IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, ASIKE-MAKHANDIA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 96 OF 2016

BETWEEN

JOSE ESTATES LIMITED .....APPELLANT

AND

MUTHUMU FARM LIMITED..... 1ST RESPONDENT

JOSEPH NJOGU NJUGUNA ..... 2ND RESPONDENT

NATIONAL BANK OF KENYA ..... 3RD RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi

(F. A. Ochieng, J.) dated 22nd February, 2016

in

HCCC No. 618 of 2000)

****

JUDGMENT OF THE COURT

In 1992 the appellant, **Jose Estates Limited** purchased all that piece or parcel of land known as L.R. No. 10551/3, "*the suit property*" by way of private treaty from National Bank of Kenya, *"the 3rd respondent"* (the Bank) for a consideration of Kshs. 15,500,000 in the latter's exercise of its statutory power of sale. The suit property which belonged to **Muthumu Farm Limited**, "*the 1st respondent*", had been charged to the 3rd respondent as security for financial facilities which it had accorded to Jo**seph Njogu Njuguna,** "*the 2nd respondent*", in the aggregate sum of Kshs. 5,000,000 between October and December, 1988. The security was for the principal sum aforesaid together with interest at the provisional rate of 15% p.a. revisable with notice to the 1st and 2nd respondents.

The 2nd respondent defaulted in the repayment of the loan so advanced by the 3rd respondent, who in turn exercised its statutory power of sale by way of private treaty and sold the suit property in the sum of Kshs. 15, 500, 000. The proceeds of the sale were apportioned in the following manner; Kshs. 14,000,000 to the debt and Kshs. 1,500,000 for the legal expenses and the sale commission. Subsequently the suit property was transferred to the appellant on 25th February, 2000. Unhappy with the sale, the 1st respondent filed suit in the High Court claiming that the sale of the suit property was fraudulent and irregular; as it was conducted secretly without any notices to the 1st and 2nd respondents; that by the time the suit property was sold, the loan had in any event been repaid in full; and that the suit property was sold at gross undervalue. The 1st respondent therefore prayed for:

> "*(aa) compensation for the loss, Shs.3, 028,750/= and interest thereon.*
>
> (a) *An injunction restraining the Defendants, their servants, agents and employees or whomsoever from selling, transferring, disposing and/or alienating L.R No. 10551/3 to any third party and from evicting, taking possession and/or in any way interfering with the Plaintiff's occupation of the charged property.*

(b) *A declaration that the purported sale and transfer of L.R No. 10551/3* by the 1st

Defendant to the 2nd Defendant is null and void.

(ab) *Damages in the sum of KShs.7, 500,000/=.*

(bbb) Further Damages at the rate of KShs.1, 500,000/= per year from the year 2005 until determination of this suit.

(c) *An order that the Registrar of Titles do delete the entry relating to the transfer dated 21st February, 2000 from the register of title to L.R No. 10551/3.*

(d) *General damages for fraud and interest thereon at court rates.*

(e) *An order that the 1st Defendant to make a proper calculation of the Plaintiff's accounts in accordance with the letters of offer and discharge instrument.*

(f) *An order that the sums overpaid to the 1st Defendant be refunded to the plaintiffs.*

(af) *An order to evict the 2nd Defendant, its servants or agents from the suit premises.*

(g) *Costs of and incidental to this suit."*

The above prayers were anchored on the averment by the 1st and 2nd respondents that the sale of the suit property was fraudulent and irregular because they deemed the 3rd respondent's rejection of higher offers from other potential buyers, like Aberdare Creameries Limited who had offered to buy the suit property at Kshs. 15,000,000, as proof of collusion between the appellant and the 3rd respondent to benefit from the suit property through irregular means. They also questioned the speed with which the suit property was sold and transferred to the appellant and termed it "fishy" and very suspicious. The respondents further believed that the appellant was incorporated deliberately for the sole purpose of buying the suit property. That it was incorporated on 12th November, 1999 and 10 days later, on 22nd November 1999, made an offer to buy the suit property through Messrs. Mereka and Company Advocates.

In a bid to demonstrate that there was conniving, the 1st and 2nd respondents reiterated that the consent obtained for the transaction was invalid because it emanated from Molo Land Control Board while the application had been made to Njoro Land Control Board. It was their case that they used to make huge profits from the farming activities on the suit property and were therefore entitled to compensation for loss of profits they had suffered through the activities of the appellant and 3rd respondent. They also claimed compensation for fraud. Their reasoning was that the charge instrument had a provision that if the 3rd respondent intended to vary interest from the 15% rate which was provided for in the charge instrument, it had to give notice to the 1st respondent at least 30 days prior to the variation taking effect which it had failed to do. The 3rd respondent was also faulted for failing to give any Demand Notice and or Statutory Notice to the 1st respondent and the borrower. As far as the 1st and 2nd respondents were concerned, the appellant was not an innocent purchaser for value and regarded it as an active participant in the fraud. It was also contended that though the purchase price was said to have been Kshs. 15,500,000 the 3rd respondent only credited the 2nd respondent's account with Kshs. 14,000,000. The sum of Kshs. 1,500,000 was apparently taken from the purchase price and paid to Mereka & Co. Advocates on account of *"finders fees"*, which according to the respondent constituted an unlawful scheme and fraud. They also faulted the participation of Messrs. Mereka & Company Advocates in the whole transaction and termed it as a deliberate scheme to defraud them of the suit property since the law firm witnessed the signatures to the sale agreement of both the 3rd respondent and the appellant. There was therefore a conflict of interest.

The appellant in its defence and counter-claim averred that the sale in question was above-board. That the 1st and 2nd respondents obtained an injunction restraining it from developing the suit property which deprived it of the right and opportunity to recoup its investment. Ultimately the appellant sought compensation from the 1st and 2nd respondents in the following terms; consequential loss and damage due to the interim injunction of Kshs. 17,988.098; loss of direct profits in the year 2000 and 2001 of Kshs. 84,439,000; further loss of profits at the rate of Kshs. 42,000,000 per year; general damages for loss of bargain; interest on special & general damages; and costs of the suit. The appellant also urged the court not to revoke its title as it was in occupation of the suit property and the balance of convenience was in its favour. This was on the basis that if the court took into account that it was in possession and the process attendant to the sale and transfer of the suit property, it would be concluded that the balance of convenience was in favour of sustaining the sale. Finally, it took the position that if anything had gone wrong with the process of sale and transfer and which it denied, that the 1st and 2nd respondents' remedy lay in damages to be paid by the offending party.

The 3rd respondent on the other hand contended that the 1st and 2nd respondents' claims were not motivated by a quest for justice but simply bitterness for the loss of the suit property. That their intention was to escape from their legal obligations founded upon contract which they admitted to have executed. That the loan amount mentioned in the Charge dated 15th November, 1988 was Kshs. 5,000,000. The Charge provided that the borrower was to pay interest on that sum at the rate of 15% per annum calculated on a reducing balance in advance on the principal sum then outstanding. However, pursuant to clause 3 of the Charge, it reserved the right to vary the rate of interest by giving one month notice. It disputed the contention that it kept increasing the applicable rate of interest without any notice to the 1st respondent. It maintained that the interest charged on the debt was strictly applied according to the contract of lending and the security.

The 1st and 2nd respondents called a total respondent (**PW1**), **Eric Kipkorir Chebii (PW2)** of three (3) witnesses; the 2nd and **Wilfred Abincha Okonok** (**PW3**). Apart from PW3, the other witnesses merely rehashed what we have already set out herein above. PW3 was from

Interest Rates Advisory Centre (IRAC). He was engaged by the 1st and 2nd respondents to re-calculate the interest paid by the said respondents to 3rd respondent. According to his calculations, as at November 1996, the account was already in credit to the tune of Kshs. 169,545/50. As for the respondents, 2nd respondent testified on his own behalf and on behalf of the 1st respondent. The 3rd respondent called its credit officer, Richard Rotich as its only witness. Again, all these witnesses merely reiterated and expounded on what they set out in their pleadings.

The learned Judge (**Ochieng', J.**) upon hearing the parties, rendered his judgment making the following observations; that the express acknowledgement by the 1st and 2nd respondent in which they accepted being indebted to the 3rd respondent did not exonerate the 3rd respondent from its obligation to comply with the terms of the contract. The learned Judge also made reference to the Decree in **HCCC No. 3415 of 1994** in which judgment was entered in favour of the 3rd respondent against the 2nd respondent for the sum of **Kshs. 22,534,493.15** which had never been set aside or varied. The learned Judge further took the view that the sums payable by the 2nd respondent to 3rd respondent had already been settled as per the Decree in the aforesaid suit. That a representative from IRAC, tendered a report of the re-calculated sums payable by the 2nd respondent. His calculations showed that as at November 1996, the account was already in credit and that is why IRAC did not incorporate legal fees, post redemption costs and penalty interest in its calculations. That from the date when IRAC deemed the 1st and 2nd respondents to have paid off the loan, it was his view that the 3rd respondent was no longer entitled debit to the loan account such legal fees as they may have had to pay. The learned Judge further noted that the IRAC report ignored the decree issued in **HCCC No. 3415 of 1994** and termed the same to be tragic. It was upon the 1st and 2nd respondent to prove that they had satisfied that Decree or that it had been set aside or varied or else it was wrong for IRAC to choose to ignore the same. The IRAC report was on that score deemed inaccurate. That the sums due between the 2nd and the 3rd respondents were calculable in terms of the Decree while those between the 1st and 3rd respondents were based on the terms of the Charge.

With regard to the Charge, the learned Judge observed that it expressly provided that it was security for the loan or other financial accommodation which the 3rd respondent would grant to the 2nd respondent from time to time provided that the aggregate amount would not exceed Kshs. 5,000,000 to which the 1st respondent bound itself to pay to the 3rd respondent. The learned Judge was of the view that the 1st respondent was simply asking the court to acknowledge and enforce the express terms of the contract and to hold the 3rd respondent responsible for its loss contrary to the 3rd respondent's assertion that the 1st respondent was asking the court to cunningly avail a front with which to stitch a garment of fraud.

Turning to the Sale by Private Treaty, the learned Judge took the view that though the 3rd respondent had asserted that it was justified because prior to the said sale there had been numerous attempts to sell the suit property by public auction but the same were either unsuccessful or called off at the behest of the 1st and 2nd respondents. That though the 1st and 2nd respondents were also given opportunities to try and sell the suit property and the fact that the 3rd respondent negotiated with the 2nd respondent about how the loan would be repaid did not bar the 1st respondent from getting involved in the negotiations. The learned Judge observed further that if the 2nd and 3rd respondents purported to vary the terms of the Charge without involving the 1st respondent, then their agreement in that respect would not be binding on the 3rd respondent. The 2nd respondent had every right to hold negotiations with the 3rd respondent and secure the best possible arrangements for the repayment of the loan and other financial accommodation which had been granted to him. He further observed that when negotiations failed and the 3rd respondent only sued the 2nd respondent could not exonerate the 1st respondent from liability. The learned Judge went on to observe that the Decree obtained in the suit between the 2nd and 3rd respondents was not binding on the 1st respondent with regard to liability under the Charge. Therefore, the 3rd respondent could not use the Decree as a basis for determining the amount of money recoverable from the 1st respondent as the Decree was only a foundation for determining the amount of money recoverable from the 2nd respondent. As regards the speed with which the sale by Private Treaty was conducted, he stated that it was so swift as to appear suspect but speed alone did not render the transaction unlawful or irregular.

Though the appellant claimed to have been the highest bidder, the learned Judge's view was that this was a sale by private treaty hence there was no forum at which potential purchasers could have put forward their respective bids. When the 2nd respondent wrote to the bank on 15th October, 1998 and on 22nd October, 1998 indicating that he had a buyer for 200 acres at a price of Kshs. 20 million out of the 400 acres, the learned Judge found the offer to be by far much higher than what the appellant paid. However, the 3rd respondent failed to respond in writing to the 2nd respondent's request for facilitation to have the suit property sub-divided so that the 200 acres could be curved out. The learned Judge also noted that the offer by Aberdare Creameries Limited to help the 1st respondent sell off 200 acres at Kshs. 25 million not to have been genuine because on 18th March, 1999 the said Aberdare Creameries Limited wrote to the bank and offered to pay Kshs. 15,000,000/- for the suit property which was the amount the suit property was sold at to the appellant.

As to the issue of the consent issued by Molo Land Control Board while the application had been made to Njoro Land Control Board**,** the Judge observed that the appellant and the 3rd respondent failed to properly respond to the question regarding the allegation that the consent was a nullity. The appellant however conceded not to have played any role in the request for the Board consent and certainly did not attend any meeting of the Board. That even though the purchase price offered was Kshs.15, 500,000 the two documents from the board indicated that the purchase price was Kshs. 14,000,000. Therefore, it was a distortion of facts if indeed the appellant paid Kshs. 15,500,000 but if the purchase price was Kshs. 14,000,000/= then it was lower and in the circumstances, the learned Judge found no justification as to why the 3rd respondent accepted to sell the property to the appellant who was shown to have paid Kshs. 14,000,000 as the purchase price.

Coming to the alleged losses suffered by the 1st respondent, the Judge held that there was no evidence to support the said claim. That the appellant had also not proved the losses that it allegedly suffered due to actions attributable to the 1st and 2nd respondents. The Judge therefore concluded that the appellant did not appear to have been an innocent purchaser for value as it had worked so closely with the 3rd respondent to buy the suit property shortly after it was incorporated.

Consequently, the sale and transfer of the suit property to the appellant was nullified with the Judge further directing that the transfer dated 21st February, 2008 be cancelled or deleted from the Register of Titles with regard to the suit property. The 3rd respondent was further

directed to provide a recalculated statement of accounts strictly in accordance with the terms and conditions embodied in the Charge to the 1st respondent, the said calculations be based on the original rate of interest of 15% per annum and any variations to that rate of interest to be given effect after the 3rd respondent had demonstrated that appropriate notices were given to the 2nd respondent at least a month before such variations took effect. The 1st and 2nd respondents' claims for general damages were rejected; the appellant's counter-claim was disallowed as well. However the costs of the suit and counter-claim were awarded to the 1st and 2nd respondent respectively.

Dissatisfied by the judgment and decree of the trial court, the appellant filed the instant appeal premised on 12 grounds in the amended memorandum of appeal dated 19th February, 2019; to wit that the learned Judge erred in law and fact; by failing to consider that the allegations made in the plaint in Nairobi High Court Civil Suit 618 of 2000 were matters to which the appellant was a stranger and in any event were of no consequence to the appellant's rights over the suit property; by ignoring that the appellant purchased the suit property in the sum of Kshs. 15, 500,000/=; by ignoring the fact that a transfer in favour of the appellant was drawn on 21st February, 2000 and a title in its favour issued on 25th February, 2000; not considering the ownership of the suit property; ignoring the fact that the suit property having been sold to the appellant by the 3rd respondent as a mortgagee and a title passed to it upon execution of a contract of sale and therefore, the appellant was the rightful owner of the suit property; by ignoring the fact that since the appellant was the rightful owner of the suit property, the 1st and 2nd respondents' remedies if any, lay against the 3rd respondent in damages; by finding that the sale and transfer of the suit property to the appellant was null and void and directing the same to be cancelled or deleted from the register of titles; by ignoring the fact that the plaint in Nairobi High Court Civil Suit 618 of 2000 did not disclose any cause of action against the appellant and the suit ought to have been dismissed accordingly; by not considering the fact that under the Indian Transfer of Property Act (now repealed), the 1st and 2nd respondents in the suit leading to this appeal could not impeach the appellant's title to the suit property on the grounds that no cause had arisen to authorize the sale, due notice was not given and the statutory power of sale was improperly or irregularly exercised; by ignoring the fact that the suit which was instituted by the 1st and 2nd respondents was in disregard to the appellant's legal rights of ownership of the suit property and the appellant as a consequence, suffered loss and damages in relation to costs of the Nairobi High Court Civil Suit, loss of quiet enjoyment of its property and consequential and anticipatory losses; and by rejecting the appellant's counter-claim and awarding the costs of the said suit to the 1st and 2nd respondents. Finally, the appellant complained that the learned Judge failed to make consequential findings and orders regarding the 1st respondent's indebtedness and the appellant's right to monies paid in the impugned sale. Ultimately, the appellant sought to have the appeal allowed with costs against the respondents; the judgment and decree of the High Court be set aside; and its defence and counter-claim be allowed with costs to the appellant, in the alternative the 3rd respondent be ordered to refund the sum of Kshs. 14,000,000 to the appellant together with interest at bank rates and in the further alternative a finding be made as to the indebtedness to the 3rd respondent.

In response to the appeal all the respondents filed cross-appeals. The cross-appeal by the 1st and 2nd respondents was in terms that: the learned Judge erred in law and in fact in failing to award the 1st and 2nd respondents damages and/or compensation as sought in the amended plaint, arising from the appellant's acts of waste, vandalism and destruction of the suit property committed within the suit property including causing the death of the 1st and 2nd respondents' animals; and failing to award the 1st and 2nd respondents compensation for loss of use of the suit property during the period that the same was unlawfully and forcefully occupied by the appellant. They also sought to have the High Court judgment varied and the following reliefs granted unto them: *Compensation/damages in the sum of Kshs. 3,028,750/= arising from the appellant's acts of waste, vandalism and destruction within the suit property; compensation/damages for loss of use of property during the period that the same was unlawfully and forcefully occupied by the appellant, that is: damages at the rate of Kshs. 1,500,000/= per year from April 2000 to 18th October, 2005 the date of filing the amended plaint totalling to the sum of Kshs. 7,500,000/=; further damages at the rate of Kshs. 1,500,000/= from 18th October, 2005 aforesaid to the date of judgment 19th May, 2016 totaling to Kshs. 16,500,000/=; and further damages at the rate of Kshs. 1,500,000/= from 19th May, 2016 aforesaid to the date when the appellant shall vacate the suit property; general damages for fraud; and interest on all the above.*

The cross-appeal by the 3rd respondent was to the effect that the learned Judge erred in law and in fact in his interpretation of the legal Charge, splitting the obligations of the 1st and 2nd respondents in the absence of declaratory orders being sought in that respect and wrongly finding that the obligations of the 1st respondent under the legal Charge were different from the obligations of the 2nd respondent under the distinct and separate contracts of lending contrary to the evidence tendered in the proceedings; re-opening the binding, unchallenged and settled Decree in Milimani HCCC No. 3459 of 1999 and granting an unpleaded and unsought order of accounts under the legal Charge in favour of the 1st respondent when he did not have jurisdiction to do so and which was contrary to the evidence tendered before him and the exchanged pleadings; making a specific finding that the 1st respondent had not been notified of default and variation of interest rate contrary to the evidence tendered before the him; nullifying the sale and transfer of the suit property to the appellant in the absence of a specific finding of fraud or illegalities and premised on extraneous matters and innuendos of bribery and collusion between the appellant and the 3rd respondent contrary to the evidence tendered before him; directing cancellation of a valid sale and transfer of the suit property to the appellant without at all reinstating the legal Charge of the 3rd respondent validly created, registered and upheld by the court against the finding of indebtedness of the 1st and 2nd respondents under the Decree and legal Charge; and failing to appreciate and critically analyze the evidence presented before him thereby reaching conclusions/findings in a vacuum based on unfounded innuendos, partisan views and extraneous matters thereby wrongly descending into the arena of evidence contrary to the established adversarial court processes. The 3rd respondent proposed that: the cross appeal be allowed and the decision of the High Court be set aside; the suit in the High Court be dismissed with costs; in the alternative and without prejudice to the above prayers, if the sale is found to be improper and the decision of the High Court affirmed, reinstatement of the validly created and registered legal Charge in favour of the 3rd respondent; and that costs of the cross appeal and the High Court be awarded to the 3rd respondent.

At the plenary hearing of the appeal, the appellant was represented by **Mr. Mutiso,** while the 1st and 2nd respondents were represented by **Mr. Mwangi,** and the 3rd respondent was represented by **Mr. Odhiambo,** all learned counsel. Counsel relied on their written submissions that they had filed earlier and opted to highlight albeit briefly.

Mr. Mutiso condensed the 12 grounds of appeal into two broad ones; that the appellant was an innocent purchaser for value without notice

and the equity of redemption. Counsel submitted that it was common ground that the suit property was charged to the 3rd respondent and the appellant was an innocent purchaser for value and without notice contrary to the finding by the learned Judge that the appellant was anything but an innocent purchaser for value. That the suit did not besmirch the appellant and was solely directed against the 3rd respondent. That fraud ought to be pleaded and proved, but no fraud was pleaded against the appellant and the only concern that the learned Judge had with the appellant was that it had worked closely with the 3rd respondent. Counsel was of the view that given that the sale was by private treaty and not a public auction, it was expected that the appellant would work closely with the 3rd respondent. With regard to the allegation that the suit property was sold at undervalue, counsel submitted that the appellant bought the suit property in 1999 at Kshs. 15,500,000 which was a lot of money at the time. That the 1st respondent conceded to have bought the suit property at Kshs. 11, 000,000 two years earlier hence the purchase price was not out of proportion. Counsel further contended that speed alone did not render the transaction unlawful and therefore the speed at which the consent of the Land Control Board was obtained could not have been used to vitiate the transaction. The question about the appellant being incorporated on the eve of the transaction; was neither here nor there; that consent was given by the proper land control board and that the equity of redemption was extinguished with the registration of the appellant as the owner of the suit property. The 3rd respondent had the right to sell the suit property and the minor infractions alluded to were not sufficient to annul the sale.

Opposing the appeal, **Mr. Mwangi** submitted that the case before the High Court was premised on the amended plaint where particulars of fraud were pleaded and the main issue was whether the 3rd respondent had the right to exercise its statutory power of sale. No statutory notice was served upon the 1st respondent. The 3rd respondent also varied the interest rate without reference to the 1st respondent and that by the time the sale was being undertaken, the 1st respondent had fully repaid the loan. It was counsel's contention that the appellant was never an innocent purchaser for value and was in fact involved in a scheme to defraud the 1st respondent of the suit property. The fact that the purchase price was Kshs. 15,500,000 and what reached the 3rd respondent was Kshs. 14, 000,000 was clear evidence of collusion between the appellant and the 3rd respondent. Counsel urged us to question the manner in which consent of the Land Control Board was obtained and find that there was no valid sale and the High Court was right to vitiate the sale. That the appellant had not pleaded for reimbursement of the purchase price and therefore its prayer in the amended memorandum of appeal was futile.

Mr. Odhiambo in urging this Court to allow the appeal reiterated his submissions before the High Court. On cross appeal, he submitted that the learned Judge reached a conclusion not supported by evidence. That the learned Judge did not find the sale to be unlawful and it was therefore not upon the learned Judge to hold that the sale was void or that the sale did not inspire confidence. It was counsel's submission that the 1st and 2nd respondents participated in the sale and never questioned the process. Service of the statutory notice was never an issue in the proceedings before the High Court. That the consent of the Land Control Board was never set aside and neither were representatives from Njoro and Molo Land Control Boards called to testify and demonstrate that the consent was wrongly obtained. Counsel submitted further that the suit property was not sold at gross undervalue and even if it were so, then it was an accounts issue which could not be a basis for nullification of the sale. That the borrowing was for the sole use of the 1st respondent and no terms of the Charge were altered. In any case, there was a decree from the High Court that was binding on the appellant. Finally, counsel submitted that the issue of reimbursement of the purchase price was never raised before the trial court.

This is a first appeal. It is a settled principle of law that the duty of the first appellate court is to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions. However, we should appreciate that we did not have the benefit that the trial court had in observing the witnesses as they testified to which we must give due allowance. In the case of **Kamau v Mungai (2006) 1 KLR 15,** this Court emphasized and drove this point home thus:

> **"Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that."**

See also rule 29 of this Court's rules.

We have considered the record, submissions both written and oral by learned counsel and the law. The issues for determination are whether fraud was proved; whether the 3rd respondent lawfully exercised its statutory power of sale; whether the appellant was an innocent purchaser for value without notice, the competence of the appeal and the fate of the cross-appeals.

On whether the allegation of fraud by the appellant and the 3rd respondent was proved to the required standard or at all, the 1st respondent alleged that the appellant and 3rd respondent were involved in a scheme to defraud it of the suit property. The 1st respondent cited incidents like the fact that the purchase price was Kshs. 15,500,000 but what reached the 3rd respondent was Kshs. 14, 000,000 as clear evidence of collusion between the appellant and the 3rd respondent. There was also the manner in which consent of the Land Control Board was obtained, rejection of the other bidders, the speed with which the suit property was sold and transferred to the appellant, the incorporation of the appellant and the close working relationship between the appellant and 3rd respondent and the finders' fee of Kshs. 1,500,000 appropriated by Messrs. Mereka & Co. Advocates as schemes of fraud. It is a principle of law that a party who alleges must prove. The 1st respondent's allegations that the 3rd respondent's sale by private treaty to the appellant was tainted with fraud on the above grounds should lead us to examine whether the high legal threshold for proving fraud was met. In **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another (1979) eKLR**, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR,** Tunoi JA (as he then was) stated 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."** Emphasis ours.

Given the seriousness of the allegations, the onus was on the 1st and 2nd respondents who alleged fraud to provide evidence in court that meets the standard of proof which was underscored by this Court in **Central Bank of Kenya Limited v Trust Bank Limited & 40 others [1996] eKLR** as being beyond that of a balance of probabilities but below beyond reasonable doubt. In that case, the Court rendered 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 the instant appeal, the 1st respondent needed to not only plead and particularize the fraud as he did in the amended plaint but to also lay a basis by way of evidence upon which the court would make such a finding. The learned Judge did not specifically make a finding on the question but held that it would be wrong to allow the appellant and the 3rd respondent to be beneficiaries of the process which did not inspire confidence in its transparency before he proceeded to declare that the sale and transfer of the suit property to the appellant was null and void. It was not enough that the process failed to inspire confidence or that it was suspicious, evidence in support of the allegation of fraud had to be tendered. A transaction which does not inspire public confidence is not tantamount to fraud. The learned Judge was perfectly entitled to be suspicious of the transaction on the grounds he set out, but suspicion is not fraud. No evidence was tendered to this end by the 1st and the 2nd respondents. In the case of **Central Kenya Ltd v Trust Bank Limited & 4 others [1996] eKLR** this Court held as follows:

> **"There is no specific evidence to show that Floriculture and First National were aware of any dispute or defect in the title of the suit property. Mrs. Muiruri has said in her affidavit that one Mr. Nakar who was a director of the Floriculture was "linked" with Ajay Shah, the majority shareholder of Trust Bank and Trust Finance. That by itself cannot be evidence of Floriculture's complicity in the alleged fraud". (**Emphasis ours.)

To this end we are satisfied that fraud was not proved. Though pleaded, it was never specifically proved by the 1st and 2nd respondents. The mere fact that fraud was alleged and no proof was tendered, the claim on fraud must fail and it was wrong for the Judge to annul the transaction on that basis. In any event, the sale was by private treaty as opposed to public auction and therefore there was bound to be closeness between the appellant and 3rd respondent.

As regards the 3rd respondent's right to exercise its statutory power of sale and the validity of the sale by private treaty to the appellant, the trial Judge did not address himself on the allegation that a statutory notice of sale was not served upon the 1st respondent. In any event, it was not even an issue before the trial court. He nonetheless proceeded to fault the sale on grounds of lack of transparency. 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 on the fall of the hammer, 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. The law is that the equity of redemption is lost on the completion of a valid agreement for sale as was held in **Ze Yun Yang v Nova Industrial Products Limited [2003] 1 EA 362.** The appellant's acceptance of the sale by private treaty and subsequent completion of a valid agreement for sale of the suit property effectively locked out the 1st and 2nd respondents' right of redemption over the suit property. If anything, their remedy lay in damages from the culpable party to the transaction in this case, the 3rd respondent.

The 3rd respondent was not obliged to sell by public auction. Sale by private treaty was an option also as long as the 3rd respondent acted in good faith. From the record before us, the 3rd respondent acted in good faith as it involved the 1st and 2nd respondents in the process of finding a suitable purchaser. The 3rd respondent gave due allowance to the 1st and 2nd respondent to exercise their equity of redemption by calling off several public auctions at their behest and also allowing them to bring on board suitable purchasers. One such purchaser was Aberdare Creameries Limited who had offered to pay Kshs. 15,000,000 for the suit property. However, the 3rd respondent sold the suit property to the appellant who offered to buy it at Kshs. 15,500,000 which was higher than what Aberdare Creameries Limited had offered. The ball of contention was that what was credited to the borrower's account was Kshs. 14,000,000. The explanation given for the difference was that Kshs. 1,500,000 was paid to **Mereka & Co. Advocates** and finders fees and on account of legal fees and commission. The explanation sounds logical to any reasonable person. In the case of **Mbuthia v Jimba Credit Finance Corporation and Another [1986-1989] EA 340; [1988] KLR 1** this Court stated thus:

> **"A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself evidence of fraud."**

We reiterate that the 3rd respondent's decision to sell the suit property by private treaty was known to the 1st and 2nd respondents and their open and unconditional participation in the process by submitting several proposals and ultimately introducing a preferred buyer, Aberdare Creameries Limited whose director, **Mr. Kairu**, was confirmed to be closely associated with the respondents completely removed the spectre of a secret sale or sale by collusion. The price offered by other bidders was comparable to the price offered by the appellant. In fact, the appellant's offer was slightly high compared to the other bids reserved by the 3rd respondent. In the premises, we do not agree with the finding by the learned Judge that the suit property was sold at undervalue. No other bids higher than that tendered by the appellant were led in evidence.

It should be noted that the 1st and 2nd respondents were all along aware of their indebtedness and never raised any objections as to the notice to sell the suit property and/or even interest until the sale was carried out.

At all the material times up to the moment of sale, the 2nd respondent severally admitted default, acknowledged the outstanding debt, made

certain proposals on addressing its default and committed himself to loan repayment. At no time prior to the sale and before institution of this process was there dispute or allegation of full repayment, nor was there a dispute on the rates of interest applied, or the growth of the debt. The respondent's own written explanation of 31st January 2000 of the situation shortly before the sale was as follows:

> *"I took a loan of Kshs. 5,000,000/- (five million) from your esteemed bank some years back to go into what appeared then to be a very profitable flower growing business… in the beginning nothing seemed likely to go wrong, but everything went wrong after my European associates set up another company at a different locality which left me with a lot of debt to service… So far I have been struggling to bring the said loan down, but every time the interest brought it up again… I have gone through a lot of sacrifices, including family breakdown, I have sold three of my city houses and after managing to pay the bank Kshs. 14 million (fourteen million) the portion of the loan that remained unpaid shot up again. … my following offer is not based on any reason but it is what I can afford to put together and I plead to your good selves to consider all reasons and in spite of my default….with those few words I plead to pay the Bank Kshs. 6 million (Kshs. Six million) and free me from any other holds that you may have on me or my property."*

Under cross-examination, the respondent stated as follows:

> *"in the letter, I admit default and the reasons."*

This admission was made after the sale by private treaty, wherein the 2nd respondent sought accomodation by making an offer to settle a debt of Kshs. 22,663,903.15 at a discounted sum. The growth of the debt is clearly out of the 2nd respondent's default, and not difficulties attributed to or the alleged manipulation of accounts by the Bank.

At this stage there was clearly no existing dispute on accounts. Nor was there any dispute on accounts when an earlier admission of debt was made in this letter of 4th June 1998 in the following terms:

> *"Surely you cannot term this loan as a bad debt not after having grown from a debt of Kshs. 5 million up to date I have paid over Kshs. 14 million and I am to pay Kshs. 12 million most of it in interest…. I am therefore proposing to you that you convert the said debt into three years loan with enough grace period in order to organize a sale of a property in Nairobi so that I may be able to pay off this debt…"*

Clearly then, the assertion by the 2nd respondent supported by the report by IRAC has no factual and legal basis. It was purely based on misapprehension of fact.

The trial court appears to have ignored the well settled principle that it is of utmost importance that the courts uphold the rights of parties to commercial transactions. It is the firm tradition of common law to do so and if the tradition is departed from, it will be a recipe for chaos. See **Aiman v Muchok (1984) K.L.R. 353**, quoted with approval in the above-referenced case of **Nancy Kahoya Amadiva v Expert Credit Limited & Another [2015] eKLR**

This then brings us to the question as to whether the appellant was an innocent purchaser for value. We pause to ask ourselves the question; what is the extent of due diligence to be exercised by a purchaser? **Black's Law Dictionary 9th Edition** defines a bona fide purchaser as:

> **"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."**

Similarly, in **Katende v Haridar & Company Limited [2008] 2 E.A.173** the Court of Appeal in Uganda held that:

> **"For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, … (he) must prove that:**
>
> (a) **he holds a certificate of title;**
>
> (b) **he purchased the property in good faith;**
>
> (c) **he had no knowledge of the fraud;**
>
> (d) **he purchased for valuable consideration;**
>
> (e) **the vendors had apparent valid title;**
>
> (f) **he purchased without notice of any fraud;**
>
> (g) **he was not party to any fraud."**

In the present appeal, it is common ground that the appellant holds the certificate of title to the suit property and is in actual possession; he purchased the suit property in good faith for a valuable consideration without any notice of fraud and none of the respondents have demonstrated that the appellant had any notice of the irregular exercise of the statutory power of sale. Though the appellant stated to have paid Kshs. 15,500,000 for the suit property, the sale agreement as executed by the appellant indicates that the purchase price was Kshs. 14,000,000. But this had nothing to do with the appellant. The explanation by the 3rd respondent for the difference was that part of the money went to Mereka & Co. Advocates, as finders' fee, commission and legal fees. This explanation was never discounted by the 1st and 2nd respondent It is true that the appellant worked closely with the 3rd respondent in the transaction. This should be expected in a transaction of this nature. After all the sale was not by public action but by private treaty.

Turning to the question of consent letter of the Land Control Board, the learned Judge once again was non-committal. He made no finding as to its validity. All he could say was:

> ***"The purchaser explained that Njoro is a location, whilst Molo is a division within Nakuru District. He also said that there were no 2 different Boards within that area. And he added that the District Commissioner of Nakuru was the Chairman for the Board. What he did not explain is why the consent was given by the Molo Land Control Board, when no application had been addressed to that Board.***
>
> ***The purchaser conceded that it did not play any role in the request for the Land Control Board consent. He certainly did not attend any meeting of the Board. But he went on to say that the Consent was given by the District Commission, Nakuru. Even assuming that the signature on the Consent was that of the District Commissioner, Nakuru, there is no evidence as to how he came to append his signature on it.***
>
> ***According to the purchaser, it was Milano and Mereka & Co. Advocates who handled the issue of the consent. It would have been useful to have either the lawyer or the agent testify in court, to prove information concerning the actual process which led to the issuance of the consent. In the absence of those persons, it still remains a mystery about how the consent was obtained."***

So, was the letter of consent from the Land Control Board invalidated or not?

We doubt whether the learned Judge had in any event jurisdiction to nullify the letter of the consent outside the procedure expressly set out in section 11 and 13 of the Land Control Act. In our view, if the Judge exercised such a jurisdiction it would be in vain. Moreover, we agree with the submissions of the 3rd respondent that the purported discrepancy between the board issuing the consent letter and the board in the application, the evidence given at the trial namely that Molo was a division while Njoro was the location all falling under the jurisdiction of Nakuru District Commissioner, ought to have been accepted. The 2nd respondent's own letter of application for the loan tendered in evidence for consent for the creation of the Charge, and the application by the 3rd respondent relating to the sale both correctly described the place in which the suit property was situate as Rongai District. It was not disputed during the trial that Molo was a division in which the suit property was situate. In any event the Land Control Act provides for a *"Land Control area or Division"*. The signatory to the letter of consent was the District Commissioner, Nakuru. The District Commissioner's authority to sign the letter of consent was not disputed or contested. The discrepancy was in our view not evidence of any wrong doing. Perhaps if the consent had been signed by a person without authority or if the Land Control Board issuing the consent was non-existent, then and only then would the consent letter be questioned and or impugned. It was incumbent upon the 1st and 2nd respondents to adduce such evidence. This was not done. Further, there was no plea for the nullification of the consent letter. Needless to say the said respondents did not avail any evidence from Molo or Njoro Land Control Boards if at all, on the proper body to issue the statutory consent.

From the foregoing, there is every reason to interfere with the learned Judge's finding that the sale and transfer was null and void. The 1st and 2nd respondents' remedy for an invalid statutory sale as already stated was in damages. This Court in **Nancy Kahoya Amadiva v Expert Credit Limited & another (supra),** stated:

> **"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*.**

This is the route the learned Judge should have followed. He did not and instead found the sale and transfer of the suit property to the appellant null and void. He then directed that transfer be canceled or deleted from the register, which was wrong.

With regard to the competency of the appeal, we note that the 1st and 2nd respondents only raised the issue in their written submissions alleging that it was filed late, that is 84 days out of time, without procuring a certificate of delay and leave of the court for the extension of time. We will say at once, that even if the objection is merited, it is overtaken by events in the absence of a requisite application to strike out the appeal being made within 30 days upon service of the record of appeal on the said respondents. This is the essence of rule 84 of this Court's rules.

Regarding the 1st and 2nd respondents cross-appeal, it is our view that the damages or compensation sought are meant to return them to the position that they were in before the alleged acts or omissions if at all by the appellant and the 3rd respondent. However, for such damages to be awarded, there was need for proof of unlawful occupation and the alleged acts or omissions. A legal burden is discharged by evidence. There was no proof of any acts of waste, vandalism or destruction of property and death of animals presented before court by the 1st and 2nd

respondents to inform the court's decision on the same. They failed to demonstrate to the court the state of the suit property before and after occupation by the appellant. They did not also explain how they arrived at the quantum of Kshs. 1,500,000 per year. The claim for loss of use of the suit property during the period when the appellant was in occupation ought to have been accompanied by proof that the appellant was in an unauthorized occupation of the suit property. That was not the case here. It is not in dispute that the appellant is the registered owner or title holder to the suit property and as earlier stated, the sale of the suit property was lawful and the appellant became a *bona fide* purchaser for value and without notice upon execution of the contract of sale. The 1st and 2rd respondents' equity of redemption had gone with the winds. Therefore, the 1st and 2nd respondents were not entitled to any compensation for the period when the appellant was lawfully in occupation of the suit property as the registered proprietor. The cross-appeal fails on that score.

Turning to the 3rd respondent's cross-appeal, we take it that the Charge was the primary source of the relationship that existed between the parties. The 2nd respondent was the borrower and the 1st respondent, the chargor, was the guarantor of the 2nd respondent's debts not exceeding Kshs. 5,000,000 which constituted the mortgage debt with the 2nd respondent as the principal debtor. Unless otherwise provided, where a guarantee limits the guarantor's liability to a fixed sum, the guarantor will be liable to the extent of the guarantee only and not to the entire debt of the principal debtor. This is due to the nature of guarantee whose terms are normally interpreted strictly. Therefore, in such case it will not make any legal sense to merge the principal debtor and the guarantor into one person or merge the guarantee with the borrower's contract of the debt. The guarantee is quite separate from the principal debtor's contract for the debt and it is desirable that they are kept separate. In the case before us, the guarantee was given in form of a Legal Charge and was for a fixed amount of money, Kshs. 5,000,000 and as such the 1st respondent was a guarantor whose liability was to sum fixed in the Charge. Therefore, the learned Judge was right in finding that the 1st respondent was only liable to the terms of the legal Charge and not the Decree in Milimani HCCC No. 3459 of 1999. He was also justified in finding that the 3rd respondent had varied the rate of interest in the charge without reference to the 1st and 2nd respondents which was in violation of the provisions in the charge documents.

With regard to granting orders not pleaded and re-opening an unchallenged Decree, a perusal of the record shows that the order for accounts was pleaded in prayer (e) of the amended plaint. It is also clear from the record that HCCC No. 3459 of 1999 was not re-opened but rather the court made reference to it which did not amount to re-opening of the said case. We have dealt with the issues of statutory notice, fraud and nullification of the sale and transfer of the suit property raised in the cross appeal at length, and so is the issue of cancellation of title. This cross-appeal can only suffer one fate, dismissal.

In conclusion we allow the appeal, set aside the judgment and decree of the High Court dated 22nd February, 2016. Instead we order the dismissal of the 1st and 2nd respondents' suit in the High Court with costs to the appellant and the 3rd respondent. The appellant and the 3rd respondent shall have the costs of this appeal too. As the issues of refund of the purchase price paid by the appellant as well as a finding as to indebtedness to the 3rd respondent were not pleaded nor canvased before the trial court, it is not open to us to entertain those prayers in this judgment.

Dated and Delivered at Nairobi this 8th day of November, 2019.

W. **KARANJA**

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

J. **MOHAMMED**

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR