Gitonga & another (Suing as the Legal Representatives of John Gitonga Kihara) v National Bank of Kenya Limited & 5 others (Civil Appeal 19 of 2017) [2023] KECA 370 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 370 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 19 OF 2017

DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA

MARCH 31, 2023

BETWEEN

DAVID KIHARA GITONGA ..... 1ST APPELLANT

PETER KIHARA ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF JOHN GITONGA KIHARA

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST RESPONDENT

FOURSOME DEVELOPERS LIMITED ..... 2ND RESPONDENT

DOVE COURT LIMITED ..... 3RD RESPONDENT

SHABA INVESTMENTS LIMITED ..... 4TH RESPONDENT

KAMUTHI HOUSING CO-OPERATIVE SOCIETY LTD ..... 5TH RESPONDENT

K-REP BANK LIMITED ..... 6TH RESPONDENT

(An appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (Ogola, J.) dated 29th September 2015 in HCCC No. 478 of 1998)

JUDGMENT

1. John Gitonga Kihara (Deceased) was the registered proprietor of LR No. 280/3 (the suit property), which he charged to the 1st respondent, the National Bank of Kenya, to secure a financial facility during the period between 1974 and 1978. By the year 1995, the mortgage debt and interest thereon had become due and payable to the 1st respondent in the total sum of KShs.136,686,550/60.

2. Following persistent default in payment of the mortgage debt, the 1st respondent issued the requisite statutory notice whereupon the deceased approached the 1st respondent in September 1995 with a request to sell LR No. 280/3 (which was subsequently subdivided into the suit properties) by way of a private treaty to service the loan account.

3. Pursuant to the terms of settlement reached between the deceased and the 1st respondent on 13th September 1995, the deceased introduced the 2nd respondent, Foursome Ltd, which offered to purchase LR No. 280/3 for KShs.60,000,000 in terms of the Agreement for Sale dated 1st November 1995. Accordingly, LR No. 280/3 was then transferred to the 2nd respondent vide an instrument of transfer dated 13th September 1995.

4. Under the terms of the settlement aforesaid, the 1st respondent and the deceased agreed that the sum or price of KShs.60,000,000 then payable by the 2nd respondent to the 1st respondent would be in full settlement of the mortgage debt then due. Accordingly, the 1st respondent credited the deceased's loan account with the sum of KShs.60,000,000 and wrote off the outstanding balance of KShs.76,868,550/60 in full and final settlement of the deceased's loan account. Consequently, the deceased's equity of redemption was extinguished upon sale of the said property to the 2nd respondent and on settlement of the deceased's loan account as aforesaid.

5. Subsequent to the sale and transfer of the suit property by the 1st respondent to the 2nd respondent, the 1st respondent instituted civil proceedings in Nairobi HCCC No. 1101 of 2003 against the deceased and one Miss. Kagure Kihara Gitonga (a daughter of the deceased) and obtained eviction orders, which it enforced to secure vacant possession of the suit property in 2003.

6. Upon recovery of vacant possession of the suit property, the 2nd respondent subdivided the same into LR Number 280/10, 280/11 and 280/12. It is noteworthy that LR Numbers 280/11 and 280/12 (hereinafter the suit properties) are the subject of the suit in the trial court and in the appeal before us.

7. Out of the agreed sum or price of KShs.60,000,000, the 2nd respondent paid to the 1st respondent a deposit in the sum of KShs.12,500,000 leaving a balance of KShs.47,500,000, which it failed to pay. Consequently, the 1st Respondent filed suit against the 2nd respondent in the High Court of Kenya at Nairobi HCCC No. 478 of 1998.

8. In its plaint dated September 16, 1998 and amended on November 13, 1998, and further amended on August 20, 2001, the 1st respondent prayed for: a declaration of Trust in its favour and an order of permanent injunction restraining the 2nd respondent from transferring, alienating or in any way whatsoever dealing with the suit property; cancellation of the 2nd respondent's title, a vesting order in favour of the 1st respondent, and for delivery up of all deeds and all documents in the 2nd respondent's possession; special damages together with interest thereon at the rate of 34% per annum from the month of May 1996 until payment in full; in the alternative, the balance of the purchase price in the sum of KShs.47,500,000 together with interest at the rate of 34% per annum from May 31, 1996 until payment in full; and Costs of the suit and interest.

9. The 2nd respondent filed a defence dated October 28, 1998 and amended on November 18, 2001. It denied the 1st respondent's claim and stated: that the suit was bad in law; that the plaint did not disclose any cause of action; and that the suit was premature, misconceived, incompetent and an abuse of the court process. The 2nd respondent also alleged that the 1st respondent did not deliver vacant possession of the suit property; that the deceased chargor advertised in print media warning all prospective purchasers; that payment of the purchase price was to be made from the proceeds of sale by the 2nd respondent of sub-plots or subdivisions of the suit property; and that efforts to sell

the subdivisions had been frustrated by the 1st respondent. It prayed that the 1st respondent's suit be dismissed with costs.

10. On 7th May 2003, the 1st and 2nd respondents recorded a consent judgment in terms that the 2nd respondent acknowledged that it held title to LR Numbers 280/11 and 280/12 in trust and as agents for the 1st respondent for purposes of purchase or sale on behalf of the 1st respondent at an agreed sum of KShs.60,000,000 of which a sum of KShs.12,500,000 had been paid to the 1st respondent leaving a balance of KShs.47,500,000; that the 1st respondent thereby accords the 2nd respondent a period of 4 (four) months from 7th May 2003 to sell the land and pay to the 1st respondent the sum of KShs.47,500,000 and that, during that period, the 2nd respondent shall continue to retain the titles as agents and trustees for the 1st respondent; that if the 2nd respondent shall not have sold the property or any subdivisions thereof, the 1st respondent be entitled to a Vesting Order transferring ownership to the 1st respondent unconditionally, and that the 1st respondent be at liberty at its discretion to extend time if it thinks necessary to do so; that, where the 2nd Respondent has sold any subdivisions of the properties and remitted payment to the 1st Respondent or the 1st Respondent's advocates, such subdivisions shall be released and transferred to the purchaser forthwith and without further conditions; that, where the 2nd Respondent transfers title to the 1st Respondent on account of failure to sell, the 2nd Respondent shall be entitled to file a counterclaim for any refunds it may seek from the 1st Respondent in the event that the issue of such refunds is not settled amicably; and that the issue of costs shall be determined together with the counterclaim (if any) and, otherwise, each party shall bear its own costs of the suit.

11. The 1st and 2nd respondents obtained a decree issued on 3rd October 2003 in terms of the consent judgment aforesaid. Failing discharge by the 2nd respondent of its obligations under the said judgment and decree, the 1st respondent obtained a vesting order dated 15th July 2004 in respect of the suit properties.

12. Subsequently, the 1st respondent sold and transferred LR No. 280/11 to the 3rd respondent on December 28, 2009 and LR No. 280/12 on 2nd June 2010, all in exercise of its statutory power of sale relating to the security previously given by the deceased's chargor to secure his mortgage debt.

13. In turn, the 3rd respondent sold and transferred the two properties to the 4th respondent on July 21, 2011, which also sold and transferred them to the 5th respondent on October 11, 2011. Finally, the 5th respondent charged the suit properties to the 6th respondent on 11th October 2011 and executed a further charge on 7th October 2013. By this time, the deceased's equity of redemption stood extinguished for a period of more than 18 (eighteen) years.

14. After the demise of the deceased chargor on 6th June 2013, the appellants obtained letters of administration ad litem on 7th May 2014 whereupon they purposed to turn back the wheels of time, so to speak, in an attempt to undo what their deceased father had done. The deceased had relinquished LR No. 280/3 to the 1st respondent in discharge of the mortgage debt aforesaid, thereby allowing the 1st respondent to exercise its statutory power of sale by way of a private treaty as aforesaid.

15. To this end, the appellants filed a Notice of Motion dated 28th July 2014 in HCCC No. 478 of 1998, and which they amended on 3rd September 2014. They moved the trial court for the following orders:

    1. That this Honourable Court be pleased to order that the said David Kihara Gitonga and Simon Peter Kihara, the legal representatives of the late John Gitonga Kihara (Deceased) be joined herein as the 2nd Defendant.

    1B. That Dove Court Ltd, Shaba Investments Ltd, Kamuthi Housing Cooperative Society and K-Rep Ltd be joined herein as interested parties.

2. That this Honourable Court be pleased to review and set aside the decree issued herein on October 23, 2003 pursuant to the consent order made herein on March 7, 2003.

3. That this Honourable Court be pleased to review and set aside the order made herein on July 15, 2004.

4. That this Honourable Court be pleased to declare that the late John Gitonga Kihara was the chargor of LR No. 280/3 at the time of his death.

5. That this Honourable Court be pleased to declare that the said David Gitonga Kihara and Simon Peter Kihara are the chargors in respect of the said LR No. 280/3.

6. That this Honourable Court be pleased to declare that the subdivision by the Plaintiff herein of LR No. 280/3 into LR No. 280/10, LR No. 280/11 and LR No. 280/12 was illegal, null and void.

7. That this Honourable Court be pleased to declare that the transfer of LR No. 280/11 and LR No. 280/12 to Foursome Developers Ltd on 12th October, 1995 was null and void.

8. That this suit be consolidated with Nairobi High Court, Commercial and Admiralty Division Civil Suit No 258 of 2010; *John Gitonga Kihara vs National Bank of Kenya Ltd*, DoveCourt Ltd, Shaba Investments Ltd, Kamuthi Housing Cooperative Sociarty and K-Rep Bank Ltd.

9. That the costs of this application be provided for."

16. The appellants' Motion was supported by the affidavit of Simon Peter Kihara sworn on September 3, 2013 and anchored on the grounds, inter alia: that the proceedings in the suit offended the cardinal principles of the rule of law and natural justice, which prevent courts from making judgments against persons not party to the suit, and who would be adversely affected by such judgments; that the subdivision of LR No. 280/3 into three portions was in breach of the chargee's duties at common law not to buy or own the charged property or trade therewith; that the transfer of the suit properties was in contravention of section 12 of the *Banking Act*; that the suit was filed to perpetrate fraud on the deceased in contravention of section 12 of the *Banking Act*, and that the 1st respondent became an owner of the suit properties in contravention of the Act; that the subsequent sale of the suit properties was null and void ab initio; that the result of the contraventions complained of was to deprive the deceased of his investment in the agricultural farm measuring 1,563.65 Acres; that the 3rd to 6th respondents would be affected by orders that may be made by the trial court; and that the rule of law requires that parties be heard before orders affecting them adversely are made.

17. It is noteworthy that the appellants' Motion came more than eleven (11) years after final determination of the suit between the 1st and 2nd respondents in terms of the consent judgment and decree obtained on 7th May 2003. Yet, they sought to be joined as the 2nd Defendant in their capacity as legal representatives of the estate of their deceased father with intent to "defend" the long-determined claim by the 1st respondent's against the 2nd respondent; and to re-open the settlement agreement between the deceased and the 1st respondent, and to revisit the 1995 sale of LR No. 280/3 by private treaty with their deceased father's concurrence.

18. In response to the appellants' Motion as amended, the 1st respondent filed a replying affidavit of Samuel Wanjohi Mundia, its Head of Commercial Transactions, sworn on August 19, 2014 and a further affidavit sworn on 19th September 2014. The 1st respondent's case is that the purpose of the appellants' Motion is to unjustly rewrite the express terms of the settlement agreement and the 1995 sale by private treaty in a belated attempt to revive and retain the legal right of redemption, which presently stands

completely and unconditionally extinguished; that the orders sought are incapable of being granted in these proceedings 12 years later, and having been overtaken by events; that joinder of the interested parties would not have served any useful purpose; that the court was functus officio in consequence of a valid and binding consent judgment recorded on July 7, 2003, and which wholly compromised the whole suit in all aspects; that, in any event, the appellants' action was statute barred by the *Limitation of Actions Act*; and that consolidation of the suit with Nairobi HCCC No. 258 of 2010 would not have led to anything useful in the absence of any dispute pending before the court or any surviving cause of action capable of being adjudicated upon by the trial court. It urged that the appellants' Motion be dismissed with costs.

19. It is noteworthy that the 2nd respondent did not respond to the appellants' Motion or file any submissions in opposition thereof. However, the 3rd, 4th, 5th and 6th respondents filed preliminary objections dated 13th October 2014, October 10, 2014, 9th October 2014 and 13th October 2014 respectively. According to them: the appellants' action was time barred; the subject suit properties had been transferred 19 years before the Motion in issue; and the trial court was functus officio and lacked jurisdiction to entertain the application. They requested the court to dismiss the appellants' Motion, but only the 4th respondent prayed for costs.

20. In addition to the preliminary objections aforesaid, the 6th respondent filed a replying affidavit of Daisy Ajima (its Legal Manager) sworn on December 18, 2014. According to Ms. Ajima, the 6th respondent contended that it has never been party to any proceedings in which any right to the suit properties was specifically and directly in question; that it was not privy to any agreement for sale between the 1st and 2nd respondents, and that it had no interest in the subject matter of the suit; and that the appellants' Motion did not disclose any legal nexus between the subject matter of the suit and the subject matter in HCCC No. 258 of 2010. She urged the trial court to dismiss the appellants' Motion with costs to the 6th respondent.

21. In his Ruling dated 29th September 2015, E. Ogola, J. dismissed the appellants' Motion. Addressing himself to the main grounds on which the application was made, the learned Judge had this to say in part:

> " 25. The Applicants have not proved to this Court that there was any fraud, mistake or misrepresentation when the Bank and Foursome Limited entered into the Consent agreement of 7th May 2003.
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> ... ...
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> 37. In HCCC No 478 of 1998, it is clear that the parties therein resolved their dispute by way of the consent order made on 7th May 2003 and the consequential decree made on 7th July 2003. These orders remain unchallenged as the Applicants have not demonstrated satisfactorily reasons before this Court to warrant a review or setting aside of the same.
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> ... ...
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> 39. ... I therefore have no option but to agree with the bank's and interested parties' submissions that this Court is functus officio in as far as the said suit is concerned.
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> ... ...

42. This Court has already established that the suit in HCCC No 478 of 1998 was conclusively determined by way of the consent order made on 7th May, 2003 ... In that case there is no subsisting dispute in the said suit and the order for consolidation cannot lie. It therefore follows that ... to join the Applicants as the 2nd Defendant as well as Dove Court Ltd, Shaba Investments Ltd, Kamuthi Housing Co-operative Society and K-rep Bank Ltd as interested parties cannot be allowed as there is no subsisting suit in HCCC No 478 of 1998."

22. Dissatisfied with the decision of E. Ogola, J. the appellants moved to this Court on appeal on a whopping 29 grounds against the grain of rule 88(1) of the Court of Appeal Rules, which requires a memorandum of appeal to "concisely set forth under distinct heads without argument or narrative, the grounds of objection to the decision appealed against". We nonetheless take the liberty to summarise and reframe them as hereunder.

23. In summary, the salient grounds of appeal set out on the face of the appellants' Memorandum of Appeal dated January 25, 2017 essentially fault the learned Judge for, inter alia: failing to hold that the settlement reached between the deceased and the 1st respondent in terms of the consent order dated September 13, 1995, and which sanctioned sale by private treaty in exercise of the 1st respondent's statutory power of sale, was vitiated upon collapse of the subsequent sale of the suit properties to the 2nd respondent; failing to find that the collapsed sale of the suit properties to the 2nd respondent with the consent of the deceased revived the deceased's equity of redemption; holding that the impugned terms of settlement and the consent order aforesaid extinguished the deceased's equity of redemption; failing to find that sale of the suit properties by the 1st respondent to the 2nd respondent, and the subsequent vesting order obtained by the 1st respondent by virtue of the consent order dated May 7, 2003

24. In support of the appeal, learned senior counsel for the appellants, Dr. Kamau Kuria, filed written submissions dated May 22, 2017 citing 9 authorities to which we will shortly return in the course of our determination of the issues falling to be determined in this appeal. Suffice it for the moment to observe that the submissions and authorities cited relate to, among others: the Court's duty to reconsider the evidence, evaluate it and draw its own conclusions; the right to fair hearing; the validity and effect of a consent order; the meaning and nature of fraud; the effect of sale of mortgaged property before expiry of the statutory period of 90 days; the effect of an illegal consent order on a subsequent vesting order; and the application of the doctrine of lis pendens to the appellants' case.

25. In opposition to the appeal, learned counsel for the 1st respondent, M/s. Rachuonyo & Rachuonyo, also filed written submissions dated October 6, 2017 in which they confined themselves to issues of fact without any reference to statute or case law.

26. M/s. Kilonzo and Company represented the 3rd respondent and filed written submissions dated June 29, 2018. Counsel cited 5 authorities relating to, inter alia: the principles that apply in applications for interlocutory injunctions; this Court's powers to interfere with the judicial discretion of superior courts; the circumstances under which sale by a mortgagee in exercise of its statutory power of sale may be set aside; and when joinder of parties to a suit may be ordered.

27. M/s. Mboya Wangong'u and Waiyaki, for the 4th respondent, filed their written submissions dated 22nd September 2017 citing 7 authorities on, among other issues: the right to be heard; the equity of redemption; when the court becomes functus officio in relation to proceedings before it; and the power of superior courts to review and set aside their orders.

28. On their part, M/s. E. M. Washe represented the 5th respondent and filed written submissions dated October 5, 2017. They cited 1 authority on the circumstances under which courts are said to be functus officio.

29. Finally, learned counsel for the 6th respondent, M/s. Munyao, Muthama and Kashindi filed written submissions dated 14th August 2017 citing 5 authorities on, inter alia: the circumstances under which a mortgagor's equity of redemption is lost; the application of the doctrine of lis pendens to the appellants' case; the grounds on which a consent judgment may be set aside; and the circumstances under which a court may review its own orders.

30. In addition to their written submissions, learned counsel made oral highlights at the hearing of the appeal. Learned senior counsel for the appellants urged us to allow the appeal as prayed. On their part, learned counsel for the respondents submitted that the appeal had no merit and urged us to dismiss it with costs to the respondents.

31. This being a first appeal, it is this Court's duty, in addition to considering submissions by the appellants and the respondent, to analyze and re-assess the report and other evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited vs. West End Butchery Limited and 6 Others* [2015] eKLR citing the case of *Selle vs. Associated Motor Boat Co.* [1968] EA p.123.

32. In Selle's case (ibid), the Court held that:

> " An appeal to this Court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions...."

33. Having examined the record of appeal and the grounds on which it is founded, the impugned ruling, the written and oral submissions of learned senior counsel for the appellants and learned counsel for the respondents, statute law and cited authorities, we are of the considered view that the appeal against the ruling in respect of the appellants' Motion stands or falls on our findings on the following main issues of law and fact in respect of which learned senior counsel for the appellant's and learned counsel for the respondents filed written submissions as aforesaid, namely: whether the 1st respondent's statutory power of sale in respect of LR No. 280/3 and the subsequent subdivisions thereof (the suit properties) had arisen; and, if the answer is in the affirmative, whether the settlement reached between the deceased and the 1st respondent on 13th September 1995 in terms that the 1st respondent exercises its statutory power of sale over the suit properties by way of a private treaty was lawful and enforceable in terms; whether sale by private treaty by the 1st respondent to the 2nd respondent with the sanction of the deceased effectively extinguished the deceased's equity of redemption; whether collapse of the sale of the suit properties between the 1st and 2nd respondents revived the deceased's equity of redemption; whether the consent judgment entered into between the 1st and 2nd respondents in HCCC No. 478 of 1998 on 7th May 2003 lawful and enforceable; whether the consent judgment dated 7th May 2003 rendered the trial court functus officio; whether the consent judgment in issue was open to review as sought or at all; whether, subsequent to the consent judgment aforesaid, the appellants were entitled to be joined as defendants in the suit, or to join the 3rd, 4th, 5th and 6th respondents as interested parties in the proceedings; whether the appellants had made a case for consolidation of HCCC No. 258 of 2010 and HCCC No. 478 of 1998; and what orders ought we to make in determination of this appeal, including orders as to costs.

34. On the 1st issue as to whether the 1st respondent's statutory power of sale in respect of the suit properties had arisen, we hasten to observe that it is common ground that John Gitonga Kihara (the Deceased) was the registered proprietor of LR No. 280/3, which he charged to the 1st respondent to secure a financial facility during the period between 1974 and 1978. It is also common ground that, by the year 1995, the mortgage debt (inclusive of interest) had become due and payable to the 1st respondent in the total sum of KShs.136,686,550/60.

35. Our examination of the pleadings, the evidence on record, and the rival written and oral submissions of learned counsel for the parties, confirm that, unable to pay the debt, the deceased chargor requested the 1st respondent to discount the debt to a maximum sum of Kshs.60 Million and, in consideration therefor, allowed the property to be sold by way of private treaty.

36. The two having reached settlement in that regard on 13th September 1995, the deceased introduced the 2nd respondent, Foursome Ltd, which offered to purchase LR No. 280/3 for KShs.60,000,000 in terms of the Agreement for Sale made between the 1st and 2nd respondents on 1st November 1995. Accordingly, LR No. 280/3 was then sold and transferred to the 2nd respondent vide an instrument of transfer dated 13th September 1995.

37. In view of the foregoing, we reach the inescapable conclusion that the 1st respondent's statutory power of sale had arisen, and that it had taken positive steps to exercise that power by way of a private treaty with the concurrence of the deceased by whom the 2nd respondent was introduced for that purpose, and the mortgaged suit property conveyed to the 2nd respondent. That settles the 1st issue.

38. The 2nd issue as to whether the settlement reached between the deceased and the 1st respondent on 13th September 1995 in terms that the 1st respondent exercises its statutory power of sale over the suit properties by way of a private treaty was lawful and enforceable is likewise not in contention. What is in controversy is the effect of collapse of the sale by the 1st respondent to the 2nd respondent of the suit property by private treaty, raising the question as to whether that collapse revived the deceased's equity of redemption or, otherwise, defeated the 1st respondent's statutory power of sale.

39. A "private treaty" is defined in *Black's Law Dictionary* (10th Edition) as "an agreement to convey property negotiated by the buyer and seller or their agents". It is instructive that the sale and transfer by the 1st to the 2nd respondent of the suit property was undertaken with the concurrence of the deceased, who introduced the 2nd respondent. We need not over emphasise the fact that sale by private treaty is one of the ways by which a mortgagee may exercise its statutory power of sale, provided that due notice is given and the agreed conditions of sale fulfilled. Accordingly, we find nothing to fault the learned Judge for holding that the settlement reached between the deceased and the 1st respondent on 13th September 1995 in terms that the 1st respondent exercises its statutory power of sale over LR No. 280/3 by way of a private treaty was lawful and enforceable.

40. A 3rd issue arises as to whether sale by private treaty by the 1st respondent to the 2nd respondent with the concurrence of the deceased effectively extinguished the deceased's equity of redemption. The appellants' case is that the consent judgment recorded by the 1st and 2nd respondents in HCCC No. 478 of 1998 on 7th May 2003 was illegal and, therefore, did not extinguish the deceased's equity of redemption.

41. On the authority of *Macfoy vs. United Africa Company Ltd* [1961] 3 All ER p.1179 at p.1172, learned senior counsel for the appellants submitted that "the consent order was illegal as its purpose was to defeat the equity of redemption of the appellant." In that case, the court observed at p.1172:

> " You cannot put something on nothing and expect it to stay there, it will collapse."

42. In rebuttal, learned counsel for the 1st respondent submit that "the deceased chargor had no further role, control, right or interest in the suit properties following the unconditional sale and transfer to the 2nd respondent, expressly consented to by him." Learned counsel for the 3rd respondent contended that "the deceased's equity of redemption was extinguished when the 1st and the 2nd respondents entered into a sale agreement, a consent order and after the vesting order was issued by the court."

43. In the same vein, learned counsel for the 5th respondent submitted that at the point of transfer of LR No. 280/11 and 280/12 ("the suit properties" being subdivisions of LR No. 280/3), the appellants lost their rights to redeem the properties and the proprietary rights thereof were fully vested in the 2nd respondent.

44. According to learned counsel for the 6th respondent, "the deceased chargor relinquished his proprietary rights to the suit properties when he consented to their sale." They cited this Court's decision in *Nancy Kahoya Amadiva vs. Expert Credit Limited & Another* [2015] eKLR where the Court observed:

> " The law is settled that the Equity of Redemption is lost on the completion of a valid agreement for a valid sale."

45. This Court in *Jose Estates Limited vs. Muthumu Farm Limited & 2 Others* [2019] eKLR had this to say on the effect of sale by private treaty in exercise of the mortgagee's statutory power of sale:

> " It was common ground that the suit property was sold by private treaty and transferred to the appellant and the 1st and 2nd respondents were participants all through. The issue of statutory notice, even if it had been raised before the trial court, would have been a none-issue in view of the conduct of the said respondents before, during and after the conclusion of the transaction. They were kept in the know all along. They were even allowed to bring on board other bidders. Again, once the suit property was sold ..... the interest therein passed to the appellant and the 1st respondent lost its equity of redemption upon the execution of a valid contract of sale."

In the same vein, Platt, JA. in *Mbuthia vs. Jimba Credit Finance Corporation & Another* [1988] eKLR held:

> " Next there was the consideration of the scope of the equity of redemption. It is now clear that the English notions apply that the equity is lost on the completion of a valid agreement for a valid sale. It is not allowed to continue until conveyance nor until registration.
>
> ... ...
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> ...it must be said that the equity of redemption is extinguished when the contract is validly concluded, while the conditions of the contract may be adjusted between the mortgagee and purchaser as they agree, leaving the mortgagor no ground upon which to intervene."

46. As observed by Apaloo , JA. in *Mbuthia vs. Jimba Credit Finance Corporation & Another* (ibid):

> " ... that the right of redemption survived the sale. That in my opinion, cannot be right.

... ...

The correct legal position is stated at Page 314 of Fisher and Lightwood Law of Mortgage in these words -

'A sale destroys the equity of redemption in the mortgaged property, and constitutes the mortgagee exercising the power of sale a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.'"

47. In the present case, the 1st and 2nd Respondents entered into a Sale Agreement for L.R No 280/3 pursuant to the private treaty expressly sanctioned by the deceased. Under Clause 2 of the Special Conditions of sale, the 1st Respondent permitted the 2nd Respondent to take possession of the property to enable them to effect subdivisions, sell and pay the purchase price out of the proceeds of sale. Consequently, L.R No 280/3 was subdivided into 3 parcels and allocated Land Reference numbers 280/10, 280/11 and 280/12.

48. As was the case in Jose Estates Limited vs. Muthumu Farm Limited (supra), the deceased lost his equity of redemption the moment the 1st and 2nd respondents executed a valid contract of sale. Consequently, neither could the deceased nor the appellants turn back the wheels of time to redeem what the deceased had given in consideration for the substantially discounted terms of settlement of his seemingly burdensome loan account with the 1st respondent.

49. On the authority of *Mbuthia vs. Jimba Credit Finance Corporation & Another* (supra), the most the deceased or the appellants could have hoped for is an account of the proceeds of sale in the event that, by any chance, the 1st respondent recovered more than the mortgage debt then due. But that was not the case here. Indeed, good faith on its part prompted the 1st respondent to forego and substantially discount the deceased's loan account by a sum of KShs.76,868,550/60 and agree to accept KShs.60,000,000 in full settlement of the mortgage debt. We are not told what more the deceased, or the appellants on behalf of his estate, was entitled to, which would have rightfully prompted the proceedings leading to the impugned ruling.

50. Having considered the record as put to us, the impugned ruling, the written and oral submissions of counsel for the appellants and for the respondents, and the cited authorities, we conclude that the deceased's equity of redemption was lost or extinguished as far back as 13th September 1995 when he, the deceased, reached settlement with the 1st respondent on the manner in which the 1st respondent was to exercise its statutory power of sale in respect of the suit properties. Having unconditionally concurred on the sale by private treaty and, to that end, introduced the 2nd respondent with whom the 1st respondent entered into a valid sale agreement and transferred the suit properties on terms expressly sanctioned by the deceased, neither the deceased nor the appellants could turn back the tide to undo what the deceased had done to redeem himself from the colossal mortgage debt compromised between him and the 1st respondent on express and mutually agreeable terms.

51. As things turned out, though, the 2nd Respondent was only able to pay a sum of KShs.12,500,000 out of KShs.60 million and, consequently, the sale fell through. Failure on the 2nd respondent's part to complete the purchase prompted the 1st respondent to institute proceedings to recover possession of the suit properties in HCCC No 478 of 1998, which was settled by the parties by way of a Consent Judgment recorded on 7th July 2003 and, flowing therefrom, the trial Court granted the 1st Respondent a Vesting Order dated 15th July 2004 thereby constituting the 1st Respondent title holders of the suit properties.

52. In view of the foregoing, the 4th issue arises as to whether collapse of the sale of the suit properties by the 1st to the 2nd respondent revived the deceased's equity of redemption, and whether repossession thereof by the 1st respondent was in breach of section 12 of the *Banking Act* and the law of mortgages, which prevent a mortgagee from buying the mortgaged property for themselves.

53. The appellants contend that the maxim of equity that "once a mortgagee always a mortgagee" applies. According to learned counsel, the appellants' equity of redemption would have been extinguished if the sale of the suit properties to the 2nd respondent was completed in view of the fact that the sale was contracted with the concurrence of the deceased chargor. In his view, neither the deceased nor the appellants consented to what happened later. With all due respect, we are not so persuaded.

54. Section 12 of the *Banking Act*, reads:

> " 12. Restriction on trading and investments An institution shall not –
>
> (c) purchase or acquire or hold any land or any interest or right therein except such land or interest as may be reasonably necessary for the purpose of conducting its business or for housing or providing amenities for its staff, where the total amount of such investment does not exceed such proportion of its core capital as the Central Bank may prescribe:"

55. The appellants' contention that the 1st respondent acted in breach of section 12 of the *Banking Act* by repossessing from the 2nd respondent, and obtaining a vesting order in respect of, the suit properties, raises perplexing questions for which they have not proffered any answers, namely: Is it their view that the suit properties should have been restored to the deceased or to his estate? Should the 1st respondent have transferred the suit properties to a third party to hold in trust for it as it endeavoured to dispose of them, as it subsequently did, in exercise of its statutory power of sale? Put differently, in whom should the properties have vested awaiting successful realisation of the 1st respondent's security?

56. We find nothing on record to suggest that the 1st respondent recovered possession of the suit properties from the defaulting 2nd respondent with the intention of holding them for its own benefit otherwise than for the purpose only of exercising its statutory power of sale to realise its security pursuant to clause 3 of the consent order dated 7th May 2003. And that is what it did. Under that clause, the 1st respondent was entitled to "... a vesting order transferring ownership of the suit properties to itself unconditionally in the event that the 2nd respondent should not have sold the suit properties or any subdivisions of it within a period of four (4) months." Furthermore, the 2nd respondent was at all material times an agent of the 1st respondent with intent to sell the suit properties or subdivisions thereof and pay the agreed price of KShs.60,000,000, failing which a vesting order accrued in favour of the 1st respondent so as to enable it to undertake sale thereof in its own right as mortgagee.

57. It is noteworthy that, on securing a vesting order in respect of the suit properties, the 1st Respondent proceeded to sell and transfer to the 3rd respondent LR No 280/11 on 18th December 2009 and, Subsequently, LR No 280/12 on 2nd June 2010. What more could the 1st respondent do than whatever was within its means to realise its security.

58. As the learned Judge correctly held concerning the vesting order:

> " This does not mean the Bank 'purchased' the properties but it only got back its securities which it was entitled to in realization of the debt owed to it by the late chargor."

59. Despite the fact that the deceased's equity of redemption had been long extinguished, the first transfer of LR No 280/11 by the 1st Respondent to the 3rd Respondent prompted the late Chargor to file HCCC No 258 of 2010 in April 2010 by which he sought orders of injunction to preserve the suit properties in what appeared to be either a misadvised change of mind or sheer misapprehension of the law of mortgages pertaining to the previous extinction of his equity of redemption.

60. Soon thereafter, the 3rd Respondent transferred the suit properties to the 4th Respondent on July 21, 2011. In turn, the 4th Respondent transferred the suit properties to the 5th Respondent on October 11, 2011. Subsequent to the transfer, the 5th respondent charged the suit properties to the 6th Respondent by way of a Charge registered on 11th October 2011 and a Further Charge registered on 7th October 2013. The charge and further charge were intended to secure payment of the respective sums of KShs.560,970,000 and KShs.200,000,000. We find nothing on the record as put to us to suggest that collapse of the sale of the suit properties by the 1st to the 2nd respondent revived the deceased's equity of redemption. Neither did repossession thereof by the 1st respondent amount to breach of section 12 of the *Banking Act* and the law of mortgages. Indeed, the 1st respondent was consistent in its attempt to, and did succeed in, exercising its statutory power of sale, and in the realisation of its security.

61. That brings us to the 5th issue as to whether the consent judgment entered into between the 1st and 2nd respondents in HCCC No. 478 of 1998 on 7th May 2003 was lawful and enforceable. Learned counsel for the appellants contends that "the purpose of the purported consent was to enable the bank to buy the property charged to it in a secret and fraudulent manner."

    According to learned counsel, "the consent order was illegal as its purpose was to defeat the equity of redemption."

62. With great respect to the learned senior counsel, we fail to see what was so "secret" and "fraudulent" about the 1st respondent's move to repossess its security from the 2nd respondent on account of its failure to sell and remit the proceeds thereof so as to make good the 1st respondent's statutory power of sale in realisation of its security. Moreover, sale of the property was, in the first place, with the concurrence of the deceased chargor by whom the 2nd respondent was introduced to the 1st respondent. Indeed, the deceased's equity of redemption was extinguished the very moment the sale was undertaken with his concurrence on 13th September 1995 followed by formal transfer on October 12, 1995

63. On the 6th issue as to whether the consent judgment dated 7th May 2003 rendered the trial court functus officio, the respondents took the position that it did. Notably, though, the appellants say nothing of it, save in their failed attempt to have the relevant consent order and the consequential decree set aside by the trial court.

64. Our clear understanding of the Latin phrase functus officio in the context of the appeal before us leads to the inescapable conclusion that the competing claims between the 1st and 2nd respondents as pleaded in HCCC No. 478 of 1998 were fully determined by the impugned consent and decree, leaving nothing to be litigated between them or between them and any other party seeking to be joined in the already-concluded proceedings.

65. The phrase functus officio is defined in *The Black's Law Dictionary* (10th Edition) thus:

> "(Of an officer or official) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

66. In the same vein, the Supreme Court of Kenya in *Raila Odinga & 2 Others vs. Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval an excerpt from an article by

Daniel Malan Pretorius entitled, The Origins of the Functus Officio Doctrine, with Special Reference to its *Application in Administrative Law* (2005) 122 SALJ 832 which reads in part:

> " The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive.
>
> Such a decision cannot be reviewed or varied by the decision maker."

67. This Court in *Telkom Kenya Limited vs. John Ochanda* [2014] eKLR, stated that -

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...
>
> The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar; is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."

68. In view of the foregoing, we find nothing to fault the learned Judge's holding that the trial court was functus officio, and that the orders sought by the appellants were unmerited. That leads us to the 7th issue as to whether the consent judgment in issue was open to review as sought by the appellants or at all. Put differently, was the consent judgment and decree in the suit between the 1st and 2nd respondents (HCCC No. 478 of 1998) open to review in the sense of being re-opened for merit review at the instance of the appellants, who were not party to the proceedings?

69. While a consent judgment recorded in civil proceedings may, as a general rule, be impeached for illegality, as correctly argued by counsel for the appellants, an attack thereon cannot be waged by a stranger to such proceedings. In any event, we are not persuaded that the consent judgment recorded between the 1st and 2nd respondents was in furtherance of an illegality. Neither was it induced by mistake or misrepresentation. In our view, the appellants who, in any event, have no locus standi to challenge the order, have failed to demonstrate why the impugned consent order is said to be illegal or fraudulent. Indeed, merely saying so does not make it so.

70. In the seminal case of Flora N. Wasike vs. Destimo Wamboko [1988]

eKLR, this Court pronounced itself on the nature of a consent order and the circumstances under which it may be set aside, and had this to say:

> " It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

71. In *Purcell vs. F C Trigell Ltd* [1970] 2 All ER p.671, Winn LJ observed at p.676:

> " It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons ...."

72. In *Geoffrey M. Asanyo & 3 Others vs. Attorney General* [2018] eKLR, the Supreme Court expressed itself thus:

> "(98) In the matter before us, we thus note that neither before this Court nor any of the Superior Courts, was it argued or alleged that the Consent as filed by parties was entered into through coercion, misrepresentation and/or fraud. In essence, the elements/principles for setting aside such a consent were never alleged and/or proved."

73. Citing the case of Flora N. Wasike vs. Destimo Wamboko (supra), the learned Judge correctly observed that -

> "the applicants have not proved to this court that there was any fraud, mistake or misrepresentation when the bank and Foresome Limited entered into the consent agreement of 7th May 2003."

74. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellants, and the cited authorities, we find nothing to fault the learned Judge for concluding, as we hereby do, that the consent judgment recorded between the 1st and 2nd respondents in HCCC No. 478 of 1998 was unimpeachable. It did not by any means constitute an illegality. Neither was it procured by fraud or misrepresentation. That leads us to the 8th issue as to whether, subsequent to the consent judgment aforesaid, the appellants were entitled to be joined as defendants in the suit, or to join the 3rd, 4th, 5th and 6th respondents as interested parties in the proceedings.

75. The impugned consent judgment between the 1st and 2nd respondents having been entered on May 7, 2003, and the appellants' Motion for joinder having been filed on 29th August 2019, theirs was an attempt to re-open for a merit review of a consent judgment and decree properly issued in determination of a dispute to which they were not party. That attempt is made sixteen (16) years and three (3) months later. It is also noteworthy that their Motion came nineteen (19) years and four (4) months after the deceased's equity of redemption was extinguished on 13th September 1995. We hasten to add that nothing remained to be done to warrant joinder of the appellants as defendants and the 3rd, 4th, 5th and 6th respondents as interested parties in the suit.

76. This is why. In principle, an application for joinder can only be entertained in a case where the proceedings have not been finally disposed of (see JMK vs. MWW [2015] eKLR citing *Tang Gas Distributors Ltd vs. Said & Others* [2014] EA p.448 where the Court stated that "it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable"). Accordingly, the learned trial Judge was not at fault in declining the appellants' application for joinder.

77. With regard to the 9th issue, namely whether the appellants had made a case for consolidation of HCCC No. 478 of 1998 and HCCC No. 258 of 2010, the only question that begs for an answer is what useful purpose would have been served by consolidation of suits in which proceedings had been finally disposed of long before the application for consolidation was made. The short answer is: None. Moreover, the consolidation was sought by strangers – persons not party to those proceedings, and in respect of whom no cause of action arose to justify joinder. Accordingly, that prayer was equally unmerited.

78. Having carefully considered the record of appeal, the impugned ruling, the written and oral submissions of learned senior counsel for the appellants, learned counsel for the 1st, 3rd, 4th, 5th and 6th

respondents, and the cited authorities, we form the view that the circumstances of this case do not impel this Court to interfere with the decision of the trial Judge and, accordingly:

a. The appellants' appeal fails and is hereby dismissed;

b. The Ruling of the High Court of Kenya at Nairobi (Ogola, J.) dated 29th September 2015 be and is hereby upheld; and

c. The 1st, 3rd, 4th, 5th and 6th respondents' costs of this appeal be borne by the appellants.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR