IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE, JJ. A)

CIVIL APPEAL NO. 160 OF 2017

BETWEEN

EURO BANK LIMITED (IN LIQUIDATION).....APPELLANT

AND

TWICTOR INVESTMENTS LIMITED.....1ST RESPONDENT

CHAMGAA COMPANY LIMITED.....2ND RESPONDENT

TESHA (K) LIMITED.....3RD RESPONDENT

Consolidated With

CIVIL APPEAL NO. 116 OF 2017

BETWEEN

CHAMGAA COMPANY LIMITED.....1ST APPELLANT

TESHA (K) LIMITED.....2ND APPELLANT

AND

TWICTOR INVESTMENTS LIMITED.....1ST RESPONDENT

EURO BANK LIMITED (IN LIQUIDATION).....2ND RESPONDENT

(Being an Appeal from the Judgment and Order of the High Court of Kenya

at Nairobi (A. Mabeya, J.) dated 2nd March, 2017

in

HCCC No. 932 of 2002)

****

JUDGMENT OF THE COURT

1. Civil Appeals No.116/2017 and 160/2017 emanate from the same judgment and principally raise similar issues. They were therefore consolidated under Rule 120 of the Rules of this Court and heard together by consent of all counsel representing the parties. The genesis of the matter is a Charge taken out by **Mirera Drive** (the principal debtor), sometime in November 1997 for Kshs. 1,000,000 from Euro Bank Limited the appellant (**the Bank**) and guaranteed by, **Twictor Investments Limited** (the 1st respondent). The Charge was registered against L.R 209/1350/2, Commercial Street, Nairobi (the suit property).

2. Upon default in payment by the borrower, the appellant sought to exercise its statutory power of sale whereupon the 1st respondent approached the High Court vide **H.C.C.C No. 1971 of 2002** challenging the manner in which the Bank was exercising its statutory power of sale. Pending the hearing of the suit, it appears that the Bank sold the suit property through private treaty to **Chamgaa company Limited** (2nd respondent (Chamgaa)) who in turn transferred the same to **Tesha (K) Limited** (the 3rd respondent).

3. Following the said transfer, the 1st respondent (Twictor) withdrew **H.C.C.C No. 1971 of 2002** and subsequently, filed an amended plaint vide **H.C.C.C 932 of 2002**, bringing on board the 2nd and 3rd respondents, seeking, *inter alia*, an order of cancellation of the purported sale on grounds that the manner in which the Bank exercised its statutory power of sale and the subsequent sale of the suit property was unlawful and unconstitutional. Further, in order to restrain the Bank, Chamgaa and Tesha from any further dealings in the suit property, Twictor sought prohibitory orders which were granted on 13th January, 2004.

4. It is noteworthy that as at the time of trial, the suit property was registered in the name of the 3rd respondent who had taken possession and was in occupation of the same.

5. It was the 1st respondent's case that the Bank declined to supply it, as guarantor to the loan facility, or the principal borrower with up-to-date statements of the facility account as proof of the amount due. Further, that no valid notice of sale, in compliance with **section 69A** of the Indian Transfer of Property Act (ITPA), 1882, was served upon either itself or the principal debtor hence the Bank's statutory right of sale did not accrue, thus tainting the 2nd respondent's purported title over the suit property.

6. According to the 1st respondent, no valuation was undertaken by the appellant prior to the sale of the suit property. Further, that the purported contractual transfer by the Bank and subsequent transfer by the 2nd respondent was not proved on a balance of probabilities and that the Bank transferred the suit property to the 2nd respondent in contravention of the principle of *lis pendens*.

7. It was also contended that the 2nd respondent transferred the suit property to the 3rd respondent despite a caveat registered against the suit property's Title by one S. Abdullah claiming purchaser's interest following an earlier sale agreement.

8. In view of the forgoing, the 1st respondent urged that the sale of the charged property was fraudulent and unlawful and consequently urged the trial Court to expunge the resultant titles over the suit property.

9. Counsel for the appellant opposed the 1st respondent's case averring that the Bank properly exercised its statutory power of sale vide a valid notice of sale following an unequivocal and irrevocable professional undertaking from the 1st respondent's advocates which they failed to honour.

10. Counsel submitted that it was within the 1st respondent's knowledge that the appellant carried out a valuation of the suit property prior to the sale as it did so with the 1st respondent's permission. It was contended that the sale of the suit property through private treaty was proper as the appellant's efforts to sell it at a reasonable price by public action proved futile. Further, the order stopping the sale granted in favour of the 1st respondent was conditional and the same stood vacated after the 1st respondent failed to comply with the said conditions. It was also the appellant's case that the appellant rescinded the initial sale agreement it had executed between it and the said S. Abdullah following a better offer by the 2nd respondent.

11. The appellant refuted the 1st respondent's claim of fraud arguing that the 1st respondent had failed to specifically plead and particularize its allegations of fraud and illegalities of the appellant's dealings. In conclusion, it was argued that the 1st respondent's right of redemption was extinguished upon the sale of the suit property to the 2nd respondent hence the reliefs sought were not available.

12. It was the 2nd respondent's case that the sale of the suit property was proper and valid and was not against the doctrine of *lis pendens*. Further, that it had purchased the suit property for valuable consideration. In a nutshell, it refuted any claims of fraud as posed by the 1st respondent.

13. Counsel for the 3rd respondent advanced a similar argument maintaining that the doctrine of *lis pendens* under **section 52** of the ITPA, 1882, did not apply to charges/mortgages. Further, that the 3rd respondent was an innocent purchaser for value without notice and held a good title.

14. In conclusion, both the 2nd and 3rd respondents opposed the 1st respondent's prayer seeking cancellation of the title arguing that in any event the 1st respondent could be compensated by way of damages since the 2nd respondent purchased the suit property for valuable consideration and had no notice whether or not the statutory power of sale was properly exercised.

15. Having considered the parties' pleadings, evidence on record and rival submissions, the trial Court ultimately found in favour of the 1st respondent granting orders to the effect that the certificate of title issued to the 3rd respondent be cancelled, and that possession be restored to the 1st respondent.

16. Aggrieved, two appeals now before us were filed. The grounds of appeal as stated in the consolidated memoranda of appeal can be condensed as follows:- That the learned Judge erred in fact and law by: considering evidence and matters not pleaded by the parties hence arriving at an erroneous conclusion; finding that onus was upon the appellant to prove the validity of the transfer by chargee; considering inadmissible evidence not properly before the court; failing to consider all evidence before him hence arriving at an improper conclusion; finding that there was no valid statutory notice served upon the 1st respondent and the principal debtor and that it was upon the appellant to prove the contrary; finding that the documentary evidence of entries in the Land Register was rebuttable; failing to find that the 1st respondent extinguished its equity of redemption by conduct; failing to find that the 1st respondent failed to plead and/or particularize the allegations of fraud/illegalities against the appellant; finding that the sale of the suit property by the appellant and subsequent dealings were irregular; misinterpreting **section 69A(1)** and **69(B)** of the ITPA and holding that the mortgagor's power of sale is limited by other statutes; cancelling the 3rd respondent's title and granting reliefs not sought in favour of the 1st respondent; failing to address the

issue of the amount due to the appellant; failing to consider the appellant's and the 2nd and 3rd respondents' submissions and failing to find that **section 52** of the ITPA does not apply to a suit for redemption where the right to exercise power of sale is express.

17. The appeal was disposed of through written submissions which learned counsel adopted during the plenary hearing and also made oral highlights.

18. Urging the Court to allow the appeal, Mr. Cheluget, learned counsel for the appellant submitted that courts are bound by the parties' pleadings, and they cannot descend into the arena of litigation. He argued that by the court delving into unpleaded issues, the appellant was denied an opportunity to counter such issues which was prejudicial to its case. For that proposition he relied on the cases of **Malawi Railways Ltd v. Nyasulu (1998) MWSC 3** and **Independent Electoral Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014) eKLR**).

19. Placing reliance on the case of **Nancy Kahoya Amadiva v. Expert Credit Limited & Another (2015) eKLR** and citing **section 69A** of the ITPA, 1882, Mr. Cheluget faulted the learned Judge's finding that there was no valid statutory notice served on the 1st respondent and the principal

debtor. He submitted that by a reading of the said provision it was evident that a statutory notice was not required and that statutory power of sale could be exercised where it is found that a mortgagor has defaulted in paying its interests to the mortgagee for over a period of two months. He maintained that the evidence on record revealed that the 1st respondent had defaulted to pay the accrued interests between the months of May and September 1998, this being a period of more than two months. Counsel urged that by that fact alone it was proper to conclude that the statutory notice was valid despite it quoting a 14-day period. Further, that it was also evident that there was non-payment by the principal debtor 90 days after such notice was served.

20. Counsel contended that the 1st respondent's equity of redemption was extinguished when he was unable to pay the debt and that it was upon the 1st respondent to prove the absence of a valid statutory notice. He submitted that **section 24** of the Registration of Titles Act provides that a party denied of its proprietary rights on allegations of fraud can only pursue a claim for damages; that a third-party purchaser for value is protected by law from such a party's claim as provided for under **Section 99** of the Land Act, 2012. He maintained that it is trite that particulars of fraud must be specifically pleaded and proved which the 1st respondent had failed to do. Counsel urged that the onus of proof was therefore on the 1st respondent which it ought to have discharged to a degree higher than on a balance of probabilities since fraud is quasi criminal in nature.

21. In conclusion, counsel urged that the sale of the suit property was lawful and that the 3rd respondent's title was good in law therefore the appeal should be allowed.

22. Supporting the appeal, Mr. Katwa, learned counsel for the 2nd and 3rd respondents took issue with the learned Judge's judgment and subsequent orders that the 2nd and 3rd respondents vacate the suit property. He maintained that this was unfair on their part since this was neither an issue pleaded, nor a relief prayed for by the 1st respondent. Further, that the 1st respondent had acknowledged non-payment of the loan.

23. Mr. Katwa contended that the 3rd respondent was an innocent purchaser for value and that the 1st respondent's allegations of fraud were not specifically pleaded, particularized and proved as required by law. He maintained that by virtue of **section 69A** of the ITPA and **section 99** of the Land Act, the only remedy that was available to the 1st respondent was damages.

24. Counsel faulted the learned Judge's findings that the 3rd respondent acquired the property through fraud saying that the mere lack of evidence of payment of consideration and the transfer instruments in the transfers between the bank and the 2nd respondent and the 2nd respondent and 3rd respondent did not in itself prove fraud. Further, that the 1st respondent had conceded owing the appellant and defaulting in re-payment of the loan.

25. Opposing the appeal, learned counsel Mr. Kyalo appearing together with Ms. Ithondeka for the 1st respondent submitted that it is not the court but parties that are bound by their pleadings. He urged that the onus to prove the existence of a valid statutory notice was upon the appellant and that it was not the duty of the court to summon Messrs. Onyango, Ohaga & Company Advocates, the originators of the impugned statutory notices to testify with a view to ascertaining its validity. He submitted that the learned Judge's findings that the authenticity/validity of the statutory notice was questionable was in order and so the appellant's right of statutory power of sale did not accrue.

26. Citing among others the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Mukori Mwaura v. Attorney General & 4 Others (2017) eKLR,** Mr. Kyalo submitted that the learned Judge after extensively analyzing the evidence on record found that there was no contract produced by the appellant or the 2nd and 3rd respondents to prove the alleged transfers and that the 2nd and 3rd respondent directorships were the same; this denoting bad faith on their part and their allegation that they were innocent purchasers for value did not hold water.

27. In view of the above he urged the Court to dismiss the appeal.

28. This being a first appeal, the duty of this Court as prescribed by **Rule 29 (1) a** of the Court of Appeal Rules is to reconsider and re-evaluate the evidence on record and draw its own conclusions bearing in mind and giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses who testified before it. Additionally, the Court should not review the findings of a trial court simply because it would have arrived at a different outcome if it were hearing the matter for the first time. (See: **Selle & Another v. Associated Motor Boat Co. Ltd & Others (1968) EA 123** and **Peters v. Sunday Post Limited [1958] EA 424**).

29. With the above guidelines in mind and having considered the record of appeal and rival submissions of learned counsel, the law and the

authorities cited on behalf of the respective parties, we discern the issues for determination as follows:-

> ***a) Whether the statutory notices issued by the appellant to the 1st respondent were irregular and if so whether the sale of the suit property was illegal.***
>
> ***b) Whether the allegation of fraud against the appellant, the 2nd respondent and the 3rd respondent was proved to the required standard and if not whether the 3rd respondent is an innocent third-party purchaser for value with a title good in law.***
>
> ***c) Whether the 1st respondent was entitled to reliefs as granted by the trial Court.***

30. The crux of this appeal is whether the statutory notices issued by the Bank were regular or not. If the Court finds the Notices irregular and noncompliant with the law, then the other issues become incidental or peripheral. The appellant challenged the learned Judge's findings that no valid statutory notice was served by the appellant. Counsel argued that in any event, under **section 69A** of the ITPA, 1882, a statutory notice was not mandatory where it was found that a mortgagor had accrued interests due to the mortgagee for over a period of two months. He argued that the evidence on record revealed that the 1st respondent had defaulted in payment of the accrued interests between the months of May and September 1998, this being a period of more than two months.

31. In dealing with this issue, it is paramount that this Court first interrogates the provisions of **section 69A** of the ITPA, 1882. The relevant provisions provide thus:-

> ***"69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-***
>
> > ***(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months <u>after such service</u>;***
> >
> > ***or***
>
> ***(b)some interest under the mortgage is in arrears and unpaid for two months after becoming due; or*** (Emphasis added)
>
> **…."**

32. A careful reading of the above provision reveals the use of the word ***"or"*** denoting that there are different circumstances granting the mortgagee the right to exercise its statutory power of sale, namely, where the mortgagor has defaulted to redeem the mortgage three months after notice or; where some interest under the mortgage is in arrears and unpaid for two months after becoming due <u>after service of the statutory notice</u>. We need to emphasise that there are no circumstances whatsoever that exempt service of the statutory notice regardless of the extent of the default in payment. We shall advert to this issue later.

33. It is not in dispute that a notice was served; what is contested is the validity of the same. In the persuasive High Court case of **<u>Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others</u> Nairobi HCCC No. 937 of 2001** (unreported) Ringera, J (as he then was) pronounced himself as follows:-

> ***"A statutory notice which does not give the plaintiff a period of three months from the date of service to redeem the charged property as required by Section 74(2) of the RLA is defective… The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding such payment and the chargor has failed to comply within three months of the date of service of such notice… The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice… <u>Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the R.L.A and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it be properly contended that the chargor's remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor</u>…"*** (Emphasis supplied)

34. It was the 1st respondent's case that the notice was invalid as it only gave it 14 days to redeem the suit property. In opposition, the appellant contended that it served the 1st respondent two sets of notices, the latter being issued with an intention to correct the contents of the former hence granting the 1st respondent 90 days for redemption. The trial court extensively analyzed the evidence on record to determine whether or not a valid notice was served upon the 1st respondent and the principal debtor.

35. The crux of this appeal is whether the 2 Notices were valid or not. The legality of a sale essentially depends in the first instance on the validity of the statutory notice served on the chargor. Was the statutory notice itself valid? Was it compliant with the law? In this case the contested issue is the validity of the notice. The 1st statutory notice is impugned on the basis that it gave the chargor 14 days within which to redeem the charged property. Counsel for the applicant maintains that upon realizing the mistake, they issued a fresh notice cancelling/correcting the first one. The second one, which bears the same date gave the chargor the mandatory 90 days' notice to redeem the property before the same could be sold.

36. The Notice is challenged on the basis that the date specifically the last digit in the year on its face has been altered by hand. It reads 1998 so the date reads 18th September, 1998. It is also said to have a different signature of Mr. John Ohaga who is said to have signed it. It also

bears a different email address from the one in the 1st notice. The respondent does not deny having received the first notice but denies receiving the 2nd notice.

37. The learned Judge discussed the issue of the 2 notices at length in his judgment and concluded that the correcting notice was written much later than 18th September, 1998. He even surmised that the latter notice could have been written at the point when the Bank was about to advertise the property for public auction. According to the learned Judge, failure to call John Ohaga as a witness was fatal as after discounting the correcting notice, the first notice was rendered invalid for giving 14 days' notice instead of 90 days. The learned Judge consequently found the notice invalid. The sale was therefore found to have been based on an invalid notice and was accordingly void; and so was the transfer to the purchasers. The court also found the 2nd respondent not to be an innocent purchaser for value without notice and Section 68B could not therefore avail him refuge. The court dismissed the suit and directed that the 1st respondent be given back possession of the property in 60 days. The judgment was also silent as to what should happen to the money which is still owed to the Bank. Was the learned Judge right in his determination on this issue?

38. In our view, the issue of the notice has to be looked at in a more holistic manner. Validity of a Statutory notice is not purely dependent on the number of days mentioned on the face of the notice. We must also consider the purpose for which the notice is issued. The purpose of a statutory notice under section 69A of the ITPA is to guard the rights of the mortgagor. It is meant to protect the mortgagor from being ambushed by a mortgagee who might just decide one morning to exercise its power of sale without Notice to the mortgagor. The Act therefore requires the mortgagor to be alerted about the default, not less than 90 days prior to the said sale. This was deemed to be sufficient time for the mortgagor to remedy the default and redeem his/her property. At the risk of being repetitive, we revisit the provisions of section 69A of the ITPA here. It provides:-

> ***"69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until –***
>
> > ***(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service;***
> >
> > ***or***
> >
> > ***(b) some interest under the mortgage is in arrears and unpaid for two months after becoming due;***
> >
> > ***or***
> >
> > **…"** (Emphasis added)

39. A reading of (a) above shows that the three months is in the default to pay after notice has been served. A mortgagor's right of redemption would be violated if the property is sold before the 90 days following the notice. The issue therefore is whether the mortgagor was given at least 90 days before the sale and not whether the notice specifically gave him the 90 days. Even assuming the subsequent notice of 90 days was not proper, the question we need to ask ourselves is whether the mortgagor was given at least 90 days to make good the payments.

40. From the record it is clear that after receiving the notice giving (whether it was for the 14 days or 90 days), the advocates on record for the mortgagor engaged counsel for the Bank with proposals on how to liquidate the loan. They did not complain at all that the notice they had been given was invalid. They actually acted on it. Following the discussions, the auctioneers were advised to hold any advertisement for the sale of the suit property. That was in November 1998. The property was not re-advertised until April 2001. The question we should be asking, in our view is whether in these circumstances, it was necessary to re-issue another statutory notice. The answer to this is in the negative as the default in payment had continued for more than 3 months following the notice in view of Section 69A(1) (a). This was the position held by this Court in **Nancy Kahoya Amadiva vs Expert Credit Limited** & **Another [2015] eLLR** where it was held:-

> **"There are also instances where a notice need not issue, where interest for more than 2 months is due and remains unpaid. This was held by this Court in** Trust Bank Limited v Kiran Ramji Kotendia Civil Appeal No.61 of 2000 eKLR and followed in James Ombere Okoth v East African Building Society and others Civil Appeal No 202 of 1996 (unreported). **There is no evidence on record of payment having ever been made by the appellant to the respondent towards repayment of the money borrowed for more than two months. For this reason alone, no notice was issuable to the appellant as explained above and it does not behove us to consider the issue any further."**(Emphasis added)

From the above analysis, it is clear that our finding is that the notice served on the 1st respondent was valid as there was compliance with section 69A(1) (a) of the ITPA .

41. On the second issue, the appellant and the 2nd and 3rd respondents faulted the learned Judge for entertaining the issue of fraud and determining that the dealings pertaining to the suit property were marred with fraud, yet such allegations were not specifically pleaded, particularized and proved by the 1st respondent.

42. It is trite that where fraud is alleged, it is not enough to simply deduce it from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another (2000) eKLR** Tunoi JA (as he then was) pronounced himself as follows:-

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and**

it is not allowable to leave fraud to be inferred from the facts."

43. Therefore, the standard of proof of an allegation of fraud is above balance of probabilities. The onus is also on the party alleging fraud to provide evidence and prove its case to the required standard. In **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others (1996) eKLR**) this Court expressed itself as follows:-

> **"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.**
>
> **In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding."**

44. The next pertinent issue for determination is whether fraud was established. The answer to this will determine whether the 3rd respondent was an innocent purchaser for value without notice.

45. In his judgment, the learned Judge in determining the issue of fraud found that the appellant, in its statement of defence, did not deny that the sale of the suit property to the 2nd respondent was secretly undertaken. A cursory perusal of the statement of defence on record buttresses such finding. The learned Judge also found that: no copy of the alleged transfer was produced and the same could not be traced in the land's office; there was no evidence to show that stamp duty was paid; there was no evidence to show that consideration was paid in regard to any transfers pertaining to the suit property.

46. During trial, neither the appellant nor the 2nd and 3rd respondents produced any irrefutable evidence to disprove the findings of the trial court. In the instant appeal, the said parties only state that onus was not upon them but was upon the 1st respondent. Further, they faulted the learned Judge for holding that it was upon them to prove that the sale was indeed free of fraud.

47. Doubtlessly, in civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she claims on a balance of probabilities. This position is anchored in the Evidence Act under sections 107,108 and 109 which provide as follows:-

> **"Section 107: Burden of proof**
>
> **(1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**
>
> **Section 108: Incidence of burden**
>
> **The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
>
> **Section 109: Proof of particular fact**
>
> **The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person."**

48. The 1st respondent appeared to make heavy weather of the fact that the caveat registered against the title, under the name S. Abdullah claiming purchaser's interest following an earlier sale agreement, was never lifted after the purported sale of the suit property to the 2nd respondent and that in itself was an element of fraud. The learned Judge found, and we are in agreement with that finding, that the interest of the caveator in entry No.32 could not stop registration of a transfer resulting from the mortgagee's exercise of the statutory power of sale pursuant to section 69 B (1) TPA. There was therefore nothing sinister about that entry.

49. We do note however that the "sale" of the suit property to the 2nd respondent and the subsequent purported sale and transfer to 3rd respondent was fraught with irregularities. As observed by the learned Judge, the sale agreement only disclosed acknowledgment of the down payment of Ksh. 2 million; no evidence of payment of the balance; no evidence of execution of the transfer document to mention but a few. There was also the contradictory evidence of the 2nd respondent's witness saying they bought the property "at the fall of the hammer" while the evidence revealed that the sale was by private treaty. We deem it unnecessary to delve into these irregularities which the learned Judge articulated in great detail, some of which we have referred to in paragraph 45 above.

50. Our conclusion is that the sale to the 2nd respondent was not above board and the incidences outlined above were reminiscent of fraud. However, as stated earlier, the law imposes a higher or heavier burden of proof on the person alleging fraud. In this case, one of the complaints was that there was no evidence of payment of stamp duty. How then was the transfer registered without payment of stamp duty? Registration of the transaction and issuance of title deeds does not lie with the appellant or the 1st and 2nd respondents, but with another independent office. The appellant does not complain that it was not paid the balance of the purchase price either. As stated earlier, there may have been glaring irregularities in the sale transactions herein, but in our view, fraud was not proved to the required standard.

51. On the issue of *lis pendens*, there seems to be two schools of thought in this area. One school holds the view that the doctrine is not applicable in cases of mortgages and charges and that a chargee cannot be stopped under the doctrine when exercising the statutory power of sale. They cite **B.B. Mitra on Transfer of Property Act 1882** where the learned author expresses that *lis pendens* does not apply to a suit

for redemption brought by the mortgagor who has given the mortgagee under the mortgage an express power of sale. Similarly, in the case of **Aprotech Services Ltd vs Savings & Loans Kenya Ltd (2001) LLR 1498,** the High Court held that the doctrine of *lis pendens* was not meant to apply to situations of mortgages as it would be a great clog to commercial activities involving land as security. Also in **Al-Jalal Enterprises Ltd [2014] eKLR** the High Court held that;

> **"the doctrine as embodied in section 52 of the repealed Indian Transfer of Property Act has no application whatever to a mortgagor who has given, under that mortgage, an express power of sale and that, he cannot, by starting a suit, perhaps a perfectly useless suit for redemption, derogate from that which he has, in express terms, conferred on the mortgagee by the instrument, namely, the power of sale."**

52. The other school of thought is represented by this Court in its decision in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** where the Court laid emphasis on the fact that the doctrine should apply only where there is active litigation. On whether the doctrine should apply to charges the court stated:-

> **"As to whether there is any interplay between statutory power of sale and the doctrine of *lis pendens;* the Black's Law Dictionary defines *lis pendens* as the jurisdiction, power or control acquired by a court over property while a legal action is pending. The Supreme Court of India in the case of KN Aswathnarayana Setty (D) Tr. LRs. & Others v. State of Karnataka & Others [2013] INSC 1069 stated that the doctrine is based on the legal maxim '*ut lite pendente nihil innovetur*' (During a litigation nothing new should be introduced). The doctrine is couched equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Our previous land legislation regime expressly embraced the doctrine under *Section 52* of the repealed *(Indian) Transfer of Property Act (ITPA) 1882* by stipulating that:**
>
> > ***"During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."*** *Emphasis added.*

53. Although the Court in the above case did not specifically say so, it appeared to insinuate that all parties to a suit are bound by the doctrine of *lis pendens* during active litigation. In the instant case, the High Court found that the first sale was in breach of the *lis pendens* rule but the second transaction was not. We don't think we need to dwell too much on this issue as it is unlikely to affect our conclusion in this matter.

54. Having so found, the next issue is whether, in view of our earlier finding to the effect that there was compliance with section 69A(1)a, the 1st respondent was entitled to the relief awarded by the High Court. Section 69 B of the TPA then kicks in. The same provides as follows:-

> **"S. 69B. (1) A mortgagee exercising the mortgagee's statutory power of sale shall have power to transfer the property sold for such estate and interest therein …**
>
> **(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-**
>
> > **(a) that no case had arisen to authorize the sale; or**
> >
> > **(b) that due notice was not given; or**
> >
> > **(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.** (Emphasis ours).

This Court addressing the issue of remedies in cases such as the present one in **Nancy Kahoya Amadiva vs Expert Credit Limited and another** (supra) pronounced itself as follows:-

> **26. We find it necessary to consider the remedies available for sale arising out of a non-valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under RLA and ITPA. Ringera J in** *David Ngugi Mbuthia v Kenya Commercial Bank and Another (HCCC No. 304 of 2001)* ***Unreported*** **set the principle thus: a person damnified by a transfer of property by mortgagee to an auction purchase pursuant to any irregular or improper exercise of statutory power of sale is entitled to recover any damages directly suffered by him from the auctioneer. The same judge restated the position in** *Hilton Walter Osinya and Saving and Loan (K) Ltd and another (HCCC No.274 of 2001)* ***Unreported.*** **We agree with the above observation of Ringera J (as he then was).** [Emphasis ours.]

55. In this case, the sale was by private treaty. There was evidence on record to the effect that the suit property had been advertised twice to proceed by way of public auction but the bidders never met the reserve price, the highest offer having been 5.7 million. In our view, there was nothing sinister therefore with the Bank proceeding by way of private treaty. The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the Amadiva case (supra), if the sale was improper, or

caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed. In any event, even if the Court was minded to cancel the 3rd respondent's Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st respondent who had not cleared the loan with the Bank.

56. As stated earlier, we hold the view that the conduct of the 3rd respondent was not that of a diligent bona fide purchaser as described in **Katende v. Haridar & Company Limited** (supra) and we agree with the learned Judge's finding that the dealings in the suit property by both the 2nd and 3rd respondent were marred with irregularities. Nonetheless, having found that the statutory notice was proper, and in view of the provisions of section 52 ITPA (repealed) and section 69B TPA cited above, we allow the appeal as consolidated and set aside the impugned judgment. In its place we order that the Title Deed issued to the 1st respondent be cancelled. The property to revert to the 3rd Respondent, with the 1st respondent being at liberty to sue for damages.

57. On the issue of costs, in view of the circumstances surrounding this case we order that each party bears its own costs of this appeal and also before the High court.

Dated and delivered at Nairobi this 24th day of July, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR