**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: WAKI, KARANJA & KOOME, JJ.A)**

**CIVIL APPEAL NO. 68 OF 2016**

**BETWEEN**

**MAITHENE MALINDI**

**ENTERPRISES LIMITED …… APPELLANT**

**AND**

**KANIKI KARISA KANIKI ……..…….. 1ST RESPONDENT**

**GIRO COMMERCIAL BANK ……..…….. 2ND RESPONDENT**

**COMMERCIAL BANK LIMITED ……....…….. 3RD RESPONDENT**

***(An appeal from the judgment of the High Court at Malindi (Chitembwe, J.)***

***dated 30th June, 2016***

**in**

**H.C.C.C No. 37 of 2015**

**Formerly Mombasa H.C.C.C No. 177 of 2006)**

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**JUDGMENT OF THE COURT**

1. Sometime in the year 1995 Credit & Commerce Finance Ltd. which was later renamed ***Commercial Bank Limited*** (the 3rd respondent) advanced a loan facility of Kshs.2,500,000 to **Kaniki Karisa Kaniki** (the 1st respondent) which was secured by an indenture of mortgage dated 6th June, 1995 registered over the 1st respondent's property described as Plot No. 2363 (suit property). A second indenture of mortgage was also registered against the suit property on even date this time around securing a sum of Kshs.1,000,000 which was to be advanced by Giro Bank Limited which also changed its name to **Giro Commercial Bank Limited** (the 2nd respondent). Apparently, the amount under the second mortgage was never disbursed to the 1st respondent.

2. Subsequently, in the year 1999 the 2nd and 3rd respondents merged their businesses which continued being run under the 2nd respondent's name. Meanwhile, the 1st respondent defaulted in making the monthly repayments and the 3rd respondent instituted H.C.C.C No. 359 of 2000 on 28th February, 2000 against the 1st respondent for recovery of the debt which then stood at Kshs.6,070,398.96. The 1st respondent entered appearance and by an amended defence claimed that the amount comprised of interest and bank charges which were unconscionable and oppressive.

3. Be that as it may, when that suit came up for hearing there was no appearance for the 1st respondent and the hearing proceeded *exparte*. Judgment was entered in favour of the 3rd respondent on 28th January, 2004. Subsequently, the said judgment was set aside on 3rd November, 2001 at the instance of the 1st respondent. The judgment was set aside on the following terms: -

***1. That the defendant (1st respondent herein) deposits with the plaintiff bank (3rd respondent herein) a sum of Kshs.1,000,000 within 45 days from the date hereof.***

***…***

***5) in default of the defendant depositing the sum of Ksh.1,000,000 as ordered in (1) above, this order shall stand vacated and discharged and the judgment dated 28th January, 2004 shall automatically become reinstated and in force. In such event the plaintiff shall be at liberty to execute the judgment and consequential decree against the defendant.***

4. The 1st respondent failed to comply with the aforesaid condition and 5 months later made an application dated 26th May, 2005 seeking review of the amount to be deposited which he considered was too high. Ultimately, the application was dismissed on 16th January, 2006.

5. According to the 1st respondent, pending the delivery of the ruling on the review application the 2nd and 3rd respondents sold the suit property to **Miathene Malindi Enterprises Ltd**. (the appellant) on 11th July, 2005 for a consideration of Kshs.1,900,000. Thereafter, the suit property vide an indenture of conveyance and transfer was registered in favour of the appellant on 3rd August, 2005. In the 1st respondent's view, the said sale was illegal because the requisite statutory notice had not been served upon it; the 3rd respondent had been precluded from exercising its statutory power of sale due to the fact it elected to file a suit for recovery of the outstanding amount under the mortgage and the suit property had been sold at a gross undervalue. As a result, the 1st respondent filed H.C.C.C No. 37 of 2015 challenging the sale.

6. In their joint statement of defence, the 2nd and 3rd respondents averred that not only was the sale of the suit property in exercise of their statutory power of sale but that the same was conducted in compliance with the law. With regard to the amount owing and rate of interest under the first mortgage, the respondents contended that the same was *res judicata* due to the suit for recovery of the debt which had already been determined. The court in the said suit had made a finding on the outstanding amount and the rate of interest applicable which had ~~n't~~ not been challenged in an appeal hence that decision was binding on the 1st respondent.

7. On its part, the appellant maintained that it was a *bona fide* purchaser for value without notice. In any event, it had carried out extensive developments on the suit property with the 1st respondent's knowledge for a period of 1 year after purchasing the suit property. As such, the 1st respondent could~~n't~~ not seek cancellation of its title.

8. Upon weighing the evidence before him, the learned Judge (Chitembwe, J.) in a judgment dated 30th June, 2016 found that firstly, the issue regarding the amount owing under the mortgage was not *res judicata*~~. For~~ for the reason that by the time the 3rd respondent filed the suit for recovery of the debt, it had ceased to exist following its merger with the 2nd respondent. Therefore, it lacked the legal capacity to institute the suit. Secondly, the sale was a nullity because the requisite statutory notice had~~n't~~ not been served upon the 1st respondent and there was proof of constructive fraud perpetrated by the 2nd and 3rd respondents in conjunction with the appellant. Thirdly, the appellant was not an innocent purchaser. All in all, the title issued to the appellant was not good and ought to be set aside. The learned Judge went ahead to issue the following orders: -

***a. A declaratory order that the sale of Plot 2363 Malindi by the 1st and 2nd defendants (2nd and 3rd respondents herein) to the 3rd defendant (the appellant) is a nullity and it is hereby set aside.***

***b. An order directing the Government Lands Registrar to cancel the aforesaid transfer and restore the status quo prior to 3rd August, 2005.***

***c. An order that the 2nd Defendant files with the court, within 45 days of the judgement, an audited report on the total amount owing before the commencement of the Nairobi Case at the interest rate of 25% per annum.***

***d.Suspended the period between the commencement of the Nairobi Case and this judgement in factoring in the calculation of payment of any loan balance or interest.***

***e.An order that the 3rd defendant renders an audited report on the rent collected since 3rd August, 2005 and file it with the Court within 45 days of the judgement and the said rent amount be taken to have offset any loan balance with any excess being granted to the plaintiff. For the sake of clarity, the 3rd defendant is not to pay the said rent amount to either the Plaintiff or the 2nd Defendant.***

***f. An injunction to restrain the 3rd defendant by itself, its servant, employees and/or agents from selling the suit premises to any third party, wasting, damaging, alienating, altering, disposing or in any other way dealing with the suit premises is hereby granted. However, this order shall take effect after the expiry of sixty (60) days hereof. In the meantime the property shall not be sold or damaged and the 3rd defendant shall continue to be in occupation.***

***g. Upon the reports of the 2nd defendant and the 3rd defendant being filed, the court to make a further finding on the exact amount owing and payable by the Plaintiff.***

***h. In view of the findings herein, I do hold that the plaintiff is entitled to damages. I assess damages at Kshs.500,000/=. This amount is payable by the 2nd defendant and can be netted off from the loan balance.***

***i. Costs and interest of the suit to the plaintiff.***

9. It is that decision that provoked the appeal before us wherein the appellant complains that the learned Judge erred in law and fact by-

***i. Holding that the appellant was not an innocent purchaser for value without notice.***

***ii. Finding that the appellant had not proved that it had carried out developments on the suit property worth Kshs.6, 000, 000.***

***iii. Finding that there was constructive fraud yet the same was never pleaded by the 1st respondent.***

***iv. Directing the appellant to file audited accounts of rent collected from the suit property which had not been sought by the 1st respondent.***

***v. Finding that the appellant had not done due diligence prior to purchasing the suit property.***

***vi. Holding that the doctrine of lis pendens applied to the appellant.***

***vii. Directing the Land Registrar to cancel the appellant's certificate of title.***

10. The 1st and 2nd respondents also filed a cross appeal on grounds that the learned Judge erred in–

***i. Determining the 3rd respondent lacked capacity to file the suit for the recovery of the debt.***

***ii. Failing to appreciate the settled principle that a party is bound by its pleadings and issues which can be determined by a Court are those brought out in the pleadings.***

***iii. Failing to appreciate that the issue of the 3rd respondent's locus standi was res judicata.***

***iv. Failing to appreciate that in light of the judgment in the suit for recovery of the debt the 1st respondent was estopped from challenging any issue regarding the sums found to be due thereunder and the interest rate applied therein.***

***v. Holding that the court's decision in the suit for recovery of the debt was a nullity which was tantamount to sitting on an appeal against a decision of a court of concurrent jurisdiction.***

***vi. Finding that the 3rd respondent was out to curtail the 1st respondent's equity of redemption by concealing its lack of locus standi.***

***vii. Finding that the sale to the appellant was a nullity.***

***viii. Finding that there was collusion between the appellant and the 2nd and 3rd respondents.***

***ix. Finding that at the time the suit property was sold a stay of execution granted on 5th April, 2004 in the suit for recovery of the debt was still in force.***

***x. Finding that the applicable interest rate was 25% thereby disregarding the terms of the first mortgage.***

***xi. Suspending the period between the commencement of the suit for recovery of debt and the date of delivery of the judgment therein in computing the outstanding loan amount.***

***xii. Failing to appreciate that under Section 69B (2) of the Indian Transfer of Property Act (ITPA) the sale of the suit property to the appellant was impeachable and the only remedy available to the 1st respondent lay in damages.***

11. In opposing the appeal and cross appeal, the 1st respondent filed grounds affirming the impugned decision under ***Rule 94*** of the ***Court of Appeal Rules***. The grounds include: -

***i. The doctrine of res judicata did not apply in the 1st respondent's case.***

***ii. The 3rd respondent lacked legal capacity to institute the suit for recovery of the debt under the first mortgage.***

***iii. The sale of the suit property was a nullity because the statutory notice had not been issued and the two mortgages registered against the suit property weren't severable.***

***iv. The issue of constructive fraud and misrepresentation of material facts were pleaded.***

***v. The appellant was not an innocent purchaser for value without notice of any defect in title since its director connived with the 2nd and 3rd respondents in the sale of the suit property.***

***vi. The remedy available to the 1st respondent could not be limited to damages as to do so would have caused grave injustice to the 1st respondent.***

12. Mr. Kaburu, learned counsel for the appellant, faulted the learned Judge for holding that the appellant was not an innocent purchaser simply because he was not satisfied with the account given of how it learnt of the sale of the suit property. It was clear that the suit property had been advertised for sale by posters affixed on the said premises. Arguing that the learned Judge had no basis for determining issues not raised by the pleadings we were referred to this Court's decision in ***Dakianga Distributors (K) Ltd. vs. Kenya Seed Company [2015] eKLR*** wherein the Court adopted with approval the sentiments of the Supreme Court of Malawi in ***Malawi Railways Limited vs. Nyasulu [1998] MWSC 3*** thus,

***"It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice."***

Setting out the unpleaded issues, it was submitted that the issues of constructive fraud and rendering of accounts of rent collected had not been pleaded.

13. As far as the appellant was concerned, it had conducted due diligence on its part by establishing that the first mortgage which empowered the 2nd and 3rd respondent to exercise statutory power of sale had been registered against the suit property. To require the appellant to inquire from the Central Bank of Kenya whether the 3rd respondent existed, as suggested by the 1st respondent, went beyond what was required of the appellant. Mr. Kaburu added that the learned Judge failed to appreciate that the 1st respondent as well as his witness, Sulubu Ngala Mwagandi (PW3) admitted that the appellant had carried out some developments on the suit property. Further, the learned Judge ignored the fact that the 1st respondent had stopped paying rates for the suit property which were settled by the appellant.

14. The appellant contended that doctrine of *lis pendens* was not applicable against it. Based on this Court's decision in ***Nancy Kahoya Amadiva vs. Expert Credit Limited & another [2015] eKLR*** where the Court expressed that-

***"We find it necessary to consider the remedies available for sale arising out of 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 the RLA and ITPA"***

It was argued that the only remedy available to the 1st respondent in the circumstances was damages.

15. On the cross appeal, the 2nd and 3rd respondents urged that the merger of the 3rd respondent and Giro Bank Limited did not take away the 3rd respondent's locus to institute the suit for recovery of the debt. In support of that line of argument, the respondents cited the provisions of ***Section 9*** of the ***Banking Act*** prior to its amendment by ***Section 95*** of the ***Finance Act No. 9 of 2000*** on 15th June, 2000. As per the respondents, prior to the amendment of that section it was not possible for any instrument that was in force prior to the amalgamation to be enforced by the amalgamated institution. It remained open for the transferor, in this case the 3rd respondent, to enforce it. The suit for recovery of the debt was instituted in February, 2000 before the aforementioned amendment. Nonetheless, the 2nd and 3rd respondents' witness gave uncontroverted evidence that despite the merger the 3rd respondent continued to exist as a company. It was instructive to note that the 1st respondent ought to have raised an objection against the 3rd respondent's standing in the suit for recovery of the debt which he never did. Consequently, the issue of the 3rd respondent's standing was ***res judicata*** even though it was not raised in the suit for recovery of the debt. Towards that end, the respondents relied in the persuasive decision of the High Court in ***Anders Bruel t/a Queenscross Aviation vs. Nyambura Musyimi & 2 others [2014] eKLR*** wherein the court held,

***"The phrase 'directly and substantially in issue' encompasses all matters which ought to have been pleaded in the decided case but were never pleaded."***

16. Making reference to the case of ***Joseph Ndirangu t/a Mooreland Mercantile Co. & Another vs. City Council of Nairobi [2015] eKLR*** the 1st and 2nd respondents contended that the learned Judge had no jurisdiction to hold that the suit for recovery of the debt was a nullity. In the cited case this Court in its own words held,

***"We reiterate this Court's findings in the Stephen Mwaura Njuguna case (supra) that a Judge has no jurisdiction to re-hear and interfere with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction. If the respondent was aggrieved by the ruling and preliminary decree, its recourse was in appealing against the same."***

17. Like the appellant, the 2nd and 3rd respondents criticized the learned Judge for finding constructive fraud on their part yet the issue was never pleaded by the 1st respondent. Submitting on the validity of the sale of the suit property, the 2nd and 3rd respondents maintained that the requisite statutory notice was issued by its advocates, Messrs Murgor & Murgor Advocates vide a letter dated 12th September, 1996.

Relying on this Court's decision in ***Mbuthia vs. Jimba Credit Finance Corporation [1986-1989] EA 340***, it was argued that there was no need to issue a new notice prior to selling the suit property to the appellant since the earlier one sufficed. Besides, the suit property was sold to the appellant at a reasonable price taking into account that valuation of the property by Burn & Fawcett indicated the market value as Kshs.2,400,000 and the forced sale value as Kshs.1,600,000.

18. In the 2nd and 3rd respondents' opinion there was nothing hindering them from exercising their statutory power of sale in the manner they did. Once the 1st respondent failed to comply with the condition of depositing Kshs.1,000,000 for setting aside the judgment in the suit for recovery of the debt, the judgment in question was reinstated and as such they were at liberty to sell the suit property.

19. The 2nd and 3rd respondents posited that the doctrine of *lis pendens* was inapplicable in this case. This is because the doctrine applies where a right to immovable property is directly and specifically in issue as demonstrated in the case of ***Anthony Muthumbi Wachira & Another vs. Housing Finance Company of Kenya [2015] eKLR***. The 1st respondent's right to property was not in issue in the suit for recovery of the debt.

20. On the issue of the rate of interest, we understood the 2nd and 3rd respondents' position to be that it is based on a contractual agreement between the parties and a court ought not to interfere with the same. The learned Judge in holding that the applicable interest rate was 25% went against the well established legal principle that a court should not re-write the terms of a contract. Finally, it was urged that where sale of a property in exercise of statutory power of sale is irregular, the remedy lies in damages. ~~M~~ The measure of damages would be the difference between the market price of the property and the price at which the property was sold.

21. Mr. Kimani, learned counsel for the 1st respondent, in supporting the learned Judge's finding that the appellant was not an innocent purchaser claimed that the appellant never shed light on how it came to learn of the sale of the suit property. From the circumstances of the case it was clear that the appellant had inside information regarding the said sale. The 1st respondent went on to argue that the appellant had admitted that it had~~n't~~ not performed due diligence by carrying out a search at the lands office. If it did, the appellant would have learnt that 2nd respondent had not advanced any money to the 2nd respondent and therefore the statutory power of sale had not accrued to it. The 1st respondent went as far as suggesting that where a party engages a chargee to purchase property through private treaty such party bears a heavier duty to establish that indeed the chargee has requisite power to sell the property.

22. The 1st respondent also took issue with the offer made by the appellant of purchasing the suit property at Kshs.1,900,000 without carrying out valuation of the property which offer was accepted by the 2nd and 3rd respondents. The foregoing conduct coupled with the 3rd respondent's non- disclosure of its lack of locus to institute the suit for recovery of the debt inferred fraud on the part of the appellant and the 2nd and 3rd respondents.

23. According to the 1st respondent, there was no evidence supporting the allegations by the appellant that it had carried out extensive developments on the suit property. Moreover, there was nothing sinister in the learned Judge directing the appellant to file audited accounts of the rent it had collected which would help in resolving the dispute before him.

24. The 1st respondent further contended that damages would ideally be adequate remedy where the sale was through a valid charge. In the case at hand, the mortgage was not valid because the letter of offer in respect of the loan subject of the mortgage is dated 14th June, 1995 while the mortgage is dated 6th June, 1995.

25. In opposing the cross appeal, the 1st respondent submitted that everything done by the 3rd respondent after it merged with Giro Bank Limited was illegal since it ceased to exist. Furthermore, the issue of its standing was not *res judicata* because in the suit for recovery of the debt the 3rd respondent litigated as a creditor banking company while in the case at hand it litigated as a limited liability company. Therefore, the 3rd respondent did not litigate under the same title in the two suits. To hold otherwise would be tantamount to sanctioning the 3rd respondent's deception.

26. In brief rejoinder, Mrs. Mwangi, learned counsel for the 2nd and 3rd respondents submitted that issue of the validity of the mortgage document was being raised for the first time by the 1st respondent in the appeal before us.

27. We have considered the record, the submissions by learned counsel and the law. This being a first appeal, our primary role as a first appellate court is to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. We are also cautious of the fact that we never saw nor heard the witnesses like the trial court. See ***Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212***.In our view, the appeal turns on whether the sale of the suit property to the appellant was a nullity and if so, whether such sale could be set aside.

28. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. This position was restated by this Court in ***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR*** -

> ***"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."***

Nevertheless, a court may base a decision on an unpleaded issue where it appears at the trial that the issue has been left to the court for decision. In the case of ***Odd Jobs vs. Mubia [1970] EA 476***. Law, J.A (as he then was), at page 478 paragraph 9-11 had this to say:-

> ***"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this Court is not as strict as appears to be that of Courts in India. In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision..."***

29. Our perusal of the record reveals that the issues of fraud and rendering of accounts of rent collected from the suit property were neither pleaded by any of the parties nor did they arise for the court's determination. Moreover, as previously held by this Court , in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts. In ***Vijay Morjaria vs. 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. <u>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.</u>" Emphasis added.***

It is our finding therefore that the learned Judge erred in considering and determining these issues.

30. The essence of the doctrine of *res judicata* was aptly set out by this Court in ***William Koross vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR-***

> ***"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***
>
> ***...***
>
> ***The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.***

See also ***Ngugi vs. Kinyanjui & 3 Others [1989] KLR 146***.

31. Therefore, for the bar of *res judicata* to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

> ***a. The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b. That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c. Those parties were litigating under the same title.***
>
> ***d. The issue was heard and finally determined in the former suit.***
>
> ***e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***

See ***Section 7*** of the ***Civil Procedure Act*** and this Court's decision in ***Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR***.

32. To us, the issue of whether the interest rate applied by the 3rd respondent was unconscionable as raised in the 1st respondent's suit was directly and substantially in issue in the suit for recovery of the debt which was filed first in time. By its judgment dated 28 th January, 2004 the trial court in the suit for recovery of the debt expressed itself as herein under: -

> ***"The interest rate set out initially was 25% but there was a clause reserving the Bank's right or discretion to vary the rate…"***

Similarly, the amount owing under the mortgage executed in favour of the 3rd respondent was directly and substantially in issue in the suit for recovery of the debt wherein the trial court made a determination on the same by entering judgment against the 1 st respondent in the sum of Kshs.6,070,398.96 as at 31st December, 1999 and interest thereon at 30% per annum from 31st December, 1999 until payment in full. It is also worth noting that in both suits the 3rd respondent was litigating as a mortgagee and the 1st respondent as a mortgagor. Accordingly, the issues of the applicable interest rate and the amount owing under the first mortgage were *res judicata* and the learned Judge had no business entertaining the same in the subsequent suit challenging the sale of the suit property. In ***Zurich Insurance Company PLC vs. Collin Richard***

***Hayward [2011] EWCA CIV 641*** the court held:

> ***"Estoppel by res judicata or estoppel by record, is a manifestation of the principle that judicial decisions once made must be accepted as final and are not open to challenge. Ultimately, it rests on a rule of policy that it is in the public interest for there to be finality in litigation, but it also sustains an important principle that decisions of competent tribunals must be accepted as providing stable basis for future conduct. The latin word 'res judicata' means simply 'a thing judicially determined.' They may apply to the claim as a whole (usually referred to as 'cause of action estoppel', or may refer to one or more specific issues which the court was required to decide in the course of reaching its decision on a matter before it (what is generally referred to as issue estoppel… the fact than an order is made by consent does not in my view prevent it from giving rise to estoppel by record provided the nature of the order is such that it would otherwise have that effect." Emphasis added.***

Further, Lawson, J in ***Regina vs. Hogan, [1974] 1Q.B 398*** at 401 in his own words articulated that-

> ***"Issue estoppel can be said to exist when there is a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arises in a later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between the same parties. It can also be described as a situation when, between the same parties to current litigation, there has been an issue or issues distinctly raised and found in earlier litigation between the same parties". Emphasis added.***

33. As to the issue of *locus standi* of the 3rd respondent in the suit for recovery of the debt, we agree with the 2nd and 3rd respondents that it ought to have been raised in the said suit. It could not be raised as it was in the subsequent suit challenging the sale of the suit property. In holding that the same could be raised in the subsequent suit, the learned Judge failed to appreciate one of the fundamental tenets of the doctrine as espoused by wigram VC in ***Henderson vs. Henderson [1843] Hare 100, 115*** that-

> ***"The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

34. To the extent that the learned Judge made a determination on the 3rd respondent's standing in the suit for recovery of the debt and declared the suit a nullity, the learned Judge re-heard and interfered with a decision in a matter that was decided by a fellow Judge of concurrent jurisdiction which had not been appealed against. This was clearly outside the ambit of the learned Judge's jurisdiction. See ***Joseph Ndirangu t/a Mooreland Mercantile Co. & Another vs. City Council of Nairobi (supra).***

35. From the sum total of the material before us, unlike the learned Judge, we are unable to discern any impropriety let alone knowledge of any illegality by the appellant with respect to the exercise of the statutory power of sale. We also find that the doctrine of *lis pendens* which prohibits a party to a suit from transferring the suit premises to a third party while the suit, in respect of the suit premises is pending was not applicable in the circumstances of this case. We say so because by the time the suit property was sold by private treaty to the appellant on 11th July, 2005 there was no suit pending with regard to the suit premises. In ***Mawji vs. US International University & another [1976] KLR 185***, Madan, J.A. stated thus:-

> ***"The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other…"***

36. We reiterate that the judgment dated 28th January, 2004 in the suit for recovery of the debt was reinstated after the 1st respondent failed to comply with the condition of depositing Kshs.1,000,000. Further, contrary to the 1st respondent's contention there were no orders staying the execution of the said judgment. In a nutshell, we find that the appellant was an innocent purchaser for value without notice.

37. As rightly observed by the learned Judge, the 2nd and 3rd respondents had not issued a statutory notice for the requisite period of 90 days prior to exercising their statutory power of sale as stipulated under ***Section 69A*** of the ***Indian Transfer of Property Act*** (ITPA) now repealed but instead issued a notice of 14 days. Still that by itself in view of ***Section 69B (2)(b)*** of the ITPA could not impeach the appellant's title which we found herein above was properly obtained. In ***Lord Waring vs. London and Manchester Co. Ltd. [1935] Ch 310*** at 318 Crossman J. said of the purpose of ***Section 104 (2) of Transfer of Property Act, 1925*** of England which as we have already observed is *in pari materia* to the entire ***Section 69B (2)*** of ***ITPA, that***:

> ***"Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course if the purchaser becomes aware, during that period of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance".***

38. Finally, on allegations of the validity of the first mortgage document, we find that a party to such a document cannot challenge its validity having received benefits thereunder. In ***Mwaniki wa Ndegwa vs. National Bank of Kenya Ltd & Another [2016] eKLR*** this Court approved the High Court sentiments in ***Noorbegum Fazal (suing as a holder of power of attorney in favour of Nadra Hussein Fazal) vs. Diamond Trust Bank [2015] eKLR*** thus,

***"The court thus found itself in agreement with the Defendant that the new assertion of the invalidity of the Charges was merely an afterthought as the Plaintiff ought to have demonstrated that she had raised the issue previously or at all the material times she had sought to stop the sale of the subject property by way of public auction.***

***Alleging that the Chargor was not present at the time the Charges were executed was not enough particularly after the Borrower had enjoyed the benefit of the financial accommodation that was accorded to her by the Defendant. If indeed, the Charges were not validly executed, the Borrower ought not to have taken the loan, which has been outstanding since 2009. Abetting an illegality would not confer any benefit or defence upon a person who would want to avoid the consequences of his default.***

***Indeed, the onus was on the Borrower to demonstrate that the Chargor could not have been present at the time the said Charges were being executed. Her acquiescence of the alleged illegality, if at all the same was true, amounted to a waiver to object and for which the court could not be persuaded to grant an injunction on this ground."***

39. The upshot of the foregoing is that both the appeal and cross appeal succeed. We hereby set aside the judgment of the High Court dated 30th June, 2016 and substitute therefor an order dismissing the 1st respondent suit with costs. The appellant and the 2nd and 3rd respondents shall have costs of the appeal and cross appeal respectively.

***Dated and delivered at Mombasa this 8th day of February, 2018.***

***P.N WAKI***

**…….**

***JUDGE OF APPEAL***

***W. KARANJA***

**……**

***JUDGE OF APPEAL***

***M.K.KOOME***

**……**

***JUDGE OF APPEAL***

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**