



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**LAND CASE NO. 664 OF 2009**

**EUNICE NYAMBURA IRUNGU.....PLAINTIFF**

**VERSUS**

**LIBEY NJOKI MUNENE.....1<sup>ST</sup> DEFENDANT**

**JAMES CHEGE MUNENE.....2<sup>ND</sup> DEFENDANT**

**FACKSON WAINAINA KAGWA.....3<sup>RD</sup> DEFENDANT**

*(Sued as the executors of the Estate of:*

**JAMES FLAVIAN CHEGE MUNENE (Deceased))**

**BALWANT SINGH.....4<sup>TH</sup> DEFENDANT**

**EIGHTY FOUR INVESTMENTS LTD.....5<sup>TH</sup> DEFENDANT**

**(AS HEARD TOGETHER WITH**

**NAIROBI ELC CASE NO. 197 OF 2010**

**BALWANT SINGH.....PLAINTIFF**

**VERSUS**

**LIBEY NJOKI MUNENE.....1<sup>ST</sup> DEFENDANT**

**JAMES CHEGE MUNENE.....2<sup>ND</sup> DEFENDANT**

**FACKSON WAINAINA KAGWA.....3<sup>RD</sup> DEFENDANT**

**EIGHTY FOUR INVESTMENTS LTD.....4<sup>TH</sup> DEFENDANT)**

**J U D G M E N T**

**INTRODUCTION**

1. By a plaint dated 28/12/2009 the plaintiff **Eunice Nyambura Irungu** filed this suit against the three defendants that is **LibeyNjoki Munene, James Chege Munene** and **Fackson Wainaina Kagwe** as representatives of the Estate of **James Flavian Chege Munene, Balwant Singh** and **Eighty Four Investments Limited**.

2. By an application dated 14/4/2011, the plaintiff applied for this suit to be consolidated with **HC ELC No. 197 of 2010 - Balwant Singh - vs- Libey Njoki Munene & 3 Others**, an application that was opposed by the 1<sup>st</sup> defendant vide grounds filed on 4/5/2011. The 5th defendant vide its replying affidavit of its director filed on 5/5/2011 opposed the application. It is clear that the 1<sup>st</sup> and 5<sup>th</sup> defendants were of the opinion that the suits should be heard separately and from the records, the application for orders of consolidation was dismissed. The two suits therefore were not consolidated and had to proceed separately. This judgment only relates to **Nairobi ELC 664/2009**.

3. Since there are two different suits and the same number of judgments the heading in this judgment will remain as it was from the filing stage, save for the present designation of each defendant as an individual defendant which alters the number description of the defendants as shown. Though the cases are related and however appropriate that seems, avoidance of confusion has dictated that I do *not* give a description of the claim as per the pleadings in *HC ELC No. 197 of 2010 - Balwant Singh -vs- Libey Njoki Munene & 3 Others* herein as that record also bears its own full judgment on the claim therein which also includes a summary of the claim.

#### **The Plaintiff's Case in ELC 664 of 2009**

4. According to the plaint, the plaintiff entered into an agreement dated **25/11/2004** with the registered owners of the suit land herein - **Thika Municipality LR 7699/2** – vide which the suit land would be sold to her for at a consideration of **Kshs.11,000,000/-**. A sum of **Kshs.1,000,000/-** was paid at the date of execution of the agreement and the balance of **Kshs.10,000,000/-** was to be paid to the vendors on the completion date which was **24/2/2005**. A *special condition* in the agreement provided that possession was to be given immediately.

5. The plaintiff avers that she dutifully complied with all her obligations under the terms of the agreement but the vendors failed and/or neglected to immediately hand over vacant possession of the suit land, thus rendering the plaintiff unable to complete the transaction. Therefore the plaintiff sought to protect her interest in the land as a purchaser thereof by lodging a caveat which was registered against the suit land on **6/10/2005**.

6. The plaintiff avers that after the demise of one of the vendors, James Flavian Chege Munene, the plaintiff often met with some members of his family in a bid to persuade them to facilitate the handing over of possession of the land to enable her complete the transaction but in vain. Then on or about 15/10/2009, she conducted an official search in respect of the suit land which revealed that a grant of probate was registered against the title on 9/10/2009 notifying the public of the identity of the Administrators of the Estate of James Flavian Chege Munene (hereinafter referred to as the deceased) who are now joined as defendants in this suit on behalf of the Estate of the deceased.

7. On 17/12/2009 the plaintiff got to know that the said Administrators had entered into an agreement to sell the land to the 5th defendant and that the caveat she had registered over the land had been removed without any notification to her. Thereafter the plaintiff raised the issue of the purported sale of the land to the 5th defendant with the 2<sup>nd</sup> defendant, who denied being a party to such an agreement and who also informed her that he was in the process of registering a caveat over the land.

8. Thereafter, the plaintiff, despite attempts failed to obtain an official search to the title and all her efforts to obtain vacant possession also failed. The plaintiff pleads that she is desirous of completing the transaction according to the terms of the agreement and that if the land is disposed of, her interest will be interfered with to her detriment. She therefore prays for the following orders:-

**a. A declaration that the plaintiff has a purchaser's interest in the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 pursuant to the agreement dated 25<sup>th</sup> November 2004;**

**b. A declaration that the plaintiff is entitled to immediate possession of the land situate in Thika Municipality and comprised in Land Reference Number 7699/2;**

**c. A mandatory injunction directed at the 1<sup>st</sup> and 2<sup>nd</sup> defendants for the specific performance of the terms of the agreement dated 25<sup>th</sup> November 2004 including handing over possession of the land situate in Thika Municipality and comprised in Land Reference Number 7699/2;**

**d. A mandatory injunction directed at the 1<sup>st</sup> and 2<sup>nd</sup> defendants to execute any and all the necessary documents for the completion of the agreement dated 25<sup>th</sup> November 2004;**

**e. A permanent injunction restraining the defendants or any of them, from disposing or in any way interfering with the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 to the detriment of or in a manner that may obstruct or delay the plaintiff's interest therein;**

**f. The costs of this suit together with interest thereon against the defendants jointly and severally;**

**g. Any other order this honourable court may deem meet and just to grant.**

#### **The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Defence in ELC 664 of 2009.**

9. The 1<sup>st</sup> defendant filed his statement of defence "*under protest*" on 14/9/2011. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants' defence is that though the deceased and 4<sup>th</sup> defendant were registered as a co-proprietors of the suit land, the 4<sup>th</sup> defendant contributed nothing to the purchase of the land; that the deceased lent him funds towards the purchase of his share of the land in return for a charge being registered, and which was so registered against his share of the land to secure the repayment of his share of the purchase price; that pursuant to this agreement, a charge for the said share of purchase price, being Kshs.518,000/= together with interest at the rate of 12% per annum, was registered against the title; that the 4<sup>th</sup> defendant defaulted absolutely in the repayment thereof; that by that default the 4<sup>th</sup> defendant's registration as a co-purchaser was liable to reversal or cancellation for reason of the failure of consideration; that by reason of that default a constructive trust was constituted in favour of the deceased over the 4<sup>th</sup> defendant's share of or interest in the suit property.

10. In respect of the transaction between the deceased and the plaintiff the defendants admit the sale agreement was entered into, but further aver that the plaintiff failed to pay the balance of Kshs.10,000,000/- as at 24/2/2005, indicated that she did not have the money and became silent and evasive; that the plaintiff never sought possession of the suit land, and the defendants did not deny her possession since the suit

land was open and no positive action was required of the defendants to grant such vacant possession; that the deceased was therefore entitled to treat the sale as rescinded by the plaintiff on account of her failure to complete the transaction and this fact was communicated to the plaintiff; that it was therefore clear to the estate that the plaintiff had repudiated the contract and that they proceeded to negotiate a sale of the suit land with other purchasers.

11. The defendants state that the Administrators were entitled to exercise their statutory power of sale on the strength of which they issued a statutory notice to the 4<sup>th</sup> defendant for the sale of his share of the property if he did not pay the sums due under the charge. The 4<sup>th</sup> defendant nevertheless failed to pay the sums demanded and the deceased therefore sold his interest in the suit land to the 5th defendant. The defendants deny that after the demise of James Flavian Chege Munene, the plaintiff met with any members of the deceased's family to discuss the sale to the plaintiff.

12. Lastly the defendants aver that the suit property was transferred for value to the 5th defendant and hence it is not available to the plaintiff. The defendants accused the plaintiff of intending to buy the suit property for speculation purposes and that in so doing she sought to unjustly enrich herself. According to the defendants the plaintiff, is guilty of laches and breach of contract and she is therefore not entitled to the equitable remedies which she seeks. The defendants subsequently sought to amend their defence vide a notice of motion dated 19/2/2013. Leave was granted and the amended defence was filed on 27/3/2013. The plaintiff replied to this amended defence in her reply to amended defence dated 11/4/2013 and denied this and added that she even paid survey fees of **Kshs.250,000/-**.

#### **Note Concerning The 3rd defendant.**

13. The 3rd defendant appears to have not participated in these proceedings. The final submissions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants omit him though he was named in the amended statement of defence. The explanation offered in the proceedings was that he renounced his executorship role in the estate and this averment by the plaintiff was not challenged by the 1<sup>st</sup> and 2<sup>nd</sup> defendant or indeed any other party. However he is considered a part of these proceedings in so far as he was one of the executors at all material times.

#### **The 4th Defendant's Defence**

14. The 4th defendant denies that there was any agreement entered into between the deceased and himself on the one hand and the plaintiff on the other hand for the sale of the suit land to the plaintiff; he denies having signed any such agreement, and avers that any signature purported to be his was forged. He denies that Kshs.1,000,000/- was paid to the two registered proprietors pursuant to the alleged agreement; he avers that at no time did the plaintiff persuade him to hand over possession of the land to her. The 4<sup>th</sup> defendant pleads in the alternative that the plaintiff did not complete the transaction as required by the agreement for sale and is not entitled to possession of the suit land. He avers that the plaintiff has never been ready to complete the transaction and is guilty of laches. He simply prays that the plaintiff's suit be dismissed with costs.

#### **The 5<sup>th</sup> Defendant's Defence**

15. The 5<sup>th</sup> defendant filed its defence dated 17/10/2011 on 19/10/2011. It denies the contents of the plaint. It avers that by an agreement dated 13/3/2007, it commenced purchase of the land after being informed that the plaintiff had forfeited her deposit owing to failure to discharge her obligations in the agreement between her and the deceased and the 4<sup>th</sup> defendant and that the 4th defendant had failed to fulfil his obligations under charge instrument in which he had charged his interest in the land to the deceased. The 5<sup>th</sup> defendant relied on these representations to formalize and complete the sale commenced by the agreement dated 13/3/2007. It denies that the plaintiff has any interest in the suit land by reason of her breach. The 5th defendant avers that no cause of action has arisen against it.

#### **The Plaintiff's Replies**

16. The plaintiff filed replies to the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants' defences on 28/9/2011. I have pored through the file record and found no reply to the defence of the 5th defendant.

#### **The parties' statements and documents**

17. The plaintiff filed her statement dated 5/12/2011 on 6/12/2011. Her list of witnesses dated 5/12/2011 comprised only of herself. James Chege Munene, filed his "*authority to act plead/appear on behalf*" of his co-executor, Libey Njoki Munene dated 2/12/2011. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant's witness statement signed by James Chege Munene on 13/3/2017 was filed on the same day. The 5th defendant's witness statement dated 22/3/2017 was filed on 23/7/2017. The 4<sup>th</sup> defendant's witness statement dated 23/3/2017 was filed on 27/3/2017.

#### **Hearing**

18. The hearing of the suit took place in Nairobi on 22/5/2017. It was agreed that the both plaintiffs in **ELC 664 of 2009** and **197 of 2010** should begin as they were plaintiffs both suits, then the defendants would follow. The evidence of PW1 spilled over to 24/5/2017. PW2 testified partly on 24/5/2017 and on 25/5/2017. On the same day the defence case began and DW1 testified. On 26/5/2017 DW2 testified and the court, upon hearing the evidence the parties had to offer on those diverse days the court ordered that submissions be filed within 42 days after which the matter was to be mentioned before the Deputy Registrar on 20/7/2017. However the submissions of the 1<sup>st</sup> defendant were filed on 19/10/2017. The submissions of the plaintiff were filed on 5/10/2017, while the submissions of the 4<sup>th</sup> defendant were filed on 21/12/2017. I have looked through the file record and I have not seen the submissions of the 4<sup>th</sup> defendant on the record.

#### **DETERMINATION**

19. I have considered the pleadings, the evidence of the witnesses and the submissions of the parties together with the documentary evidence tendered.

**Issues for Determination.**

20. In my view the issues that arise for determination in this suit are as follows:-

1. Whether the plaintiff in ELC 664 OF 2009 is entitled to the completion of the sale transaction over the suit property.
2. Whether the exercise of the chargee's statutory power of sale by the deceased over the 4<sup>th</sup> defendant's half share of the suit land was lawful.
3. Whether the transfer of the suit land by the Administrators to the 5<sup>th</sup> defendants was lawful or fraudulent.

**A. Whether The Plaintiff In ELC 664 OF 2009 Is Entitled To The Completion Of The Sale Transaction Over The Suit Property.**

The determination of this issue depends on the answer to several sub- issues as hereunder:

- (a) *Whether both deceased and 4th defendant executed the agreement dated 25/11/2004?*
  - (b) *Whether the plaintiff fulfilled the terms of the agreement dated 25/11/2004?*
  - (c) *Whether the defendants fulfilled the terms of the agreement dated 25/11/2004.*
  - (d) *Whether the administrators of the Estate of the deceased James Flavian Chege Munene are obligated to honour the sale agreement dated 25/11/2004.*
- (a) *Whether both deceased and the 4<sup>th</sup> defendant executed the agreement dated 25/11/2004?*

21. The plaintiff states at paragraph 7 of her plaint that both the deceased and the 4<sup>th</sup> defendant agreed to sell the land to the plaintiff. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendant's amended defence implicitly admits that both the deceased and the 4<sup>th</sup> defendant were involved in the agreement for sale of the suit land to the plaintiff in the year 2004. **Paragraph 8** of the amended defence reads as follows:-

*“(8) The 1<sup>st</sup> defendant avers that the failure of consideration by the 2<sup>nd</sup> (now read 4<sup>th</sup>) defendant meant that a constructive trust was constituted in which therefore the 2<sup>nd</sup> (now read 4<sup>th</sup>) defendant held the interest in the suit property in trust for the 1<sup>st</sup> defendant.”*

22. The 4<sup>th</sup> defendant's pleading with regard to this issue in his defence dated 1/9/2011 is as follows:-

3: *“The 2<sup>nd</sup> defendant (now read “4<sup>th</sup> defendant”) denies the averments contained in paragraph 7 of the plaint and states that no agreement for sale was entered into as between James Flavian Chege Munene and himself with the plaintiff for sale of land to the plaintiff.”*

4. *“ If, (which is not admitted) the 2<sup>nd</sup> defendant (now read “4<sup>th</sup> defendant”) signed the said agreement as alleged in paragraph 7 of the plaint the 2<sup>nd</sup> defendant avers that he did not sign any agreement and that any signature claimed to be his was forged and puts the plaintiff to strict proof thereof.”*

23. The 5<sup>th</sup> defendant in its defence dated 17/10/2011 pleads as follows regarding that agreement:-

*“(3) The (5<sup>th</sup>) defendant avers that they are strangers to the contents of paragraphs 7, 8, 9, 10, 11, 12 and 13 of the plaint and put the plaintiff to strict proof thereof”.*

.....

*“(8) The (5<sup>th</sup>) defendant denies the contents of paragraphs 20 and 21 of the plaint and avers that the plaintiff has no interest on (sic) said parcel of land having failed to complete her end of the bargain in the agreement”.*

24. The amended defence of the Administrators of the Estate of the deceased who are the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants, admits at paragraph 9 that the deceased and the 4<sup>th</sup> defendant offered the suit property for sale to the plaintiff. Even in the absence of any other direct evidence this is persuasive circumstantial evidence that the 4<sup>th</sup> defendant may have signed the agreement.

25. In her sworn evidence-in-chief the plaintiff asserted that the agreement was sworn by the owners and herself. Under cross examination by counsel for the 4<sup>th</sup> defendant the plaintiff stated that she dealt with J.K. Ngaruiya, the Advocate handling the matter on behalf of the two

vendors. It was the deceased who took her to that advocate. She believed that the 4<sup>th</sup> defendant had given the consent to the sale transaction. However, she was not there when the 4<sup>th</sup> defendant is said to have executed the agreement but all she knows is that the agreement was signed by both the deceased and the 4<sup>th</sup> defendant before their lawyer.

26. The 4<sup>th</sup> defendant testified as follows regarding the same agreement: -

**“One day Dr. Munene came to my workshop with two other people and I signed the papers he had. PW1 never paid me. She paid to Dr. Munene. I never saw the originals of those cheques. I never heard from my co-proprietor after signing the sale agreement”.**

27. I must state that this concludes this court’s expedition meant to discover whether both the deceased and the 4<sup>th</sup> defendant executed the sale agreement. There is in the oral statement of the 4<sup>th</sup> defendant above his admission that he indeed executed the agreement dated 24/11/2004. Indeed there was no claim in the evidence- in- chief of the 4<sup>th</sup> defendant that the signature said to be his in the agreement dated 25/11/2004 was forged. I therefore find that both the deceased and the 4<sup>th</sup> defendant executed the sale agreement dated 25/11/2004 by which they agreed to sell the land to the plaintiff.

**(b) Whether the plaintiff fulfilled the terms of the agreement dated 25/11/2005.**

28. It is trite that a court can not rewrite an agreement for the parties. In the case of Nairobi ELC Appeal No. 36 Of 2015 Catherine Mgendi Versus Utumishi Investments Limited Kenya Police Staff Sacco Society Limited, this court stated as follows:

**“It is a recognized rule that the court cannot rewrite the contract between parties or uphold a unilateral decision of a party to rewrite a contract after it has been signed by parties. The court must enforce the terms of the contract.**

**The Court of Appeal said as follows in Civil Appeal No 95 of 1999 National Bank of Kenya Ltd –vs-Pipe Plastic Samkolit (K) Professor Samson K. Ongeri (Tunoi, Shah & Keiwua JJ A):-**

**“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.”**

29. Therefore the terms of the agreement dated 24<sup>th</sup> November 2007 have to be construed to reflect the intent of the parties. In the case of Kisumu Civil Appeal 152 of 2006 Savings And Loan Kenya Limited And Mayfair Holdings Limited, the Court Of Appeal stated as follows:

**“The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. In Ford vs Beech (1848) 11 QB 852 at 866:**

**“The common and universal principle ought to be applied: namely that (a contract) ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties to be collected from the whole agreement, and that greater regard is to be had to the clear intention of parties than to any particular words which they may have used in the expression of their intent.”**

30. The plaintiff’s obligations under the agreement were to pay the deposit of one million Kshs.1,000,000/- before the signing of the agreement and to pay the balance of the purchase price in the sum of Kshs.10,000,000/= to the vendors on the completion date. **Clause 5** of the said agreement set the completion date as 24/2/2005. All the rates and other outgoings were to be paid by the purchaser. However no timeline was set for these outgoings. However there are clauses in the agreement which suggest that the parties did not strictly commit themselves to the stipulation as to completion date of 24/2/2005. Clause A of the “SPECIAL CONDITIONS” states as follows:

**“If for any cause whatsoever than the completion caused by an act or default of the vendors the transaction shall not be completed on the completion date then the purchaser shall pay interest on the balance of the purchase price due from the completion date until the date of payment of the entire purchase price at the rate of 10% p.a.”**

31. In my view **clause “A”** in the special conditions does not envisage instant rescission of the agreement once the balance in the event the plaintiff defaulted on the payment of the balance of the purchase price.

32. **Clause “C”** of the “SPECIAL CONDITIONS” in the agreement stated as follows:-

**“C. The purchaser shall take possession immediately”.**

33. In my view this clause entitled the plaintiff to immediate possession upon the execution of the agreement and the payment of the Ksh 1,000,000/= deposit it required.

34. From Clause “C” emanates the bone of great contention in this suit, for whereas the plaintiff states that she was denied possession, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ position is that the land was open land which did not require any positive action from the deceased and the 4<sup>th</sup>

defendant to grant and the plaintiff was not at any time inhibited from entering upon the suit land. Further, by way of amendment to the original defence, the payment by the plaintiff to the deceased of Kshs.1,000,000/-, which had been admitted in the original defence, was subsequently denied.

35. First, I will deal with the payment of deposit, as it was the main gateway to the consensual and contractual relations which came to exist between the vendors and the purchaser by virtue of the agreement. **Clause 3** of the agreement states as follows:-

**“3. The purchase price is Kenya Shillings Eleven Million (Ksh.11,000,000/-) only of which sum of Kenya shillings One Million (Kshs.1,000,000/-) only has been paid to the vendors as deposit before the signing of this agreement. The balance of the purchase price in the sum of Kenya Shillings Ten Million (Kshs.10,000,000/-) only shall be paid by the purchaser to the vendors on the completion date”. (emphasis mine.)**

The language of the agreement appears to be clear to me that the purchaser had to pay a deposit of Kshs.1,000,000/- before the execution of the agreement, and that she did so on an unspecified date. The execution of the agreement is sufficient evidence of that payment.

36. The 4<sup>th</sup> defendant's evidence was that the sums so paid were given by the plaintiff to the deceased. The plaintiff testified that she paid the Kshs.1, 000,000/= using a Bankers Cheque No. 008550 dated 24/11/2004 made out in favour of the deceased.

37. DW1, the deceased's son, said in his very brief oral evidence-in-chief that he never knew of the Bankers Cheque vide which the deposit was made at the time of his written statement dated 13/3/2017. He stated that he came to know of the sale to the plaintiff after his father died. He did not demonstrate any efforts made to secure evidence to the effect that the allegations of payment by way cheque dated 24/11/2004 was false. If it was false, nothing would have been as easy as indicating that in his oral evidence and presenting evidence to prove so. I therefore find that the plaintiff discharged her obligation to pay Kshs.1,000,000/- as required by the agreement.

38. On the issue of whether the plaintiff took possession of the suit property, the plaintiff avers that she was hindered or obstructed from such taking of possession by the deceased's manager, one Mr. Matu.

39. Whereas the evidence of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants is that the suit land was open land which did not require any positive act on the part of the deceased or his agents to put the plaintiff in possession the evidence presented by the 4<sup>th</sup> defendant in his case is critical for it tends to demonstrate that the suit land was not open land and that indeed for many years the deceased had rented out the structures on the suit land to third parties and received the rent thereof to the exclusion of the 4<sup>th</sup> defendant. His evidence was that there was a godown on the property at the time he and the deceased purchased it. Later on in his evidence he stated as follows:-

**“Jimba Bank closed. I got Kshs.2,000,000/= from my family. Archer (and Wilcock) were acting for my family. I eventually received this money.....**

**When I got this money I injected the money into the suit property. I renovated the houses to be habitable. Then we started generating money. We were getting Kshs.25,000/= rent per month..... This is a letter to all our tenants dated 9/5/2002. I wrote the letter. I appointed Sort Masters...(this) is a payment voucher showing rent collection by Sort Masters. After year 2002 I never got any rent money”.**

Later on he stated as follows:-

**“Payment vouchers mentioned me. I only received money once. Dr. Munene completely forgot me. I did not have access to the suit property. For all those years Mr. Munene received rent up to his death”.**

40. The evidence of PW2 regarding the existence of buildings on the land as well as his evidence of receipt of rents from the suit property was not controverted by cross-examination or otherwise. There were houses on the suit property and those houses had tenants in living in them. The deceased was in control of the premises through his manager. In this respect the 4<sup>th</sup> defendant may not be personally blamed but it is observed that the acts of the deceased bound him.

41. It was also not demonstrated by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants that vacant possession was obtained from the tenants on the premises after the agreement was executed. In this suit no evidence has been presented by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the effect that the deceased put the PW1 into possession as required by the agreement between the parties. In fact their pleading is to the contrary. It states and therefore appears to admit that the deceased was not expected to put the plaintiff PW1 into possession after purchaser because the premises comprised of “open land”. On the other hand PW1 has convincingly described in great detail her attempt to get the then deceased to put her in possession of the suit property as required by the agreement. Her attempts were in vain.

42. I therefore find that the premises could not have been open land and it require positive action on the part of the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants in order to put the plaintiff PW1 in possession. I find that the plaintiff has established that she was not put into possession of the premises as was required by the agreement. I therefore find that the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants never fulfilled their part of the agreement dated 24/11/2004.

43. The final observation on this point is that if the plaintiff did not pay the balance of the purchase price as required by 24<sup>th</sup> February 2005, and she happened to be the one in breach, the clause no “A” of the “SPECIAL CONDITIONS” in the agreement came into operation and she had to pay the penalty. However it has been established that she was not in breach.

***(c) Whether the defendants fulfilled the terms of the agreement dated 25/11/2004.***

44. This question has already been answered in the discussion concerning whether the plaintiff fulfilled her part of the agreement and there is therefore certainty that the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants did not fulfil their part of the agreement.

***(d) Were the Administrators of the deceased's Estate obliged to honour the sale agreement dated 25/11/2004 and if the sale to the 5<sup>th</sup> defendant was fraudulent.***

45. The deceased having died with two transactions that he had initiated hanging in the balance this court is bound to access the evidence and determine which of the two transactions his administrators ought to have taken up and completed.

46. The amended defence of the Administrators of the Estate of the deceased who are the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants, admits at paragraph 9 that the deceased and the 4<sup>th</sup> defendant offered the suit property for sale to the plaintiff and that by reason of failure to pay the deposit and the balance as at the completion date, the contract subject matter of the suit entirely failed for want of consideration.

47. This court has already found that the plaintiff having paid Kshs.1,000,000/- deposit as required by the agreement, the contract cannot be deemed to have entirely failed for want of consideration for sale to the plaintiff. Though **paragraph 9A** of the 1<sup>st</sup> and 2<sup>nd</sup> defendant's amended defence denied payment of the Kshs.1,000,000/- deposit, this court has found that indeed payment of that sum was effected by the plaintiff to the deceased.

48. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants plead that the plaintiff did not pay the balance of Kshs.10,000,000/- by the completion date as required by the agreement.

49. In the earlier part of this judgment this court has already found that the deceased failed to grant the plaintiff possession of the suit premises as required by the agreement. At **paragraph 12** of the amended defence the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants aver, albeit without tabling any evidence, that the deceased was entitled to treat the sale as rescinded by the plaintiff, and that he in fact did treat it as rescinded, and that his fact was communicated to the plaintiff. But was this the correct position according to the agreement?

50. This court has examined clause "A" of the special conditions in the agreement and observed that the intention of the parties appears to have been that default in payment of the balance of purchase price would not result in automatic rescission. In my view it would also not call for a unilateral variation of, or application of implied terms, that were entirely prejudicial to the other party. In the case of **Catherine Mgendei, supra** the court stated as follows:

***"In Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, (eKLR) it was held:***

***"Parties only bind themselves by the terms contracted and executed and not anything else e.g. charging interest rates not in accord with what was covenanted cannot make a total figure a chargee considered having fallen in default and therefore entitling it to exercise its statutory power of sale... Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."***

51. Therefore where the defendants aver that there was a right to deem the agreement as rescinded, or rescission, the agreement has to speak the same language otherwise such a claim will ring hollow. In the light of the contents of clause A of the special conditions, without any communication from the deceased regarding rescission, and in view of the registered caveat, the question would be when was the contract rescinded or deemed so?

52. The 5<sup>th</sup> defendant quoting the cases of **Thrift Homes Limited Vs Kays Investments Limited [2015] eKLR** and **Civil Appeal No 165 Of 1996 - Gurdev Singh Birdi And Marinder Singh Gatora And Abubakar Madhubuti**, submits that payment of the balance of the purchase price is so crucial a term in the agreement that default disentitles the plaintiff from specific performance and that by reason thereof the deceased was discharged from further performance of the contract. This court fails to see how that submission can come in aid of the defendant while the timelines in the contract executed by the parties were left open ended and each party would in the circumstances have to consult the other in order to make any variation to its terms. Besides, the plaintiff lodged a caveat which was registered against the suit land on **6/10/2005**, it should have been clear enough to the deceased that the plaintiff was intent on proceeding with the transaction any deviation from the terms of the contract would have to be mutual. In the absence of any consensual variation the terms of the original agreement stood valid.

53. In my view the agreement between the deceased and the 5<sup>th</sup> defendant came rather late in the day after a valid agreement had been executed by the plaintiff and the deceased; the administrators merely stepped into the deceased's shoes and they could only have proceeded with the transaction that was proper, even if it meant going against the earlier conviction held by the deceased that he could dispose of the land to any person other than the plaintiff. I consider that the transaction between the deceased and the plaintiff herein was the only one the administrators of the deceased's estate could have properly proceeded to complete.

54. For these reasons this court finds that it is proper to hold the Administrators liable to complete the transaction that was commenced by way of the sale agreement dated 25<sup>th</sup> November 2004.

**B. Whether The Exercise of the Chargee's Statutory Power Of Sale By The Deceased Over The 4<sup>th</sup> Defendant's Half Share Was Lawful or Fraudulent.**

55. From the initial stage caution must be taken to remember that in this judgment the issue of the purported exercise of the chargee's statutory power of sale is discussed in relation to the deceased's (and hence the administrators') relationship with the 4<sup>th</sup> defendant as they had a charge document executed between them. However, the deceased's (and hence the administrators') relationship with the plaintiff is different as the plaintiff's claim is based on a sale agreement prior to the purported statutory sale.

56. It is not in dispute that the 4<sup>th</sup> defendant's half share of the suit property was charged to the deceased. The document is admitted, just as is the fact that the amount was never repaid in full by the 4<sup>th</sup> defendant. The secured amount was Ksh 518,000/= and by the terms of the charge document it was repayable by the 4<sup>th</sup> defendant on the **24<sup>th</sup> January 1987** with interest at the rate of 12% p.a.

57. In default of the 4<sup>th</sup> defendant's performance of the obligations as covenanted in the charge document the whole amount owing would become immediately due and payable and the lender would be entitled to his exercise of statutory power of sale and appointment of receiver and other rights under the Transfer of Property Act of India 1882. The issue of the statutory notice has relationship with some other issues raised by the parties which are dealt as herein below:

**a. Did the 4<sup>th</sup> defendant incur any expenses on renovations on the suit property and if so what relationship do these have to the charge document?**

58. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants submit that evidence of expenses the 4<sup>th</sup> defendant incurred in renovating the premises is irrelevant to the charge document whose terms are clear. They submit that the contents of the letter from Jimba Credit Corporation Limited dated 6<sup>th</sup> July 1987 do not show that the facility Jimba provided was meant to be utilized to discharge the charge or that it was utilized to that purpose.

59. They state that the letter is indeed to both the deceased and the 4<sup>th</sup> defendant; it is submitted that the statement of account produced shows that the facility was a joint account between the two. It is submitted that the same case applies to the Ksh 2,000,000/= paid to the 4<sup>th</sup> defendant as part of a deed of family arrangement: that there is no evidence that the money was utilized to discharge the 4<sup>th</sup> defendant's liabilities under the charge.

60. To begin with, I have examined the statement of account in the 4<sup>th</sup> defendant's bundle of documents in **Nbi Milimani ELC 197 of 2010** and found nothing in it to suggest that he operated that account alone or that any of the withdrawals were done by him or only on his behalf. The evidence to this end should have been availed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant but they did not tender any.

61. Regarding the expenses it is noted that among the 4<sup>th</sup> defendant's bundle of documents in **Nbi Milimani ELC 197 of 2010** is a copy of a letter dated 9<sup>th</sup> May 1995 from the 4<sup>th</sup> defendant to Dr. JFC Munene, the deceased lamenting that he had had to spend his money on the suit land and that he had spent more on it than the deceased. At the bottom of that letter are the following hand-written words:

***"Please let me have full details of your expenses and I will give you the full amount you have taken from me. Do in good faith.***

***Signed***

***10/5/95."***

62. This court has no doubt that those words were written by the deceased who appeared to have received the said letter and written the above response, there is therefore no doubt left that the 4<sup>th</sup> defendant had spent monies in the renovation of the premises.

63. However it is unclear whether the 4<sup>th</sup> defendant subsequently complied with the handwritten instructions and if any account was taken of whatever sums he had incurred on the premises.

64. However, though the alleged expenditure on the suit premises and the correspondence analysed above may explain why there was no purported exercise of the chargee's statutory power of sale for so long by the deceased in respect of a co-owner with whose relationship he was so comfortable as to share a joint account with, it is difficult to relate this directly to the charge document.

**b. Did the 4<sup>th</sup> defendant get any rent proceeds from the suit premises after 2002?**

65. It has been further submitted that the issue of rent from the premises had nothing to do with the charge and that in any event **P.Exh 15, 16, 16(a)** of the 4<sup>th</sup> defendant's evidence demonstrate that he was paid the rent monies from the suit premises. However, the evidence alluded to shows that the 4<sup>th</sup> defendant received rent amounts on 13/6/2002 and no other dates. It was his evidence that the last time he received any share of the rent from the premises was the year 2002 and he got none after that. It was incumbent upon the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant to produce evidence to prove that the 4<sup>th</sup> defendant received rent after the year 2002 and they have failed to prove that. I am therefore of the opinion that this issue is relevant to the issue of the exercise of the statutory power of sale owing to the fact that an account had been demanded in vain by the 4<sup>th</sup> defendant.

**c. Was The Issuance Of The Statutory Notice Regular?**

66. In my view, the Statutory Notice dated 14/10/2008 is not expressed to be made pursuant to the provision of any law. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants submit that **section 69(1)** of the **ITPA 1882** (now repealed) allowed a chargee to sell, after issuing a three months' notice, the charged property either under a public auction or by private treaty.

67. The statutory notice issued by the administrators is under a double attack from the plaintiff and the 4<sup>th</sup> defendant. The plaintiff's submission is that the deceased had died on 23<sup>rd</sup> December 2007 and the statutory notice was purported to be issued on the 14<sup>th</sup> October 2008 evidently before the grant of probate was confirmed on 23<sup>rd</sup> March 2009. The question that would arise then is whether the statutory notice can issue before the Grant of probate is registered.

68. In response, the administrators submit that the powers of executors of a written will take effect upon the death of a testator and that they therefore had power to instruct JK Ngaruiya & Co Advocates to issue a statutory Notice on 14<sup>th</sup> October 2008 after their appointment. I agree with the Administrators on this issue, and in any event the plaintiff has not shown any authority for the proposition that the grant of probate had to be registered before the issuance of a statutory notice. In my view the executors of the will had power to issue, and did issue, the statutory notice.

**d. Did the deceased prematurely enter into an agreement over the 4<sup>th</sup> defendant's share of the suit land relative to the purported statutory power of sale?**

69. The plaintiff also submits that the statutory notice was issued after the deceased had already entered into a sale agreement with the 5<sup>th</sup> defendant on 13<sup>th</sup> March 2007 for the sale of the suit land and part payment effected. The conclusion of the foregoing submission is that the deceased entered into an agreement for sale of land of which he was not the sole owner as at 30<sup>th</sup> May 2007.

70. It is true that the charge document reserved for the deceased some powers including the statutory power of sale over the 4<sup>th</sup> defendant's share. However in my view unless these powers were exercised in accordance with the charge document they lay dormant and no interest in respect of the 4<sup>th</sup> defendant's share could have been said to have passed on to the deceased.

71. It is not in dispute that the transfer dated 13<sup>th</sup> March 2007 was executed by the deceased and the 5<sup>th</sup> defendant to the exclusion of the 4<sup>th</sup> defendant before the issuance of the statutory notice. The recitals in that transfer do not refer to the 4<sup>th</sup> defendant or his interest in the suit land at all. The deceased did not even attempt to purport to be representing the 4<sup>th</sup> defendant's interests in any capacity. It appears that as at that date in the deceased's mind, the 4<sup>th</sup> defendant did not have any interest in the land yet he never attempted to exercise his power of sale. In this court's view, whether or not there was any default on the 4<sup>th</sup> defendant's part regarding his obligations under the charge, this was highly irregular. The deceased's act of sale of the whole land parcel so as to include the 4<sup>th</sup> defendant's share of the land was therefore premature.

72. I therefore agree with the plaintiff that the sale of the entire parcel before the procedural exercise of the statutory power of sale on 13<sup>th</sup> March 2007 was grossly irregular and of no effect to create any interest in favour of the 5<sup>th</sup> defendant for the deceased's want of capacity.

73. Consequently, the issuance of a statutory notice after the execution of the agreement dated 13<sup>th</sup> March 2007 was irregular.

**e. Was the Administrators' exercise of the statutory power of sale notwithstanding the existence of the agreement dated 13<sup>th</sup> March 2007 lawful?**

74. The first occasion in which the statutory power of sale is being seen to be exercised is not by the deceased during his lifetime but by the executors of his will.

75. There is no evidence of the rescission of the agreement dated 13<sup>th</sup> March 2007 and the execution of any new agreement between the executors and the 5<sup>th</sup> defendant either before or after the statutory notice was issued. In my view this meant that the administrators were keen to complete the transaction the deceased began under the old agreement dated 13<sup>th</sup> March 2007 despite his lack of capacity to contract. In this court's view, the executors proceeded to complete a transaction that was flawed *ab initio*.

76. The plaintiff also submits that the deceased could only be deemed to have lawfully entered into an agreement for sale of only his half share. However, in this court's view, the owners' shares in the land were undivided and the execution of the sale agreement by the 4<sup>th</sup> defendant was crucial, so that without it the agreement dated 13<sup>th</sup> March 2007 was entirely incapable of creating any interest in favour of the 5<sup>th</sup> defendant. The exercise of the statutory power of sale by the administrators was therefore on unlawful.

**f. Was the exercise of the statutory power of sale affected by the deceased's failure to share the rent proceeds with the 4<sup>th</sup> defendant?**

77. It was submitted that the administrators purported to exercise the statutory power of sale notwithstanding that the deceased had singly collected the rent from the premises from the year 2001 until his demise without sharing it with the 4<sup>th</sup> defendant. The burden of proof that the 4<sup>th</sup> defendant participated in the rent sharing after the year 2002 lay on the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants and they have failed to discharge it. However, the 4<sup>th</sup> defendant himself has laid no direct connection between the rent-sharing and the charge. On this issue I agree with the Administrators that the fact of not getting his share of the rent alone has no connection with and does not affect the exercise of the statutory power of sale if that power of sale was otherwise properly exercised.

**g. Had the statutory power of sale crystallized?**

78. The submission is made by the plaintiff that the charge in favour of the deceased had not crystallised and the sale of the suit land was therefore fraudulent. It is submitted that to date the breakdown, or statement of account of sums allegedly owed to the deceased by the 4<sup>th</sup> defendant has never been availed despite demand by a letter dated 3/12/2008 from Oraro & Co Advocates. Caution is applied while dealing with this issue for in the case of **Koileken Ole Tupolanka –vs- Melech Engineering & Construction Ltd & 2 Others 2015 eKLR** it was stated as follows:-

**"As a general rule, disputes on accounts or amounts owing on a mortgage will not per se be a basis for granting of an injunction. But if, from the charge or evidence adduced in court, the amounts claimed are excessive or tainted with illegal charges and interest, the mortgagee may be restrained from exercising its statutory power of sale."**

79. The above dicta was made in respect of an application for injunction. The determination herein is of a substantive suit.

80. In the case of **Nairobi Civil Appeal No. 133 Of 2006 - Nancy Kahoya Amadiva And Expert Credit Limited John Mutitu Ngacha** the Court Of Appeal stated as follows:

***"The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser? In Captain Patrick Kanyagia and Another v Damaris Wangechi and others, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR. In Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported), this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2nd respondent had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 2nd respondent before the trial court, the 2nd respondent's action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security. (Pall J, in Muhani and Another v National Bank of Kenya Limited [1990]KLR 73)"***

81. In the instant case an amount was said to be due under the notice. The chargor, having received the notice and requested for a breakdown of the sum due within the 3 months' notice period, he was entitled to comprehensive information as to the alleged indebtedness. This is an issue that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have failed or neglected to address in their submissions. They never demonstrated in their evidence that such breakdown or account was provided to the 4<sup>th</sup> defendant. In default the notice period would, in my view not continue running and any attempts to sell the land so charged to the deceased without clarifications to the 4<sup>th</sup> defendant would be irregular. The chargee cannot be in my opinion, the unquestionable and final authority over the matter of the 4<sup>th</sup> defendant's indebtedness. He is responsible to the 4<sup>th</sup> defendant.

82. In the case of **Givan Okallo Ingari & Another –vs- Ltd 2007 eKLR the Hon. Warsame J** (as he then was) observed as follows:-

***"The acts of the defendant, in my view amounts to muddling the waters that were for the benefit of all parties. This court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable.***

***"In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute. The court is empowered to hear the circumstances that made the defendant to behave in the way it acted against the plaintiffs. The question that the court would ultimately have to answer is the amount due and payable by the plaintiffs. And pending that determination, I think it is illegal to alienate, sell or dispose the central thread that joins the parties to this suit. The court must intervene to curb such prima acts of illegality committed by the defendant and which does not stem from the contractual document." (Emphasis mine)***

83. So, was the amount owed agreed upon between the parties before the exercise of statutory power of sale? It wasn't. Nowhere in their evidence have the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants demonstrated that. In my view, where there were several dealings involving the suit land, when a call was made to the administrators to demonstrate the fullest extent of the 4<sup>th</sup> defendant's indebtedness, they were bound to do so. I also consider it to be the proper position that the exercise of the statutory power of sale notwithstanding the non-provision of the details of indebtedness in respect of the suit land renders the sale to the 5<sup>th</sup> defendant null.

84. Both the administrators and the 5<sup>th</sup> defendant referred this court to the case of **Mbuthia Vs Jimba Credit Finance Corporation & Another 1988 eKLR** but the administrators cited the additional case of **Central Kenya Ltd Vs Trust Bank Ltd and 4 Others CA No 215 Of 1996** on the same point. The 5<sup>th</sup> defendant cited the following dicta in the case of **Mbuthia Vs Jimba Credit Finance Corporation & Another 1988 eKLR**:

***"In this regard I respectfully agree with Platt and Apaloo JJA that the long line of English authorities and decisions of this court in respect of mortgages under the Indian Transfer Of Property Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale."***

85. The 5<sup>th</sup> defendant also cited the case of **Samuel Ndiba Kihara & Another Vs Housing Finance Company Of Kenya Limited And 2**

*Others 2006 eKLR* where the court stated as follows:

***“The plaintiff’s equity of redemption was extinguished and he could not obtain an injunction to restrain the defendant from transferring the suit property to the purchaser. The position is correct in law for it is well established that a mortgagor’s right of redemption is extinguished by the mortgagee’s entry into a binding contract for sale of the mortgagor’s property either by public auction or private treaty. (see Section 60 of the TPA as amended by Act No 20 of 1985.)”***

86. It is vital to note that even in the **Mbuthia case (supra)**, the extirpation of the equity of redemption is pendent on a valid agreement which in my view is of similar meaning to the “binding contract” referred to in the **Samuel Ndiba Kihara case (supra)**. In the instant case the transfer of the suit premises was based on a null agreement that failed to involve the 4<sup>th</sup> defendant while that involvement was a necessity, was itself null.

87. In addition the conduct of the deceased and the administrators who filled his shoes upon his demise was wanting: the misrepresentations the deceased made to the 5<sup>th</sup> defendant and the further processing of the agreement the deceased and the 5<sup>th</sup> defendant executed based on those misrepresentations makes the transfer to the 5<sup>th</sup> defendant improper.

88. The transfer of the suit land was pursuant to an exercise of a statutory power of sale that this court has found to be irregular for reasons set out above. The purported statutory power of sale had therefore not crystallised.

89. I had indicated beforehand that the issue of the validity of the exercise of the statutory power of sale was only considered in regard to the relationship between the administrator’s and the 4<sup>th</sup> defendant.

90. Compared to the facts in the cases cited above, the situation in the instant case is a bit different, for the sale to the plaintiff’s claim herein arose from contract and fraud and not purely from the exercise of a statutory power of sale; she is not claiming as a chargor whose security has been realized by a chargee. This is a case in which, owing to a previous sale to her, the statutory notice was designed as a mere cloak meant to veil the continuance of a fraud that had conceived and partially executed before its issuance. That statutory notice should not have been issued in the first place before the dealings with the plaintiff were ascertained to have completely collapsed.

91. Having said so, the doctrine of the equity of redemption is therefore not applicable to the plaintiff who has approached court seeking a remedy against both proprietors of the suit land, one of whom waived his right to exercise of a statutory power of sale against his fellow co-owner long ago by joining hands with the co-owner/chargor to sell the plaintiff the charged land. The doctrine of the equity of redemption would have been applicable in the 4<sup>th</sup> defendant’s case against the administrators, but hindsight recalls to memory the fact that the 4<sup>th</sup> defendant admitted that he executed the sale agreement in favour of the plaintiff herein thereby validating the sale agreement dated 24<sup>th</sup> November 2004. In the instant suit This court should and will not therefore allow its perspective to be befogged by a red herring in the name of the equity of redemption and will regard the statutory notice as null *ab initio* incapable of provoking such an issue or eventually effecting any sale.

**C. Was The Transfer Of The Suit Property By The Administrators Of James Flavian Chege Munene to the 5<sup>th</sup> defendant was lawful or Fraudulent?**

92. In this case the plaintiff’s submission is that the title in the name of the 4<sup>th</sup> defendant was indefeasible and the whole transfer to the 5<sup>th</sup> defendant was irregular and fraudulent.

93. On this theme, the plaintiff relied on the provisions of section 23(1) of the Registration of Titles Act and cited the cases of **Arthi Highway Developers Limited Vs West End Butchery Limited and 6 Others, 2015 eKLR, Civil Appeal No 246 Of 2013** where the Court Of Appeal observed that whether there was fraud is a matter of evidence.

94. In that case the court delivered itself as follows:

***“The registration of the forged documents was subsequently used by the fraudsters for the purpose intended by them, that is, to have access to the land registered in the name of West End. Barely one year later in 2005, the fraudsters entered into an agreement of sale with Arthi. The trial court found upon reviewing the evidence on record that fraud was committed in the land transaction too and upon re-examination of that evidence, we respectfully agree.***

According to Black’s Law Dictionary,

***“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.***

Section 2 of RTA also defines “Fraud” as follows:-

***“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”***

It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 Ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

95. The cases of **Godfrey N. Nyaga vs Margaret W. Theuri & 2 Others**, ELC No 61 of 2015- formerly HCC 96 of 2012 and **Neepu Auto Spares Limited Vs Narendra Changlal Solanki & 3 Others** (2013) eKLR - Civil Appeal No 217 of 2012 were also cited by the plaintiff in this regard.

96. In addition, the plaintiff wishes to persuade this court that the transfer to the 5<sup>th</sup> defendant by the administrators was illegal and fraudulent in that it was allegedly for the 4<sup>th</sup> defendant’s half share at first, but later on the interest that was transferred to the 3<sup>rd</sup> defendant by that transfer was for the whole portion of the suit land.

97. I have examined the transfer instrument employed in the transaction. All the three administrators executed that transfer. The transfer begins by describing the interest of the 4<sup>th</sup> defendant, but ends up transferring the entire land parcel.

98. Essentially, there should have been a separate transfer for the share owned by the 4<sup>th</sup> defendant first or the recitals should have included the description of the deceased’s estate’s interest as proprietor in the same transfer. The complaint by the plaintiff is genuine but absent the other defects in the exercise of the statutory power of sale dealt with herein, this defect *per se* has no impact on the effectiveness of the transfer in regard to the whole title.

99. In any event, the form of transfer was accepted and registered by the registering authority and, rather than the form, what matters now is the validity of the purported act of transfer.

100. The plaintiff has also submitted that the transfer is also void for the reason that the same was registered despite the existence of a caveat lodged against the title and that it took place during the pendency of these proceedings, and order of status quo issued by this court. In the light of the fact that both owners had executed the sale agreement, I find registration of the transfer at the instance of the administrators in favour of a third party to be improper.

101. The plaintiff further submits that the fraud in respect of the suit property does not only comprise of the transfer while these proceedings were pending, but the subdivision of the land by the 5<sup>th</sup> defendant and change of the legal regime to the **Registered Land Act** from the **Registration of Titles Act** under which it was previously administered, purportedly to defeat justice.

102. It is submitted, and I agree with the plaintiff, that the doctrine of *lis pendens* is a common law principle which was incorporated into the law under section 52 of the **Indian Transfer of Property Act 1882** which provides as follows:

*“52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly 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 any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”*

103. The plaintiff also seeks the aid of sections 1A and 1B of the **Civil Procedure Act**. She cited the case of **Carol Silcock Vs Kassim Sheriff Mohamed** 2013 eKLR (Case No 55 Of 2011) in which the court stated that:

*“The Plaintiff’s counsel relied on the case of FREDRICK JOSES KINYUA & ANOTHER VS E. N. BATED, NAIROBI CIVIL CASE NO. 4819 OF 1989 in which Justice G. S. Pall quoted with approval a passage in Sir H. S. Gaur’s Transfer of Property Act, 7th Ed; pg 579:*

*“Every man is presumed to be attentive with what passes in the courts of justice of the state or sovereignty where he resides. Therefore purchase made of property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”*

*In a nutshell, the Plaintiff is relying on the principle of lis pendens to defeat the Intended Interested Party’s claim on the suit property.*

*The Black's Law Dictionary, 9th Edition, has defined lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending.*

*This common law principle, as defined above, is incorporated under section 52 of the Indian Transfer of Property, 1882 (now repealed) This section provides as follows:*

*“During the active prosecution in any court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly 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 any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.”*

*Section 52 of the ITPA 1882 prohibits the transfer of a property to a third party during the pendency of a suit. The converse of this provision therefore is that where a party to a suit transfers the suit property to a third party, such a transfer shall be null and void for being contra statute. Such a transfer cannot affect the rights of a Decree holder.*

*As I stated in Malindi HCCC No. 63 of 2013 Abdalla Omar Nabhan Vs The Executor of the Estate of Saad Bin Abdalla Bin Abuod & Another, the purposes of the principle of lis pendens is to preserve the suit property until the suit is finally determined or until the court issues orders and gives terms on how the suit property should be dealt with. The doctrine of lis pendens is founded on public policy and equity.”*

104. This suit was filed on the 28<sup>th</sup> December 2009. The transfer took place on 13<sup>th</sup> January 2010. It does not matter whether the transacting parties knew of this litigation or not for in the same case of **Carol Silcock (supra)** the court further stated as follows:

*“In the Abdalla Omar Nabhan case (Supra), I held as follows:*

*“In the absence of an injunctive order, a party may dispose of a property to a third party but the final judgment or order of the court shall issue as though such a sale or transfer never took place and the judgment shall be binding on the third party. The court shall not be concerned with the developments or investments that such a third party would have put in the property because everybody is presumed to have known about the existence of a suit in respect to such a property.....A party who purchases a property and invests in it while a suit is pending, does so at his own risk notwithstanding the absence of an injunctive order duly registered against the title.”*

*That is the unfortunate situation that the Intended Interested Party has found itself in. It does not matter that the said company (Intended Interested Party) was not aware of the pending suit. The fact remains that the suit property was transferred to the company pendente lite.*

*Indeed, the doctrine of lis pendens is in tandem with the provisions of Sections 1A and 1B of the Civil Procedure Act, which provides for the overriding objectives that should guide the courts in all civil matters, otherwise known as the oxygen principle (O2).”*

105. In this case there is evidence that all the transacting parties knew of the agreement between the deceased and the plaintiff and of this litigation. DW1 admitted that the administrators signed the transfer to the 5<sup>th</sup> defendant as the administrators of the deceased's estate and that the said parcel of land was not included in his will as it was already sold. In apparent justification for this in his statement dated 13/3/2017 in this case DW1 restated that his father was entitled to treat the sale as rescinded.

106. It was the evidence of the DW1 that he never knew of the sale to the plaintiff till after his father died. When shown the witness statement of the 5<sup>th</sup> defendant's witness, John Mburu, he conceded that the 5<sup>th</sup> defendant knew of the transaction between the deceased and the plaintiff during the formalization of agreement for sale to the 5<sup>th</sup> defendant.

107. According to that statement John Mburu's version of the events was as follows:

*“...the deceased informed us that he had lost touch with the lady and she did not seem interested to complete the transaction since it was close to 3 years since he heard from her.”*

According to DW2, the deceased informed them that PW1 had not paid any deposit for the sale of the suit land, which position this court has already found to be incorrect.

108. In this court's view the representations made by the deceased to the 5<sup>th</sup> defendant amounted to trickery and fraud. It was incumbent for the deceased to disclose with fullest candour all the pertinent facts surrounding the transaction between him and the plaintiff to the 5<sup>th</sup> defendant.

109. Instead, he appears to have misinformed the 5<sup>th</sup> defendant who relied on these misrepresentation to enter into a sale for the suit land while the suit land was not available for sale.

110. Further, when the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' counsel issued a statutory notice dated 14/10/2008 to the 4<sup>th</sup> defendant, the 4<sup>th</sup>

defendant's counsel, Oraro & Co Advocates wrote back and in a letter dated 3/12/2008 stated as follows:-

**"J.K. Ngaruiya & Co Advocates,**

**Dear sir,**

**RE : STATUTORY NOTICE IN RESPECT OF LR NO 7699/2**

**The above matter and your letter dated 14<sup>th</sup> October 2008 refer. (sic)**

**We act for Balwant Singh who has instructed us to respond to your aforesaid letter under reference as follows:**

**We are advised that your client has misadvised you on the pertinent facts surrounding the entire matter.**

**For instance we are reliably informed that our client and the late James FC Munene were registered as joint tenants in respect of the suit property. That being the case our client was and still is entitled to the monthly rents that are derived from the property which we are currently advised stand at Ksh 40,000/= per month.**

**Secondly we are instructed to request from you, a point-by-point breakdown of the sum allegedly owed, to wit ksh 1,823,360 as our client asserts that no such sums are due.**

**Let us hear from you noting that we have instructions to resist any precipitate action from your end. We however are of the view that this matter may be amicably resolved.**

**Yours faithfully,**

**ORARO AND COMPANY ADVOCATES.**

111. The issue of the extent of the 4<sup>th</sup> defendant's indebtedness was not resolved.

112. The administrators, while transferring the suit land to the 5<sup>th</sup> defendant, did indicate in the transfer that they did so in their status as administrators while exercising a statutory power of sale conferred on them by the Indian Transfer of Property Act. They purported to transfer the suit land to the 5<sup>th</sup> defendant free from all encumbrances and discharged from the right of redemption and from all claims equities and demands under the charge.

113. The subdivision of the land evidently took place long after this suit was filed but as submitted by the plaintiff the 5<sup>th</sup> defendant kept the details of such developments away from this court's eye. However there is good cause to believe that this was done in furtherance of the fraud perpetrated by the transfer, for one of the 5<sup>th</sup> defendant's directors is one Kenneth Kahiga Munene, a beneficiary to the estate of the deceased; the testimony of the plaintiff to the effect that Kenneth knew of the agreement between the plaintiff and the deceased was not controverted. Notably the said Kenneth Kahiga Munene never appeared in court to deny the said allegations.

114. I find it strange that a beneficiary of the estate who is adversely mentioned would not be called to testify in this suit in which the interests of the estate he is a beneficiary of are at stake.

115. In dealing with the allegation of fraud herein, it is also notable that besides the involvement of a beneficiary to the deceased's estate, the purported sale to the 5<sup>th</sup> defendant was by way of a private treaty rather than by way of a public auction. As I conclude on the issue of alleged fraud, the dicta of the Court of Appeal in the Nancy Kahoya Amadiva case (supra) comes to mind in this case:

***"There is a general duty for a mortgagee to act in good faith in exercising the power of sale. This duty stems more from equity than statute. This argument is backed by the proposition that the fact that a sale has been effected at a properly conducted auction is a strong prima facie evidence that no unfair advantage has been taken either by the vendor or purchaser. Indeed, it has been argued that there is no better or more reliable method of determining the true and fair market value of property than by sale at public auction."***

116. Failure on the administrators' part to employ the public auction method which could have possibly mitigated the perception of fraud, and the apparently secretive use of a private treaty denied the administrators the benefit of doubt in the face of allegation of fraud.

117. The evidence of the plaintiff that the 5<sup>th</sup> defendant and Kenneth Kahiga Munene met with her to discuss her agreement with the deceased is therefore taken to be the correct position. In his witness statement Dr John Muiru, testifying for the 5<sup>th</sup> defendant acknowledged that he and other directors of the 5<sup>th</sup> defendant including Kenneth Kahiga, met with the deceased to discuss both the agreement between the deceased and the plaintiff and the charge by the 4<sup>th</sup> defendant in favour of the deceased.

118. These facts coupled with the want of capacity of the deceased to contract for the sale of the 4<sup>th</sup> defendant's share of the suit land renders the transfer to the 5<sup>th</sup> defendant fraudulent and therefore illegal.

## **CONCLUSION**

**119.** The upshot of the foregoing is that I find the plaintiff's claim against 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to have merit. The status of the suit land must therefore revert back to the point where the estate of the deceased and the 4<sup>th</sup> defendant, having constituted themselves into a team of willing sellers in oblivion of the terms and conditions of the charge document, contracted with the plaintiff for its sale.

**120.** I therefore enter judgment in favour of the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants jointly and severally to the extent stated herein below and issue the following final orders:

**a.** A declaration that the transfer dated 22<sup>nd</sup> December 2009 between 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the one hand and the 5<sup>th</sup> defendant on the other and all consequential entries made on the title by the Registrar of Titles pursuant to that transfer or any subdivisions made after the transfer are null and void;

**b.** An order directing the Chief Land Registrar to cancel the entry registering the transfer dated 22<sup>nd</sup> December 2009 between 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the one hand and the 5<sup>th</sup> defendant on the other and all consequential entries made on the title pursuant to that transfer or any subdivisions made after the transfer;

**c.** A declaration that the plaintiff has a purchaser's interest in the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 pursuant to the agreement dated 25<sup>th</sup> November 2004;

**d.** A declaration that the plaintiff is entitled to vacant possession and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants shall give the plaintiff vacant possession of the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 within 14 days hereof;

**e.** An order that the plaintiff shall pay to the administrators the entire balance of purchase price, being the sum of Ksh 10,000,000/= within 7 days of such delivery of possession in paragraph (d) above;

**f.** An order that the administrators shall hold such sums in trust for the 4<sup>th</sup> defendant as he is entitled to by virtue of the sale to the plaintiff under the subsequent terms of this judgment;

**g.** An order that in default of payment of the sum stipulated in paragraph (e.) above within the stipulated time the agreement dated 25<sup>th</sup> November 2004 shall be deemed automatically rescinded;

**h.** A mandatory injunction directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the specific performance of the terms of the agreement dated 25<sup>th</sup> November 2004 including handing over possession of the land situate in Thika Municipality and comprised in Land Reference Number 7699/2;

**i.** A mandatory injunction directed at the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to execute any and all the necessary documents for the completion of the agreement dated 25<sup>th</sup> November 2004;

**j.** A permanent injunction restraining the defendants or any of them, from disposing or in any way interfering with the land situate in Thika Municipality and comprised in Land Reference Number 7699/2 to the detriment of or in a manner that may obstruct or further delay the plaintiff's interest therein;

**k.** An order that the aggregate of proceeds of the sale to the plaintiff in accordance with the agreement dated 25<sup>th</sup> November 2004, which computation shall include sums already paid on that agreement and sums payable after this judgment, shall be shared equally between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein on the one hand and the 4<sup>th</sup> defendant herein on the other;

**l.** An order that the costs of this suit shall be met by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants jointly and severally.

It is so ordered.

Dated and signed at Kitale on this 8<sup>th</sup> day of May 2018.

**MWANGI NJOROGE**

JUDGE

Delivered at Nairobi on this 21<sup>st</sup> day of May, 2018

**E.O. OBAGA**

JUDGE

21/5/2018.

**In the presence of :-**

**M/s. Kivindu for M/s. Gaituri for 3<sup>rd</sup> Defendant**

**Mr. Mogoi for Mr. Aboge for 4<sup>th</sup> Defendant**

**M/s. Kivindu for Mr. Koech for 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

**Court Assistant - Kevin**