **Mawaji versus U.S. International and another**, **Madam Judge** held, only a fool handy purchaser would purchase a property which is actually the subject matter of litigation. The court must protect ***“status quo.”*** There are other authorities cited namely:=-

- (1) **Hillcrest School Ltd versus Barclays Bank & 3 others.**
- (2) **Dr. Josephat Kipkoech Yego and another versus Allan Musa and 3 others.**
- (3) **Miethi and Swerm Farmers Co-operative Ltd versus The Co-operative Bank & another.** Court said, ***“Considering that the chargee/mortgagee is the first defendant and bearing in mind the provision of Section 52 Transfer of Properties Act, the income from the farm must be preserved and paid into interest bearing account to obviate hardship on whoever will be found to be the innocent party.....”*** Section 52 Indian Transfer of Property Act does itself prohibit dealings in property in

dispute in civil proceedings.

In addition to the above, it is submitted that there is breach of the law of guarantee. The plaintiff was a guarantor. The principle debtor remains primarily liable. The guarantor becomes liable on default of the principle debtor. The contract of guarantee is differed from that of the borrower to the lender. In this case the plaintiff guaranteed on the understanding that principle debtor would issue a debenture over its entire assets and a legal charge on LR124/182 and LR1211/1, directors point and individual guarantees and a board resolution authority the borrowing. However, the first defendant only charged the 2nd defendant properties above stated and first defendant charged the rate of interest from time to time. The case of **Burns versus Trade Credits Ltd** is also relied on. And **Patel and Others Versus National & Grindlays Bank Ltd** and **Washington Otieno versus The Co-operative Bank of Kenya**. Also **National Bank of Naigeria versus OBA A. wolesi.**

On issue of damages being adequate remedy, the case of **Muiri versus Bank of Baroda (K) Ltd.** the **Court of Appeal** finding that mortgagee had not served the statutory notice on the chargor granted injunction. In the case of **Lucy Njoki Waithaka versus ICDC Ringera** Judge held ***“it is not on inexorable rule that where damages may be an appropriate remedy on interlocutory injunction should never be granted. If that were rule the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. It would be unjust and be seen to be unjust”***.

Warsame J said the same in case of **Joseph Siro Mosiono versus HFCK & 3 others.** The plaintiff/applicant’s counsel concluded the submissions by saying the plaintiff demonstrates infringement of its legal rights, the court ought not to be loabour the issue of damages being an adequate remedy because money is not everything. The chargee is duty bound to observe the law strictly.

The 4th defendant who was represented by another senior counsel Gantama leading Mr. Sehmi had filed written submissions which were highlighted in court. It was submitted that the applicant’s counsel did not touch or advance the advance the plaintiff’s case against the 4th defendant. None of the authorities cited bear the historical background of 14(**8 High Court and 6 in Court of Appeal**) which have either been dismissed or struck out. The authorities submitted are relevant. In reply the 4th defendant relies on:-

- (1) Affidavit of Rahnil Dilesh Bid file don 17/9/2008.
- (2) Affidavit of Kunal Kamlesh Bid filed on 17/9/2008
- (3) Statement of grounds of objection dated and filed on 17/9/2008.

On issue of **Res Judicata** the counsel adopts and supports the submission of Mr. Nyachoti for 1st and 2nd defendants. He submits that the matters submitted are **Res Judicata**. He refers to earlier proceedings where similar prayers were sought on account of fraud and the ruling of this court suit No.494 of 2008 where similar applications were made. In that suit the dispute was in the similar transaction except the present plaintiff withdrew its case. This court commented ***“all matters relating to the exercise of power of sale by 1st defendant are now Res Judicata”***. The court proceeded to say regarding this suit (HCC 494/2008) the issue of injunction as between plaintiff and first defendant is **Res Judicata** and in any case has been one take by events for the property has been sold. Those were only observations they were not matters for decision.

It is to be noted that case was between the principal debtor and the lender. This case is between the guarantor and the lender. It is clear that in the transaction there are two agreements namely lending agreement between lender and borrower and the guarantee between guarantor and the lender. The principle in **Henderson versus Henderson (1843)** cannot be applicable where there are two transactions endorsed differently. The issues arising are quite different.

I have also read **Pop-In (K) Ltd & Others versus Habib Bank, A. G. Zurich.** In that case there was omission to join one plaintiff. It is also submitted that plaintiff in all previous cases could have and

should have raised all the issues he is now raising including agreements in respect of **Section 52 of Indian Transfer of Property Act**. It is submitted therefore this issue is also *Res Judicata*. I have perused the case of **Uhuru Highway Development Ltd. versus Central Bank** of Kenya & Others where it was said once an application for injunction with a suit has been heard and determined a similar application cannot be brought unless there are new facts not brought before earlier which merit a reliving. In this case the matters raised are from the purported sale which is said to have taken place on 19/9/2007. This is a new transaction not taken up before. The plaintiff is arguing another dispute regarding issue of fraud. This was denied under paragraph 5 of Rahmls affidavit. But the fraud alleged in another transaction with different parties must be tried separately. It is submitted that undervalue is evidence of fraud and such evidence can be enough proof. The valuation obtained by auction of Kshs.58,000,000/= on a fraudulent sale was very low considering the valuation of the plaintiff of over Kshs.600,000,000/=.

In my ruling I did state with material before the court that there was no evidence that the purchaser obtained the title by fraud and he has demonstrated that public auction was conducted lawfully and regularly complying with all rules of the auction company. The purchaser in their case was delayed in completion of transaction which is attributed to litigation going on. This is an issue for trial.

The defendant also states that the consent of commissioner of lands was not necessary. The 4th defendant also filed written submissions. The first item was in respect to principle of *Res Judicata*. The 4th defendant adopted the submissions of Mr. Nyachoti for first defendant regarding the issue reciting all previous suits filed in respect of this transaction. HCCC No.122 of 2007 was between **Benjoh Amalgamated Ltd with Muiri Coffee Estate Ltd. versus Kenya Commercial Bank Ltd and 3 Others**. It was not then between the same parties as in this present suit. The subject was declaration that Benjoh first plaintiff loan account with the first defendant had been fraudulently dealt and that the court orders Director of Criminal Investigations to investigate the said loan account and report to this court. General damages with costs of the suit. That dispute is not similar with the present suit.

The ruling dated 3rd November, 2008 in HCCC No.494/08. This suit was between Benjoh Amalgamated Ltd. versus Kenya commercial Bank Ltd and Bidii Ltd. The parties are different and the plaintiff herein does not appear. As I have said above there are two transactions that of lender and Borrower and Lender and Guarantor. HCCC No.494/2008 is regarding them. The transaction of Lender and borrower and the present suit 505/2008 is between Guarantor and the lender. The issues in the two cases are different. In HCCC 494/2008 the comment “all matters relating to the exercise of the power of sale by first defendant was obiter. The same is to be sound of **“I believe all issues between the parties have been raised in one case or the other”**. It is also to be said that **“the issue of injunction as between plaintiff and 1st defendant is Res Judicata and in any case has been overtaken by events for the property has been sold”**. Meaning that once charged property has been sold an injunction cannot be granted. Regarding the cited case of **Herderson versus Herderson (1843) 67 ER313-319**, I have already commented on it. Whereas the court requires the parties to litigation to bring forward their whole case and will not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject. In contest there are special circumstances that may arise in the instant case of exercise of charges power of sale. Every time a sale is aborted it gives rise to fresh sale and this is a different new matter of which the mortgagor is entitled to challenge. I have also considered **Pop-In (Kenya) Ltd. & 3 Others versus Habib Bank AG Zurich** and I hold the same view. The application of the provisions of **Section 52 Indian Transfer of Property Act** are clearly meant to apply during the pending of ongoing proceedings. It prohibits transactions of immovable property while proceedings as to the rights of parties are pending determination. The purpose is to avoid a fresh suit being filed anytime there is change of ownership and the rule applies to mortgage and sales.

Regarding the authority of **Uchumi Highway Development Ltd. versus Central Bank of Kenya & Others (Civil Appeal No.36 of 1996)** the Court of Appeal said **“a similar application cannot be brought unless there are new facts not brought before the court earlier after exercise of due diligence which merits a re-hearing and possible departure from previous ruling. Such cases of course must be very few and far in between.”** It is my view that where there are fresh transactions like where there is a new public auction a party is entitled to bring another challenge. It is not a matter which might and ought to have been made a ground of defence or article in such a former suit (application).

I have considered provisions of **Section 7 Civil Procedure Act**, The doctrine of *Res Judicata* by **George Spencer Boner, and Trade Bank Ltd.** In liquidation **or L.Z. Engineering Construction Ltd and others.** It is a principle of procedure that any person alleging fraud has to prove the same strictly the allegation being a serious matter. However the plaintiff has not been called to prove the same. He says the evidence of the price of Kshs.70,000,000/= for 434 acres of land and improvements is gross undervalue which is evidence of fraud. The plaintiff has shown valuation which shows the value of Kshs.600,000,000/=. There is need to test this valuation by cross examination.

On the issue of *Locus Standi*, the plaintiff has not terminated his suit. On the issue of Land Control Consent is important. A transaction not blessed with the consent of relevant Land Control Board is void and hence it cannot be said that the right of equity of redemption has been extinguished until the consent of Land board is first heard and obtained. There is the issue of the charges clause (d) which states that the chargor hereby irrevocably appoints the chargee to be the attorneys of the chargor in the name and on behalf of the chargor and or borrower to execute and do any assurances acts and things which the chargor ought to execute and do under the covenants and agreements herein contained. And clause (i) "For the purpose of enabling the bank to exercise more readily and beneficiary the powers herein before conferred on it the chargor hereby irrevocably appoints the Bank to be the attorney of the chargor in the name and on behalf of the chargor to execute and do any assurances acts and things which the chargor ought to execute and do under the contents agreements herein contained and generally to use the name of chargee....." Provisions such as those are not in the prescribed form J1 or J2 in the **Registration of Titles Act** and therefore the clauses are null and void and not applicable in charges under **Registration of Titles Act**. It is admitted that there was delay in completion of the sale. The transfer document was executed by two directors with different names. The 4th defendant has tried to explain that Rahmel Dilsh Bid and Kunal Kamlesh Shah are one and the same person. The 4th defendant raises issues of suppression of material facts. That HCCC No.122 of 2007 is pending but in fact it was struck out by Warsame Judge. Also to state that David G. Kariuki had not filed affidavit is not suppression of material facts since the information is on record. I would consider such misinformation as not material. The provisions of Section 69 b (1) Transfer of Property Act, it is submitted that the title of purchaser (4th defendant) is not impeachable on the grounds that no case had arisen to authorize sale or that due notice was not given or the power was otherwise improperly or irregularly exercised nor is the purchaser concerned to inquire whether a case had arisen to authorize sale or due notice had been given or that the power was properly or regularly authorized. The 4th defendant has cited several authorities. The court has considered **Henderson versus Handerson and Pop-In Kenya Ltd.** The court has read the other authorities. It is to be noted that the court cannot support illegal acts. The first defendant has also participated in this application so as to oppose the orders sought against it. It is submitted that in view of the previous court ruling in these proceedings that the dispute between plaintiff and first defendant is *Res Judicata*. The application for injunction stands dismissed. Furthermore, the first defendant has enumerated several 14 cases since 1992 that have passed through these courts and even the Court of Appeal. The first defendant has strongly argued that the plaintiff's application is *Res Judicata* and although this is a guarantor. He consented together with the borrower on one side and first defendant on the other side. Both guarantor and the borrower agreed to pay the total outstanding sums on or before 31st July, 1992. They proceeded to authorize the first defendant to sell the securities in default. Therefore the plaintiff cannot now raise the issue of which securities would be realized first.

I have considered these arguments and submissions of the parties plaintiff, first defendant and 4th defendant. Firstly, the issue to be considered is whether the plaintiff has made a case to warrant granting of injunction as prayed in the application, it is alleged there is invalidity of statutory notice whose validity is the key to the exercise of chargee's power of sale, illegality of sale, chargee's duty to act on the interest of chargor in selling the property at an undervalue will occasion loss to the chargor. The authorities can on the side of applicant/plaintiff. On the issue whether an injunction can be granted after transfer of suit property. There is the case of **Mwathi versus KCB Ltd.** where Court of Appeal granted an injunction where the conditions of auction sale were not complied with. And on case of **Manjit Singh Sete and Others versus Paramount Universal Bank, Waweru Judge** granted injunction to prevent eviction of the applicant's pending hearing of suit on merits and in **Dawood Khan versus EAS,** injunction was allowed as 25% deposit was not paid. Interest illegally charged is also an allegation and it

is submitted that court cannot assist an illegal door. In validity of charge document. The documents of the charge are not in accordance with the prescribed form. The prohibition of further transactions while an ongoing suit is pending under **Section 52 Indian Transfer of Property Act.**

Breach of law of guarantee discharges the guarantor, damages are not adequate remedy. Fraud and several irregularities are alleged. The 4th and 1st defendants rely on the doctrine of Res Judicata, delay in completion of sale and execution of transfer. Further the provisions **Section 69B(1) Transfer of Property Act.**

I have weighed both sides and it is my finding that the applicants have support both on law and facts. The doctrine of **Res Judicata** is not confirmed here. There is no case that has proceeded and finally determined between the plaintiff and the 4th defendant. Therefore, the issues are not Res Judicata. Regarding the issue of guarantee the breach of the terms is raised in the plaint. The breach is to be proved. The plaintiff would stand to lose greatly if the injunction was not granted. On the other hand, the first and 4th defendants stand to lose not much.

It is my view that orders sought ought to be granted if only for a period to enable the plaintiff to prosecute his case. I grant the orders for a period of six (6) months from today. If the suit is not prosecuted to a conclusion this application shall stand dismissed.

The plaintiff shall give undertaking as to damages within the next three days from today.

Orders accordingly.

Dated, signed and delivered at Nairobi this 2nd day of November, 2009.

JOYCE N. KHAMINWA

JUDGE