**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 659 of 2007**

**SHAROK KHER MOHAMED ALI …….....…….…1ST PLAINTIFF**

**SAID MUHIDDIN GATIBARU …….....…….…2ND PLAINTIFF**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED.....…1ST DEFENDANT**

**DAVETRONIC COMPANY LIMITED……..….....…..2ND DEFENDANT**

**RULING**

On 30th November 2005 **Mr. Sharok Kher Mohamed Ali** and **Said Muhiddin Gatibaru** trading as Neeyat hostel services approached the 1st defendant for a facility of Kshs.5.8 million as a working capital to enable them boost their business. As a security for the repayment of the loan a property registered in the names of **Firoz Nurali Hirji** and **Mr. Sharok Kher Mohamed** was charged to the bank. In the said charge the registered proprietors were referred to as the chargors while the persons who were advanced the facility were referred to as borrowers.

It appears the charge document was signed by the 1st plaintiff on his behalf and on behalf of the other registered proprietor **Firoz Nurali Hirji.** While the plaintiffs herein signed the certification part as having understood the meaning and effect of section 69(1) and 100A of the Indian Transfer of Property Act 1882. The subject charge was registered on 28th December, 2005. According to the said charge the property which was given as the security is shown as Grant No. IR 46303. And in paragraph (a) the said charge it is stated;

"**the chargors are registered proprietors as lessee from the Government of Kenya of all that piece of land more particularly described in the schedule hereto for the term and subject to the rent covered and/or mentioned therein and to such charges, leases or encumbrances as are notified by the memorandum endorsed hereon (hereinafter referred to as the charged property)"**

And according to the schedule it is stated;

"**All that piece of land situate in the city of Nairobi in the Nairobi area of the Republic of Kenya containing by measurement NOUGHT DECIMAL NOUGHT THREE NINE NOUGHT (0.0390) of**

**a Hectare or thereabout that is to say Land reference No.209/10196 being the premises comprised in a grant registered in the land titles registry at Nairobi aforesaid as Number IR 38962/1 which said piece of land with dimensions of abuttals and boundaries thereof is more particularly delineated and described on a plan annexed to the grant and more particularly of the land survey plan Number 120556 deposited in the survey records office at Nairobi aforesaid and thereon bordered land and is hereby held by chargors for a term of 99 years from the 1st day of February 1984 subject to the revisable annual rent of Kshs.3,200/- and subject to the charges, leases and encumbrances as notified by the memorandum thereon".**

There was a default in repayment of the loan and on 10th July 2007 the bank served the proprietors of the charge properties to what is alleged as statutory notice giving one month's notice to pay an outstanding amount of Kshs.8,248,557.90 with an interest of 28% per annum. It is important to quote the letter which has brought the subject dispute in this matter;

*Sharok Kheru Nurali*

*P. o. Box 22378-00400*

*NAIROBI*

*Firoz Nurali Hirji*

*P. O. Box 21482*

*NAIROBI*

*STATUTORY NOTICE*

*SEC. 69 & 69a (1B) (I. T. P. A.)*

*"ARREARS NOTICE"*

*Dear Sir/Madam*

*RE; LOAN ACCOUNT NO.3790000212 IN THE NAME OF NEEYAT HOSTELS LTD AT SOUTHERN CREDIT BANKING CORPORATION LTD*

*SECURITY: L.R. NO.7785/259 (I.R. NO.46302) RUNDA ESTATE, NAIROBI*

*IN THE NAME OF SHAROK FIROZ HIRJI & FIROZ NURALI HIRJI*

*We act for Messrs southern Credit Banking corporation Limited and HEREBY REQUIRE YOU TO PAY to us on their behalf forthwith the principle moneys now owing under a charge made between your self of the one part and our client of the other part, as guarantors to banking facilities granted to NEEYAT HOSTELS SERVICES (registered in the Central Land Registry, Nairobi in the Encumbrances Section of L.R. No.7785/259 with interest owing in respect thereof on the date of payment and GIVE YOU NOTICE that if such principal moneys are not paid before the expiration of one (1) month from the service hereof, our client shall sell the property comprised in the said charge or some part thereof. The debt stood at kshs.8,248,577.90 as at 30th June 2007 which is in arrears together with interest thereon at 28% per annum monthly compounded from 1st July 2007 until payment in full.*

*Acceptance of part of the principal sum demanded herein does not constitute a waiver of this Notice.*

*Yours faithfully*

*ZABLON MOKUA*

*ADVOCATE*

*cc. Neeyat Hostel Services*

*P. O. Box 22378-00400*

*NAIROBI.*

*cc. Southern Credit Banking Corporation Ltd*

*P. O. Box 11666-00400*

*NAIROBI.*

According to the above alleged statutory notice the property and/or the security described as LR. NO.7785/259 (IR NO.46302) situate at Runda Estate Nairobi and it gave the proprietors one month from the service thereof otherwise the bank would sell the property comprised in the charge document.

The issues raised by the plaintiffs in respect of this dispute is as follows:

(1) there is no valid charge document to entitle the 1st defendant to exercise statutory power of sale.

(2) The charge dated 30th November, 2005 and registered on 28th December 2005 is null and void.

(3) The statutory power of sale had not accrued since no valid notice was served.

(4) The transfer document is illegal, null and void.

(5) The bank failed to act honestly and sold the property below the market price.

(6) The bank frustrated the plaintiffs in their efforts to redeem the suit property.

There is no dispute that the plaintiffs received the letter dated 10th July, 2007 and upon receipt replied through a letter dated 10th September, 2007. The letter states in part;

"**The notice gives our clients a month to liquidate an amount of over 8 Million instead of the mandatory 90 days period as provided for under the law.**

**Be that as it may our clients are sourcing for a financier to take over the mortgage from your Clients. The progress has been slow but steady and our clients hope to liquidate the accounts with your clients within 6 months from today.**

**Further instructions are that you please avail to our clients the statements to enable reconcile the figures in preparation for settlement".**

The said letter was followed by another letter dated 26th October 2007 which stated as hereunder;

"***We refer to our letter of 6th September 2007 and will be grateful to have a confirmation that your clients are agreeable to the proposal therein contain to liquidate the outstanding loan within Six***

***months to enable advice our clients on the same.***

***Please expedite".***

It appears at the time the said letter was written the suit property had been sold to the 2nd defendant by contract of private treaty on 12th September, 2007 at agreed price of Kshs.12.5 million. It is the contention of the bank that it was by reason of applicant's default that on 10th July, 2007 the bank notified the registered proprietors of the suit property of the respondent's intention to sell the suit property if the amount then outstanding was not repaid together with accrued interest.

It is also the position of the bank that it exercised its statutory power of sale which had arisen under valid, enforceable and duly registered charge document. And that it did not in any way collude to fraudulently cause the sale and transfer of the suit property to the 2nd defendant.

On its part the 2nd defendant states that on 21st August 2007 it came to their knowledge that the 1st defendant was offering for sale all that property known as LR. NO. 7785/259 Runda by way of private treaty. The source of the said information is not disclosed. However, it is the contention 2nd defendant that it made an offer to purchase the suit property at Kshs.12.5 million which offer was accepted by the bank. And upon completion of payment of entire purchase price the completion documents were forwarded to the Advocates for registration of transfer documents making the transfer to be effected. The 2nd defendant also states that upon transfer he took possession of the suit property after obtaining the requisite orders from court. In essence the plaintiffs and/or their agents were evicted from the suit premises by the 2nd defendant without any court order or permission. In my view nobody has right to forcefully and illegally evict a person from a premises simply because he bought the property either through a private treaty or public auction. In a civilized system it is always prudent to use the mechanism and all process of the court in obtaining any right or cause of action which belongs to a particular person.

It is clear that the bank entered into an agreement for sale with the 2nd defendant on 12th September 2007 and the transfer effected on 15th October, 2007. **Mr. Khalwale** learned counsel for the plaintiffs submitted that the sale of the suit property was not proper because there was no requisite statutory notice issued and secondly the charge document was invalid because it was not executed by both proprietors. He stated that the suit property is jointly owned by two people and in the charge document it was only signed by the 1st plaintiff. He also contended that the statutory notice dated 10th July, 2007 is not a proper statutory notice and the right to sell the suit property had not arisen.

The application was opposed by **Mr. Onguto** for the 1st defendant and **Ms Ithondeka** for the 2nd defendant. And the gist of their submission was that the allegation of fraud and collusion is nothing but an attempt to mislead the court since there is no evidence to support the same. Secondly it is not in dispute the amount advanced by the 1st defendant to the plaintiff and the security for that advance, a charge was created. The charge and the law did allow the 1st defendant to sell the property if no payment was made. And since the plaintiffs never paid a penny towards the redemption of the loan the bank was justified in selling the property the way it did. It was also contended that since the plaintiffs are not the registered proprietors and since they are only borrowers they have involved themselves in some legal misadventure. And the recourse is to seek damages since the equity of redemption has been exercised.

The 2nd defendant contends the property has been transferred after the 1st defendant has properly exercised its statutory power of sale. There is a transfer registered against the title and the 2nd defendant is the legal owner of the suit property.

I have considered the application and the submissions of the learned counsels for the parties herein. I have also taken into consideration all the documents and pleadings filed by the parties to this dispute. The starting point is whether the plaintiffs are entitled to the orders sought in the application. In doing so I wish to make the following observations before I address my mind to the central issues in dispute between the parties herein: The first issue concerns the description of the suit property. According to the

charge what was charged as a security for loan advanced is Grant No.IR 46303. And as I stated earlier the land reference of the said property according to the schedule under clause 9 is LAND REFERENCE NO.209/10196 and the IR NO. is 38962/1. In the alleged statutory notice dated 10th July, 2007 addressed to the proprietors of the suit property the security is mentioned as LR. NO.7785/259 and the IR No. is shown as 46302. Further according to the sale agreement between the bank and the 2nd defendant the property is described as "***ALL THAT piece of land situate in the city of Nairobi in the Nairobi area containing by measurement Nought decimal four nought eight eight (0.4088) of a hectare or thereabouts that is to say Land Reference Number 7785/259 as delineated on Land Survey Plan Number 14074 deposited in the Survey Records Office at Nairobi to hold for 108315 annexed to the Transfer registered as Number I.R. 30597/322 Subject to the Act, Special conditions, Encumbrances and other matters specified in the Memorandum contained in the Grant".*** Again according to the transfer by chargee dated 15th October, 2007 the property is indicated as I.R. NO.30597 and more particularly described as ***ALL THAT piece and parcel of land situate in the City of Nairobi in the Nairobi district of the Republic aforesaid containing by measurement nought decimal four nought eight eight (0.4088) of a hectare or thereabouts and being Land Reference Number 7785/259 (Original 7785/10/257) as delineated on land survey Plan as Number 108315 annexed to a Transfer registered as I.R. No.8160/26 subject to the Act, Special conditions Encumbrances and other matters specified in the memorandum contained in the grant TOGETHER WITH the buildings and improvements which now are or may hereafter be erected or made thereon HELD by the Chargor as proprietor as owner for an estate in fee simple from the government of Kenya (hereinafter called the "charged Property" which expression shall also include all buildings and improvements hereafter erected and being on the said piece or parcel of land.) (hereinafter referred to as "the property".***

It is clear beyond doubt the property described in the charge dated 30th November, 2005 and the one in the alleged statutory notice dated 10th July, 2007 is different. In my view the statutory notice could only arise and/or be based on a right and/or obligation found in the charge. The central document in the exercise of statutory power of sale is the existence of a valid charge incorporating the proper title number and all other relevant expressions. No doubt the charge does not describe the proper property. It also does not indicate the rate of interest that would be charged on loan account. I think that is a fundamental defect which defeats the right of the bank to sell the property by invoking its statutory power of sale. As indicated the properties described in the charge document dated 28th November, 2005, the one described in the statutory notice, the one in the sale agreement between the bank and 2nd defendant and the one described in the transfer are different. One may say that the misdescription of the relevant property is not a defect which goes to the root of vitiating the statutory power of sale allegedly exercised by the bank. In my humble view and without making a definitive conclusion I think that is a fundamental defect giving rise to a prima facie case which should be determined on merit at full hearing. The other defect in the charge is that it was not signed jointly by the registered proprietors of the suit property. It is also clear that the certification required under Section 69 and Section 100A of Indian Transfer of Property Act as mandatorily required was not signed by both proprietors. The said certificate was signed by one proprietor and the 2nd plaintiff herein who is not one of the registered owners.

The requirement that the certificate be signed by both proprietors is mandatory since the law presupposes that the registered owner must be made aware of the consequences of endorsing his signature on an instrument of mortgage. Such registered owner is made aware that in the event of a default he would be deprived of his property, therefore in the circumstances where one proprietor executes the mortgage instrument in the absence of the other, prima facie that charge is voidable. The purpose of the certification is to give the chargor an opportunity to understand the effect and consequences of the bank exercising its statutory power of sale in the event of a default of the loan advanced. The statutory noticed dated 10th July, 2007 was addressed to both proprietors and in my view the bank addressed the notice to Firoz Nurali Hirji who did not sign the charge because it knew that it could not exercise its statutory power of sale without notifying both proprietors. If one of the registered proprietors had not signed the charge instrument, the bank had no right to exercise its statutory power of sale since no relationship whether contractual or otherwise existed between the bank and **Firoz Nurari Hirji**. In my understanding the basis of sending the notice to the said person who did not sign the charge and the certification is a clear indication that the bank was aware it could only exercise its statutory power by notifying the

registered owners. There is ample evidence to show the bank acted in a manner to suggest that it was privy to the inadequacies and illegalities in the charge instrument. In my view that explains the reason why the bank was in a hurry to dispose of the suit property.

In my humble view parties in a mortgage dealing have contracted on the basis that some fundamental things or state of things shall continue to exist between them in that upon default the mortgagor would be entitled to give sufficient notice before the equity of redemption is extinguished. In essence parties are presumed to have expressed what they had agreed as the terms and conditions of the charge instrument upon appending their signatures on the instrument of the charge. No other term or condition can later be imported and/or incorporated by either party. That being the foundation of any mortgage/charge contract, it is of fundamental importance for the mortgagee to observe and avoid any breach which would clog or fetter the equity of redemption. Indeed that is what was contemplated by the parties in the subject charge. The issue that is apparent is whether the 1st defendant was entitled to sell the suit property by private treaty by giving the notice dated 10th July, 2007. And secondly whether the said notice amounts to a proper statutory notice under the relevant laws.

According the letter dated 10th July, 2007 the bank gave one month notice from the service of the said letter. And if I understood **Mr. Onguto** learned counsel for the 1st defendant, the bank exercised its statutory power of sale based on the notice under the letter dated 10th July, 2007. The notice was given under section 69 and 69A 1(b) of the I.T.P.A. The plaintiff claim that the said notice did not amount to a proper statutory notice. Section 69A states;

"**A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-**

**(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or**

**(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or**

**(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon".**

In my understanding a mortgagor is not entitled to redeem the mortgaged property before the time fixed in the mortgage contract for payment of the debt and before the provisions of section 69A is properly complied with. It is only after the time stipulated in the mortgage document, upon default and upon satisfactorily getting and being served with a proper notice that the mortgagee can start the process of sale. The mortgagee has a greater obligation to ensure that he does not wrongfully part with the mortgaged property by putting it out of reach of the lender. He is also required not to put a clog or a fetter on equity of redemption. In my humble view a clog or fetter on the equity of redemption is void, that is nothing or no act can make the right of the mortgagor to release his property irredeemable unless there is evidence to show that the charger was unable due to his own fault or omission.

Section 69A clearly and mandatorily provides that a mortgagee intending to exercise its statutory power of sale must give notice of not less than 3 months of service upon expiration of which if no payment is made the mortgagee may sell the property. It is also my position that a mortgagee is required to exercise its statutory power of sale in good faith and fairly. The point I am making is mortgagee is not allowed to exercise the statutory power of sale in a manner that can be termed as capricious or oppressive. In my judgement the notice issued by the bank's advocate said to be given under Section 69 and 69 IB is in contravention of the test laid down by the court of appeal in the case of **Trust Bank Limited vs Eros Chemists Ltd. (2000) 2 E.A. at page 550**. In that case the Court of Appeal addressed its mind what amounts or what constitutes a valid notice under section 69A of I.T.P.A. 1882 of India. The court held;

"**The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of the notice is. In our judgement the object of the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warning of an intended right of sale.**

**For that right to accrue the statute provided for a three month's period to lapse after service of notice. In our judgement a notice seeking to sell the charged property must expressly state that the sale shall take place after three month's period. To omit to say so or to state a period of less than three months for sale (as in the Russel case) is to deny the mortgagor a right conferred upon him by statute. That must clearly render the notice void.**

**In our judgement with respect there is a mandatory requirement that a statutory right to sell will not arise unless and until three months notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one, failing obedience to it, a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the bank failed to give a valid notice, with the result the right of sale did not accrue under such notice".**

The question for my determination now is whether the notice dated 10th July, 2007 addressed to the proprietors of the suit property meets and/or conforms the test and requirement set out under section 69A and pronounced by the Court of Appeal in the above case. No doubt the notice under the letter dated 10th July, 2007 gave one month's notice before the proprietors could redeem the charged property. No doubt 2 months later on 12th September, 2007 the bank entered into an agreement with the 2nd defendant selling the property through a private treaty. In my view the law requires that the right to sell the charged property can only accrue until after the lapse of three months' period and upon service of the said notice on the mortgagor or chargor. The notice is given with understanding that the mortgagee will re-convey the property in question to the mortgagor upon payment of the principal sum and any interest that may have accrued. That is why the equity of redemption gave the mortgagor a general right to redeem his property on or before actual date of redemption. It also gave him the grace period which extends long after the actual date of redemption. In my humble view failure for borrowers to pay on agreed date or being in arrears did not in any way extinguish their interest on the property. The existence of a debt did not have necessarily to cause the borrower to forfeit his property to the lender.

It is the contention of the bank that the borrowers did not pay a penny out of the sum advanced at the time the sale took place. Therefore that they were justified to sell the property by private treaty. The fact that a person seeks financial accommodation from a bank does not mean the bank can deal with the charged property in the way it deems fit. The existence of a mortgage document cannot give the bank unlimited power to seize, take possession and deprive the property owners. It is therefore my position that any arrangement between a mortgagee and a third party to deprive the chargor of his equitable right of redemption shall be void for all purposes. That right is inviolable and I think contemporary jurisprudence will frown at anything that leads to the clogging of the right to redeem.

I think it will be startling result if banks were to be allowed to proceed in the manner this particular bank proceeded against the charged property. The conduct of the bank would in my view constitute a clog on the equity of redemption directly or in the sense of impediment of the exercise of that equitable remedy. By giving one month's notice and selling the mortgage property without proper notice and behind the back of the owners in a discrete and opaque manner to the 2nd defendant, the bank introduced fundamental change of circumstances beyond the control of the borrowers or original contemplation of the parties, thus rendering it physically and commercial impossible for the borrowers to fulfill their obligation and/or rights to redeem the suit property. Such conduct and/or action on the part of the bank transformed performance into a radically different obligation from that contemplated and or envisaged under section 69A of I.T.P.A. It is therefore invariably clear that the power to sell the suit property without sufficient notice to the mortgagor and/or borrowers is unlawful, unfair and oppressive.

It is the contention of the 2nd defendant that on 21st August, 2007 it came to their knowledge that the bank was selling and/or offering for sale ALL THAT property No.7785/259 Runda Nairobi by way of private treaty. And consequently it made an offer to purchase the said property at Kshs.12.5 million which offer was accepted. The question that arises is whether the bank was invited to sell the suit property before it had given the notice envisaged under section 69A of I. T. P. A. It is clear beyond doubt that the bank did not give a proper notice before it started the redemption process. I make a finding that the notice given under the letter dated 10th July, 2007 is invalid and improper and therefore could not amount to a statutory notice. It means the bank had no powers to sell the suit property either by way of public auction or by private treaty. Having made a decision that the notice did not constitute notice under section 69A of I.T.P.A. it is clear in my mind that any subsequent transaction or dealings in the suit property was void *ab initio.*

In my humble view there is some impropriety both in the conduct of the bank and that of the 2nd defendant which shocks the conscious of equity. For instance the 2nd defendant does not disclose how he came to know that the subject suit property was up for sale. It means there was some non-disclosure of information from the bank's officials or its advocates. The law is that where there has been undue oppressive exercise of the statutory power of sale is indicative of the presence of fraud of mala fides on the part of the bank as in the present case. A court of equity cannot allow a party to retain the benefit of a transaction which he or she unfairly acquired. Equity will intervene to prevent any unconscientious use of power. In my humble view there is an element of fetter or frustration when an act takes place which so significantly changes the nature of outstanding rights and obligations from what the parties and the law could have reasonably contemplated at the time of the inception of the subject contract. The mortgage required and empowered the bank to give a statutory notice of three months before it could exercise its statutory power of sale. The notice must be in place for three months after service and it is only after service of three months notice that the bank is required or allowed to deal with the suit property. I think it was absurd and illegal on the part of the bank to give one month's notice and sell the property through a private treaty two months after the date of the said notice.

As stated earlier the rule against clogging or fettering the equity of redemption relates to the very essence of an equitable right to redeem the mortgaged property. The right to redeem a charged mortgaged property cannot be fettered or clogged by any stipulation other than under the right procedure. I think the procedure adopted by the bank is in contravention of the law and equity. In **HCCC No. 265 of 2000 Joseph Siro Mosioma v H.F.C.K. & 3 others** I addressed my mind as to whether financial institutions had powers to sell up a charged property by a private treaty. In that ruling I stated that the bank officials and/or agents in selling a property by private treaty must address their minds to the drastic effects of depriving the owner of the charge property. My position was the banks are required to give a fair amount of time and/or notice in addition to giving the mandatory statutory notice under the relevant laws before an attempt to sell the property by private treaty is endeavoured. I also deprecated the practice of banks rushing to sell the charged or mortgaged properties through private treaty without giving adequate notice and without attempting to sell the same by public auction. It was my view in that ruling that there cannot be any sale by private treaty when there has been no previous attempts to sell the subject property by public auction. In my humble view there must be evidence or attempts to sell the charged property through a public auction which failed either through a conduct of the borrower or some other issues relevant to the case.

I reiterate my position in that ruling that a mortgagee cannot at his convenience deal with the mortgage property in the manner he deems fit by resorting to sell by private treaty at a first instance. The right to sell by private treaty is not available and cannot be exercised by the mortgagee unless and until the mode of public auction has been attempted but failed due to the conduct of the borrower. Where a chargee resorts to sell by private treaty without attempting to sell by public auction the resulting transaction would be void *ab initio*. In this case the bank purported to sell the suit property through a private treaty before it had given the mandatory statutory notice required under section 69A of I.T.P.A. and without attempting to sell by public auction. That was absolutely illegal and in contravention of the clear provisions of section of section 69A of I.T.P.A. I make a finding that an illegal transaction cannot be a basis to confer a right on a third party especially like the present defendant whose conduct is somewhat suspicious.

I am therefore satisfied that the plaintiffs have disclosed the existence of several prima facie issues to entitle them to the grant of an injunction. Having satisfactorily passed the requirement of the first test of **Giella v Cassman Brown** the other issue is whether damages are adequate remedy in the circumstances in this case. I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence the damages and/or loss that would be suffered by the plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention. Refusing an injunction in the circumstances of this case will fly in the clear provisions of the law. I am therefore satisfied that the plaintiffs will suffer irreparable loss if an injunction is refused.

In conclusion it is clear that the bank deprived the mortgagor of their property and did not give the borrowers adequate opportunity to redeem the suit property. It is also clear the bank in unclear circumstances made contacts with the 2nd defendant may be with a view to deprive the plaintiffs of their property. Perhaps it is also important to note that the 2nd defendant evicted the plaintiffs and/or the agents from the suit premises without the due process of the law. The conduct of the defendants is unfair and unconscionable. A court of equity will not intervene merely because the mortgagee has obtained a collateral advantage but it will intervene if the act complained of is unconscionable. In short the balance of convenience tilts in favour of maintaining the status quo pending the determination of the dispute between the parties herein.

Finally and more significantly I have discovered at the time of writing this ruling that the plaintiffs had not applied for an order of permanent injunction in the plaint. I reckon that that is an issue which is central to the orders sought in this application. I am aware that a court has no powers to grant orders which were not prayed for in the pleadings of the parties. Nevertheless this is a court of equity. And equity follows the law. And in view of the clear contraventions committed by the bank, it would be inequitable not to grant an injunction. Given the increased flexibility of the equitable doctrine it is, I think, in the interest of justice and the protection of borrowers against clear contravention by lenders to grant the orders sought in the application. The protection of the borrowers and safeguarding of the interest of the lenders can be accommodated in a much more principled formula without inhibiting the statutory power of sale given to the financial institution. Perhaps more debate and honest discussions into the legal regime governing such relationship is of paramount importance. Parliament having given a lead to the courts in areas of commercial practice, issues creating unnecessary grey areas should be laid to rest by the courts. I do not wish to proscribe that which must attract unnecessary sanction to the smooth operation in the area of commercial dealings. We need to move to principles that are both wide enough to extend to those in need of protection yet not so broad as to apply to those who are not in need. It is for that reason I propose to adapt that in areas where there is a clear and outright contravention of the law by lenders the court has a legitimate and residual powers to grant an injunction even when it is not prayed for in the plaint provided there is an application seeking such prayers. I also think that the court in addition to the prayers sought should be in a position to render itself by giving an appropriate order to parties who are in need of protection, especially where there is a clear omission whether inadvertent or otherwise by their advocates to plead and pray for such orders. That may sound radical and one may be tempted to say that this court is stepping on murky areas by being proactive. Nevertheless matters of public importance and public interest must be analyzed and debated in a sober but vigorous manner. In the book by **R. W. Turner** on the Equity of Redemption the author stated'

"**Having established a general principle from the particular rules already in force, the law is able to take a further step forward and work out other rules from this general principle to suit a variety of difficult situations. If these new rules are just and equitable when applied to new cases, and, where they come into conflict, more just and equitable than the old rules which do not fit in with the new principle, that principle will stand the criticism of the age and be a stepping stone in the law of the land. This is the way in which our common law and equity have been built up, by a process of trial and error. Just as the invention of a new and simple symbol in the place of a long mathematical formula simplifies the calculations to be made, and, when all the ideas involved can be carried in the head mechanically by means of that symbol, the mind is able to make a further advance into unknown realms of mathematical speculation; so, a new and simple explanation of a number of**

**closely related, yet complicated series of juristic ideas, put into a single commonplace legal phrase, which conveys the whole, leads to a great advance in jurisprudential thought, which must result in a corresponding advance in practice".**

In this country borrowers live in a mortal and perpetual fear of losing their property merely because he or she is in a debt and one may be tempted to say the legal regime in this country is substantially in favour of the banks. It is for that reason that the courts in this country are required to play pivotal and leading role in the protection of the rights of the borrowers when there is fragrant contravention of the law and when there is a lacuna in the applicable law. The point I am making is that it is the judges to mould the rules which they apply in accordance with the exigencies of the time and situation without disregard to the existing laws applicable. By any standard I do not intend to shy away from addressing my mind to what has notoriously been referred to as unconscionable or oppressive mortgage/charge transactions, bearing in mind that I have to do justice to both sides. I also do not intend to overstretch what has been settled by the Court of Appeal.

All in all having made a decision that the charge is voidable and subsequent statutory notice is ineffective and illegal, then it means the whole transaction was conducted in a manner contrary to law and equity. As stated earlier it was admitted by the 2nd defendant that after purchasing the suit property from the 1st defendant it used unlawful means to evict the registered owners. In short the purported exercise of statutory power of sale, the removal and/or eviction of registered proprietors without the legal mechanism being followed was such that this court is empowered to invoke its inherent powers to do justice to the parties and make appropriate orders restoring the status quo before the unlawful acts of the defendants.

**In the premises and having considered the matter in its entirety I grant the plaintiffs the prayers in the application dated 18th December, 2007. Costs shall be in the cause.**

Dated and delivered at Nairobi this 11th day of April, 2008.

**M. A. WARSAME**

**JUDGE**