IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, MARAGA, OKWENGU, JJ.A.)

CIVIL APPEAL NO. 274 OF 2003

BETWEEN

KENYA NATIONAL CAPITAL CORPORATION LTD…….....….APPELLANT

AND

ALBERT MARIO CORDEIRO.....…….....…….....….1ST RESPONDENT

CYPERR ENTERPRISES LIMITED (In Receivership) through the Official Receiver,

Deloitte & Touche, Certified Public Accountants.....2ND RESPONDENT

An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J.) dated 16th October, 2000

in

H. C. C. C. No. 2430 of 1996)

****

JUDGMENT OF VISRAM, J.A.

The Appellant, **Kenya National Capital Corporation Limited,** is aggrieved by the judgment of the High Court (Ang'awa, J) dated 16th October, 2000 wherein specific performance was ordered in favour of the 1st respondent, Albert Mario Cordeiro. The court further made orders as to costs against the appellant.

A brief summary of the facts is as follows. Sometime in March, 1993, or thereabouts, the 1st respondent offered to purchase 4 housing units ("the suit property"), at an agreed sum of Kshs 2,160,000/= from the 2nd respondent. The 1st respondent bought the housing units from Optimax Associates, the agents acting on behalf of the 2nd respondent in respect of the project. The 1st respondent made the said purchase vide bankers cheque no. 360418. A receipt was subsequently issued to the 1st respondent by Optimax Associates.

At the time of filing the suit at the High Court, Optimax Associates had been enjoined in the suit as the defendant but was struck out from the suit on grounds that it was not a limited company.

The housing units were part of a development project being undertaken by the 2nd respondent, Cyperr Enterprises Ltd (under receivership) and which was financed by the appellant to the tune of Kshs 130,000,000/=. Subsequently, the appellant caused a charge to be created in its favour in respect of LR No. 15347. The charge was later varied so as to facilitate individual titles for each unit. The said sum of Kshs 130,000,000/= was also secured by a debenture dated 15th May, 1992. This effectively made the appellant a secured creditor.

However, the 2nd respondent defaulted in repaying the loan advanced by the appellant and was not able to complete the housing project. Consequently, and at the behest of the appellant, the 2nd respondent was placed under receivership. This was done after the statutory notices of sale under section 74 of the Registered Lands Act had been served on the 2nd respondent.

However, upon realization that the individual housing units were incomplete and would hence attract low bids, the appellant opted not to exercise its statutory right of sale. Instead, it placed the 2nd respondent under receivership, whereupon the appointed receiver took over the sale of the housing units. The proceeds collected from the sales were utilized in offsetting the loan amount owed by the 2nd respondent.

Subsequently, other agents were appointed by the appellant to take over the sale of the housing units. The new housing agents did not recognize the 1st respondent as one of the purchasers since they had not received any money from him.

It was the appellant's contention that the 1st respondent lacked *locus standi* to institute a suit against it as it did not have any contractual relationship with it. The appellant further contended that the 1st respondent was not entitled to the remedy of specific performance as he was not among the purchasers of the property; that neither the appellant nor its agents had received any deposit from him. The appellant therefore argued that it had no contractual relationship with the 1st respondent.

The High Court having considered the arguments and evidence presented before it, found that the appellant in appointing a receiver, became involved in the affairs of the 2nd respondent and as such, liable to the 1st respondent, and ordered specific performance in favour of the 1st respondent.

There are 15 grounds of appeal. However, Mr. C. O. Rachuonyo, learned counsel for the appellant, argued grounds 2, 3, 7 and 11, centered mainly on the fact that no contractual relationship existed between the appellant and the 1st respondent and to that end, the learned Judge erred in ordering specific performance on a non-existent contractual relationship.

On the other hand, Mr. E. N. Mwangi, learned counsel for the 1st respondent, argued that the appellant was aware of the erstwhile arrangement constituting the agreement between the 1st respondent and the 2nd respondent and in fact is liable in equity to the 1st respondent who had already paid for the four housing units. It is also worth mentioning that at the hearing of the appeal, the 1st respondent was allowed to tender additional evidence which constituted minutes of a meeting held on 24th March, 1994 and which showed that the 1st respondent was on the list of purchasers of the housing units.

There are essentially four issues before us:

i. Was there a contract between the appellant and the 1st respondent?

ii. Was the 1st respondent entitled to specific performance against the respondent?

iii. What were the consequences of the 2nd respondent being placed under receivership?

iv. Whether the 1st respondent has proprietary estoppel on the suit property against the appellant?

I will now proceed to explore the four issues:

(1) Was there a contract between the appellant and the 1st respondent?

The main contention between the parties herein revolves around the existence of a contract. I shall therefore consider texts and authorities that have sought to lay down the principles governing the existence (or lack thereof) of a contract.

The learned authors, **Chesire, Fifoot and Formstons, the Law of Contract, (14th Edition)** at pages **34** and **35** have authored that:

> ***"The first task of the plaintiff is to prove the presence of a definite offer made....Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer".***

It is not in contention that the offer to purchase the houses in question was made by the 1st respondent to the 2nd respondent who subsequently accepted the offer thereby resulting in a contract between the two parties. Subsequently, the contract was binding between the two parties, that is, the 1st respondent and the 2nd respondent. Further, no evidence was tendered during the hearing at the High Court or through arguments before this Court as to the existence of any contract between the 1st respondent and the appellant, nor to the fact that the 2nd respondent acted as the agent of the appellant.

The 1st respondent contends that the appellant was "aware" of the funds paid to the 2nd respondent. It is my considered view that the appellant's knowledge of the existence of the contract between the 1st respondent and the 2nd respondent does not in effect make it party to the same.

I therefore find that there was no contract between the appellant and the 1st respondent.

Having established that the contract to purchase the houses in question existed between the 1st respondent and the 2nd respondent, the next question for determination is whether the same was binding on the appellant.

In ***Agriculture Finance Corporation vs. Lengetia Ltd, (1985) KLR at 770,*** the Court of Appeal held that:

> ***"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. There existed no direct contract between the first respondent and the appellant, and so the first respondent had no cause of action against the appellant".***

In this instant case, the contract was directly between the 1st respondent and the 2nd respondent hence the appellant was a stranger to the same. There being no direct contract between the appellant and the 1st respondent herein, I do find that the appellant is not bound by the contract between the 1st respondent and the 2nd respondent; hence the 1st respondent had no cause of action against the appellant.

Further, in ***Kenindia Assurance Co. Ltd vs. Otiende, (KLR) at 38***, the learned Judges held that:

> ***"In this instant case, the contract of Insurance was between the appellant insurance company and the insured. Therefore, the plaintiff in this case was out of court ab initio".***

One of the arguments advanced by the appellant initially was that, the 1st respondent lacked *locus standi* to sue the appellant. Following the holding in the ***Kenindia case*** and having held as above that the 1st respondent lacked a cause of action against the appellant, I further hold that the 1st respondent lacked *locus standi* to sue the appellant in the first place. Hence any claim by the 1st respondent against the appellant is incompetent and cannot be sustained.

I now move to explore the second issue.

(2) Was the 1st respondent entitled to specific performance against the appellant?

As noted hereinabove, the High Court issued an order of specific performance against the appellant. It would be appropriate therefore that I explore the justification (or lack thereof) of issuing the same. In the case of ***Masha vs. Tol Ltd (2003) 2 EA 593***, it was held, that:

> ***"Specific performance is a discretionary remedy, which compels a party in breach to perform its contractual obligations.This of necessity means that there must be a concluded contract between the disputants".***

As I have held above, there was no contractual relationship between the appellant and the 1st respondent, hence specific performance cannot issue. Therefore, the learned Judge erred in ordering specific performance against the appellant.

It is worth mentioning that counsel for the 1st respondent sought to rely on the case of ***Benson Ngugi Muiruri vs. Kenya National Capital Corporation Ltd.*** However the ***Benson case*** should be distinguished from the one herein as the two are entirely different, the main point of departure being, that, there existed a valid contract between the parties in the ***Benson case***, but not so in the case before me.

Having determined the two issues above, I now turn to the third issue for determination.

(3) What was the consequence of placing the 2nd respondent on receivership?

It is not in contention that the 2nd respondent was placed under receivership at the behest of the appellant. This was done on the basis of the appellant being a debenture holder. In the case of ***JK Industries vs. Kenya Commercial Bank Ltd & Another, Nairobi Civil Appeal No. 130 of 1987,*** the court stated that:

> ***"Where a debenture holder's right to appoint a receiver to manage a company's affairs accrues, it is a matter for the judgment of business of courts. Indeed, the courts have held that a debenture holder is under no duty to refrain from exercising its rights because doing so might cause loss to the company or its unsecured creditors".***

Further, ***section 74 (2) (a)*** of the Registered Lands Act (now repealed) gave the debenture holder liberty to "***appoint a receiver of the income of the charged property.....".*** Therefore, I cannot fault the appellant in acting the way it did and subsequently, its option to place the 2nd respondent under receivership as opposed to it exercising its right of sale under ***section 74 (2)*** of the Registered Lands Act was well within its rights. I am also guided by the case of ***SAA Technical (Property) Limited vs. Air Kenya Aviation Limited (2006) 2 EA 317***, where the learned Judges stated that:

> ***"Upon appointment of a receiver, the floating charge crystallizes and upon crystallization, the power of the company to deal with the property are paralyzed.The said powers are then delegated to the receiver.....by virtue of holding a debenture, the***

person who appointed the receiver held a right which made him a secured creditor. He therefore ranked in priority over any other person who were unsecured creditors".

In this instant case, the appellant by virtue of being a debenture holder ranked in priority to all the other creditors claiming against the 2nd respondent, and this included the 1st respondent. At page 322, Ochieng, J stated that:

"Although, I do sympathize with the plaintiff's position, the law deprives this court of the authority to remove the defendant's property from the custody of the receiver appointed by the debenture holder".

Subsequently, and in light of the privileged position of a secured creditor, this Court cannot interfere with the suit property by upholding the decision to grant specific performance against the appellant in favour of the 1st respondent, an unsecured creditor in this case.

I now move to explore the consequences of the said receivership especially in light of the contract between the 1st respondent and the 2nd respondent.

Pennington's Company Law, (4th Edition) at page 459 states that:

"the appointment of a receiver, either by the court or out of the court does not affect the validity of contracts which the company has previously entered into, and the other contracting parties can enforce such contracts against the company subject, of course, to the interests of the debenture holders in specific assets of the company".

In the case herein, the 1st respondent cannot seek to enforce his erstwhile agreement/contract with the 2nd respondent against the appellant.

Finally, the fourth issue.

(4) Whether the 1st respondent has proprietary estoppel on the suit property against the appellant?

The learned counsel for the 1st respondent presented arguments and authorities based on the equitable principle of estoppel. In particular, the 1st respondent relied on the case of ***Chase International Investment Corporation and Another vs. Laxman Keshra and others*** ***(1976-1980) 1 KLR 891***, where proprietary estoppel arose in favour of Laxman, which had built lodges at its own expense for Chase Investment Company. This had been done upon a promise by Oliver, one of the directors of Chase, that the work would be paid for. The court found that it would be unconscionable for Laxman to be without a remedy.

A distinction must however be drawn between the ***Chase case*** and the instant case since the Chase Corporation had through its directors directly engaged Laxman and promised that the construction work would be paid for. Subsequently, Laxman had acted on the basis of that promise by going ahead to complete the lodges.

It is possible to trace proprietary estoppel right back to the 17th century and for many years, there have been many attempts to lay down a definitive test for it. The case of ***Taylors Fashions Ltd vs. Liverpool Victoria Trustees Co. Ltd*** ***(1982) QB 133, 151H-152A,*** per Oliver J shows that, in determining whether or not proprietary estoppel operates in a case, the court will look for three elements:

(i) A believed that he had or was going to have a right in or over B's property;

(ii) B created or encouraged the belief; and

(iii) A acted in reliance of the belief.

In the instant case, I have held that there was no contractual relationship *ab initio* between the appellant and the 1st respondent, and the appellant did absolutely nothing either by conduct or through representation, to give rise to an estoppel.

Accordingly, and for reasons outlined, I would allow this appeal; set aside the judgment and decree of the High Court dated 16th October, 2000; and dismiss the 1st respondent's suit filed in the High Court with costs to the appellant. The appellant shall also have the costs of this appeal. As Okwengu, JA also agrees, those shall be the orders of this Court. Orders accordingly.

Dated and delivered at Nairobi this 27th day of February, 2014.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF MARAGA, JA.

ii. This is an appeal from the judgment of Ang'awa, J delivered on 16th October, 2000 in Nairobi HCCC No. 2430 of 1996 in which the learned Judge granted an order of specific performance in favour of the 1st Respondent, Albert Mario Cordeiro against the Appellant.

iii. The facts of the case were that sometimes in March, 1993, the Appellant advanced a loan of KShs. 130 million to Cyperr Enterprises Ltd, (the 2nd Respondent) to develop housing units on L.R. No. 15347 Nairobi for sale. As security for that loan, the 2nd Respondent charged the said piece of land to the Appellant and executed a debenture dated 15th May, 1992 over its assets. The charge was later varied so as to facilitate individual titles for each unit I suppose for sale to third parties.

iv. The 2nd Respondent engaged a firm by the name Optimax Associates (the Agents) as its agents to sell the units under development to third parties. Sometimes in March 1993, the Agents, on behalf of the 2nd Respondent, sold 4 of those housing units (the 4 units) to the 1st Respondent at the price of Kshs.2,160,000/= for all of them. The 1st Respondent paid, vide bankers cheque no. 360418, that sum in full to the Agents who duly acknowledged receipt.

v. Upon the 2nd Respondent's default in the loan repayment, the Appellant served on it a statutory notice under **Section 74** of the **Registered Land Act**[1] **(**now repealed) which was in operation at that time, demanding the immediate repayment of the outstanding loan. Instead of selling the charged property as a whole, apparently because it realized that would not have fetched the outstanding loan, the Appellant, pursuant to the debenture the 2nd Respondent had executed and the provisions of the charge, placed the 2nd Respondent under receivership and appointed Isaiah Mworia Magambo and James Irungu Mwangi as receivers (the receivers). The receivers in turn

appointed new agents to sell the units. The new agents refused to recognize the 1st Respondent as one of the purchasers whereupon the 1st Respondent filed a suit against the Appellant, the 2nd Respondent and Optimax Associates (the Agents). The Agents were later struck out of the suit on ground that they were not a limited company.

vi. After hearing the case, Angawa, J held the Appellant liable and ordered specific performance in favor of the 1st Respondent against the Appellant. This appeal is against that decision.

vii. Presenting the appeal before us, Mr. Rachuonyo, learned counsel for the Appellant, in a nutshell, contended that as there was no contractual relations between the appellant and the 1st Respondent and as neither the Appellant nor its agents had received any money from the 1st Respondent, the learned trial Judge erred in ordering specific performance against the Appellant.

viii. On his part Mr. Mwangi, learned counsel for the 1st Respondent, referred us to the minutes of a meeting held on 24th March, 1994 between officers of the Appellant and its advocate and those of the 2nd Respondent and its advocate at which the 1st Respondent was recognized as one of purchasers of the 4 units, and submitted that the appellant was clearly aware of the agreement between the 1st Respondent and the 2nd Respondent. He further argued that the Appellant was therefore liable to complete the sale of the 4 units to the 1st Respondent. In the circumstances, counsel concluded, Angawa J cannot be faulted for ordering specific performance against the Appellant. He therefore urged us to dismiss this appeal with costs.

ix. Since the decision of the predecessor of this Court in **Selle & Another v. Associated Motor Boat Co. Ltd & Others**[2] which has been followed in several subsequent cases including **Mwanasokoni v. Kenya Bus Services Ltd,**[3] the principle upon which the first appellate court acts are well settled. It is not bound by the conclusions of the trial court. Save that it will not rehear the case, it has to assume the role of the trial court, reconsider and re-evaluate the evidence on record itself and draw its own conclusions. Bearing in mind the fact it has neither seen nor heard the witnesses testify, it should be slow in interfering with the trial court's finding of fact unless it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding.

x. With these principles in mind, I have read the record and supplementary record of appeal and considered the rival submissions made by learned counsel for the parties. The substratum of the Appellant's case is that there having been no contractual relationship between the Appellant and the 1st Respondent, the learned trial judge had no basis of ordering specific performance of a contract between the 2nd Respondent and the 1st Respondent against the Appellant. According to the appellant therefore the entire appeal revolves around the principle of privity of contract. The 1st Respondent on the other hand contends that the appellant, having recognized him as one of the purchasers, it should not be allowed to go back on its word.

xi. Principally these are the two points upon which the parties in this matter addressed us. There is, however, a third point which arises in the matter, which the parties did not address us on, but being a legal point, this Court, in my view, has to consider. It is the exercise of the Appellant's powers to appoint a receiver and to sell the charged property.

xii. It is trite that the doctrine of privity of contract is a long-established part of the law of contract. Save for the exceptions brought in by recent reforms of the law in this area which allow third parties for whose benefit the contract is made to enforce it, the essence of the privity rule is that only the people who actually negotiated a contract, and are thus privy to it, are entitled to enforce its terms. That is to say only the parties to a contract have enforceable rights and obligations under it. A third party to the contract cannot enforce any of its terms nor have any burdens from that contract enforced on them. That is the law on the doctrine as I understand it and the Hon. Justice Visram has, in his judgment, given a splendid exposition of it.

xiii. In this matter, there is admittedly no privity of contract between the Appellant and the 1st Respondent. In my respective view, however, as I have pointed out, in the peculiar facts of this case, we should not restrict our decision to that doctrine alone. As I have stated in paragraph 4 above, upon the 2nd Respondent's default in the loan repayment, the Appellant served it with a statutory notice under Section 74 of the Registered Land Act, demanding the immediate repayment of the outstanding loan. Instead of selling the charged property as a whole, apparently because it realized that the sale of the charged property as a whole would not fetch the outstanding

loan, the Appellant placed the 2nd Respondent under receivership and appointed receivers. The receivers in turn appointed new agents who sold the individual units. In my respective view, the determining factor in this appeal is the legal effect of the Appellant's combined action of placing the 2nd Respondent under receivership and selling the charged property. In other words we need to consider whether or not the Appellant, as chargee, was legally entitled to simultaneously appoint receivers and sell the charged property and if so, how it should have proceeded.

xiv. Prior to the appointment of receivers, the Appellant had, on 24th March 1994, held a meeting with the 2nd Respondent at which it had recognized the 1st Respondents as one of the bona fide purchasers from the 2nd Respondent of the 4 units on the project. The minutes of that meeting which were produced as additional evidence in this appeal provided as follows:

> ***"Minutes of the 3rd Meeting of the Implementation Committee on Cyper Enterprises Ltd. Project-Saika Estate, held in KENYAC's Boardroom on Thursday 24th March, 1994 at 2.30 pm***
>
> ***Present:***
>
> ***Mr. L. Muthoga - Muthoga Gaturu & Co. Advocates (Developers Lawyers)***
>
> ***Mr. S. Kibunja -Kibunja & Mwiti Advocates (KENYAC's Lawyers)***
>
> ***Mr. I. M. Mworia -Chief Accountant- KENYAC (Chairing)***
>
> ***Mr. S. Jirongo -Cyperr Enterprises Ltd. (Developers)***
>
> ***Mrs. N. Musiyimi -Company Secretary- KENYAC***
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> **….....**
>
> **….....**
>
> ***Sales:***
>
> ***(a).....***
>
> ***(b) The only buyers who will purchase the houses at the old prices are the twenty two (22) buyers who have already processed their loans with HFCK, the KENYAC staff, Mrs Beatrice Moraa and Mr. Coldeiro who has purchased four bungalows at the price of Shs. 550,000/= each. (Emphasis Mine)***
>
> ***Annexed List of twenty two (22) Applicants as at 10/03/1994 shows File Numbers 1,4,5,6 to have been bought by Albert Mario Cordeirio who Deposited Shs. 2,160,000/=."*** (*Emphasis Mine).*

xv. As I have pointed out, soon after they were appointed, the receivers in turn appointed agents to sell the housing units on the charged property. The property having been registered under the registered Land Act which was in operation then, the receivers were duty bound to comply with the provisions of that Act. In this regard they were bound to comply with **Section 74** of that Act. The relevant part of the Section reads:-

> **"74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.**

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

***Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.*"** (Emphasis Mine)

15. It is clear from this provision that for a chargee to sell the charged property after having appointed a receiver, the chargee must give a further notice of three months. This position was reiterated in the case of **Munga Concrete Works Limited v. Industrial Development Bank Limited**[4].

16. In this case there is no evidence that the receivers issued any further notice as required by the above provision. They nonetheless went ahead and sold the individual units, and to make matters worse, by private treaty without any sanction of the court as was required by **Section 79** of the Registered Land Act.

17. What then is the effect of that illegal act? In my view the sale of individual units was not in exercise of the Appellant's statutory power of sale under the charge. I say so because there is no evidence of the receivers collecting any income accruing to any of the 2nd Respondent's assets other that from the sales of the units on the charged property. That is clear from the evidence of James Mwangi Irungu, DW2, one of the receivers who testified that the receivers only sold the units on the project as there was apparently no income accruing from the 2nd Respondent's assets. He added that they sold the units on instructions of the Appellant. Despite the provisions of Clause 13 of the debenture that the receivers were agents of the 2nd Respondent, with those clear instructions, the receivers became agents of the Appellant.

18. At the meeting referred to above, Mr. Jirongo of the 2nd Respondent had complained that the 2nd Respondent was not happy with Fremats Ltd, the agents who apparently the 2nd Respondent had appointed to either replace Optimax Associates or to complement them in the sale of the units. Upon agreement of the parties, M/s Mwaka Musau Consultants were appointed to replace Fremats Ltd. As is clear from the evidence of John Kamau, DW1, the Appellant's advances officer, the receivers appointed the same Mwaka Musau Consultants to sell the units.

19. A chargee or debenture holder, who, in the purported exercise of his powers under the charge, unlawfully takes over the operations of a company without any protestation from such company, steps into the shoes of such company and is liable to honour the obligations of that company. He cannot be allowed to act unlawfully to recover his debt in total disregard of other creditors. In this case having acted outside the provisions of the charge as read together with Sections 74 and 79 of the Registered Land Act, and with clear instructions to the receivers to sell the units on the charged property, I find that the Appellant simply usurped the operations of the 2nd Respondent and stepped into its shoes with the result that they took over the assets and liabilities of the 2nd Respondent. Among the obligations of the 2nd Respondent was honouring its contractual obligations with the 1st Respondent.

20. Putting a corporation under receivership does not work its dissolution. The corporation continues to exist until the receivership is either lifted or set aside by an order of court. During the pendency of receivership, the corporation cannot run its affairs. This is because a corporation can do no act while the receiver is in full control.[5] An appointment of a receiver does not, however;

iii. change any existing contractual relationships or create any new contractual relationship;

(ii) determine rights between the parties by reason of an existing contract; and

(iii) in general does not operate to excuse performance under an existing contract.[6]

Pennington's Company Law,[7] also succinctly expressed this point thus:

> **"the appointment of a receiver, either by the court or out of the court does not affect the validity of contracts which the company has previously entered into and the other contracting parties can enforce such contracts against the company subject, of course, to the interests of the debenture holders in specific assets of the company."**[8]

With this legal position in mind, and being of the view that on the unique facts of this case the receivers were agents of the Appellant the latter having usurped the operations of the 2nd Respondent, I find that the learned trial Judge was right, though from a different point of view, in decreeing specific performance against the Appellant. I would on my part therefore dismiss this appeal with costs. However, as Visram and Okwengu, JJA are of a different view, the final order of the Court is that this appeal is hereby allowed in terms of the orders of Visram JA.

DATED and delivered at Nairobi this 27th day of February, 2014

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGEMENT OF OKWENGU, J.A.

[1] The facts giving rise to this appeal are essentially not in dispute and have been adequately covered in the judgement of my brothers Hon. Visram JA and Hon. Maraga JA, which I have had the opportunity to read in draft. The fact that the 2nd respondent charged its properties to the appellant, and that the appellant appointed receivers to manage the secured properties pursuant to its rights under the security documents, is not in dispute. Nor is the fact that prior to the appointment of the receivers, the 2nd respondent through its agents had entered into a contract with the 1st respondent for the sale of four of the houses forming part of the secured property subject of the charg**e**.

[2] The contract of sale between the 1st respondent and the 2nd respondent was entered into in March 1993 and was therefore subject to the interests of the appellant secured through the charge and debenture that had been registered earlier. The appellants having appointed receivers and managers, the question is whether the appellant could proceed to exercise their rights over the mortgaged property regardless of the 1st respondent's interest arising from his agreement with the 2nd respondent. To put it differently, whether the appellant was bound by the agreement of sale entered into between the 1st respondent and the 2nd respondent such that an order of specific performance of the agreement could issue.

[3] The proposition from Penington's Company Law 4th edition page 459 referred to by Visram JA is instructive that:

*"**the appointment of a receiver, either by the court or out of the court does not affect the validity of contracts which the company has previously entered into, and the other contracting parties can enforce such contracts against the company subject, of course, to the interests of the debenture holders in specific assets of the company."***

[4] Thus the appointment of the receivers by the appellant did not affect the validity of the contract entered into between the 1st respondent and the 2nd respondent. However, the 1st respondent could only enforce that contract against the 2nd respondent subject to the interest of the appellant, which ranked higher as Chargee.

[5] The 1st respondent relied on the minutes of a meeting that indicated that there were discussions between the appellant's representative and the 2nd respondent, in which the 1st respondent's right to the four houses was acknowledged. Nonetheless, there is no evidence of any direct promise made to the 1st respondent by the appellant or the receivers in regard to the sale of the four houses, that can be said to have been relied upon by the 1st respondent, such as would give rise to a proprietary estoppel. In fact the minutes relied upon by the 1st respondent do not reflect the 1st respondent as having been present or represented in the meeting.

[6] Moreover the appellant not being party to the agreement of sale between the 1st and 2nd respondent there is no privity of contract between the appellant and the 1st respondent, and therefore the appellant is not bound by that agreement. Thus there was no binding contract between the 1st respondent and the appellant upon which the order of specific performance sought by the 1st appellant could be anchored. Although this finding may be sufficient to dispose of this appeal, there is a further issue that require consideration.

[7] This is the pertinent issue as to whether in adopting the twin remedy of appointing receivers and selling the charged property, the appellant acted in accordance with the law as stipulated in **Section 74** of the Registered land Act, read together with the conditions provided in the security documents, and if there was violation of the law whether this can be the basis of liability of the appellant upon which the order of specific performance can be anchored.

[8] The appellant appointed receiver and managers of the charged property under clauses 12 & 13 of the Debenture and **Section 74** of the Registered Land Act as modified by clause 7 of the Replacement Charge dated 16th April 1993**,** and the Variation Charge signed by the Parties on 8th March 1995. **Section 74** of the Registered land Act provide as follows:

> **(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.**
>
> **(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1) the chargee may –**
>
> **(a) appoint a receiver of the income of the charged property, or**
>
> **(b) sell the charged property:**
>
> **Provided that the chargee who has appointed receivers may not exercise the power of sale unless the chargor fails to comply within three months of the date of service with a further notice served on him under that subsection.**

[9] The modification provided under clause 7 of the Replacement Charge was as follows:

> **Section 74 of the said Act shall be deemed to be varied and added to by the provisions following that is to say that the charge debt and interest hereby secured shall immediately become payable and the statutory powers of KENYAC to appoint a receiver or to sell the charged property shall (subject to the provisions of section 79 of the Act) forthwith become exercisable (without delay for one month or any lesser period and without service of any notice on the Borrower other than notice of the immediate exercise of such powers) should the Borrower commit a breach of any of the covenants herein contained or implied PROVIDED that in the event of action upon such variation not being sought or not being sanctioned by the Court, nothing herein contained shall prejudice or affect the exercise of the said statutory powers on due notice in accordance with the provisions of section 74 of the said Act.**

[10] The Variation Charge signed between the appellant and the 2nd respondent on 8th March 1995, varied section 77 of the Registered Land Act that provides for sale by public auction. Clause 1(a)(i) of the Variation Charge gave liberty to the appellant in exercise of the statutory power of sale, to sell the charged property either together or in lots by public auction or private contract or to rescind any contract of sale and to resell without being answerable for any loss occasioned thereby.

[11] It is stated clearly in the Replacement Charge and the Variation Charge that the variations provided in the two documents were subject to **Section 79** of the Registered Land Act, which states as follows:

> **The provisions of sections 72(2) and (3), 74, 75, 76, and 77 may in their application to a charge be varied or added to in the charge:**
>
> **Provided that any such variation or addition shall not be acted upon, except where the chargee is Agricultural Finance Corporation or the Settlement Fund Trustees, unless the Court having regard to the proceedings and conduct of the parties and to the circumstances of the case so order.**

[10] Ringera J (as he then was), considered these provisions in his ruling dated 9th December 1996 wherein he granted an interlocutory injunction restraining the appellant and the 2nd respondent from disposing off the charged properties pending the hearing of the suit, stating inter alia:

> ***According to the provisions of section74 (2) of the Act, it is apparent that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him. There is nothing in the affidavit by the chargee to show that the chargor was served with such further notice. It may well be that such further notice would not have served any practical purpose but it is a mandatory requirement of law. That being the case the argument that the chargee is exercising a power of sale that has accrued is not a compelling one. But even assuming a power of sale had accrued I have doubts whether it was being exercised properly. Section 77 of the Act is clear that the power of sale is to be exercised by public auction. In this case, there is no pretense that the power is being exercised in that manner. In fact it is being exercised by private treaty. The justification is a variation of charge dated 8th March 1995. Such a variation could only be justified under section 79 of the Act. That section permits the variations of section 77 in their application to a charge provided that any such variation (except where the chargee is the Agricultural Finance Corporation or the Settlement Fund Trustees) cannot be acted on unless the court so orders. Now assuming that the provision of sale by a public auction is a provision which applies to a charge within the intendment of section 79 and can as such be varied in a charge – I asked counsel for authority to such effect and none was provided – the second respondent was then obliged to show that the variation relied upon had been sanctioned by the court. No such sanction was proved or even alluded to in the otherwise detailed affidavit of the chargee in opposition to the application.***

[12] I entirely concur with the interpretation of the provisions as given by Ringera J. The ruling put the

appellant on notice, and it was of importance at the trial, since it was not disputed that the appellant adopted the twin remedy of appointing a receiver and selling the mortgaged property through private treaty, that evidence be adduced to show either that section 74 was complied with or that the variation to sections 74 and 77 of the Registered Land Act doing away with the requirement for a second notice in the event that the appellant opted to sell the charged property after first appointing a receiver, and granting liberty for sale of the charged property by public auction or private treaty, were sanctioned by the court in accordance with section 79 of the Registered land Act. No such evidence was adduced and therefore the contention that the appellant was improperly exercising its statutory powers of sale was justified.

[13] The question that arises is whether the improper exercise of the statutory powers of sale by the appellant could be a basis for liability of the appellant to the 1st respondent who was not party to the mortgage agreement. To put it differently whether an order for specific performance of the agreement of sale between the 1st and 2nd respondents could be anchored on the improper exercise of the appellant's statutory power of sale.

[14] In my view the enforcement of the appellant's statutory power of sale was a matter between the parties to the agreement that gave rise to the exercise of the statutory powers. In this case the parties to that agreement were the 2nd respondent and the appellant. Therefore, it is only the 2nd respondent who could question the improper exercise of the appellant's statutory powers, and not the 1st respondent who was not privy to the mortgage agreement. Indeed the improper exercise of the statutory powers of sale, could not confer any rights on the 1st respondent such as to be the basis of specific performance of a separate contract to which the appellant was not a party.

[15] Further, assuming that the statutory powers were being improperly exercised, at best the court could only avert the breach of the law by restraining the irregular process and not permanently restraining the exercise of the statutory powers. Thus the appellant would still be entitled to reinitiate the process of exercising its statutory powers of sale under section 74 of the Registered Land Act, provided the appropriate provisions of section 74, 77 and 79 of the Land Registered Act are complied with. An order of specific performance of the agreement of sale in favour of the 1st respondent would deny the appellant this opportunity as it would not only have the effect of compromising the appellants priority interest, but also take away the appellants statutory rights of sale under section 74 of the Registered Land Act in regard to the four houses.

[16] The irregular appointment of the receiver manager may give rise to liability on the part of the appellant for actions taken by the receivers, nonetheless such liability cannot extend to actions undertaken by the 2nd respondent prior to the appointment of the receivers. Indeed the 1st respondents claim to the four houses is subject to the charge registered against the titles to the properties.

For the aforestated reasons, I would concur with Visram JA that this appeal be allowed, judgment and decree of the High Court dated 16thOctober, 2000 be set aside, and the 1st respondent's suit filed in the High Court be dismissed with costs, and costs of this appeal be awarded to the appellant.

Dated at Nairobi this 27th day of February, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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[1] [1] Cap 300 of the Laws of Kenya

[2] .[1968] EA 123 at 126.

[3] . [1985] KLR 931.

[4] Civil Appeal No. 18 of 1998 Court of Appeal (Nyarangi, Gachui & Masime JJA)

[5] State (Pros) v. Board of Assessors, 57 N.J.L. 53, 29 Att. 442 (Sup. Ct. 1894)

[6] James M.MCGee, Basic Receivership Law and Concepts, pg 6 para 4

[7] 4th Edition, at p. 459.

[8] Parsons v. Sovereign Bank of Canada [1913] AC 160; Foster v Nixon's Navigation Co. Ltd (1906) 23 TLR 138