



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT KISII

CASE NO. 16 OF 2012

BERNARD GESORA MAKORI1ST PLAINTIFF

KEPHA ONDUKKO MAKORI2ND PLAINTIFF

VERSUS

THE CO-OPERATIVE MERCHANT BANK LTD1ST DEFENDANT

EMERGE INVESTMENTS LTD2ND DEFENDANT

J U D G M E N T

1. The plaintiffs instituted the instant suit vide a plaint dated 29th June 2009 filed in court on the same date. The plaintiffs are brothers and sons of the late Johnson Makori Onduko. The late Johnson Makori Onduko was the registered proprietor of LR No. 631/IV/60 Kericho (hereinafter referred to as the “**suit property**”) which he caused to be transferred to the 1st plaintiff on 9th January, 1996.

2 The 1st plaintiff charged the suit property to the 1st defendant to secure a financial facility of kshs.8,000,000/=. The repayment of the loan facility by the 1st plaintiff to the 1st defendant was irregular which prompted the 1st defendant to seek to exercise its statutory power of sale conferred under the instrument of charge and the statute. This triggered various suits as particularized in the plaint. In an effort to settle the matter finally, the 2nd plaintiff and the 1st defendant entered into an agreement dated 1st July 2004 where the 1st defendant as chargee agreed to sell the charged property to the 2nd plaintiff by way of private treaty for kshs. 10,000,000/=. This agreement was not completed as between the parties and the 1st defendant subsequently sold the suit property to the 2nd defendant vide an agreement dated 6th October 2005 and a transfer of the property was registered in favour of the 2nd defendant on 27th April 2006.

3. The 2nd plaintiff protested the sale of the property to the 2nd defendant by the 1st defendant on allegations that the 1st defendant had defaulted on the agreement entered into between them and that the 1st defendant had fraudulently sold and transferred the property to the 2nd defendant. The plaintiffs vide a plaint dated 29th June 2009 filed the present suit against the defendants seeking the following orders:-

(a) This Honourable court be pleased to issue a permanent injunction against the defendant whether by themselves, through their agents, servants, employees and or any other person claiming through them restraining them from selling, transferring, alienating, charging, mortgaging or in dealing in any other manner whatsoever with the land known as LR No. 631/IV/6 Kericho Town.

(b) An order of specific performance directed to the 1st defendant to complete the sale transaction by the agreement dated 1st July, 2005 of LR No. 631/IV/60 Kericho Town to 2nd plaintiff.

(c) An order cancelling the transfer or sale and the ensuing title issued to the 2nd defendant over the same LR No. 631/IV/60 Kericho by the 1st defendant.

(d) A declaration that the purported sale or transfer of LR No. 631/IV/60 Kericho Town by the first defendant to the second defendant is illegal, null and void abinitio.

(e) In the alternative, the value of the property and loss of business.

4. The 1st defendant filed a statement of defence dated 18th April 2016 on 20th April 2016. The 1st defendant denied the 2nd plaintiff's allegations that it breached the agreement with the 2nd plaintiff and further denied the allegations of fraud attributed to the 1st defendant by the 2nd plaintiff. The 1st defendant's defence is aptly captured in paragraphs 13, 14, 15 and 16 of the Statement of Defence which are set out hereunder for ease of reference.

13. In reply to paragraphs 17 and 18 of the plaint, the 1st defendant admits that indeed an agreement to sell the suit property to the 2nd plaintiff by private treaty was entered into. However, the 2nd plaintiff breached its obligation under the said agreement with the result that a 2nd sale agreement was entered into with 2nd defendant herein who performed the same timeously and accordingly, the suit property was transferred to the latter.

14. Contrary to paragraph 20, the 1st defendant denies practising or perfecting any fraud against the plaintiffs herein. It is the plaintiffs who have deliberately misstated the facts in order to mislead the court. The particulars of fraud therein made are hereby denied as if the same were herein expressly repeated and specifically traversed seriatim.

15. The 1st defendant denies the plaintiffs claim for specific performance and cancellation of the transfer to the 2nd defendant. Equity does not aid the indolent. There can be no specific performance of an agreement breached by the very party moving the court. Needless to say, that the plaintiffs have not established any basis for their claim for cancellation of the transfer registered in favour of the 2nd defendant.

16. Paragraph 22 of the plaint is denied. The 1st plaintiff offered the suit property as security for the borrowing without regard to the sentimental value thereof to his family. The 1st plaintiff defaulted in the repayment of the loan. The 1st defendant was entitled to and did exercise successfully its statutory power of sale successfully and in accordance with the law.

5. The 2nd defendant filed its statement of defence dated 22nd May 2015 under protest on the basis that no summons to enter appearance had been served on them. The 2nd defendant vide its defence denied the various allegations of fraudulent dealing made against it by the plaintiffs. The 2nd defendant stated that it was the registered proprietor and owner of land parcel known as LR No. 631/IV/60 situated at Kericho Town within Kericho County. The 2nd defendant contended that it validly and lawfully purchased the suit property from the 1st defendant on 6th October, 2005 and was registered as the lawful proprietor and owner on 27th April 2006 and was granted full possession of the suit premises pursuant to a decree issued in Kericho HCCC No. 21 of 2009. The 2nd defendant denied the particulars of fraud attributed to it by the plaintiffs and further denied that the 1st plaintiff had any *locus standi* to seek any relief on the basis of the agreement dated 1st July 2004 entered into between the 1st defendant and one, Kepha Onduko. The 2nd defendant further stated it was an innocent buyer for value without any notice of the 1st plaintiff's interest in the suit property, if any and contended the suit by the plaintiffs against it constituted abuse of the court

process and ought to be dismissed.

Evidence from the parties;

6. The suit was heard before me on diverse dates. The 2nd plaintiff testified as PW1 in support of the plaintiffs claim. The 1st plaintiff did not tender any evidence and did not testify. The 2nd plaintiff testified and he adopted his witness statement dated 23rd March 2015 as his evidence and he relied on plaintiffs' bundle of documents as itemized in the list of documents dated 23rd March 2015 filed in court on 24th March 2015. The bundle was admitted in evidence and the documents deemed produced as "PEX.1-15" as per the list of documents.

7. PW1, Kepha Onduko Makori, the 2nd plaintiff testified that he entered into an agreement of sale to purchase the suit property with the 1st defendant as the chargee's of the property in terms of the agreement dated 1st July 2004 listed as No. 5 in the plaintiffs bundle of documents at page 162 ("PEX.5"). He stated that the 1st defendant was selling the property in exercise of its statutory power of sale which had arisen. As per the agreement of sale the purchase price was kshs.10 Million and that he paid a deposit of kshs. 1 Million. The balance of kshs. 9 Million was to be paid within the completion period which was expressed to be within 90 days of the date of execution of the agreement for sale. Inter alia the agreement provided as follows in the following clauses:-

4. The parties expressly agree that the title documents will be released and the title discharged upon payment of the full purchase price.

13. The completion date shall be Ninety (90) days from the date of execution of this agreement. The parties agree that time shall be of essence.

14. The parties agree that time shall be of essence. They further agree that if the purchaser does not make full payment within the agreement period, any deposit paid shall be automatically forfeited.

8. The 2nd plaintiff admitted he did not complete the agreement within the 90 days completion period but states he had entered into negotiations with Housing Finance Company of Kenya Ltd to finance him the balance and that arrangements for funding were in progress when the 1st defendant opted to sell the property to the 2nd defendant. The 2nd plaintiff as per paragraph 6 of his witness statement alleged that the sale to the 2nd defendant by the 1st defendant was fraudulent and gave particulars of fraud as therein itemized (a) – (j) but on cross examination by Mr. Chengo advocate for the 1st defendant he stated thus:

"I have no proof of the particulars of fraud as per my paragraph 6 of my witness statement. I alleged fraud having regard to the manner the bank concluded the sale to the 2nd defendant."

9. The 2nd plaintiff under further cross examination by Mr. Bundotich advocate for the 2nd defendant, stated that he was aware the 1st plaintiff had offered the suit property as security for a loan he had obtained and that the private arrangement sale was so as to salvage the property. The 2nd plaintiff's assertion was the 1st defendant in breach of the agreement of sale with the 2nd plaintiff colluded with and fraudulently sold the suit property to the defendant. In support of his assertion that there was connivance between the 1st defendant and the 2nd defendant, the 2nd plaintiff pointed to the fact that the 2nd defendant deposited the purchase funds in an account in the name of the 1st plaintiff at Nakuru and besides suggested the 2nd defendant may have had prior information of the contract between the 2nd plaintiff and the 1st defendant. In particular the 2nd plaintiff alleged that a relative of the 2nd defendant was a tenant in the suit premises and he may have given information to the 2nd defendant regarding the sale to the 2nd plaintiff.

10. The 2nd plaintiff in further cross examination stated that he had not confirmed to the bank that he had the balance of the purchase price although he reiterated that the HFCK was processing a loan for him though no loan offer had been communicated to him or the bank. He acknowledged that the sale was not made subject to him obtaining funding from any source. The 2nd plaintiff's position was that he expected the 1st defendant would have given him a notice of rescission if it intended to rescind the agreement.

11. The 1st defendant's witness one Constance Andeje a bank officer of the 1st defendant at the Bank's Branch, Kisii testified as DW2. She relied on her filed witness statement dated 18th April 2016 and the bundle of documents filed on behalf of the 1st defendant which were admitted as the 1st defendant's exhibit.

12. The witness testified that in 1995 the 1st plaintiff obtained a loan facility from the 1st defendant which he defaulted in paying. The 1st plaintiff introduced the 2nd plaintiff who was a family member to purchase the property so that the property could remain within the family. The 2nd plaintiff failed to honour the terms of the agreement of sale entered into with the 1st defendant for the purchase of the property charged to the bank. The 1st defendant consequently sold the property in exercise of its statutory power of sale to the 2nd defendant.

13. In cross examination by Mr. Mutubwa Advocate for the plaintiffs, the witness maintained that the 1st defendant followed due process in selling and transferring the suit property to the 2nd defendant. The witness further stated that there was no formal rescission of the agreement with the 2nd plaintiff as at December 2004 when the charged property was advertised for sale. The witness further stated that under clause 14 of the agreement of sale with the 2nd plaintiff, time was of the essence and that the 2nd plaintiff failed to honour the terms of the agreement precipitating the sale to the 2nd defendant. The witness further contended that the property was sold to the 2nd defendant at the prevailing market value as per the valuation report dated 24th March 2005 exhibited at page 104 of the 1st defendant's bundle of documents. The witness refuted that there was any fraud in regard to the sale to the 2nd defendant.

14. The 2nd defendant, testified through its director one, Naglin Kumar Megji who gave evidence as DW1. He relied on his written witness statement dated 15th June 2015 and the bundle of documents as per the list dated 15th June 2015. DW1 stated that the 2nd defendant only dealt with the 1st defendant and denied the 2nd defendant had any dealings with the plaintiffs respecting the property the 2nd defendant purchased from the 1st defendant. The 2nd defendant denied the allegations of fraud levelled against it by the plaintiffs. DW1 specifically denied the 2nd defendant was a tenant in the suit premises and stated that they learnt about the sale of the property from Acumen Auctioneers who were marketing the property for sale on the instructions of the 1st defendant.

15. DW1 further stated he was familiar with HCCC No. 14 of 2008 (Kericho) which was initially HCCC No. 1534 of 2005 (Nairobi) before it was transferred to Kericho. He stated the 2nd plaintiff was a party in the suit and that the suit was ultimately struck out. DW1 further stated in HCCC No. 21 of 2009 (Kericho), the 2nd defendant sought possession of the suit premises from tenants who had failed to vacate the suit property and was granted orders for vacant possession and lawfully took possession and continue to be in possession of the suit premises.

16. In response to questions put to him in cross examination by Mr. Mutubwa advocate for the plaintiffs, DW1 maintained that the 2nd defendant was registered as a company at the time it purchased the suit property and hence denied it had no capacity to buy the property. DW1 further stated he was never advised by the 1st defendant that the 2nd plaintiff had entered into an agreement which he failed to perform and maintained that the 2nd defendant was an innocent purchaser for value without any notice of any defect in the title. The 2nd defendant denied that it had any knowledge that of any ongoing court cases involving the plaintiffs and the 1st defendant and stated that as at the time the transfer to the 2nd

defendant was effected there was no order of injunction barring the same.

Analysis and determination:

17. The parties after conclusion of the trial filed final written submissions as directed by the court. I have considered the pleadings, the evidence and the submissions filed by the parties and the following issues render themselves for determination.

(i) Whether the 1st plaintiff's suit against the defendants is sustainable when he offered no evidence in support of his evidence.

(ii) Whether the 1st plaintiff's claim and that of the 2nd plaintiff against the defendants were common such that the 2nd plaintiff would properly have the locus standi to testify on behalf of the 1st plaintiff.

(iii) Whether the 2nd plaintiff's claim is founded on the agreement for sale dated 1st July 2004 entered into between the 2nd plaintiff and the 1st defendant, and if so, whether the said agreement is enforceable against the 1st defendant.

(iv) Whether the sale and transfer of the suit property by the 1st defendant to the 2nd defendant was fraudulent and hence null and void.

(v) Whether the instant suit is res judicata.

(vi) Who bears the costs of the suit?

18. I will consider and determine the 1st and 2nd issues together. A perusal of the joint plaint filed by the 1st plaintiff and the 2nd plaintiff clearly show the causes of action of the plaintiffs against the defendants are separate and distinct. The 1st plaintiff's cause of action stems from the loan facility he obtained from the 1st defendant against the security of a charge that was registered against land parcel LR No. 631/IV/60 Kericho. It is evident from the plaint that the property was previously owned by the plaintiffs' father one, Johnson Makori Ondiko (now deceased) and that he had charged the same to Trust Bank Limited to secure a sum of kshs. 5,000,000/=. Following agreement with his deceased father, the 1st plaintiff redeemed the property from Trust Bank Limited through a loan of kshs. 8,000,000/= he was advanced by the 1st defendant upon the property being transferred to him from his late father. The 1st plaintiff by the plaint has disputed various sums debited to his account by the 1st defendant (see paragraph 12 of the plaint) and has further alleged that the 1st defendant charged exorbitant interest rates and unilaterally changed the terms of the contract (paragraphs 13 and 14 of the plaint). Under paragraph 15 of the plaint it is pleaded as follows:-

15. The first defendant's acts were illegal, unequitable, uncontractual and a blatant abuse of the lender and borrower relationship and an exploitation of the first plaintiff and flew in the face of the doctrine of privity and freedom of contract.

19. It is pleaded under paragraph 5 of the plaint that there were two previous suits which related to the suit property namely Nairobi HCC No. 1543 of 2005 (transferred to Kericho as HCC No. 46 of 2008) and Nairobi HCCC No. 1149 of 1998. The former suit abated and the joinder of the 2nd plaintiff as a party therein was struck out for want of leave of court. In the 1998 suit, the 1st plaintiff sought to restrain the 1st defendant from exercising its power of sale. This suit apparently has not been finalized.

20. The various suits alluded to in the plaint were precipitated by the attempts by the 1st defendant to enforce its security over the suit property by way of exercise of its power of sale conferred under the charge following default by the 1st plaintiff in paying the loan. Under paragraph 17 of the plaint, the 1st

plaintiff avers that he entered into negotiations with the 1st defendant which resulted in a mutual agreement whereby the 1st defendant agreed to sell the charged property to the 2nd plaintiff by private treaty ostensibly because the 1st plaintiff was keen that the property remains within the family circles for sentimental value. That was the culmination of the sale agreement dated 1st July 2004 between the 1st defendant and the 2nd plaintiff.

21. The plaintiffs have jointly pleaded fraud as particularized under paragraph 20(a) – (k) of the plaint. Some of the particulars of fraud such as 20(c), (d), (e), (f), (g), (h), (i), (j) and (k) touched and concerned the 1st plaintiff and that the 1st plaintiff's evidence would have been required to prove and establish the fraud. The 1st plaintiff did not testify and the 2nd plaintiff had not been given authority by the 1st plaintiff to plead and/or testify on behalf of the 1st plaintiff. The 1st plaintiff's allegations of fraud against the 1st defendant related to the contractual agreement arising out of the charge instrument and the operation and management of the loan account with the 1st defendant. No evidence was led to support the allegations of fraud by the 1st plaintiff against the 1st defendant. Failure by the 1st plaintiff to tender evidence means the 1st plaintiff's claims against the defendants was not proved. The 1st plaintiff's cause of action and claim could only arise from the relationship of chargor of the suit property and borrower from the 1st defendant who was the chargee and the lender. The 2nd plaintiff's cause of action arose from the contract of sale he entered into with the 1st defendant and hence the causes of action were not common.

22. The 1st plaintiff's claim against the defendants not having been prosecuted and there being no evidence tendered in support of the claim, I find and hold the claim to be unproved and therefore unsustainable against the defendants. I therefore answer the first and second issues in the negative.

23. As regards, the third issue there is no dispute that the 2nd plaintiff and the 1st defendant entered into the sale agreement dated 1st July 2004. The real issue is whether this agreement was honoured and performed by the parties. The 1st defendant avers that the 2nd plaintiff failed to perform the agreement as he did not pay the balance of the purchase price of Kshs. 9,000,000/= by the completion date of the agreement as provided. It is the 1st defendant's assertion that the 2nd plaintiff breached the agreement which entitled the 1st defendant to avoid the agreement and proceed to sell the suit property to the 2nd defendant. The 2nd plaintiff asserts that the 1st defendant never gave him any notification to complete the sale transaction and further avers that as at the time the 1st defendant sold the property to the 2nd defendant, he was in active negotiations with the Housing Finance Company of Kenya to secure funding for the balance of the purchase price.

24. The contestation as between the 2nd plaintiff and the 1st defendant is whether as at the time the 1st defendant sold the suit property to the 2nd defendant, the agreement entered into on 4th July 2004 was still in force and valid. The 2nd plaintiff asserts it was still in force while the 1st defendant contends the agreement had lapsed as the 2nd plaintiff failed to complete the same as provided within the completion period. Paragraph 13 of the agreement of sale provided for completion thus:-

13. The completion date shall be 90 days from the date of execution of this agreement. The parties agree that time shall be of essence.

25. The plain and literal interpretation of the above clause is that the duration of the agreement was for 90 days from the date of executing the agreement and that all that was required to be done to complete the agreement, was to be done within the set time line. The 2nd plaintiff has submitted that the 1st defendant did not serve upon him a notice to complete the transaction and therefore could not have rescinded the agreement without having given such notification.

26. Under clause 10 of the agreement of sale the parties subjected the sale transaction to the Law Society Conditions of Sale (1989 Edition) in so far as the provisions were not inconsistent with the conditions of the agreement. Clause 4 of the Law Society Conditions of Sale deal with completion and provides

elaborate provisions respecting how completion of a sale transaction is to be effectuated. Sub clause (7) of clause (4) of the Law Society Conditions of Sale makes provision respecting when a “**completion notice**” may be given and in the relevant part provides thus:-

4. (7) This sub-condition applies unless a special condition provides that time of the essence in respect of the completion date.

(a) In this condition “completion notice” means a notice served in accordance with this sub-condition;

(b) If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:

(i) If he could be so but for some default or omission of the other party;

(ii) Notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.

(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.

(d)

(e)

(f)

(g)

27. Having regard to the Agreement of Sale dated 1st July 2004 between the 2nd plaintiff and the 1st defendant, the above sub condition (7) of Condition 4 of the Law Society Conditions of Sale had no application since the parties had provided for the completion and had specifically provided under condition 13 of the Agreement that time would be of the essence. Condition 14 of the agreement further emphasized that time was to be of the essence. Condition 14 provided as follows:-

14. The parties expressly agree that time shall be of the essence. They further agree that if the purchaser does not make full payment within the agreement period, any deposit paid shall be automatically forfeited.

28. In my view, clause 13 and 14 of the Agreement of Sale dated 1st July 2004 made it clear beyond any doubt that the agreement was time specific and time bound. The agreement was valid for a period of 90 days from 1st July 2004 and the same came to an end on 30th September 2004 and beyond that date there was no agreement. It had lapsed by effluxion of time and the 1st defendant did not need to do anything to signify that the agreement had come to an end. It is only the 2nd plaintiff who could have salvaged the agreement perhaps by seeking an extension of the period for completion and which extension the 1st defendant would have had to agree to. If the 1st defendant chose not to agree, still the agreement would have lapsed unless the 2nd plaintiff would have shown and demonstrated that the 1st defendant had breached the agreement during the validity of the agreement. In my mind, nothing short of depositing the full balance of the purchase price and/or furnishing a valid guarantee for the balance of the purchase price would have sufficed to keep the agreement alive. As matters stand, the 2nd plaintiff could not as at 30th

September 2004 show that he was ready, able and willing to complete the transaction. It was not sufficient for the 2nd plaintiff to aver that he had approached Housing Finance Company of Kenya Limited to finance him. The contract he had entered into with the 1st defendant was not subject to him seeking and obtaining finance from any financier.

29. It is in view of the foregoing reasons, my holding and finding that the sale agreement dated 1st July 2004 was not performed during the completion period and that the same lapsed on 30th September 2004. As no extension of the completion period was sought and/or granted after the completion period expired, the agreement ceased to have any validity and cannot therefore be enforceable against the 1st defendant. That disposes of the third issue.

30. Although what I have stated in my consideration of the first three issues that I framed for determination should have been sufficient to dispose of this suit, the plaintiffs raised other issues touching on the consequent sale of the suit property to the 2nd defendant by the 1st defendant which I will now turn to consider. The 1st and 2nd defendants also contended the instant suit was *res judicata* and I will equally have something to say about that.

31. The plaintiffs have submitted that the 2nd defendant lacked the capacity to enter into a contract of sale with the 1st defendant as at 6th October 2005 when the sale agreement was entered into allegedly because the 2nd defendant had not been registered. The plaintiffs placed reliance on a letter dated 20th March 2006 from the companies registry included in the plaintiffs bundle of documents at page 35 where the registry stated thus “...**particulars regarding this company does not appear in our records means it may not be registered.**” This letter could not constitute an official search under the Companies Act, Cap 486 Laws of Kenya (now repealed) and cannot therefore be taken as conclusive evidence that the 2nd defendant had not been registered. The plaintiffs vide the plaint (paragraph 4) pleaded that the 2nd defendant was a limited liability company incorporated in Kenya and this position remained upto and including at the trial. Whether or not the 2nd defendant was a registered company was therefore never an issue that required any proof by the 2nd defendant and/or any rebuttal.

32. It is a cardinal rule of pleadings that parties are bound by their pleadings and a party will generally not be permitted to adduce evidence to establish issues that are not borne out by the pleadings. Equally a party is not allowed to introduce new issues through submissions. The plaintiffs referred the court to the cases of **Salomon & Co. Ltd –vs- Salomon [1987], AC 22HL, Management Committee of Shalemi Community Educators & 7 Others –vs- Registered Trustees of Micro Enterprises Support Programmes Trust [2016] eKLR** and **West Kenya Sugar Co. Ltd –vs- Busia Sugar Industries Ltd & 2 Others [2017] eKLR** to support their submission that an entity or a company that was not incorporated had no legal capacity to contract and that any transaction entered into by such an entity before being registered was a nullity. These authorities with due respect, have no application in the instant case as the issue whether or not the 2nd defendant was registered as at the time it entered into the transaction was not pleaded and was not in fact proved as a fact at the trial.

33. The plaintiffs submitted that the sale and transfer of the suit property to the 2nd defendant was fraudulent. The plaintiffs set out the particulars of fraud as against the defendants under paragraph 20(a) – (k) of the plaint and as observed earlier in this judgment these particulars to a large extent related to and concerned the contractual relationship between the 1st plaintiff and 1st defendant as provided in the loan offer and the charge instrument. The 1st plaintiff did not adduce any evidence in proof of the fraud allegations and therefore the allegations remain unproven. The general principle of law is that where fraud is alleged the party alleging fraud must prove the allegations and that the burden of proof is on standard which is higher than on a balance of probabilities. There was absolutely no proof of fraud by the plaintiffs against the defendants.

34. As against the 2nd defendant, the plaintiffs alleged that there was collusion between the 1st defendant and the 2nd defendant to proceed with the sale to the 2nd defendant, notwithstanding that there was valid

sale between the 2nd plaintiff and the 1st defendant. The plaintiffs submitted that they were not served with an appropriate statutory notice for the redemption of mortgage and/or to complete the sale transaction. I have earlier in this judgment held that the sale agreement entered into between the 1st defendant and 2nd plaintiff lapsed after the 2nd plaintiff failed to complete the same within the completion period and thus at the time the 1st defendant contracted with the 2nd defendant there was no valid agreement in force. The plaintiffs agree that as at the time the 1st defendant entered into the sale agreement with the 2nd plaintiff, the 1st defendant's right to exercise its power of sale over the charged property had arisen and it was on that basis the 1st defendant was entering into an agreement with the 2nd plaintiff to sell the property by private treaty as chargee. If that sale failed to materialize, there was nothing to prevent the 1st defendant to enter into the subsequent agreement with the 2nd defendant on the same basis.

35. The 2nd defendant has denied the allegations of collusion and/or fraud against it and has contended that it was an innocent purchaser for value without any notice of any defect in the title. The 2nd defendant entered into a formal agreement of sale with the 1st defendant dated 6th October 2005. The 2nd defendant paid the full purchase price of kshs. 10,000,000/= which was deposited in the 1st plaintiff's loan account with the 1st defendant within the contractual period and the property was subsequently transferred to the 2nd defendant on 27th April 2006. On the basis of the evidence, I find no basis to hold that the agreement entered into between the 1st defendant and the 2nd defendant was as consequence of any collusion or fraud as alleged by the plaintiffs. There is no proof of any collusion or fraud. To the contrary, the 2nd defendant's agreement with the 1st defendant was entered into after the 2nd plaintiff's agreement with the 1st defendant had lapsed more than 12 months earlier.

36. The plaintiffs further allegation that the property was sold to the 2nd defendant at an undervalue was not proved. The 1st plaintiff who was the registered owner and the chargor of the suit property did not offer any evidence to prove that the property was sold at an undervalue. The valuation report carried out by the 1st defendant dated 24th March 2005 annexed at pages 103-115 of the 1st defendant's bundle of documents shows the market value of the property as of that date was kshs. 10,500,000/= while the forced sale value was stated at kshs. 7,500,000/=. A valuation report dated 14th February 2006 carried out at the instance of the plaintiffs, annexed at pages 168-177 of the plaintiffs bundle of documents indicates a market value of kshs.23,000,000/= and forced sale value of kshs. 13,000,000/=. The valuation report by the plaintiffs was carried out after the property had been sold to the 2nd defendant and one cannot rule out the possibility that it could have been procured with an eye to these proceedings. A chargee is by law required to obtain a valuation report before exercising the power of sale. The 1st defendant complied with this legal requirement when they procured the valuation report dated 24th March 2005. The sale to the 2nd defendant was within one year of that valuation report and the sale price was well above the forced sale value of kshs. 7,500,000/=. In the circumstances of this matter, I do not accept that the property was sold at an undervalue as alleged by the plaintiffs.

37. The plaintiffs have submitted that the transfer of the suit property to the 2nd defendant was made when there was in force court orders restraining any dealings with the suit property and contend that the transfer was in effect null and void and of no effect. The plaintiffs in this regard refer to an order of injunction issued in Nairobi HCCC no. 1534 of 2005 (later transferred to Kericho and renumbered Kericho HCCC No. 46 of 2008). The plaintiffs pursuant to their averments under paragraph 5(a) of the plaint admit that this suit abated as against Johnson Makori Onduko who was the 1st plaintiff following his death and that equally the same suit was struck out as against Bernard Gesora Makori (the 1st plaintiff herein) who had been enjoined as the 2nd plaintiff vide a ruling of 19th day of February 2009. Therefore the said suit did not exist as at the time the plaintiffs filed the present suit. As a consequence, any injunction that had been issued in favour of the plaintiffs in the suit stood discharged and vacated once the suit abated and/or was struck out.

38. Under paragraph 5(b) of the plaint, the plaintiffs plead that in Nairobi HCC No. 1149 of 1998 **Bernard Gesora Makori –vs- The Co-operative Merchant Bank Limited**, the suit sought injunctive reliefs but contend that this suit was overtaken by events once the 1st defendant agreed to sell the suit property to the 2nd plaintiff and after the 2nd defendant purported to have purchased the suit property from the 1st defendant. The import of paragraphs 5(a) and (b) of the plaint is that the plaintiffs acknowledge that the injunctive orders that were obtained in the suits referred to therein and which had been registered against the title of the suit property had ceased to be of any legal effect and could not prevent the 1st defendant from dealing with the suit property. In the circumstances of this matter, the doctrine of *lis pendens* would have no application.

39. The exercise of power of sale by the 1st defendant to the 2nd defendant was pursuant to Section 69(1) of the Transfer of Property Act which was the operative statute in regard to the suit property as of the date of sale. The power of sale of a mortgagee once the right has arisen is unfettered save as provided under the instrument of charge and the statute. Section 69(1) of the Transfer of Property Act provides as follows:-

69(1) A mortgagee, or any person acting on his behalf where the mortgage is an English Mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the court, have power when the mortgage-money has become due, subject to the provisions of this Section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act, referred to as the mortgagee's statutory power of sale and for purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable."

40. Where mortgage-money has become due and payable the court has no business in interfering in the mortgagee's exercise of its power of sale conferred under Section 69(1) as above. The 1st plaintiff, it is evident from the numerous cases he filed against the 1st defendant was determined to frustrate the 1st defendant from exercising its power of sale. In a ruling rendered by D. A Onyacha, J. (as he then was) in Mombasa HCCC No. 576 of 2001 **Bernard Gesora Makori –vs- Co-operative Merchant Bank Ltd** on 26th February 2002 (annexed in the 1st defendant's bundle of documents) the Judge analyzed the several cases the 1st plaintiff had instituted against the 1st defendant which included:-

1. Kisii HCCC No. 451 of 1997

Prayer: (a) That the respondent be restrained by an order of injunction from selling alienating or disposing of the applicants land parcel LR No. 631/IV/60 Kericho Municipality until further orders.

Result: That the plaint filed herein on 9th day of October 1997 be and is hereby struck out.

2. Nairobi HCCC No. 1149 of 1998

Prayer (1) That the defendant be restrained by itself, its agents, servants and others from alienating, selling, transferring or otherwise affecting or interfering with plaintiffs ownership, title and interest in the property known as LR No. 631/IV/50 Kericho Municipality pending the final determination of this case.

Result: The application for injunction is hereby allowed subject to the applicant depositing kshs. 4,104,000/= in court within the next 10 days hereof. That failure of the applicant to deposit as aforesaid the application to stand dismissed and Respondent to be at liberty to sell. (The application stood dismissed as no deposit was made).

3. Kericho HCCC No. 84 of 1999

Prayer (b) That a temporary injunction do issue restraining the defendant or its agents and/or servants from selling LR No. 631/IV/60 Kericho Municipality by public auction or otherwise due on 20th December 1999 pending the hearing hereof.

Result: Application struck out as *res judicata* Nairobi HCC No. 1149 of 1998. Application filed in bad faith and is an abuse of the court process

4. Kisumu HCC No. 362 of 2000

Prayer (2) That the defendant whether by itself, its servants, agents or otherwise howsoever be restrained from advertising for sale, selling or in any way interfering with the plaintiff's possession and/or ownership of land parcel LR No. 631/IV/60 situated in Kericho Municipality.

Result: This application is nothing but *res judicata* Kisii HCC No. 451 of 1997, Nairobi HCC No. 1149 of 1998 and Kericho HCC No. 84 of 1999. The plaintiff not to be allowed to waste the time of the court in this manner. Application dismissed with costs.

41. In the application, Onyancha, J. was considering in Mombasa HCCC No. 576 of 2001, the plaintiff had sought a similar order of injunction as in the earlier suits outlined above. The Judge held the application was *res judicata* as similar applications had been made in Kisumu HCCC No. 362 of 2000, Nairobi HCCC No. 1149 of 1998, Kericho HCCC No. 84 of 1999 and Kisii HCCC No. 451 of 1997. While expressing his indignation to the plaintiffs conduct, he observed the applicant's conduct was intolerable. The judge observed as follows:-

“My brother Tanui, J. stated in one of the above mentioned cases, Kisumu HCCC No. 362 of 2000, that what he saw in the series of cases aforementioned is nothing but *res judicata* and an abuse of the process of court. I, even more strongly state that what I see before me in this application is nothing but more *res judicata*. And where in the ruling he said the applicant should not be permitted to waste the time of the court, I state that the applicant herein should within the parameters of our jurisprudence be prevented from once again walking into another court be it Machakos, Nyeri, Eldoret, Bungoma, Meru, Embu, Malindi or even Kitale or Busia. If he is not stopped, he will walk there and therein file another similar application. There must be an end to litigation and in this case there must be an end to similar suits and applications being filed in our courts of law by the applicant. If this cannot be so, one can imagine our courts being inundated by new applications filed one after another after the earlier one is dismissed. The application is a classic example.”

42. The 1st plaintiff being aware of the scathing ruling by Onyancha, J. no doubt got his late father Johnson Makori Onduko to front as the plaintiff in Nairobi HCCC No. 1534 of 2005 (Kericho HCCC No. 46 of 2008) which suit he subsequently unsuccessfully sought to be enjoined as the 2nd plaintiff.

43. The defendants have on the basis of aforesaid history regarding the suit property submitted that the instant suit is *res judicata* having regard to the previous suits. I have considered the submission and my view is that even though the subject matter is the same and the 1st plaintiff and the 1st defendant are common parties in all the previous suits, the entry of the 2nd plaintiff introduced a new cause of action which was not in issue in the previous suits. However, the suit in as far as it relates to the 1st plaintiff would be *res judicata* as all the issues that relate to the 1st plaintiff have previously been in issue in the

previous suits. Even if, it is argued, the previous suits had not been finally determined the suit by the 1st plaintiff would not lie as it would be subjudice the earlier suits in terms of Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya.

44. The suit as relates to the 2nd plaintiff however would not be *re judicata* as it is predicated on the Agreement of Sale dated 1st July 2004 which he claimed had been breached by the 1st defendant and sought an order of specific performance of the agreement. I have in the course of this judgment made a finding and holding that the agreement had lapsed for want of completion within the contractual completion period and could therefore not be specifically performed. Having determined that issue, there is nothing left on which the 2nd plaintiff's suit could stand, and surely the same must be dismissed.

45. I have in my discussion and analysis dealt with issues (iv) and (v) and it must have become evident by now that the plaintiffs suit lacks merit and is for dismissal. In my view, having regard to all the evidence, the plaintiffs have not proved their case on a balance of probabilities and I accordingly dismiss the same with costs to the defendants.

Judgment dated, signed and delivered at Kisii this 10th day of November, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the 1st and 2nd plaintiffs

Mr. Soire for Chengo for the 1st defendant

Ms. Kebungo for Bundotich for the 2nd defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE