IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 102 OF 2013

BETWEEN

HOUSING FINANCE COMPANY OF KENYA ………………… APPELLANT

AND

CAPTAIN J. N. WAFUBWA ……………………..………… RESPONDENT

(Being an appeal arising from the Judgment and Decree of (E. K. O Ogolla, J) delivered on the 26th day of April, 2012 in the High Court of Kenya at Milimani Commercial Courts

in

CIVIL CASE NO. 385 OF 2011)

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JUDGMENT OF THE COURT

1. The appellant appeals the judgment of the High Court (E. K.O. Ogola, J) delivered on 26th April 2012 awarding the respondent Kshs. 4,500,000.00 amongst other reliefs on the basis that the appellant unlawfully sold the respondent's property to a third party purportedly in exercise of its powers of sale under an instrument of legal charge when the respondent did not owe any money to the appellant. The respondent has cross appealed and prays that the judgment of the High Court be varied by substituting the award of Kshs. 4,500,000.00 with an award for the residue balance after the fall of the hammer amounting to Kshs. 3,375,000.00. The respondent also seeks reversal of the decision of the trial court refusing to award him Kshs. 1,131,470.00 as damages for wrongful eviction from the charged property.

Background to the appeal.

2. In a suit instituted in the High Court on 8th September 2011 the respondent (as plaintiff) complained that he charged his property L.R. No. 209/10481/85 ("the charged property") to the appellant (the defendant) under an instrument of legal charge dated 16th October 1989 to secure the loan of sum of Kshs.650,000.00 advanced to him by the appellant; that he defaulted in the repayment of the loan whereupon in a bid to recover the amount outstanding the appellant

exercised its statutory power of sale under the charge and sold the charged property through a public auction on 8th November 1996 for Kshs. 4,500,000.00; that the purchaser at the auction paid a deposit of Kshs.1,125,000.00 being 25% of the purchase price which was sufficient to offset the entire balance of the loan then outstanding as well as costs and charges leaving a credit balance or surplus of Kshs. 20,662.80 in favour of the respondent.

3. The respondent further pleaded that the 75% balance of the purchase price amounting to Kshs. 3,375,000.00 was payable by the purchaser to the appellant by 8th February 1997 for the credit of the respondent; that the appellant neither tendered the surplus amount of Kshs. 20,662.80 to court nor paid the balance of Kshs. 3,375,000.00 and gave no reason for failure to do so; that the appellant is therefore liable to the respondent for the total sum Kshs. 3,395,662.80 [Kshs. 20,662.80 + Kshs. 3,375,000.00] and interest thereon at the contractual commercial rate of 27.5%; that disregarding several court orders, the appellant sold the charged property by private treaty to a second purchaser who evicted the respondent from the charged property on the basis of illegal orders obtained from the magistrate's court and the appellant is therefore liable to the respondent for the damages for wrongful eviction.
4. On that basis, the respondent sought judgment against the appellant for Kshs. 3,395,662.80; general damages for illegal eviction from the charged property; mesne profits at the rate of Kshs. 15,000.00 per month with effect from 21st August 2009 and interest on the amounts claimed at the rate of 27.5% and costs.

5. The appellant in its defence admitted having sold the charged property as chargee in exercise of its power of sale at an auction held on 8th November 1996 for Kshs. 4,500,000.00 but that the purchaser failed to complete the purchase after paying the 25% deposit of Kshs.1, 125,000.00; that there was no credit or residue balance to be credited to the respondent; that in February 2009 the appellant sold the property to one John Wambua Kiilu (the second purchaser) leaving a balance of Kshs. 6,800,000.00 due from the respondent; that the respondent's suit was res judicata and the same should have been dismissed.

6. After hearing the parties, the High Court delivered judgment on 26th April 2012 holding that the prayers by the respondent against the appellant for general damages for wrongful eviction and for mesne profits and for interest thereon could not be granted as the appellant was not in any way involved in the eviction of the respondent from the charged property.

7. The High Court rejected the appellant's defence that the respondent's claim for Kshs. 3,395,662.80 was res judicata. In lieu of the claim for the residue of the balance of the purchase price, the court awarded the respondent Kshs.4.500, 000.00 as the value of the charged property as represented by the price at which it was sold in February 2009. The court also awarded the respondent Kshs. 20,662.80 and interest at 27.5% as prayed.

<u>The appeal and submissions</u>

8. Both parties are aggrieved by that judgment. The appellant complains that the High Court awarded remedies that were not sought; that the High Court erred by failing to uphold the plea of *res judicata* as the subject matter of the suit was also the subject of the previous suit, High Court Misc. Civil Cause No. 660 of 1997(O.S) that culminated in the Court of Appeal decision in Civil Appeal No. 253 of 2004; that the award of damages has no basis; that the High Court misinterpreted section 69(C) of the Indian Transfer of Property Act; that the trial judge erred in basing his decision on a dissenting minority judgment of this Court in Civil Appeal No. 253 of 2004 and that on the whole the trial judge disregarded the evidence and failed to consider submissions made on behalf of the appellant.

9. In his notice of cross appeal the respondent complains that the trial judge erred in awarding him Kshs.4.500,000.00 as the value of the charged property "*that was never prayed for*" and that the residue balance of Kshs. 3,375,000.00 is the remedy the judge should have awarded him; that the learned trial judge was wrong in holding that the right of redemption was revived because the sale

of the charged property was not completed on 8th February 1997 following the auction on 8th November 1996; that the judge erred in refusing to grant the respondent relief for illegal and brutal eviction from the charged property. The respondent urged that the decision of the High Court should be varied by substituting the award of Kshs.4.500, 000.00 with an award for Kshs. 3,375,000.00 being 75% residue balance that should have been paid by the initial purchaser and an award of Kshs. 1,131,470.00 general damages for wrongful eviction.

10. At the hearing of the appeal before us, learned counsel Mr. M.P. Munge appeared for the appellant. The respondent appeared in person.

11. In support of the appeal, Mr. Munge submitted that the learned trial judge erred in awarding the respondent the sum of Kshs.4.500, 000.00, a remedy that was not sought in the plaint and that the appellant was thereby prejudiced in that it did not have an opportunity either to plead on it or call evidence or submit on it. Citing the decision of this Court in the case of **Mwaniki vs. Mwaniki Civil Appeal No. 176 of 1995** and the decision of the Malawi Supreme Court of Appeal in the case of **Malawi Railways Ltd v Nyasulu Misc. Civil Appeal No. 13 of 1992,** Mr. Munge submitted that cases must be decided on the issues on record and that it was an error on the part of the trial judge to base his decision on a matter which was not pleaded and on which the appellant did not have an opportunity to either present evidence or make submissions. Relying on **Nimo Ali v Sagoo Radiators Limited Civil Appeal No. 231 of 2005,** counsel went on to say that the award of Kshs.4.500, 000.00 was an award in the nature of special damages, which should have been pleaded and proved.

12. Mr. Munge further submitted that the judge erred in failing to uphold the plea of *res judicata* as the matter before him was the subject of previous proceedings in High Court Misc. Civil Cause No. 660 of 1997 (O.S) between the same parties; that the judge erred in his interpretation of Section 69(C) of the Indian Transfer of Property Act, 1882 (ITPA) by misconstruing the words “attempted sale”; and that the learned trial judge failed to address the issue whether the respondent’s suit was barred by limitation under Section 19 of the Limitation of Actions Act.

13. The respondent, Captain Wafubwa on his part argued that the appellant’s complaints before this Court are different from the defence it raised in the High Court in that the issue of section 69 of ITPA was not raised in the High Court; that the award of Kshs. 20,662,80 and interest by the trial court was correct having been proved; that the learned trial judge erred in awarding him Kshs.4.500, 000.00 as the value of the property instead of awarding him the residue of the balance of the purchase price amounting to Kshs. 3,375,000.00 which is what he was entitled to; that under Section 269(C) of ITPA the appellant was required to have deposited in Court the surplus of Kshs 20,662.80; that the appellant failed to do so and did not offer an explanation why it did not do so; that the appellant also failed to pursue the purchaser for the balance of the purchase price and the sale should be deemed to have been completed.

14. The respondent argued that the learned trial Judge should not have dismissed his claim for general damages and for the loss of Kshs. 1,131,470.00 that he incurred as a result of wrongful eviction as it was the duty of the appellant as chargee to take possession of the charged property upon sale and to hand it over to the purchaser and that no notice was served on him requiring him to vacate. He contended that his claim for general damages was reinforced by the judgment of this Court in Civil Appeal 253 of 2004 and pronouncements by the judge in Misc. Cause No. 660 of 1997(O.S).

15. Regarding the contention that his claim was barred under Section 19 of the Limitation of Actions Act, the respondent stated that he addressed that issue in his submissions before the judge; that the issue was not raised in the appellant’s defence; that his claim was not statute barred as he was not privy to the contract of sale between the appellant and the initial purchaser; that any claim between the original purchaser and the chargee should have been commenced within 12 years and he had to wait for that period to lapse before he could initiate his claim against the chargee.

16. In his reply Mr. Munge submitted that in light of the concession by the respondent that the award of Kshs.4.500, 000.00 is erroneous, that award should be set aside; that the claim by the

respondent for the residue balance of the purchase price is not maintainable as there is no evidence that the initial purchaser paid the balance of the purchase price; that the amount the respondent is seeking in damages for wrongful eviction was not pleaded and that the claim by the respondent is barred under section 19 of the Limitation of Actions Act.

<u>Analysis and determination</u>

17. We have considered the appeal, the cross appeal and the rival submissions. We have condensed the issues arising from the appeal and cross appeal as follows:

a. Whether the learned judge erred in refusing to uphold the plea of *res judicata*.

b. Whether the learned judge erred in failing to consider and uphold the appellant's contention that the respondent's claim was barred under section 19 of the Limitation of Actions Act.

c. Whether the learned trial judge erred in awarding Kshs.4.500, 000.00, as the value of the property, to the respondent?

d. Whether the learned trial judge erred in rejecting the respondent's claim for the residue of the balance of the purchase price in the sum of Kshs. Kshs. 3,375,000.00

e. Whether the High Court erred in awarding the respondent Kshs. 20,662.80 and interest.

f. Whether the appellant is liable to the respondent for damages for wrongful eviction.

18. The first issue is whether the learned trial judge erred in rejecting the contention that the matters the subject of the respondent's suit were res judicata. Counsel for the appellant submitted that the issues raised by the respondent in the suit giving rise to this appeal were also the subject of High Court Misc. Cause 660 of 1997 (OS) Court of Appeal Civil Appeal 253 of 2004 and were therefore *res judicata*.

19. The doctrine of *res judicata* bars re-litigation of matters that have already been determined. The doctrine is premised on the principle that litigation on a particular matter must be concluded and prevents a party from being harassed twice on account of the same subject matter (See **<u>Mulla, the Code of Civil Procedure, 16th Ed Vol 1 page 161</u>**). Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides that:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

20. Under explanation (4) of section 7 of our Civil Procedure Act any matter, which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in the subsequent suit. In effect, a party is required to present his whole case before the court instead of presenting his case in parts or by installments.

21. For the doctrine of *res judicata* to apply, the matter must be 'directly and substantially' in issue in the previous and in the former suit and the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit **(See <u>Uhuru Highway Development Ltd. - v- Central Bank & 2 Others – Civil Appeal No. 36 of 1996</u>; <u>Henderson vs. Henderson (1843-60) ALL ER 378</u>**)

22. We have not had the benefit of perusing the Originating Summons filed by the respondent in High

Court Misc. Cause No. 660 of 1997 (OS) as it is not part of the record. Based on the decree that was issued in that suit which is part of the record before us, the respondent sought a declaration that the charge dated 16th October 1989 over the charged property "has been fully redeemed." He also sought an order against the appellant "to re-convey to the plaintiff aforesaid L.R. N. 209/10481/85 and that the defendant do execute all the requisite document to facilitate the registration of the re-conveyance." That was in 1997.

23. When dismissing the respondent's originating summons in a judgment delivered on 23rd September 2003 the learned judge of the High Court (Njagi, J) held that:

> ***"Whatever other remedies that the plaintiff may be entitled to, such a claim for damages, I do not think that he is entitled to the prayers he has sought. His action must therefore fail for the simple reason that he failed to redeem his property. The same was sold in exercise of a statutory power of sale, and his right of redemption was extinguished upon the fall of the hammer at the auction. Therefore he is not entitled to a re-conveyance of the same. This case is dismissed with costs."***

24. The respondent appealed against that decision to this Court in Civil Appeal No. 253 of 2004. In a majority judgment of this Court (with Nyamu, J.A. dissenting) delivered on 11th February 2011, the respondent's appeal was dismissed. In the lead judgement of the Court by M. Ole Keiwua with which P. K. Tunoi, J.A. agreed, this Court had this to say:

> ***"Turning to the judgment of the learned judge, we think he correctly found that the charged property was sold after the appellant acknowledged his own failure to redeem the same and as a consequence thereof, the same was sold in exercise of the statutory power of sale…there is accordingly no ground upon which we could order the respondent to re-convey the charged property to the appellant."***

25. In his dissenting judgment, Nyamu, J.A. expressed himself as follows:

> ***"…The transaction which is said to have extinguished the appellant's right of redemption has not been finalized and there is a pending suit in the superior court between the respondent as chargee and the purchaser and one of the issues pertains to whether or not the purchaser did complete the transaction, a doubt exists as to whether the right of redemption could in the circumstances be said to have been extinguished."***

26. As it later turned out, the prediction by the Hon. Mr. Justice Nyamu was correct as the transaction between the appellant and the purchaser was not completed. When we enquired from counsel during the hearing of this appeal about the fate of that transaction, no information was forthcoming. It is however clear from the record that the appellant subsequently, in the year 2009, sold the charged property by private treaty to one John Wambua Kiilu who then obtained an eviction order on 21st August 2009 against the respondent in the Magistrates Court in Civil Case No. 4964 of 2009.

27. In those circumstances can it then be said that the respondent's suit in HCCC 385 of 2011, based as it was to a large extent on circumstances that did not exist when High Court Misc. Cause No. 660 of 1997 (OS) was instituted in 1997, was res judicata? We do not think so.

28. In **Henderson vs. Henderson** the court alluded to "special case" when the general principles on res judicata will not apply. The court stated:

> ***"… Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might***

have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, <u>except in special case</u>, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a 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." *(*Emphasis added*).*

29. Even if the respondent's claims in High Court Misc. Cause No. 660 of 1997 (OS) and in HCCC 385 of 2011 were anchored on the legal charge, the developments to which we have referred that occurred subsequent to the institution and determination of High Court Misc. Cause No. 660 of 1997 (OS) constitute special circumstances bringing this matter, in our view, within the exception of "special case" referred to in **<u>Henderson vs. Henderson (1843-60) ALL ER 378</u>**.

30. We are therefore unable to fault the learned trial judge when he found that "*the current issue is therefore not res judicata and has not been a subject of any suit between the parties*." We accordingly hold that the learned trial judge was right in refusing to uphold the contention by the appellant that the claim was *res judicata*.

31. We move to the question whether the learned judge erred in failing to uphold the appellant's contention that the respondent's claim was barred under section 19 of the Limitation of Actions Act which provides:

> ***"An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or <u>to recover proceeds of sale of land, after the end of 12 years from the date when the right to receive money accrued</u>."***

32. According to counsel for the appellant, the respondent's cause of action arose from the public auction staged on 8th November 1996 and the suit was filed more than 13 years later with the result that the claim was statute barred by the time it was filed. Counsel argued that statute cannot be waived and neither can estoppel apply to prevent application of the Limitation of Actions Act.

33. In opposition, the respondent argued that the sale agreement was between the purchaser and the chargee; that the chargee had 12 years to claim the final balance from the original purchaser United Millers Ltd; that the respondent had to wait for the expiry of that period before he could mount his claim against the chargee. The respondent further argued that the statutory bar was never raised in the defence and was only brought up during the submissions.

34. In **<u>Town Council of Awendo V Nelson Oduor Onyango and 13 others (2013) eKLR</u>** this Court stated that under Order 4 Rule 4(1) of the Civil Procedure Rules, the defence of limitation must be pleaded before a party can rely on it and before a court of law can entertain it. Rule 4(1) of Order 4 of the Civil Procedure Rules provides:

> "***4.(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality:***

a. ***which he alleges makes any claim or defence of the opposite party not maintainable…..***"

35. In the above cited decision the Court held that the omission to plead limitation was fatal particularly because the issue was never canvassed and left to the court to decide. The Court cited **<u>Galaxy Paints Co. Ltd V Falcon Guards Ltd (2000) EA 885</u>** where it was held:

> ***"The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were***

amended, parties were confined to their pleadings. Gandy V Caspair (1956) EACA 139 and Fernandes V People Newspapers Ltd (1972) EA 63."

36. However, where, as is the case here, the parties have canvassed the issue and left it to the court, the court can pronounce judgment on it though it was not pleaded. This was the holding in the case of **Odd Jobs V Mubia (1970) EA 476** where the court held:

> ***"A court may base its decision on unpleaded issue if it appears from the course followed at the trial court that the issue has been left to the court for decision."***

37. Unlike the situation in **Town Council of Awendo V Nelson Oduor Onyango** (Supra) where the issue of limitation was not raised at all, the respondent himself in his closing written submissions in this case raised the issue of limitation for the first time. The appellant in its closing written submissions picked up the issue contending that the claim was statute barred. The court did not address the matter in its judgment. In the circumstances of this case where both parties took up the issue in their submissions and placed it before the court for determination, we think the failure by the court to adjudicate on it was an error.

38. Had the trial court addressed itself to the question of limitation, we think it would have come to the conclusion that the respondent's claim was not barred under section 19 of the Limitation of Actions Act. Although section 19 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya sets up a bar to a claim for proceeds of sale of land after a period of 12 years, Section 20(1) of the same statute provides:

> "***None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action –***
>
> ***a)…***
>
> ***b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.***

39. Construing a similar provision in the English Limitation Act, 1980 the learned editors of "**Halsbury's Laws of England**" take the view that where a mortgagee retains any surplus of the proceeds of sale, that provision cannot be used to prevent the mortgagor from claiming the surplus. At paragraph 1049 of volume 28 of Halsbury's Laws of England 4th Edition the editors state that:

> ***"A mortgagee is not a trustee of his power of sale for the mortgagor. If the mortgagee sells the mortgaged property under his power of sale and there is any surplus after his claims have been satisfied, he becomes a trustee of the surplus for unbarred second or mortgaged second or subsequent mortgagees of whose claims he has notice and, subject to those claims, for the mortgagor if the mortgagor's title is not barred. If the mortgagee retains the surplus or converts it to his use, the Limitation Act 1980 cannot be set up as a bar to a claim against him."***

40. We think that statement is applicable here. By reason of Section 20(1) of the Limitation of Actions Act, therefore, we are not persuaded that the respondent's claim was statute barred.

41. The next issue regards the award of Kshs.4.500, 000.00 for the value of the charged property. The trial judge dismissed all the reliefs that the respondent sought in his plaint in the High Court except for the prayer for Kshs.20, 662.80 which was part of prayer a) in the plaint and the prayer for "*any other or further relief the court may deem fair and expedient to grant*" under which the trial judge found a window to award Kshs.4.500, 000.00 with interest at 27.5% pa from 9th February 2009. The judge stated:

*"**I have considered that the plaintiff has not specifically prayed for an order of general damages for loss of his property. Neither has he prayed for the value of his property. However, the plaintiff has at paragraph (g) of his prayers made an omnibus prayer asking this court for any other or other relief the court may deem fit and expedient to grant.**"*

42. And later in the judgment, the learned trial judge stated:

"I hereby exercise my discretion to allow the said omnibus prayer (g) under which I enter judgment for the plaintiff for Kshs. 4.5 million with interest at 27.5% p.a. with effect from 9th February 2009."

43. Both parties have rightly complained about that award. We think the learned trial judge erred in granting it. None of the parties addressed the judge on this award and relief granted was not sought in any pleading. Neither party led any evidence on it. No submissions were made by the parties on whether the relief was available or indeed on the question of the value of the charged property. The trial judge expressed doubts regarding the value of the charged property. He stated:

*"**The suit/mortgage property was sold in February 2009 at Kshs. 4.5 million. It is interesting that in 1996 the same property was sold at an inconclusive contract at Kshs. 4.5. It would appear that while all property in Kenya appreciated in value, the value of the mortgaged property remained static for 13 years. Be that as it may I will take the value of the property to be Kshs. 4.5 million in February 2009.**"*

In view of that statement, there is no justifiable basis on which the learned judge determined that the value of the charged property was Kshs.4.500, 000.00.

44. As held in **Blay v Pollard and Morris [1930] 1 K B 628,** cases must be decided on issues on record and if it is desired to raise other issues they must be placed on record by amendment. In **Charles C. Sande v Kenya Co-Operative Creameries Limited Civil Appeal No. 154 of 1992** the Court underscored the need for parties to have notice of issues in an action when it stated that:

*"**All the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are**."*

The decisions in **Town Council of Awendo V Nelson Oduor Onyango** and **Galaxy Paints Co. Ltd V Falcon Guards Ltd,** which we have referred to support the same proposition.

45. The respondent is himself categorical in his notice of cross appeal that the award of Kshs.4.500, 000.00 is erroneous and the trial judge did not have the discretionary power he purported to exercise in granting that remedy. That position accords with the decision in **Abdul Shakoor v Abdul Majied Sheikh Nairobi Civil Appeal No. 161 of 1991** to the effect that in general a plaintiff is not entitled to a relief which he has not specified in his claim.

46. We are therefore persuaded that the award in favour of the respondent for Kshs.4.500, 000.00 being the value of the property cannot be upheld and we would allow the cross appeal to that extent.

47. We turn next to the question whether the learned trial judge erred in failing to award the respondent the residue of the balance of the purchase price in the sum of Kshs. 3,375,000.00.

48. In his plaint, the respondent pleaded that the charged property was sold by public auction on 8th November 1996 for Kshs.4.500, 000.00 and a deposit of Kshs. 1,125,000.00 paid by the purchaser and that the 75% balance of Kshs. 3,375,000.00 was to be paid by the purchaser to the appellant by 8th February 1997. The respondent further pleaded that the appellant "*never set aside the sale*

for non-payment of auction price and …never took any action on the dispute with the purchaser…" and that in the year 2009 the appellant entered into a private treaty with another purchaser where it "*sold, transferred and gave out the title to the second purchaser*."

49. In his testimony before the trial court, the respondent stated that the charged property was re-advertised for sale by the appellant in May 1997 and transferred to the second purchaser after which he was evicted from the property on 22nd August 2009. Under cross-examination the respondent stated quite categorically that he was aware that "*… the purchaser did not complete paying the balance…*".

50. Having regard to the circumstances as pleaded and as borne out by the evidence presented before the trial court, we think the judge was right when he found as a fact that the contract under which the balance of 75% of the purchase was to be paid was not concluded. Referring to the auction on 8th November 1996, the trial judge correctly stated, " *this property was sold to the highest bidder United Millers Limited for Kshs. 4.5 million who paid the deposit of 25% being Kshs. 1,125,000.00. The sale later aborted as the purchaser failed to pay the balance of the purchase price within the limited period. The plaintiff was aware that the sale did not go through*."

51. The result is that the question of payment to the respondent by the appellant of the residue of the balance of the purchase price following the abortive sale on 8th November 1996 could not therefore arise. Not having itself received the balance of the purchase price from the purchaser at the auction held on 8th November 1996, the appellant could not pay over to the respondent that which it did not have. We agree with the trial judge when he stated, "*with this truth established the plaintiff cannot lay claim to the 75% of the purchase price which was never paid*."

52. In **Wright and Another V New Zealand Farmers Co-op Association of Canterbury Ltd [1939] 2 ALL ER 701** a mortgagee, in exercise of his power of sale, had contracted to sell the mortgaged property, but, on failure by the purchaser to carry out the contract, and before the property had become vested in the purchaser, had rescinded the contract pursuant to his powers thereunder and sold the mortgaged property to another purchaser at a lower price than that agreed upon with the first purchaser. The Privy Council held that the mortgagee was not accountable to the mortgagor for the purchase price for which the property was agreed to be sold under the rescinded contract, and which he had never received.

53. We do not therefore think there is any merit in the respondent's complaint that the learned trial judge erred in failing to award the respondent the residue of the balance of the purchase price in the sum of Kshs. Kshs. 3,375,000.00.

54. The next issue concerns the award of "the surplus" of Kshs. 20,662.80 and interest. When awarding that amount to the respondent the learned trial judge stated as follows:

> ***"The sum result of the evidence before the court from all the parties is that the main disagreement between the parties related to the 25% deposit of Kshs. 1,125,000.00 paid by United Millers Limited pursuant to the aborted auction sale of 8th November 1996. While the plaintiff claims the sum is due to the mortgage account the defendant submits that the same is for the banks loss and profit account."***

55. Later the judge stated that:

> ***"It is clear that if the disputed sum belonged to the plaintiff, then it was enough to clear outstanding mortgage balances and the auction expenses leaving a credit balance of over Kshs. 20,662.80 in favour of the plaintiff."***

56. The learned trial judge was persuaded that in exercising the power of sale under the charge the appellant was doing so as the respondent's attorney to whom the charged property belonged and

that the "*law and natural justice demanded that in the event of any surplus money the only beneficiary is the mortgage account*." The learned Judge therefore felt that it was unjust for the appellant to benefit from the deposit after the sale was aborted and that the appellant should use the deposit for the benefit of the mortgage account, since this was after all, the purpose of the sale. The learned judge also relied on section 69(C) of the ITPA and held that the surplus in this case constituted "*residue of… money…[payable] to the person entitled to the mortgaged property*" for purposes of section 69(C) of the ITPA.

57. The question therefore is whether the so called surplus amount of Kshs. 20,662.80 is "*money which is received by a mortgagee arising from a sale by him under the mortgagee's statutory power of sale*…" for purposes of section 69(C) of the ITPA and therefore disposable in the manner set out under that provision. Section 69(C) of the ITPA provides:

> ***"The money which is received by a mortgagee, arising from a sale by him under the mortgagee's statutory power of sale after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into court of a sum to meet any prior encumbrances shall be held by him in trust to be applied by him first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise, and secondly, in discharge of the mortgage – money, interest and costs and other money, if any, due under the mortgage, and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts from the proceeds of the sale thereof."***

58. Invoking that provision the learned trial judge held that:

> ***"It is clear to me the auction sale which took place on 8th November 1996 was a "sale" or an "attempted sale." Whether or not it aborted it was either a sale or an attempted sale, and therefore the deposit received from it can only be spent as provided under the Act, and the balance thereof after deducting the costs and charges, must be used to reduce the mortgage debt and interest, with the residue, if any, given to the plaintiff. If the proceeds of sale was applied as provided under above section 69 (c) then clearly, the residue credit balance of kshs. 20,662.80 became the property of the plaintiff and I hold that to be the position in my judgment."***

59. The learned Judge was convinced that the amount forfeited under the 'attempted sale' could only be spent as provided under the Act and the balance thereof to be given to the Respondent. Counsel for the appellant submitted before us that the learned High Court Judge misinterpreted S. 69(C) of the ITPA in that the words 'attempted sale' as appearing in that section refer to costs and expenses of previous attempts of a sale. The respondent disagreed.

60. We do not doubt that under section 69(C) of the ITPA, a mortgagee is entitled to charge the expenses of any actual or attempted sale against the proceeds of sale. Indeed the mortgagee's right in that regard was recognized in **Farrer V Lacy, Hartland and Co. (1885) 31 Ch. D 42**. [See also **Halsbury's Laws of England, 4th Edition at paragraph 782].** We doubt that section 69(C) of the ITPA is applicable to the circumstances of this case and neither are we able to construe the words 'attempted sale' as used in S. 69(C) of the ITPA as extending the application of that section to the situation obtaining in this case where the sale aborted. We therefore think that the learned judge erred in basing his decision regarding the respondent's entitlement to the proceeds of sale on S. 69(C) of the ITPA. Section 69(C) of the ITPA envisages a situation where a sale has in fact taken place and been concluded and not a situation where a sale has aborted. We have already made reference in this regard to the decision of the Privy Council in **Wright and Another V New Zealand Farmers Co-op Association of Canterbury Ltd.**

61. Notwithstanding the finding that the forfeited deposit could not be applied to the mortgage account on the basis of section 69(C) of the ITPA, there is nothing that prevented the appellant, after it became clear that the forfeited deposit was not the subject of any claim by the initial

purchaser, to apply it to the credit of the mortgage account. According to the terms of the first sale, if the purchaser defaulted in payment of the balance of the purchase price within the period stipulated in the particulars and conditions of sale the appellant was to retain the deposit paid. The same would then have to be applied towards the mortgage debt and not otherwise. It is unconscionable for the appellant to credit the deposit to its profit and loss account.

62. The facts here are not dissimilar to those in **Wright and Another V New Zealand Farmers Co-op Association of Canterbury Ltd,** to which we have already referred, where by an agreement dated May 8th 1929 the power of sale being then exercisable, the Respondent mortgagee agreed to sell 'Cattle Peaks' to one Little for 15,317*l*.5*s*. 2000L was to be paid upon signing the agreement, which sum was duly paid. A sum of 9425L was to be paid by Little assuming liability for the first mortgage of that amount and the balance to be paid on March 23rd, 1934. Little was given possession of the property with the condition that the respondent might re-enter the land and re-sell it if Little was in default of payment. Little failed to carry out the contract and the respondent rescinded the agreement with him and sold the property to another purchaser. The amount paid by Little under the agreement was credited to the mortgagor.

63. The appellant contended in the court below that under the terms and conditions of the auction the deposit was to be forfeited to the appellant. We note from the mortgage account statement produced in the lower court that in November 1996 the respondent's mortgage account with the appellant was credited with Kshs. 1,125,000.00. That was after debiting auctioneers charges and legal fees. The mortgage account ended up with a credit balance of Kshs. 20,662.80 that the respondent claimed in the High Court. Sometimes in March and April 1997 the mortgage account was debited with "interest adjustment" and ledger fees and the amount of Kshs. 1,125,000.00 was debited from the mortgage account under an entry described as "a/c balance transferred".

64. The circumstances under which the amount of Kshs. 1,125,000.00 was then debited from the mortgage account in April 1997 are not clear. Indeed, there is dearth of information regarding what eventually came of the transaction between appellant and the purchaser at the auction. As we have observed, the appellant was not forthcoming with information regarding the fate of that transaction. Be that as it may, we see nothing that would have prevented the appellant, after it became clear that the forfeited deposit was not the subject of any claim by the initial purchaser, to apply it to the credit of the mortgage account. We hold the view that the conclusion reached by the trial judge in awarding the respondent Kshs. 20, 662.80 was the correct one.

65. The final issue is whether the appellant is liable to the respondent for damages for wrongful eviction. In our view, the learned trial judge was right in dismissing the respondent's claim for damages for eviction. Firstly, it is clear from the evidence that was adduced before the High Court that the eviction of the respondent from the charged property was done at the behest of the second purchaser of the property and that the appellant was not privy to the eviction. Indeed the appellant was not a party to the court proceedings initiated by the purchaser of the property in the magistrate's court on the basis of which the purchaser was granted an order for possession.

66. The result of the foregoing is that the appellant's appeal partially succeeds. The respondent's cross appeal also partially succeeds. The result is that the award by the High Court in favour of the respondent for Kshs. 4.500,000.00 and interest thereon is set aside. The award by the High Court to the respondent of Kshs. 20,662.80 and interest thereon is upheld. The appeal and cross appeal otherwise fail.

67. We think the appropriate order regarding costs is that each party should bear its own costs both in the High Court and in this Court. We so order.

68. Before we leave this judgment, we must comment on some general and seemingly intemperate remarks made by the learned Judge in his judgment. The remarks were to the effect that all institutions in the banking and financial industry conduct their business in an oppressive and fraudulent manner, thus causing untold suffering and distress to their customers. We may quote

the learned Judge verbatim:-

> ***"Banks cannot just hide behind the contracts they make, regardless of how unjust they are, to literally destroy their customers. Without their customers the banks cannot operate. A time has come for banks in Kenya to look into the eyes of their customers and answer the question: Are banks Kenyans? Or have they just entered Kenya for business?***
>
> ***Banks in Kenya reign large. I am reminded of predator who after killing the prey is not satisfied to leave the carcass to the vultures, but becomes both the predator and the vulture, killing the prey and gleaning the meat from the carcass to ensure the prey is really dead. I am also reminded of a robber killing his victim and not only attending his funeral, but insisting on carrying the casket to the grave to confirm that this victim is dead and buried.***
>
> ***Else, how does one explain a situation or case at hand? Wasn't there no time when the Defendant in this matter could say "this is the case and time to close this account?" It is a sorry state of affairs in our country. As all sectors of our society are being reformed, banks should not be left behind. They need to look into the eye balls of their customers and answer the question: "Are banks Kenyan?'***

69. We think, with respect, in the first place, there is no evidence on record relating to all Banks and financial institutions. In the second place, it was neither appropriate nor necessary for purposes of the judgment to reign in all those institutions. As we have shown above, the learned Judge was generally right in assessing the evidence on record on the matter before him.

Dated and delivered at Nairobi this 28th day of March, 2014.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

………………………….

JUDGE OF APEAL

I certify that this is a true copy of the original.

REGISTRAR