

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL CASE NO. E002 OF 2021 AS CONSOLIDATED WITH

CIVIL CASE NO. 2A OF 2022

JUDY CHEPTOO LABOSO

PLAINTIFF

VERSUS

**EDWIN ABONYO (being sued in his capacity as an
Administrator of the estate of JOYCE CHERONO LABOSO)**

..... 1ST DEFENDANT

MARY CHEPKIRUI LABOSO 2ND

DEFENDANT

KALEEN AHAMED

MOKTHAR AHAMED 3RD DEFENDANT

STANBIC BANK KENYA LTD 4TH

DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

AND

ITIBO LIMITED THE AFFECTED

PARTY

JUDGEMENT

1. This is a consolidated suit being Bomet Civil Suit Number E002 of 2021 and Bomet Civil Suit Number 2A of 2022. In Bomet Civil Suit Number E002 of 2021, the Plaintiff (Judy Cheptoo Laboso) via a Plaint dated 10th March 2021 alleged that the 1st, 2nd and 3rd Defendants as directors of the Affected Party fraudulently colluded to borrow money from the 4th Defendant without following proper procedure thereby lading the Affected Party with a debt.

2. The Plaintiff prayed for the following Orders: -

- I. A Declaration that the 1st, 2nd and 3rd Defendants being Directors of the Affected Party acted fraudulently and in breach of trust by subjecting the Affected Party into borrowing from the 4th Defendant and charging the Affected Party's property namely KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 to secure the loan without convening a meeting and passing a resolution to that effect.

- II. A Declaration that the 4th Defendant acted negligently by not calling for the Minutes of the meeting where the Resolution to borrow and charge the suit property was passed and requesting to be supplied with the resolution itself before approving the loan hence the 2nd Defendant is disentitled to recover the loan from KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28.
- III. A permanent injunction do issue restraining the 4th Defendant/Respondent whether by itself, its employees, servants, agents, assigns or any other person acting on its instructions from selling, taking possession of, transferring or otherwise in any manner whatsoever dealing with the suit property herein.
- IV. An order do issue, directed at the Land Registrar, ordering him to remove the encumbrance in Title Number KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 as a result of the Charge created over the said property by the 2nd Defendant.

V. Any further relief that this Honourable Court may deem just in the circumstances.

3. In Bomet Civil Suit Number 2A of 2022, the Plaintiff (Judy Cheptoo Laboso) instituted the suit through a Chamber Summons Application dated 10th March 2021. She sought the following orders: -

- I. Spent.
- II. Spent.
- III. Spent.
- IV. A Declaration do issue that Mary Chepkirui Laboso (2nd Defendant) being a trustee over all those properties known as KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 was in breach of trust by secretly offering the trust properties as security for a loan advanced to ITIBO LIMITED without the knowledge and consent of the Plaintiff, being a beneficiary, hence the loan facility was illegally obtained.

- V. A Declaration do issue that Mary Chepkirui Laboso (2nd Defendant) being a trustee over all those properties known as KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 was in breach of trust by having the Titles registered without showing the Plaintiff's beneficial interest thereon.
- VI. An order to issue, directed at the Land Registrar (5th Defendant) ordering him to rectify the titles in respect to title numbers KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 to reflect the beneficial interest as detailed in the Certificate of Confirmation of Grant to the 1st Defendant in the estate of REBECCA CHEBET LABOSO (HC Succession Number 46 of 2014) on 4th November 2015.
- VII. An order to issue that Stanbic Bank Kenya Ltd (4th Defendant) never conducted its due diligence properly on KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 before accepting to create a Charge and advancing the loan otherwise it could have discovered the Plaintiff's beneficial interest.

VIII. A Declaration do issue that Stanbic Bank Kenya Ltd (4th Defendant) having failed to conduct its due diligence properly coupled with the fact that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 are trust properties to which the Plaintiff was a beneficiary did not consent to the Charge being created over the said properties, the 4th Defendant was not entitled to exercise its power of sale over the said properties to recover the loan advanced to ITIBO LIMITED.

IX. An order to issue directed at the Land Registrar (5th Defendant) to remove the encumbrance in KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 as a result of the Charge created by the 4th Defendant.

4. The 1st, 2nd, 3rd and 5th Defendants did not file their defences.

The 4th Respondent (Stanbic Bank) filed their defences dated 8th February 2024 on 13th March 2024.

5. I shall summarize the Plaintiff's and 4th Respondent's case in the succeeding paragraphs.

The Plaintiff's case (Judy Cheptoo Laboso)

6. It was the Plaintiff's case that she was the sister to the late Joyce Laboso and Mary Chepkirui Laboso (2nd Defendant). That the subject pieces of land i.e. KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 emanated from a succession cause (Succession Cause Number 46 of 2014, being the estate of Rebecca Chebet Laboso) and the mother title was Title Number KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1. That the said ancestral land was later subdivided into KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 without her knowledge. It was her further case that Mary Laboso (2nd Defendant) and her late sister Joyce Laboso were the

administrators and trustees of the estate of their late mother, Rebecca Chebet Laboso).

7. The Plaintiff stated that the 2nd Defendant and Joce Laboso (deceased) irregularly used the three Titles KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 to secure a loan of USD 3,542,000/=. The Plaintiff further stated that the bank's interests could not defeat her interest as a beneficiary where it was clear that the trust was breached by the 2nd Respondent who committed fraud by transferring the trust property to herself.

8. The Plaintiff stated that the 2nd Respondent and Joyce Laboso (deceased) as trustees, bore the responsibility of honesty and accountability to the beneficiaries of the estate of their late mother. That they were guilty of flagrant breach of trust.

9. The Plaintiff stated that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK

1/45 were not registered with the words “as a trustee” as envisaged under **Section 66 of the Land Registration Act** and that the 2nd Respondent (Mary Laboso) and the Chief Land Registrar (5th Respondent) were in breach of the trust created in Succession Cause No. 46 of 2014. That the 2nd Respondent committed fraud by not having the registration include the words “as a trustee” and that one could not pass a good title to a property that had been obtained fraudulently. She further stated that the Charge created by the bank could not be valid in the circumstances.

10. It was the Plaintiff’s case that she lived on the subdivided land together with Mary Laboso and their brother David Kipkoech. That she stood to suffer irreparably as she has not known any other home since her childhood and if the property was sold, she would have nowhere else to go. It was the Plaintiff’s further case that the bank did not conduct a physical search or inspection on the property as they would have found that the property in question was trust property.

The 4th Defendant’s case (Stanbic Bank).

11. The 4th Defendant stated that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 was registered in the name of Itibo Limited. The 4th Defendant further stated that Itibo Limited was its customer and it submitted all the prerequisite documents prior to opening an account with them.

12. It was the 4th Defendant's case that through a Facility Letter dated 14th March 2017, they agreed to advance Itibo Limited an overdraft facility limited at Kshs 40,000,000/= and an asset facility of USD 3,113,000/=. It was the 4th Defendant's case that Itibo Limited were required to present extract of the Minutes of the meeting of its Board of Directors approving and authorizing the execution of the said Facility Letter and such Minutes dated 14th March 2017 and the said Minutes were compliant with **Articles 19 of the company's Articles of Association.**

13. The 4th Defendant stated that the Facility Letter dated 14th March 2017 was executed by the late Joyce Laboso, Mary Laboso (2nd Defendant) and Kaleen Ahamed Mokthar Ahamed

(3rd Defendant) on behalf of Itibo Limited and they also executed a joint undertaking/Guarantee and Indemnity to secure the loan amount. That the said Facility Letter was amended on 17th July 2018.

14. It was the 4th Defendant's case that the loan was secured by the company's (Itibo Limited) Directors' joint Guarantee and Indemnities, all Assets' Debenture dated 27th July 2017, first ranking legal Charge dated 27th July 2017 over KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, first ranking legal Charge dated 27th July 2017 over KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 both registered in the joint names of the late Joyce Cherono Laboso and the 2nd Defendant and personal Deeds of Guarantee and Indemnities by the late Joyce Cherono Laboso, Mary Laboso (2nd Defendant) and Kaleen Ahamed Mokthar Ahamed (3rd Defendant).

15. The 4th Defendant stated that the Debenture and Charge Instruments were registered in its favour to secure the sum

of USD 3,524,000/=. That it was a condition precedent in the Facility Letter dated 14th March 2017 that for the disbursement of the secured sum (USD 3,524,000/=), Itibo Limited had to contribute USD 1,910,000/= that was to be capitalized by 31st December 2017. The 4th Defendant stated that it did not disburse the secured sum as Itibo Limited failed to provide any evidence of their contribution.

16. It was the 4th Defendant's case that Itibo Limited requested to restructure the loan to a term loan of USD 322,395/= and the term loan letter was executed on behalf of Itibo Limited by the late Joyce Laboso, the 3rd Defendant and David Kipkoech Langat who also executed a joint undertaking/Guarantee and Indemnity to secure the loan. It was the 4th Defendant's further case that at the time of creating the securities, it was not aware of the company's internal wrangles.

17. The 4th Defendant stated that the company repeatedly defaulted on its monthly payments and as a result, it begun the process of realizing the securities. That they negotiated a payment structure with the company and the company still

failed to honour its obligation. The 4th Defendant stated that they were entitled to recover the amount owed to it.

18. It was the 4th Defendant's case that the allegation that it failed to conduct due diligence was false and misconceived and that the suit was aimed at delaying their accrued right to exercise its statutory power of sale without any basis.

19. Both parties filed their statement of agreed issues on 10th July 2023 to wit: -

i. Whether the 1st, 2nd and 3rd Defendants conspired to defraud the Affected Party by charging the Affected Party's property without any decision being passed by the Affected Party to that effect.

ii. Whether the 4th Defendant conducted due diligence to the required standard before agreeing to advance the loan to the Affected Party.

iii. Whether the 4th Defendant is a bona fide charge without notice of fraud.

- iv. Whether the 1st and 2nd Defendants as Administrators are in breach of trust owed to the Plaintiff as a beneficiary of having title numbers KERICHO/KAPLETUNDO CHEMAGEL BLOCK 1/44 and 45 registered in their names and subsequently offering the properties as security for the loan advanced by the 4th Defendant.
- v. Whether the Plaintiff has made out her case against the Defendant
- vi. What order is to be made as to costs.

20. In analysing the above, I shall consider the parties' testimonies in court, the evidence adduced and their respective written submissions.

21. In court, the Plaintiff (PW1) testified that together with Joyce Laboso (deceased), Mary Laboso (2nd Defendant) and their brother David Kipkoech Langat they incorporated Itibo Limited (Affected Party) to run a family business and the Affected Party consisted of four directors/shareholders where

Joyce Laboso (deceased) and Mary Laboso (2nd Defendant) were the majority shareholders. The Plaintiff further testified that the Itibo Limited was the registered owner of KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 as the same was allocated to it through Succession Cause Number 46 of 2014, in the estate of Rebecca Chebet Laboso.

22. It was the Plaintiff's testimony that on 3rd March 2021, Mary Laboso (2nd Defendant) sent her a Notice dated 1st February 2021 from Stanbic Bank Kenya Ltd (4th Defendant) indicating the bank's intention to exercise its power of sale over KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 to recover a loan of USD 428,207/=. It was her further testimony that she was not aware of any resolution passed by Itibo Limited to borrow money or charge the said properties.

23. The Plaintiff testified that the three Titles KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and

KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 were used to secure a loan of USD 3,542,000/= but the bank only advanced USD 322,395/=. She further testified that there were serious irregularities surrounding the Charge as the same was executed by Joyce Laboso (deceased) and Kaleen Ahamed Mokthar Ahamed (3rd Defendant) and that there was no company seal affixed to the Charge document and further, there was no Letter of Offer.

24. It was the Plaintiff's testimony that Mary Laboso (2nd Defendant) breached the trust she held on behalf of her other beneficiaries when she authorized the use of titles being KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 as security for the loan and was therefore a beneficiary of an illegal transaction. It was her further testimony that the loan amount was never utilized for Itibo Limited's benefit as the same was squandered by the 1st, 2nd and 3rd Defendants in breach of the **Memorandum and Articles of Association of Itibo Limited.**

25. The Plaintiff testified that Stanbic Bank (4th Defendant) did not conduct due diligence and negligently advanced the loan to the 1st, 2nd and 3rd Defendants. She further testified that the bank advanced the loan without requiring the production of Minutes authorizing the 1st, 2nd and 3rd Defendants to borrow on behalf of Itibo Limited and the same was in breach of the **Banking Act**.

26. It was the Plaintiff's testimony that the bank (4th Defendant) should not be allowed to benefit from its own mistake by selling Itibo Limited's properties. It was her further testimony that Mary Laboso changed the title from their mother's name to her (Mary) name.

27. The Plaintiff testified that shares in Itibo Limited were to be held by the surviving children of her late mother, Rebecca Laboso. The Plaintiff further testified that her late sister, Joyce introduced other shareholders of Indian origin without her knowledge and that she only became aware of their existence when she obtained a CR-12 that had been supplied to the bank.

28. It was the Plaintiff's testimony that upon conducting her own search, she obtained a CR-12 where the name of the 3rd Respondent had mysteriously been removed.
29. When the Plaintiff was cross examined by the 1st Defendant's advocate, she testified that she was a minority shareholder of Itibo Limited. The Plaintiff further testified that the title deeds to KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 were changed secretly and were fake and that she was not aware of how the loan was taken. When the Plaintiff was further cross examined by the 4th Defendant's advocate, she testified that she became aware of the loan three days before the death of Joyce Laboso. She further testified there was no resolution to borrow the money and that the company seal was not on the loan documents. It was her further testimony upon cross examination that there was a difference between Itibo Estate and Itibo Limited.

30. Through her written submissions dated 4th December 2024, the Plaintiff submitted that the 1st, 2nd and 3rd Defendants conspired to defraud Itibo Limited's property without any resolution passed to that effect. She submitted that the particulars of fraud were pleaded in her Plaint and in relation to proving the fraud, she submitted that from her evidence, it was clear that there was no meeting by the shareholders or directors to pass a resolution to borrow money from the bank (4th Defendant) and thereafter charge Itibo Limited's properties. She further submitted that the loan amount was not utilized for the benefit of Itibo Limited.

31. It was the Plaintiff's submission that it was incumbent for the bank (4th Defendant) to produce the Minutes of the meeting where the resolution to borrow was passed and the bank failed to do so. It was her further submission that her position was uncontroverted that there was no such meeting or Minutes.

32. The Plaintiff submitted that the bank (4th Defendant) did not conduct due diligence before advancing the loan amount to

Itibo Limited. That the Plaintiff should have asked for the Minutes that indicated the company's resolution to borrow and they should have also conducted a physical visit to the suit property before advancing the loan amount. The Plaintiff further submitted that the bank was negligent in the way it handled the transaction as it allowed the Respondents to access the partially released funds before fulfilling the pre-conditions for releasing the rest of the loan and they could not be allowed to benefit from their own mistakes.

33. It was the Plaintiff's submission that the bank erroneously relied on the Turquand case as a defence. That the general position was that a third party dealing with a company was not bound to ensure that all internal regulations of the company have been complied with. It was her submission that the Turquand rule had some exceptions and one was that anyone dealing with a company was deemed to have notice of its public documents. That the 4th Defendant stated that it only received the extracts of Minutes. It was her further submission that the 4th Respondent should have taken an extra step and asked for the Minutes themselves.

That the position of further inquiry was stated in **Habiba Mohamed Al-Amin & 2 others vs Standard Chartered Bank of Kenya Limited & 8 others (2020) eKLR.**

34. The Plaintiff submitted that the 4th Respondent did not inquire for a resolution or authority from the company authorizing her deceased sister and the 3rd Respondent to sign documents on behalf of Itibo Limited. That since there were no Minutes out of which the resolution was extracted, the purported Charge was null and void. The Plaintiff further submitted that the 4th Respondent could not benefit from the company's property as no one could pass a good Title where fraud was proved.

35. It was the Plaintiff's submission that she had proved fraud and further she had proved that the bank failed to conduct due diligence and as such the bank could not be termed as a bonafide charge without notice. Further that the Turquand rule does not apply where there is fraud. She relied on **Ndigirigi v Nzioki & 4 others (Civil Appeal 85 of 2020) [2024] KECA 538 (KLR) (9 May 2024) (Judgment)** and

Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] KECA 816 (KLR). It

was her further submission that the mysterious removal of the 3rd Defendant as a director of Itibo Limited indicated fraud.

36. The Plaintiff submitted the 1st and 2nd Defendants breached the trust owed to her as a beneficiary by having KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 registered in their names and subsequently offering them as securities for loan advanced by the 4th Defendant. She further submitted that she sued in her capacity as an administrator of the estate of Rebecca Chebet Laboso vide Succession Cause Number 46 of 2014 where the late Joyce Laboso and Mary Laboso (2nd Defendant) were appointed as trustees. That upon the death of her sister, **section 81 of the Law of Succession Act** placed responsibility of the administration of the estate on the surviving administrator.

37. It was the Plaintiff's submission that trust was created under the succession proceedings in respect to KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 as the same were contained in the Confirmed Grant and they were listed as being held in trust for themselves and all the beneficiaries' i.e. Judy Laboso and David Kipkoech Langat. It was her further submission that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 belonged to the land referred to as Itibo estate and that the same was confirmed by the 1st Defendant during cross examination.

38. The Plaintiff submitted that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 measured approximately 4 hectares, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 measured approximately 42.77 hectares and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 measured approximately 26 hectares and the sum total acreage of the three parcels was 72.77 hectares. She further submitted that

this (72.77 hectares) was the exact acreage of Itibo Estate before it was subdivided.

39. The Plaintiff submitted that the fraudulent subdivision of the land was done before the Grant was confirmed and during the pendency of the succession proceedings. That the Title to KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 was issued in the year 2015, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 were issued in the year 2016. She relied on **Alice Chemutai Too (suing in her capacity as the personal representative of Kipkoech Tele (Deceased) v Nickson Kipkurui Korir, Attorney General & Consolidated Bank of Kenya (Environment & Land Case 51 of 2014) [2015] KEELC 151 (KLR).**
40. It was the Plaintiff's submission that the late Joyce Laboso breached the trust she owed to the Applicant when she converted the trust property to her name. She relied on **Stephens & 6 others vs Stephens & 2 others (1987) eKLR.**

41. On the other hand, the 4th Defendant through its Manager, Business, Support and Resolution, Collins Sabatia (DW1) testified that as part of its due diligence and prior to the registration of the loan facility, they conducted searches on the three properties KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 and it was revealed that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 was registered in the name of Itibo Limited and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 were both registered in the joint names of Joyce Cherono Laboso (deceased) and Mary Laboso (2nd Defendant) as absolute owners and in the circumstances, the Plaintiff's consent was not required. That they never saw the Certificate of Grant produced by the Plaintiff and the same was not availed to them during the creation of the facilities.

42. It was DW1's testimony that the Plaintiff did not prove that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and

KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 came as a result of the sub division of Itibo Estate as alleged.

43. DW1 testified that when the company (Itibo Limited) defaulted in its loan obligations, they issued the 90-day Statutory Notice dated 24th October 2019. He further testified that upon receipt of the Statutory Notice, the company wrote back to them acknowledging the outstanding amount and undertook to pay Kshs 15,000,000/= by 23rd March 2020 and thereafter sought to restructure the loan.
44. It was the DW1's testimony that they had not received any payment as at 23rd March 2020 but the company still expressed its intention to regularize its loan account and presented a Sale Agreement dated 14th September 2020 where the company wanted to sell its shares and liabilities to Helec Builders Ltd and thereafter use the proceeds of the sale to credit their loan account and clear their outstanding liabilities with them. It was DW1's further testimony that no payment was received from the company and they instructed their advocates to begin the realization process.

45. DW1 testified that the Plaintiff's claim if any lay with the 1st, 2nd and 3rd Defendants and not with them. That the Plaintiff had approached this court with unclean hands. He further testified that as at 28th February 2024, the outstanding loan balance was USD 674,136.59/=.

46. It was DW1's testimony that by offering KERICHOKAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHOKAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHOKAPLETUNDO/CHEMAGEL BLOCK 1/45 as security, they became commodities for sale. It was his further testimony that they valued the suit properties before they were charged and the Valuation Reports were consistent with the Certificates of Official Searches.

47. When DW1 was cross examined by the Plaintiff's advocate, he stated that the bank (4th Respondent) had done its due diligence and reiterated that they did not disburse the entire loan amount. When he was further cross examined by the 1st Defendant's advocate, he testified that they were not aware

that Mary and Joyce Laboso were administrators of the deceased's estate.

48. Through its written submissions dated 17th January 2025, the 4th Defendant submitted that they properly conducted their due diligence and that the company's Resolutions to borrow and execute the loan documents were aligned to the company's governing documents. They further submitted that the Plaintiff's allegation that the Charge was illegal because it did not contain the company seal had no legal basis and they relied on **section 37 of the Companies Act, 2015.**

49. It was the 4th Defendant's submission that they acted in good faith and that the Plaintiff did not dispute that the 1st, 2nd and 3rd Defendants were not members of the company's Board of Directors. It was their further submission that they were not aware of any internal wrangles between the directors and that persons dealing with corporate entities must be insulated from such company's shortcomings. They relied on

**East African Safari Limited vs Anthony Ambaka
Kegode & another (2011) eKLR.**

50. The 4th Defendant submitted that they satisfied itself that all the three suit properties were free from any encumbrances and further that it had no knowledge of the Plaintiff's alleged interest in the suit properties as the Certificate of Official Searches proved otherwise. That the nature of diligence contemplated by the law by a financial institution when creating a Charge was to obtain a Certificate of Official Search which they did.
51. It was the 4th Defendant's submission that the Plaintiff did not have a cause of action against it as it dealt with the suit properties at arm's length without notice of the alleged trust. It was the 4th Defendant's submission that it acted on the representations and warranties given by the Company's Directors therefore the allegations of negligence against it were unfounded.
52. The 4th Defendant submitted that the Plaintiff had not proved fraud against the bank and that although the Plaintiff

accused the 1st, 2nd and 3rd Defendants of fraud, she did not plead or tender evidence to support her claims of fraud. It relied on **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v. Stephen Njoroge Macharia (2020) eKLR.**

53. It was the 4th Defendant's submission that having exercised its due diligence, they acquired an equitable interest over the suit properties in a similar way to a bona fide purchaser for value without notice. It was the 4th Defendant's further submission that the Plaintiff did not make out her case against the bank.

Analysis

54. In any civil matter, the burden of proof lay with the Plaintiff and the standard of proof is on a balance of probabilities.

Section 107 of the Evidence Act describes the burden of proof as follows: -

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

55. In the case of **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] KECA 290 (KLR)**, the Court of Appeal stated that: -

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

56. In the present case, it is an undisputed fact that the properties, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 were charged by the 4th Respondent as security for advancement of loans to the Affected Party (Itibo Limited) and the 1st and 2nd Defendants. They were secured by a first ranking legal Charge dated 27th July 2017 over KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, a first ranking legal Charge dated 27th July 2017 over KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45.

57. The Plaintiff stated that Itibo Limited owed KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45. That the mother title was KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1 and before the subdivision, the land belonged to their late mother, Rebecca Chebet Laboso). The Plaintiff further alleged that the 1st and 2nd Defendants were trustees by

virtue of being the administrators of their late mother's estate.

58. In regards to KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45, the Plaintiff testified that the parcels belonged to Itibo Limited and the parcels were subject of a succession suit which placed the 1st and 2nd Defendants as administrators of the estate. That the 1st and 2nd Defendant as administrators of their late mother's estate were trustees and had a fiduciary duty to the other beneficiaries on how they conducted the affairs of the estate. On the other hand, the 4th Defendant stated that they conducted due diligence and were satisfied with the ownership of KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 after their Title Deeds were produced and indicated that the 1st and 2nd Defendants were its registered owners.

59. I have keenly gone through the testimony of the Plaintiff and the exhibits she produced in court. The Plaintiff (PW1) produced Title Deeds for KERICHO/KAPLETUNDO/CHEMAGEL

BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 and the Title Deeds indicated that the said parcels were registered in the names of the 1st and 2nd Defendant. The Plaintiff also produced a Certificate of Grant dated 22nd May 2017 issued by the High Court in Kericho in relation to the estate of Rebecca Chebet Laboso, Succession Cause Number 46 of 2014. The said Certificate of Grant confirmed that Joyce Laboso and Mary Laboso (2nd Defendant) were the administrators of the deceased's estate. The Certificate also showed that the 1st and 2nd Defendants were to hold Itibo Tea Estate in trust for themselves and all beneficiaries in equal shares and the beneficiaries were Judy Cheptoo Laboso (Plaintiff) and David Kipkoech Langat.

60. **The Black's Law Dictionary, 10th Edition** defines trust as:

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A fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the

trustee's obligations toward the property and the beneficiary.

61. Fiduciary relationship is defined as: -

A relationship in which one person is under a duty to act for the benefit of another on matters within then scope of the relationship.

62. From the evidence tendered in court, the mother title to KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 was KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1 (also known as Itibo Tea Estate). The aforementioned Certificate of Confirmation of Grant dated 22nd May 2017, provided that the 1st and 2nd Defendant, as administrators of the deceased's estate, were to hold Itibo Tea Estate in trust for themselves and all the beneficiaries in equal shares. The beneficiaries included the 1st and 2nd Defendants, the Plaintiff and their brother, David Kipkoech Langat.

63. As trustees, the 1st and 2nd Defendants had a fiduciary duty to deal or administer the deceased's estate and ensure equitable distribution amongst them, the Plaintiff and David Kipkoech Langat. The presence of title deeds for KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 in the names of the 1st and 2nd Defendants' names indicated that they had breached their duties as trustees. The Plaintiff protested the registration of KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 in the sole names of the 1st and 2nd Defendant's names and further stated that she had been kept in the dark during the administration of the estate and subsequent registration of KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 in the 1st and 2nd Defendants' names. The Plaintiff produced the said Title Deeds and Certificate of Confirmation of Grant dated 22nd May 2017 to buttress her claim.

64. On the other hand, once the Plaintiff made her claim and produced documents, the 1st and 2nd Defendants had an evidentiary burden to dispute or discredit the Plaintiff's claim

by showing that they had duly and properly acted in their capacities as administrators of the deceased's estate and had not breached their fiduciary duty to the Plaintiff and David Kipkoech Langat. The 1st and 2nd Defendants did not discharge their evidentiary burden.

65. In my view, this was *prima facie* evidence that the 1st and 2nd Defendants acted with fraud and mischief when they registered KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 in their joint names to the exclusion of the Plaintiff and David Kipkoech Langat. They did with the knowledge that they held and administered the deceased's estate in trust and ought to have made equal allocations to all the beneficiaries. There was no evidence that was presented in court to indicate any form of consent by the Plaintiff and David Koech Kiplangat that allowed the 1st and 2nd Defendants to register KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 in their joint names.

66. Flowing from the above, it is my finding that the registration of KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44 and KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/45 in the joint names of the 1st and 2nd Defendants was actuated by fraud.
67. In regards to KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28, the Plaintiff stated that the said parcel belonged to Itibo Limited in which she was a minority shareholder. That the 1st and 2nd Defendant subjected the company to be a security for a loan advanced by the 4th Defendant without her input and consent. The Plaintiff further accused the 4th Respondent (Stanbic Bank) of not conducting its due diligence before processing and advancing the loan to the company. On the other hand, the 4th Defendant stated that they conducted due diligence before they advanced the money to the company and further that the company produced a company resolution to borrow. That they had no knowledge of any wrangles within the company and were beneficiaries of the Turquand Rule.

68. I have gone through the evidence and I have noted that the 4th Defendant in its defence of not conducting due diligence relied on **Article 19 of the company's Memorandum and Articles of Association** which stated: -

The Directors may exercise all the powers of the Company to borrow money and to mortgage or charge its undertaking, property and uncalled capital or any part thereof and to issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation of the Company or of any third party.

69. I have keenly gone through the company's **Memorandum and Articles of Association** and I have noted with interest, **Article 14** which states: -

Until otherwise determined, the number of Directors shall be a maximum of nine. The names of the first Directors shall be determined in writing by the subscribers of the Memorandum of Association or a majority of them and until such determination the

signatories to the Memorandum of Association shall be the First Directors.

70. The 4th Defendant produced a Letter of Offer to Itibo Limited dated 14th March 2017. The 4th Defendant also produced Itibo Limited's CR-12 dated 26th August 2015 which listed the names of the nine Directors of the company. I have gone through the CR-12 and I have noted that the Plaintiff was listed as a Director. I have also gone through the Resolution to borrow by Itibo Limited dated 14th March 2017 and it was signed by Joyce Laboso (deceased) and the 3rd Defendant. When the Plaintiff was cross examined, she testified that there was no Resolution to borrow and was not involved in the Letter of Offer.

71. From the above, it was clear that at the time of giving the Letter of Offer to the 1st and 2nd Defendants, the 4th Defendant was aware that Itibo Company had nine directors and not two.

72. I am inclined to believe the Plaintiff's assertion that she was sidelined during this loan process. Part of the 4th Defendant's

due diligence was to ascertain the ownership of Itibo Limited. By their own evidence, they obtained a CR12 which showed that Itibo Limited had nine directors. It is interesting to this court that the 4th Defendant would accept a Resolution to borrow from Itibo Limited which showed a directorship of only two people. In my view, the Resolution would have been concrete if it showed the members/directors present in the meeting or acknowledged absences. As it were, the Resolution did not contain such and it was insufficient.

73. I say this because if you take into account the colossal amount of money that the 4th Defendant was to advance the company, professional diligence required or mandated the 4th Defendant to conduct more scrutinized diligence rather than simply rely on Article 19 of the Memorandum and Articles of Association.

74. I posit that banks and other financial institutions should always exercise extraordinary diligence before granting an individual, institution or in the present case a company loan. It is my view that it would be unreasonable and self-defeatist to conduct due diligence when assessing whether the

company had resolved to borrow the money then conduct extraordinary diligence when creating the security documents. The level of extraordinary diligence should be uniform. **The Black's Law Dictionary, 10th Edition** defined extraordinary diligence as: -

Extreme care that a prudent person of unusual fastidiousness exercises to secure rights or property.

75. Banks are quasi-public entities because they accept deposits from the public and, thus, are entrusted with funds. Consequently, they are legally obligated to exercise extraordinary diligence, especially in safeguarding deposits or interests. In **Philippine National Bank v. Raymundo, 802 Phil. 617, 631-632 (2016)**, the Supreme Court of Philippines held: -

“Since their business and industry are imbued with public interest, banks are required to exercise extraordinary diligence, which is more than that of a Roman pater familias or a good

father of a family, in handling their transactions.....”

76. As stated earlier, banks should be extraordinarily diligent throughout the loan process, from the inception to the conclusion. In **Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**, the Supreme Court of Kenya in realizing the value of a beach property held: -

“.....The suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.” (Emphasis mine)

77. Flowing from the above, it is clear that from the inception, the 1st and 2nd Defendants sidelined the Plaintiff who was a fellow Director. This gave impetus to the Plaintiff’s testimony that she was unaware of any loan taken on behalf of Itibo Limited and only became aware when she was issued with a

Notice dated 1st February 2021 by the 2nd Defendant indicating the 4th Defendant's intention to exercise its power of sale. In my view, the conduct of the 1st and 2nd Defendant indicated fraud *ab initio*. If they were indeed honest in their desire to borrow money for the company's use, they would have involved all their directors in the Resolution as opposed to two. Suffice to say, the Plaintiff pleaded the particulars of fraud in her Complaint dated 10th March 2021 and I have found the particulars proved on a balance of probabilities.

78. The 4th Defendant relied on the Turquand Rule which according to them insulated them from any wrangles in Itibo Limited. In response to this, I will quote the self-explanatory case of **Ethics & Anti-Corruption Commission v Vulcan Lab Equipment Ltd & another [2020] KECA 598 (KLR)**, where the Court of Appeal held: -

“Whereas I see the practical necessity and the patent utility of the rule, for to hold otherwise would be to unduly clog the commercial interaction between companies and third parties, and unduly

burden the latter with the duty to make inconvenient, lengthy and probably unsuccessful inquiries or investigations into internal procedures of companies, I cannot accept that such third parties are in any way absolved from the duty to be satisfied that the rather obvious relevant statutory requirements have been met....." (Emphasis mine)

79. From the above, it is my finding that the process of offering KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 as security was actuated by fraud. It is my further finding that the 4th Respondent did not conduct proper and satisfactory due diligence.

80. In the end, I make the following orders: -

- I. A Declaration is issued that the 1st, 2nd and 3rd Defendants being Directors of the Affected Party acted fraudulently and in breach of trust by subjecting the Affected Party into borrowing from the 4th Defendant and charging the Affected Party's

property namely KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28 to secure the loan without convening a meeting and passing a resolution to that effect.

II. A permanent injunction is issued restraining the 4th Defendant whether by itself, its employees, servants, agents, assigns or any other person acting on its instructions from selling, taking possession of, transferring or otherwise in any manner whatsoever dealing with the suit property being KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/28.

III. A Declaration is issued that Mary Chepkirui Laboso (2nd Defendant) being a trustee over all those properties known as KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 was in breach of trust by secretly offering the trust properties as security for a loan advanced to ITIBO LIMITED without the knowledge and consent of the Plaintiff.

IV. A Declaration is issued that Mary Chepkirui Laboso (2nd Defendant) being a trustee over all those properties known as

KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 was in breach of trust by having the Titles registered without showing the Plaintiff's beneficial interest thereon.

- V. An order is issued to the Land Registrar (5th Defendant) ordering him to rectify the titles in respect to title numbers KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 to reflect the beneficial interest as detailed in the Certificate of Confirmation of Grant to the 1st Defendant in the estate of REBECCA CHEBET LABOSO (HC Succession Number 46 of 2014) on 4th November 2015.
- VI. A Declaration is issued that Stanbic Bank Kenya Ltd (4th Defendant) having failed to conduct its due diligence properly coupled with the fact that KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 are trust properties to which the Plaintiff was a beneficiary did not consent to the Charge being created over the said properties, the 4th Defendant was not entitled to

exercise its power of sale over the said properties to recover the loan advanced to ITIBO LIMITED.

VII. An order is issued to the Land Registrar (5th Defendant) to remove the encumbrance in KERICHO/KAPLETUNDO/CHEMAGEL BLOCK 1/44, and KERICHO/KAPLETUNDO BLOCK 1/45 as a result of the Charge created by the 4th Defendant.

VIII. Each party to bear its own costs.

Judgement delivered, dated and signed at Bomet this 8th day of October, 2025.

.....
Hon. JULIUS K. NG'ARNG'AR
JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants).

Mugambi for the Plaintiff

Chepkoech for the 1st Defendants

Rono for the 2nd and 4th Defendants