



**Economy Network Limited & 2 others v Equity Bank & another; Gwiyo (Interested Party)
(Commercial Case 63 of 2018) [2024] KEHC 16564 (KLR) (31 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 63 OF 2018
RE ABURILI, J
DECEMBER 31, 2024**

BETWEEN

**ECONOMY NETWORK LIMITED 1ST PLAINTIFF
MARTHA JOSEPH 2ND PLAINTIFF
PERES ASEWE OKUMU 3RD PLAINTIFF**

AND

**EQUITY BANK 1ST DEFENDANT
NYALUOYO AUCTIONEERS 2ND DEFENDANT**

AND

LEAH ADDA GWIYO INTERESTED PARTY

JUDGMENT

Introduction

1. The plaintiffs herein, vide a further amended plaint dated the 4th February 2021, sued the defendants and the interested party seeking the following orders:
 - a. An order directing the 1st defendant to furnish the plaintiffs with a statement of account for both the overdraft and the advance payment guarantee accounts from the date of disbursements to the time of the demand.
 - b. A permanent injunction to refrain the defendant whether by themselves or through their servants or agents or anybody claiming through them whatever form of selling, transferring, alienating or dealing in any manner whatsoever with properties Title Numbers KisumuKoru1279 & Kisumu/Pandpieri/454 registered in the names of Martha Joseph and Peres Asewe Okumu respectively.



- c. An order for nullification of the sale conducted on the 18th July 2017 by Nyaluoyo Auctioneers over property land parcel number Kisumu/Koru/1279.
 - d. Costs of the suit and
 - e. Any other relief that the Court desires deem fit to grant.
2. The plaintiffs averred that on or about the month of April 2011, the 1st plaintiff made an offer to the defendant to borrow an overdraft facility of Kshs. 500,000 and a further advance payment guarantee facility of Kshs. 1,000,000 which were to be secured by a charge over Title number Kisumu/Koru/1279 and subsequently Kisumu/Pandpieri/454 after it was discovered that the first property's value was below the value of the proposed facilities.
 3. It is the plaintiffs' case that the 1st property was registered in the name of the 2nd plaintiff, Martha Joseph while the second property was registered in the name of the 3rd plaintiff, Peres Asewe Okumu.
 4. The plaintiffs averred that there were other forms of security detailed in the letter of offer over the facilities advanced to them including; a pledge over Kshs. 300,000 held in a fixed deposit account No. 0290397050919 to secure the repayment of the overdraft facility, directors personal guarantees and indemnity for Kshs. 1,331,048, letter of lien and set off and a resolution of the Board of Directors of the Borrower authorizing the borrowing and creation of the security.
 5. The plaintiffs further averred that the purpose of the facilities advanced to them was to source for petroleum products from Oil Libya Kenya Limited which were to be supplied to various customers including Muhoroni Sugar Factory who faced financial difficulties in settling the said amounts and subsequently led the plaintiffs to be in to debt to the 1st defendant.
 6. It is the plaintiffs' case that in the course of negotiations with the 1st defendant to restructure both the overdraft and advance payment, the 1st defendant without issuing any demand proceeded to advertise the charged property with the intention of exercising its statutory power of sale.
 7. The plaintiffs averred that despite various requests, the 1st defendant has failed, refused and/or ignored to supply them with the charge documents so as to enable them exercise their remedies under the charge and that this is due to the fact that the 1st defendant applied unlawful method of interest calculation as no notice of interest valuation was issued to them by the 1st defendant.
 8. The plaintiffs further averred that they subsequently engaged an independent financial analyst who tabulated and analysed the loan amount and discovered that the interest charged were over and above.
 9. The plaintiffs averred that despite being requested to carry out valuations of the suit properties intended to be sold through public auction, the 1st defendant refused to do so and instead conducted a valuation whose open market and forced sale value greatly undervalued the suit properties thus breaching their duty to act in good faith.
 10. The plaintiffs further averred that the 1st defendant failed to effect proper service of the requisite statutory notices and proceeded to advertise the intended auction of the suit property to be undertaken by the 2nd defendant which advertisement done in the daily newspaper of 26th June 2017 failed to disclose the venue. It was the plaintiffs' case that the entire process of auction was tainted with fraud on the part of the auctioneer, the 2nd defendant and on the part of the winner of the bid, the interested party.



11. The plaintiffs averred that they are ready and willing to settle the debt upon supply of the proper account statements indicating the interest rate charged and outstanding amounts payable to the 1st Defendant.
12. In addition to the orders sought hereinabove, the plaintiffs further seek an order of stay of the intended sale that emanated from the unlawful, unprocedural auction conducted by the 2nd defendant on the 18th July 2017, payment of the purchase price, transfer and/or any other dealings on land reference number Kisumu/Koru/1279.
13. The defendants filed a joint amended statement of defence filed on the 23rd March 2021 denying the allegations made by the plaintiffs save for the descriptive parts of the further amended plaint and proceeded to aver that after following all the laid down procedures, they did successfully sell by public auction title number Kisumu/Koru/1279 on the 18th July 2017, a Certificate of sale issued and thus the plaintiffs' suit had been overtaken by events.
14. The interested party also filed a statement of defence dated 18th March 2021 denying the plaintiffs allegations in the further amended plaint and proceeded to put them to strict proof.
15. It was the interested party's case that she became aware of the sale by public auction of Title Number Kisumu/Koru/1279 through an advertisement in the Daily Nation Newspaper of 26th June 2017, which auction went in line with the rules of advertisement.
16. The interested party averred that she attended the public auction carried out in accordance with the Public Auction Act and was declared the highest bidder having paid 25% of the bid price at the fall of the hammer and subsequently the full price of the property. She denied that the entire process was tainted with fraud and put the plaintiffs to strict proof of the same.

The Plaintiffs' Oral Testimonies

17. The 2nd plaintiff testified as PW1. She adopted her witness statement dated 15th January 2022 as her evidence in chief. PW1 testified that the 3rd plaintiff is her mother and that she is her guarantor. It was her testimony that she signed a letter of offer for a loan facility from the 1st defendant but did not pay the full amount as their business was struggling following a default by one of their clients, Muhoroni Sugar Company.
18. The 2nd plaintiff testified that the condition for the loan facility was her own personal guarantee, property Kisumu/Koru1279, her mother's property and Kshs. 300,000 in the 1st plaintiff's bank account.
19. She testified that they were never served with the statutory notices of sale but rather a notice of redemption upon which she went to the bank and met the credit manager who gave her bank statements showing an overdraft of Kshs. 500,000 running without renewal and an additional overdraft of Kshs. 1 million paid to Oil Libya as added as an overdraft.
20. PW1 testified that she saw fliers on the advertisement for sale of her property and on the date and time of sale she nominated someone to attend on her behalf who gave her the report that there was no auction. She testified that her property was undervalued as she knew the value of the properties in the area by virtue of sitting on the Muhoroni Land Board. She further testified that there was no auction hence the interested party could not be the highest bidder, that there was no 25% of the bid sum paid and nor was there payment of the amount allegedly paid for the sold property.



21. In cross-examination, PW1 testified that she was bound by the terms of the overdraft facility, that she was indebted to the bank to the tune of Kshs. 1.2 million which debt is still due. She testified that she nominated someone to attend the scheduled auction. PW1 further agreed that the 1 million paid by the bank to Oil Libya by the 1st defendant as advance payment of the guarantee facility though the bank never communicated the same to her. She admitted that she was aware that the property was sold to Caleb Omoro as the highest bidder.
22. PW1 further testified that the bank only served her with the redemption notice, that there was a valuation done by the 1st defendant prior to granting her the facility and that each property was valued. It was her testimony that her post office box number 1439 was withdrawn by the Postal Corporation after she took the loan though she was not aware of the withdrawal.
23. PW2, Charles Mumbo Owanga, a practicing accountant testified that in July 2017, the 1st plaintiff through its directors sought his services in consideration of their Bank statements and interest used by the Bank in charging their overdraft account.
24. It was his testimony that they went through the Bank statements and found the interest rate charged to have been varying from 30.83% - 31.89% up to September 2016 and that the money demanded by the Bank overstretched from Kshs. 500,000 – Kshs. 3,850,071.03. PW2 testified that there was regime change that reduced the interest rate which stood at 23% and allowed banks to increase rates by 2% but that the Bank overcharged by Kshs. 2.35 million.
25. In cross-examination, PW2 testified that the 2nd plaintiff gave him Bank statements and correspondence of an overdraft for Kshs. 500,000 and informed him that she defaulted to pay Oil Libya that is why the Bank debited the account with Kshs. 1 million. He admitted that he had not produced any document on how much interest was charged by the regulator CBK, that the interest rate capping rate came into effect on 14th September 2016 while his report was from 1st – 15th July 2017. PW2 further admitted that prior to the interest capping rates there was no abnormality in the interest rates charged by the 1st defendant.
26. PW3 Moses Omondi Owuor, a valuer testified that he was instructed by the plaintiffs in July 2017 to value Kisumu/Koru/1279 for purposes of litigation which he did on the 14th July 2017. PW3 produced the valuation report as P Exhibit 9.
27. In cross-examination, PW3 clarified that the 2nd plaintiff was the one who approached him to carry out the valuation for litigation purposes. He denied that she instructed him to value the property at Kshs. 7.2. million but that he carried out the valuation independently and professionally using comparisons with comparable properties as this was the best method given that the property is agricultural land.

The Defendants' Oral Testimonies

28. DW1, Steve Biko, the 1st defendant's Credit Manager adopted his witness statement dated 20th June 2022 as his evidence in chief and the documents filed as per the list filed on 22nd September 2021 as D Exhibit 1 – 33. DW1 prayed that the plaintiffs claim be dismissed with costs as the client failed to honour payments even after they were ordered to serve several notices on them by the lower court.
29. In cross-examination, DW reiterated that it gave the plaintiffs two facilities, a bank guarantee and a loan facility secured by two parcels of land and further that they also had a fixed deposit account which it had lien over. DW1 further testified that in cases where a client has an FDR account, in cases of default they first liquidate it.



30. He testified that the 1st defendant issued notices following the default following a case in the lower court directing them to issue fresh notices through the postal address given to them by the client though the notices were never returned to them. DW1 testified that based on the notices (as produced as exhibits), they instructed the 2nd defendant and subsequently instructed a valuer to value the properties prior to sale with the first property being valued at Kshs. 2.35 million mortgage value and a forced sale value of Kshs. 1.7 million.
31. DW1 testified that the valuation done prior to the auction of the property found that the market value of the same was Kshs. 3 million and a forced sale value of Kshs. 2.25 million. He testified that based on this, they instructed the 2nd defendant to advertise the property for sale and the property was bid by a couple with a deposit of 25% being paid at the fall of the hammer with the property finally selling for Kshs. 4.6 million.
32. DW2 Godfrey Omondi, a registered valuer testified that in December 2016 they received instructions from Equity Bank to sell the property to recover the loan. He testified that the property measured 12.3 acre and they valued its market value at Kshs. 3 million and forced sale value of Kshs. 2.25 million. He produced his valuation report dated 8th March 2017 as P Exhibit 33.
33. In cross-examination, DW2 reiterated his testimony and further went on to add that valuation can vary depending on the professional valuation and that a variation of 10% is allowed.

Interested Party's Oral Testimony

34. The interested party adopted her witness statement dated 1st December 2020 as her evidence in chief and the list of documents dated 20th April 2021 produced as IP Exhibits 1 – 5.
35. In cross-examination, the Interested Party reiterated that she attended the auction and that she paid the 25% of the purchase price on the 15th July 2017 at Standard Chartered Bank, Nairobi. She testified that the cheque was for 950,000 though 25% was Kshs. 1,150,000 and that she paid the balance of Kshs. 200,000 to clear the same. She further testified that the bank has never claimed for any balance of money as she paid all the money required by the auction
36. IPW2, Caleb Omoro adopted his statement dated 1st December 2020 as his evidence in chief. In cross-examination he testified that he placed the bid on behalf of IPW1, his companion with whom he had gone to the auction.
37. In re-examination it was his testimony that IPW1 had been his companion since 2003 and that she asked him to bid on her behalf.

The Plaintiffs' Written Submissions

38. It was submitted that service of statutory notices under the *Land Act* is a pre-requisite for the exercise of the statutory power of sale and that the burden was on the 1st defendant to prove that it served the notices which burden they failed to discharge.
39. The plaintiffs faulted the defendants for using the wrong postal code in serving the said notices being code, "40100" which notices were shown to be unclaimed and thus there was no prima facie evidence of service as required by law and held in the case of Moses Kibyegon Yator & Anor v Eco Bank Kenya Limited [2014] eKLR, thus depriving the plaintiffs of the opportunity to know the alleged nature and extent of their default thus rendering the notices null and void.



40. It was submitted that the 1st defendant had not produced a copy of the charge document showing the contractual interest agreed between the parties and proceeded to charge un-contractual interest rate on their loan account contrary to the provisions of section 44A of the *Banking Act* as reiterated by the Court of Appeal in the cases of Housing Finance Company of Kenya Limited v Scholastic Nyaguthi Muturi & Anor (2020) eKLR and Kenya Hotel Limited v Oriental Conventual Bank Limited (Formerly known as Delphi’s Bank Ltd) (2019) eKLR.
41. The plaintiffs further submitted that the 1st defendant breached the Banking Laws by unilaterally levying un-contractual interest. Reliance was placed on the case of Francis Joseph Kamau Ichacha v Housing Finance Company Limited (2014) eKLR.
42. It was submitted that under section 97 of the *Land Act*, the 1st defendant is required by law to carry out a valuation prior to exercising its statutory power of sale and that under the terms of reference issued by the 1st defendant, the valuer was directed to advise on the current market value for foreclosure purposes and thus the valuer’s hands were tied and his opinions were not independent. The plaintiffs thus submitted that the said valuation was carried out in consideration of irrelevant factors in relation to section 97 of the *Land Act*.
43. As to whether the interested party can be protected under section 99 of the *Land Act*, it was submitted that the interested party did not attend the auction nor did she place any bid and that if she did, she ought to have had her name in the attendance register and neither did she pay for the 25% of the purchase price required to be paid.
44. The plaintiffs thus submitted that the whole process was unlawful and incapable of conferring any proprietary rights to the interested party.

The Defendants’ Submissions

45. It was submitted that the plaintiffs enjoyed a relationship with the 1st defendant where they requested for an overdraft facility to enable her obtain petroleum products from Oil Libya Petrol Station for resale and as such the parties were bound by their contract or agreement, the terms of which ought to take precedence which the court ought to acknowledge as was held in the case of Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd (2017) eKLR.
46. The defendants submitted that the plaintiffs were re-issued with all statutory notices as ordered by the court in Kisumu CMCC No. 136 of 2015 as was evident from D Exhibits 29 to 32 and that subsequently, by failing to repay their loan, the claimants have unclean hands in equity and deserve no equity as was held in the case of Nairobi Milimani HCC No. 414 of 2014 (ELR) Francis J.K. Ichathe v HFCK Ltd.
47. It was submitted that the plaintiffs should not be granted the orders sought for nullification of the sale conducted on the 18th July 2017 as they had approached the court with unclean hands.
48. The defendants further submitted that once an auction has been successfully carried out, the plaintiffs’ equity of redemption is extinguished and they cannot proceed to stop the transfer of the suit property or retain interest thereon and that their only option is to seek damages as against the 1st defendant as was held by the Court of Appeal in Civil Appeal No. 111 of 1986 Mbutia v Jimba Credit Finance Corporation & Another {1986 – 1989} 1EA 340 {CAK}.
49. It was submitted that the plaintiffs claim that the auction was tainted by fraud and illegality was not proven beyond reasonable doubt through evidence presented. The defendants submitted that any



allegations of fraud must be pleaded and strictly proved as was held by the Court of Appeal in *Kinyanjui Kamau v George Kamau* [2015] eKLR.

50. It was further submitted that even on the issue of the value of the suit parcel that was sold, the respondents demonstrated that they did two valuations, in 2016 before the first auction and again in March 2017 thus there was no under valuation of the land or fraud as the sale was done guided by valuation of the land as a whole.
51. The defendants further submitted that a difference or dispute in valuation is not sufficient to stop a chargee from exercising its statutory right of sale especially when damages would be an adequate remedy as was held in the case of *Maina & Another v Equity Bank Limited & 2 Others (Commercial Case E324 of 2023)*.
52. It was further submitted that if indeed there is any irregularity in the sale as conducted, the plaintiffs had a recourse as against the 2nd defendant pursuant to section 26 of the *Auctioneers Act*. The defendants further submitted that they were entitled to the costs of the suit.

The Interested Party's submissions dated 8th July, 2024

53. On the part of the interested party, it was submitted on three main issues:
 - i. Whether one can bid on behalf of another. Reliance was placed on *Maina Wanjigi & another v Bank of Africa & 2 others* [2015] e KLR where the court so held that a party can bid through another person or agent.
 - ii. whether the auction was regularly conducted: it was submitted that the auction was regularly conducted and that even if there was an irregularity, which was not proved in this case, then the plaintiffs remedy lay in an action for special damages against the auctioneer as stipulated in section 26 of the *Auctioneers Act*. Reliance was placed on *Job Ochieng Muganda v HFCK Ltd* Further, that there was nothing irregular about issuance of advance cheque which was more than the bid amount. It was submitted that the bank had issued statutory notices as directed in *Kisumu CMCC 136 of 201*, in 2017 as shown by the documents produced in court. Reliance was placed on *Ichathe v HFCK Ltd HCC 414 of 2014* on approaching the court with clean hands as cited in *HFCK v Ngege Kitson Mondo* [2006] e KLR on the right of the mortgagee to exercise its right and statutory power of sale and the right not to be interfered with at the fall of the hammer.

In this case, it was submitted the plaintiffs made unsubstantiated claims of fraud, misrepresentation and dishonest dealings of the charge, which were not even pleaded.
 - iii. on whether the plaintiffs are entitled to the orders sought, it was submitted that the plaintiff's equity of redemption having been extinguished following the successful auction of the property subject of this suit, the court cannot void the sale. Reliance was place don *Mbuthia v Jimba Credit Finace Corporation Ltd* where the court held that the mortgagee had no right to intervene once the sale has been concluded. The interested party also relied on *Fisher, Lightwood*, law of Mortgages page 314.

On alleged fraud, misrepresentation and misconduct, it was submitted that no particulars were pleaded that the property was properly valued in 2016 before the first auction and in 2017 by *CMT Realtor Ltd* as per *GMW 2*.
 - iv. on whether the interested party is entitled to a transfer of the purchased property, it was submitted that having successfully bid for the property at the auction as advertised, paid 25%



at the fall of the hammer and later clearing the balance of Kshs 3,450,000 on 18/7/2017 by fulfilling all conditions of the auction, she was entitled to the transfer of the property.

The interested party urged this court to dismiss the plaintiff's suit.

- v. on who should bear costs of the suit, the interested party prayed for costs considering the fact of the plaintiffs occupying the land she purchased and dragging her into court.

Analysis & Determination

54. I have considered the pleadings filed by the respective parties, the oral testimonies as well as their submissions. I have also perused the exhibits and considered the decisions cited. The issues for determination are thus;

- a. Whether there was a valid charge contract between the parties herein and if so;
- b. Who defaulted in the charge contract?
- c. Whether the 1st defendant's right to exercise its statutory right of sale materialised and
- d. Whether the 1st defendant's right to sale was properly exercised
- e. Whether the Public Auction was properly conducted
- f. Whether the plaintiffs are entitled to the orders sought
- g. Who bears the costs of the suit?

Whether there was a valid charge contract between the parties herein and if so

55. As to whether there was a valid contract between the plaintiffs and the 1st defendant, the plaintiffs submitted that the 1st defendant had not produced a copy of the charge document showing the contractual interest agreed between the parties upon which it was charging the illegal and unlawful interest rate on their loan account.
56. The law places the burden of proof on the plaintiffs to prove their case on a balance of probability. Section 107 of the *Evidence Act* (Cap 80) provides that whoever desires the court to give judgment on the basis of existence of certain facts, must prove that such facts exist. Further, section 108 provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party.
57. In this regard, the plaintiffs are the one's who pleaded in their further amended plaint that the 1st defendant was charging them illegal and unlawful interest in contradiction to section 44A of the *Banking Act*. Accordingly, it was upon the plaintiffs to prove their allegations which they presented no evidence of the same.
58. That notwithstanding, I note that the plaintiffs pleaded that despite various requests, the 1st defendant had failed, refused and/or ignored to supply them with the charge documents so as to enable them exercise their remedies under the charge and ascertain the interest.
59. All the aforementioned notwithstanding, the evidence presented before court shows that there was a contract of charge between the plaintiffs and the 1st defendant based on the letter of offer dated 27th April 2011 produced as an exhibit by the plaintiff upon which the plaintiffs agreed to have the suit parcels herein charged in exchange for the facility advanced.



60. Taking all the above into consideration I find and hold that there was a valid contract between the plaintiffs and the 1st defendant on charging of the suit properties as security for the loan facilities advanced vide the letter of offer dated 27th April 2011.

Who defaulted in the charge contract?

61. The 1st plaintiff testified and admitted that the plaintiffs were in default of the agreement between themselves and the 1st defendant. The plaintiffs sought to attribute their default to unpaid invoices forwarded to Muhoroni Sugar Company. However, this bears no direction on the terms of the said contract. Further, it is trite that a court cannot rewrite a contract between two parties. The reason for the default is not one that this court can interpret to exempt the plaintiffs from fulfilling the terms of the contract.

Whether the 1st defendant's right to exercise its statutory right of sale materialised

62. Having found that the plaintiffs were in breach of the loan agreement between themselves and the 1st defendant, it is automatic that the 1st defendant's right to exercise its statutory right of sale crystallized. Kwach JA. had this to say in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 when considering whether a prima facie case had been made out to warrant grant of a temporary injunction:

“I have always understood That it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so That he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah That the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf.”

63. I quote this case to emphasise the importance of a party undertaking all due diligence prior to entering into a commercial transaction involving not only a large amount of money but similarly one that involves such enormous implications.

Whether the 1st defendant's right to sale was properly exercised

64. The plaintiffs averred that they never received any statutory notices for the sale from the defendants save for the notice of redemption. They however submitted that the notices sent to them bore a postal code “40100” and that the envelopes that had been sent to them were marked “unclaimed” and thus it was upon the defendants to prove that the notices had been sent.
65. In her own testimony, however, the 2nd plaintiff testified that her post office box number 1439 was withdrawn by the Postal Corporation after she took the loan though she was not aware of the withdrawal. She did not adduce any evidence to show that she notified the 1st defendant upon discovery of such withdrawal or change of postal address and when the withdrawal was done.
66. On their part, the defendants adduced evidence that they sent the statutory notices to the postal address used by the plaintiffs when acquiring the loan facility and that subsequently, following court orders issued in Kisumu CMCC No. 136 of 2015, they reissued the said notices and served them upon the plaintiffs.



67. Section 90 of the Land Act, to which is of importance in the instance case, provides for remedies of a charge to the effect that:

90(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

90(2) The notice required by Subsection (1) shall adequately inform the recipient of the following matters – ...

The notice required by subsection (1) shall adequately inform the recipient of the following matters—

- a) the nature and extent of the default by the chargor;
- b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
- d) the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and
- e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

68. It is worth noting that a statutory notice issued pursuant to section 90 of the Land Act, prompts a process, which leads to the chargee ultimately exercising its remedies outlined under section 90(3) of the Act. The notice is issued where the chargor is in default of any obligation under the charge or has failed to pay interest or any other periodic payment and such default continues for one month.

69. As read together with section 90(3), section 90(2) of the Land Act obligates the chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non observance of a covenant in the charge, then the notice is to state what the charger is to do or desist from doing so as to rectify the default. Thirdly, the notice ought to state the fact that if the default is not rectified within the time stated in the notice, then the chargor would thereafter sue for money due and owing under the charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the notice is that the notice needs to state that the chargor has the right to apply to court and seek any relief or challenge the exercise by the chargee of any of the statutory remedies. The notice crystallizes after the expiry of ninety days from the date it is received by the chargor.



70. The statutory notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory notices.
71. The Statutory notices in the present case in my humble view were in accordance with section 90(2) of the Land Act and therefore the acts of the defendant in seeking to exercise its chargee's statutory power of sale were lawful.
72. I am satisfied with evidence presented by the defendants before court that the plaintiffs were duly served with the statutory following the orders in Kisumu CMCC 136 of 2015. The address of service was the same one used by the plaintiffs in the application of the loan. The fact that the plaintiffs' postal address was withdrawn is immaterial especially considering that the same has not been proven through any evidence in court of a letter of withdrawal from the Postal Corporation of Kenya. I find that service was duly undertaken by the defendants in accordance with the provisions of the Land Act.
73. Secondly, section 96 of the land Act is explicit to the effect that after the borrower has failed to remedy the default in accordance with the notice issued under the law, the chargor, who is the guarantor is entitled to a notice of not less than 40 days under section 96(2) of the Land Act, before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is mandatory, and is quite different from the Redemption Notice issued under rule 15 of the Auctioneers Act as herein explained.
74. Section 96(2) of the Land Act which provides as follows:-
- “Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.
75. In the case of David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR, Justice F. Gikonyo had this to say on a Charge under Section 96(2) of the land Act as compared to the Redemption Notice issued under rule 15 of the Auctioneers Act.
- ‘Of importance, when Parliament enacted section 96(2) of the Land Act, the provisions of the Auctioneers Act were existing law as per section 7 of the Sixth Schedule of the Constitution. Again, rule 15 of the Auctioneers Rules applies to sale by public auction of any immovable property in execution of a decree or on instructions such as by a chargee. It is not specially tailored for purposes of section 96(2) of the Land Act. One other important thing: Until the enactment of the Land Law, 2012, equity of redemption had been left to judicial interpretation and case law. But now it has gained statutory expression in section 89 of the Land Act which provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption. I refuse that section 96(2) of the Land Act is an embellishment in the statute or a duplication of or could be read to mean Rule 15 in the Auctioneers Act.’
76. I cannot agree more.



77. The plaintiffs further faulted the valuation process undertaken by the defendants stating that the 1st defendant refused to carry out the valuation but rather conducted a valuation whose open market and forced sale value greatly undervalued the suit properties thus breaching their duty to act in good faith.
78. On their part, the defendants presented evidence to the effect that they undertook two valuations, in 2016 before the first auction and again in March 2017 thus there was no under valuation and further that a difference or dispute in the valuation is not sufficient to stop a chargee from exercising its statutory right of sale.
79. I note that valuation of property is based on professional and expert opinion of a duly qualified valuer hence a valuation cannot be disregarded merely because there is a difference in professional opinion. The courts have always held that a difference or dispute in valuation is not sufficient to stop a chargee from exercising its statutory right of sale especially when damages would be an adequate remedy. Therefore, even if it is demonstrated that the suit property was undervalued, the plaintiffs bear the burden of proving that the Bank is incapable of compensating them (see *Omega Foundation v Chase Bank of Kenya KSM HCCC No.69 of 2018 [2018] eKLR*).
80. In this case, the plaintiffs do not contend nor have they presented any evidence to show that that the valuer who undertook the valuation on the Bank's instructions was unqualified. Furthermore, the plaintiffs have not outlined any irrelevant factors considered by the valuers in undertaking the valuation. The instructions given by the Bank were for the valuer to undertake a valuation of the suit parcels in preparation for sale. Accordingly, I find and hold that there was nothing wrong in those instructions.
81. Taking all the aforementioned into consideration, it is my finding that the 1st defendant's right to sale was properly exercised.

Whether the Public Auction was properly conducted

82. The plaintiffs pleaded and testified that the public auction carried out on 18th July 2017 was fraught with fraud on the part of the 2nd respondent and interested party and that the same ought to be declared illegal and all subsequent transactions nullified and that as a result the interested party cannot seek protection under section 99 of the *Land Act*.
83. Bearing in mind that the issue whether the Bank had the right to sell the suit property has already been determined, the ground fails. Any proven irregularity in this instance can be ameliorated by a claim for special damages against 1st and 2nd defendants as stipulated in section 26 of the *Auctioneers Act*. This is because once the suit property had been knocked down and sold in a public auction by the Bank in exercise of its statutory power of sale, as was in the instant case, the plaintiffs' equity of redemption of the plaintiff was extinguished and since the suit property passed at that instance upon issue of certificate of sale to the purchaser third party who is the interested party in the instant suit, the court cannot issue an injunction stopping completion of the process of sale and transfer (see *Jacob Ochieng' Muganda v Housing Finance Company of Kenya Ltd, NRB CA No. NAI 453 of 2001* (UR 241/2001) cited by the interested party in her submissions and *Bomet Beer Distributors Ltd & another v Kenya Commercial Bank Ltd & 4 others NKR HCCC No. 147 of 2004 [2005] eKLR*).

Whether the plaintiffs are entitled to the orders sought

84. From all the above evidence and analysis, it is clear that the plaintiffs failed to prove their claims against the defendants and the interested party and as such, they do not merit any of the order orders sought. A court cannot be seen to make orders in vain. The plaintiff's suit is accordingly dismissed.



Who bears the costs of the suit?

85. Section 27 of the *Civil Procedure Act* provides: -

27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

86. In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review application no 6 of 2014 the Court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

87. In the instant case, the plaintiffs having filed this suit have failed to succeed in their claim, they cannot be awarded costs in the circumstances. However, considering the long period that this matter has been in court being litigated upon, I find and hold that it is fair and just for each of the parties bear their own costs of the suit.

88. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

