Kirima v Taramba & 3 others (Environment and Land Appeal E007 of 2022) [2023] KEELC 17530 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17530 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E007 OF 2022

CK NZILI, J

MAY 17, 2023

BETWEEN

JULIUS KIRIMA ..... APPELLANT

AND

JAMLICK GITONGA TARAMBA ..... 1ST RESPONDENT

NAOMI NYOROKA IKIARA ..... 2ND RESPONDENT

MOLYN CREDIT LIMITED ..... 3RD RESPONDENT

ERIC TIMOTHY BALONGO ..... 4TH RESPONDENT

JUDGMENT

1. This judgment relates to two consolidated appeals namely Appeal No. E007 and E009 of 2022 brought by Julius Kithinji Taramba and Molyn Credit Limited herein after the 1st and 2nd appellant pursuant to an order dated March 3, 2022.

2. The 1st appellant by a memorandum of appeal dated February 15, 2022 faults the judgment delivered on February 21, 2022 on the grounds that the trial court;-failed to adhere to the provisions of Section 96(2) of the *Land Act*; failed to appreciate his pleadings and submissions; failed to properly interpret the sale agreement and establish its terms showing that due diligence was done; for ignoring to find that the sale was legal and consideration had been paid between him and the 4th respondent; for finding that he was not an innocent purchaser for value yet no fraud was proved by the 1st & 2nd respondents against him; for not appreciating that the 1st respondent had indeed secured a loan facility with the consent of the 2nd and 3rd respondents with the latter advancing him money; for failing to appreciate that the transaction was legal, procedural and due diligence had established that the 4th respondent was the rightful owner of the property; for ignoring that he was holding a valid title upon transfer to him by the 4th respondent; for invalidating and or cancelling his title; for failing to make consequential finding

and orders regarding his indebtedness and right to the monies he had paid to the 4th respondent; for failing to interpret the law properly yet the 1st respondent had admitted awareness of the outstanding loan of Kshs 622,203/= which was accruing interest but failed to clear it rendering the 3rd respondent, now 2nd appellant to exercise its statutory right of sale with the 3rd respondent being declared the highest bidder subsequent to which he was registered as a rightful owner; for failing to appreciate that the requisite 90 days and 45 days notices and the forced valuation had been done, issued and undertaken; for entering judgment in favour of the 1st and 2nd respondents contrary to the facts, evidence and the law; for failing to appreciate the status of the land as at 12.8.2016, 13.4.2018 and 13.8.2018 and the history behind it; for failing to award costs; for failing to appreciate that there was a bank customer relationship which caused the 1st respondent to seek a loan from the 3rd respondent but failing to repay it on the set monthly instalments lastly by issuing bouncing cheques.

3. The 1st appellant has prayed that the appeal be allowed, his defense be allowed with costs and in the alternative, to be refunded Kshs 1,100,000/= together with interest at bank rates and or in the alternative a finding be made as to the indebtedness to the 4th respondent.

4. The 2nd appellant by a memorandum of appeal dated February 17, 2022 seeks to set aside the judgment dated January 20, 2022 because the trial court;- made a blanket order directing that the charge be reopened and or reviewed; for voiding the 2nd appellant's exercise of its statutory power of sale and the resultant transfers; for failing to consider the overwhelming evidence it tendered showing compliance with the law as regard the 1st and 2nd respondents; for directing the cancellation of the title to revert to the 1st respondent; for awarding any damages to the 1st and 2nd respondents of Kshs 2million which was irregular and unwarranted; for failing to consider its evidence and written submissions; for failing to establish that the 1st & 2nd respondents had not met the threshold on the burden of proof on fraud and collusion to prove their claims and lastly; for going against the weight of the evidence and the law.

5. This being a first appeal, the court is required to rehearse, re-hear and re-appraise, reassess and or re-evaluate the finding on fact and law by the trial court, come up with its findings in fact and law, while at the same time giving due allowance for the trial court had the benefit of seeing and hearing the witnesses first hand and assessing their demeanor. See *Selle & another vs Associated Motor Boat Company Limited* (1968) E.A 123 and *Peter vs Sunday Post Limited* (1958) E.A 424.

6. At the lower court, Jamlick Gitonga Tharamba, Naomi Ikiara a husband and wife now the 1st& 2nd respondents were the plaintiffs while the 2nd appellant herein was the 1st defendant and the 1st appellant was the 3rd defendant, the 4th defendant now the 4th respondent.

7. By an amended plaint dated July 17, 2020, the 1st respondent had averred that he was the registered owner of LR No. Nkuene/Mikumbune/1623 (hereinafter the suit property) on which he took a loan of Kshs 405,000/= from the 2nd appellant by an agreement made in August 2014 and a charge registered against the suit land in favor of the 2nd appellant. The 1st & 2nd respondents averred that the loan was to assist in a pig-keeping project and partly cater to the medical attention of the 3rd respondent. It was averred that on 15.5.2015/= the 1st and 2nd respondents were notified of loan arrears of Kshs 103,278/= and directed to clear the same to avoid the disposal of the security.

8. The 1st and 2nd respondents averred that in February 2018, it came to their knowledge that the property had been sold to the 1st appellant respondent who gave the notice to vacate the land by 31.12.2018. The 1st and 2nd respondents averred that the exercise of the statutory power of sale by the 2nd appellant was fraudulent, breached the duty of care and was contrary to Sections 90 (1) (2) (b), 96 (2) and 97 (2) and (3) of the *Land Act, 2012*. They prayed for the charge to be reopened and or revised, the sale and the transfers to be invalidated, and the property to revert to them. In the alternative, the 1st

and 2nd respondents prayed for damages for breach of care and aggravated damages. The plaintiff was accompanied by a list of witness statements and documents dated January 30, 2019.

9. The 2nd appellant as the 1st defendant at the lower court opposed the suit by an amended defense dated August 24, 2020. While admitting that the land initially belonged to the 1st and 2nd respondents who took a loan and charged it as pleaded in paragraphs 7, 8, 10, 11 & 12 of the amended plaint, save to state that it disbursed Kshs 405,000/=, it denied that the 1st respondent was regularly servicing the loan given that he defaulted and issued dishonored cheques. It averred that demand notice(s) sent to the defaulters were ignored prompting it to exercise its statutory power of sale on March 16, 2016 in full compliance with the law. The 2nd appellant denied any breach of any law or duty of care as alleged in paragraphs 30, 32, and 33 of the amended plaint.

10. Additionally, the 2nd appellant denied any alleged collusion with the 4th respondent in the 1st appeal. The amended defence was accompanied by a case summary, issues for determination, witness statements and a list of documents dated June 8, 2020

11. The 1st appellant opposed the suit by a defense dated February 15, 2019 on the basis that he purchased the suit land from the 4th respondent and 3rd respondent to the two appeals upon conducting an official search following which he became an absolute owner of the property. He denied that he was privy to any alleged arrangements between the 1st and 2nd respondents with the 2nd appellant. Further, the 1st appellant to the 1st appeal admitted to entering into the land as averred in paragraph 21 of the original plaint and fencing it in the exercise of his proprietary rights as a duly registered owner.

12. The 1st appellant denied the contents of paragraphs 22-29 of the original plaint and urged the suit to be dismissed. He did not file any amended defense after the original plaint was amended. His defense was accompanied by a list of witness statements, a list of documents and a case summary dated November 15, 2019. Later on, the 1st appellant filed a further list of documents dated April 6, 2021. From the record of February 20, 2019, it appears that Eric Timothy Balongo, the 4th respondent in the 1st appeal was not served in person with summons to enter an appearance but leave was granted to serve him with summons by way of a registered post. The same was done and an affidavit of service was filed to that effect as per the records of February 27, 2019.

13. By a ruling dated June 26, 2019, the trial court granted an injunction pending hearing and determination of the suit which restrained the respondents herein from interfering with the 1st and 2nd respondents' rights to quiet possession of the suit land. Following compliance with Order 11 of the Civil Procedure Rules the matter commenced its hearing on December 16, 2020 in the absence of the 4th respondent.

14. The 1st respondent testified as PW 1. He adopted his witness statement dated 30.1.2019 and produced a copy of the title deed as P. Exh No. (1), a loan processing slip as P. Exh No. (2), a loan disbursement deposit to the Cooperative Bank as P. Exh No. (3), loan repayment slips and receipts as P. Exh No. (4), letters from 2nd appellant dated 15.5.2015 & 8.3.208 as P. Exh Nos. (5) and (6), a notice to vacate the land by the 4th respondent dated 22.3.2018 as P. Exh no. (7), photos as P. Exh No. (8), an official search dated 4.1.2019 as P. Exh No. (9), a copy of a green card as P. Exh No. (10), and lastly, a valuation report dated January 16, 2018 as P. Exh No. (11).

15. In cross-examination by the 2nd appellant's counsel, PW 1 told the court that he took out a loan of Kshs 400,000/= and offered the suit property as security, which loan was payable in (48) monthly installments of Kshs 22,404/= with effect from November 2, 2014. His wife also signed the spousal consent. PW 1 told the court that his land was valued at Kshs 1.2 million in 2014. He admitted that his loan application was for Kshs 405,000 but he only received Ksh.340,000/=. Further, PW 1 told the

court that he had only repaid Kshs 94,125/= as of February 2015. PW1 admitted that he was served with the statutory notice by the 2nd appellant dated 15.5.2015 via his address 105-6202 Nkubu to clear the loan within 60 days from the date of the notice but was unable to comply with the notice.

16. Additionally, PW 1 admitted receiving D. Exh No. (8) at his address which was a 3 months statutory notice. Similarly, he also admitted receiving D. Exh (9) from the auctioneers and D. Exh (14) through the same address. PW1 admitted that after February 2015 he never repaid the loan and that some of the cheques he gave out to the 2nd appellant to clear the loan were dishonored by his bank on January 5, 2015, February 3, 2015, March 3, 2015, June 3, 2015 and August 5, 2015 respectively.

17. PW 1 said that he was registered as the owner of the land on February 12, 2010, which land was later transferred to the 4th respondent on 12.8.2016 and eventually to the 1st appellant on 13.4.2018. He said that he only learned of the changes after he was served with a notice to vacate the land dated 23.3.2018. He told the court that he declined to vacate the land though he did not object when he got the notice(s). However, the 1st appellant fenced the land despite his occupation. PW 1 insisted that there was no notification of the impending auction sale on March 16, 2016 when the loan allegedly due from him was Kshs 945,813/-. He denied receiving the letters dated September 3, 2015 and January 7, 2016. The 1st respondent did not call any other witness including the 2nd respondent to corroborate his evidence.

18. Moses Marai Anyanga on behalf of the 2nd appellant testified as DW1. He adopted his witness statement dated June 8, 2020 and produced a copy of the credit application and agreement form as D. Exh No. (1), the charge as D. Exh No. (2), the official search as D. Exh No. (3), a valuation report as D. Exh No. (4), a bundle of bounced cheques as D. Exh No. (5), letter dated 15.5.2015 as D. Exh No. (6), copy of the certificate of postage for letters dated 15.5.2015 as D. Exh No. (7), copy of the 3 months' notice dated 3.9.2015 as D. Exh No. (8), copy of the redemption notice dated 7.11.2016 as D. Exh No. (9), a newspaper advertisement dated 29.2.2016 as D. Exh No. (10), a valuation report dated 23.2.2016 as D. Exh No. (11), copy of the certificate of sale as D. Exh No. (12), a memorandum of sale as D. Exh No. (13), a letter dated 27.7.2017 as D. Exh No.1 4, and lastly a copy of the statement of accounts as of 26.7.2017 as D. Exh No. (14).

19. In cross-examination, DW 1 told the court that the 1st & 2nd respondents were advanced Kshs 405,000/= by the 2nd t respondent, paid a down payment of Kshs 32,000/= on 30.8.2014 as the processing fees, and Kshs 62,320/= following completion of the process on 2.10.2014. DW1 insisted that the requisite statutory notices were served, received and acknowledged by the 1st and 2nd respondents at their disclosed registered postal addresses. He did not produce the certificates of postage. Further, DW 1 testified that both a two months' notice and a 45 days' notice were issued under Section 92 of the *Land Act* as per D. Exh No. (9).

20. Similarly, DW1 said that the newspaper advertisement had a clear date when it was issued. He admitted that he had no affidavit of service from the auctioneers, a certificate of postage, and or delivery to the 1st & 2nd respondents to that effect. DW 1 said that he had no proof that the notices were sent to the 1st & 2nd respondents. About the auction sale, DW 1 said that the property was sold for Khs.1,240,000/= which the 2nd appellant received on 16.3.2016 as a deposit and that the balance was paid on August 31, 2016, although as per the memorandum of sale D. Exh No. (13), the balance should have been paid within 30 days that is by 16.4.2016. He said that the 1st & 2nd respondents in law could not maintain a recovery claim over the property after the fall of the hammer.

21. DW 1 said that all the costs incurred from the auction were reflected in D. Exh No. (14). As regards the letter dated 27.6.2017, showing an outstanding balance of Kshs 622,203/= DW1 was unable to explain its basis and if it was recoverable from the 1st respondent. DW 1 confirmed that the land was sold to

the highest bidder and a certificate of sale was issued to the 4th respondent. Thereafter, the land was transferred and registered under his name on 12.8.2016. DW1 told the court that the 4th respondent eventually transferred the land to the 1st appellant.

22. In re-examination, DW 1 told the court that the 1st & 2nd respondents were all aware of their obligations to pay the processing fee for the loan which the 1st respondent agreed to and was explained to on 8.10.2014 while receiving the loan. As regards the notices, DW 1 clarified that D. Exh No.(6) had given the 1st respondent 60 days to clear the loan and which he did through the address that he provided in the loan application forms.

23. DW 1 said that it was the same address number 105-60202 Nkubu that the other notices were sent through. Further, he clarified that the advertisement in the newspaper was carried on 29.2.2016. Again DW 1 clarified that the notice dated 27.6.2017 had explained to the borrower how the proceeds of the auction sale were utilized after the deposit of Kshs 310,000/= was paid on 16.3.2016 and the balance of Kshs 930,000/= was received on 31.8.2016. Even though the security was realized, DW 1 said that the borrower still owed the bank Kshs 622,203/=. He clarified that a customer's account ordinarily stops attracting interest when the loan is cleared and, in this case, at the time of the auction, Kshs 900,774/= was due and owing. He said that the property was sold at Kshs 1,240,000/= while Kshs 900,774/= included the accrued interests and penalties up to 16.3.2016.

24. The 1st appellant testified as DW 2. He adopted his witness statement dated 15.11.2019 and produced a title deed dated Exh.12.8.2016 as 3DD Exh. No. (1), sale agreement dated 22.3.2018 as 3DD Exh. No. (2), search as 3DD Exh. No. (3), Acknowledgement of the cheque as 3DD Exh No. (4), (a), (b), (c), and letter of consent dated 7.3.2018 and stamp duty payment slips as 3DD Exh. No. 5 (a), copy of the transfer of land as 3DD Exh. No. (6), a copy of the title as 3DD Exh. No. (7), and lastly, an official search as 3DD Exh. No. (8).

25. In summary, DW2 told the court that he bought the land at Kshs 1,100,000/= and paid a broker Kshs 100,000/= after he had confirmed from the lands office that the land was registered in the name of the 4th respondent. He denied being privy to any loan between the 2nd appellant, the 1st and 2nd respondents. DW 3 requested that his defense be allowed so that he can utilize the land. He was not subjected to any cross-examination by the parties to the suit including the 1st and 2nd respondents.

26. At the close of the evidence, parties filed written submissions dated 15.12.2021, 14.12.2021, and 1.12.2021 respectively, following which the trial court rendered judgment, the subject matter in this appeal, which parties' respective advocates on record agreed with the directions of the court to canvass by way of written submissions.

27. The 1st appellant by submissions dated March 8, 2022 has condensed his 21 grounds of appeal into two issues namely whether he was a bonafide purchaser for value and secondly, if the 1st & 2nd respondents had any claim against him. On the first issue, the 1st appellant urged the court to take into consideration his rights, legal position, and interest for he followed the law to the letter in purchasing the land in question and find his title deed was unimpeachable.

28. The 1st appellant submitted that he was not aware of, and or privy to the loan agreement between the 1st & 2nd respondents on one hand and the 2nd appellant on the other hand, including anything which had happened to the suit property before he became a registered owner.

29. On whether the 1st & 2nd respondents had repaid the loan to the 2nd appellant, the 1st appellant maintained that their story did not add up since the process of exercising the statutory power of sale

was very elaborate with several components making it implausible that the 1st & 2nd respondents were unaware of them to have safeguarded their proprietary rights at the time.

30. As to what a bonafide purchase was, the 1st appellant relied on Lawrence Mukiri vs AG & 4 others (2013) eKLR, where the court held that a bonafide purchaser was a person who honestly intended to purchase the property offered for sale and did not intend to acquire it wrongly and such a purchaser had to prove key elements that he held a title purchased in good faith, he did not know about the fraud, the vendor had an apparent valid title, he purchased without notice of any fraud and lastly, that he was not a party to any fraud. The 1st appellant submitted that going by the evidence tendered by the 2nd appellant, the 1st and 2nd respondents had fallen into loan arrears contrary to the loan agreement and the charge leading to the 2nd appellant exercising its statutory power of sale.

31. It was submitted that fraud must not only be pleaded but be proved to a standard higher than the ordinary balance of probability. To this end, the 1st appellant submitted that the allegations made against the 2nd appellant were not substantiated given the chronology of events and documents produced by the 2nd appellant's witness, which showed that it had acted within the *Land Act*, and the Auctioneer's Rules 1997 as per pages 212 – 221 of the record of appeal.

32. Further, the 1st appellant submitted that the 1st & 2nd respondents going by the testimony before the trial court were duly notified of the nature, extent, monies due and the consequences of non-compliance in terms of Sections 90(3), & 96(2) of the *Land Act*. The 1st appellant submitted that the failure to comply with the statutory notices led the 2nd appellant to serve 40 days' notice under Section 96(2) of the *Land Act* as illustrated in the replying affidavit filed by the 2nd appellant on 27.2.2019, which notice was also not complied with leading to the 2nd appellant to exercise its statutory rights under Section 98 (2) of the *Land Act* as read together with Rules 15, 16 & 17 of the Auctioneers Rules 1997.

33. The 1st respondent submitted that upon the fall of the hammer, the 25% deposit, as provided under the conditions of sale of the auction and memorandum of sale on page 217 of the record of appeal, the monies were transferred to the 2nd appellant and thereafter the transaction was completed. Reliance was placed on John Kagura Githae vs KCB & 2 others (2013) eKLR.

34. As regards any duty on his part and immunity, the 1st appellant relied on *Captain Kanyagia & another vs Damaris Wangechi & others* (1995) eKLR, *Virjay Morjaria vs Madhusing Darbar & another* (2000) eKLR, *Joyce Wairimu Karanja vs James Mburu Ngure & 3 others* (2018) eKLR.

35. On whether the sale by auction should have been set aside, the 1st appellant submitted that the 1st and 2nd respondents never demonstrated any irregularity or fraud to the public auction, and since the due process was followed as per the Auctioneers Rules, the title which he had acquired from the 4th respondent was indefeasible in law.

36. Therefore, the 1st appellant submitted that the 1st & 2nd respondents had no legal remedies over the property and were also unable to explain the inordinate delay of 3 years to realize that the land had been sold. To this end, the 1st appellant submitted that no blame was laid on him by the 2nd & 3rd respondents in their testimony and therefore he qualified to be termed as an innocent purchaser of the land for value without notice, from the 4th respondent.

37. As to whether the 1st and 2nd respondents had a claim against him, the appellant submitted that he was protected under Section 99 (2) (c) and 3 of the *Land Act* since he owed no obligations to the 1st & 2nd respondents, yet the trial court erroneously imposed such obligations on him.

38. The 2nd appellant by written submissions dated March 11, 2023 submitted that it was not disputed that there was a loan agreement, disbursement of the sum, execution of a charge to secure the funds and default in payment by the 1st and 2nd respondents. Further, it was submitted that evidence was tendered by DW 1 on the measures which the 2nd appellant had taken as per the law to realize the security by way of a public auction to recover the loan.

39. The 2nd appellant submitted that a three months' notice was given on September 3, 2015 after the 1st & 2nd respondents had ignored the 60 days' notice issued as per D. Exh No. (6) and (7), to regularize the loan payments on May 15, 2015, as was the habit with the two respondents. This according to the 2nd appellant was followed with a 45 days' notice dated 7.1.2016 and produced as D. Exh No. 8 & 9, indicating the date of the advertisement and the date of the intended auction but were also ignored.

40. The 2nd appellant submitted that a valuation report dated February 23, 2016 was prepared and the public auction took place as scheduled on 16.3.2016 with the 4th respondent emerging as the highest bidder for Kshs 1,240,000/=. It was submitted that 25% of the price was paid. Eventually, the balance was paid after which a discharge of charge was effected and the land transferred to the highest bidder. Therefore, the 2nd appellant submitted that on July 27, 2017 the 1st and 2nd respondents were notified of how the proceeds were applied and for the balance due then, standing at Kshs 622,203/=. The 2nd appellant submitted the suit was filed 3 years later after the auction, yet the public auction, the sale, and the transfer were legally and procedurally done.

41. The 2nd appellant, therefore, summarized the two issues for the court's determination as whether the power of sale was lawful and if it is entitled to the prayers sought in its appeal. On the first issue the 2nd appellant relied on *Palmy Co. Ltd vs Consolidated Bank of K (L)* (2014) eKLR, *Silver-gate Academy Ltd vs National Bank of Kenya & another* (2015) eKLR.

42. On whether the 2nd appellant should be awarded the orders sought in the appeal, it was submitted that since the 1st respondent was a serial defaulter who never committed himself to repay the loan or show any commitment to do so before the trial court as he was obligated to do, yet he willingly offered his property as security for the loan which as a commodity was disposed of off to recover the loan. Further, the 2nd appellant submitted that the 1st and 2nd respondents were fully conscious of the fact that if the loan was not repaid in full, then the land would be sold by public auction. Therefore, they willingly took the risk and voluntarily offered the said parcel of land as security, took away the money from the 2nd appellant for their comfort but opted not to repay the same. The 2nd appellant submitted that the 1st & 2nd respondents came to court with no clean hands in the circumstances of this case since they ought to have shown that they were committed to fulfilling their part of the agreement by repaying the loan. Reliance was placed on Kings Group of Schools Ltd and another vs Kenya Women Microfinance Bank Ltd (2018) eKLR.

43. The 1st & 2nd respondents by written submissions dated 16.3.2023 submitted that two issues fell for the court's determination. On the first issue as to whether the appeal was merited for lack of a decree, it was submitted that Section 65 (1) (b) of the *Civil Procedure Act* and Order 42 rules 2, 13, 14 (f) of the *Civil Procedure Rules* required a decree otherwise the appeal has no substratum to stand on. Reliance was placed on *Racheal Wambui Nganga & another vs Rahab Wairimu Kamau* (2020) eKLR and *Kilonzo David t/a Silver Bullet Bus Co. vs Kyalo Kilukumi & another* (2018) eKLR, *Paul Karenyi Leshuel vs Ephantus Karithi Mwangi & another* (2015) eKLR, *Municipal Council Kitale vs Fedha* (1983) eKLR.

44. As to whether there was compliance with the law on the issuance of statutory notices, the 1st and 2nd respondents submitted that the trial court interpreted Sections 96(1) and (2), 96 (3), and 97 (2) of the *Land Act* and established that there was breach hence the judgment cannot be faulted.

45. The court has carefully gone through the record of appeal, the grounds of appeal, and written submissions by the parties.

46. The issues calling for my consideration are:

    a. If the appeal meets the requisite requirements under the law.

    b. If there was default on the part of the 1st & 2nd respondents in meeting their loan obligations to justify a precipitate action by the 2nd appellant.

    c. If the 2nd appellant followed the law in realizing the security and transferring the suit land to the 1st respondent and the 1st appellant

    d. If the 2nd appellant is liable for any mistakes, irregularities, unprocedural mistakes, and breach of the law by the 1st & 2nd, and 4th respondents together with the 2nd appellant.

    e. If the appellants herein sought any reliefs in the lower court to be entitled to reliefs before this court.

    f. If the trial court erred in fact and law in finding fault on the part of the 1st appellant and the 2nd appellant.

    g. What is the order as to costs?

47. The 1st and 2nd respondents have raised a jurisdictional issue as to whether the appeal is competent before the court for lack of the decree which has been appealed against. In the case of *Lucas Otieno Masaye vs Lucia Olewe Kidi* (2022) eKLR, the respondent had objected to the omission to put in a decree and on whether the omission was a mere technicality as provided under Order 42 (13) (4) *Civil Procedure Rules*. The court cited with approval *Bwana Mohamed Bwana vs Silvano Buko Bonaya & others* (2015) eKLR where it was held that an incompetent appeal denies a court the jurisdiction to consider the factual or legal controversies embodied in the relevant issues. Further, the court cited with approval Chege vs Suleiman (1988) eKLR, where it was held that failure to attach a decree or order appealed against under Sections 66 of the *Civil Procedure Act* was not a procedural but jurisdictional point and in the absence of a decree no competent appeal was in existence.

48. In *Kilonzo David* (*supra*), the Court of Appeal said that to strike out an appeal for lack of a decree would be too draconian. In *Richard Ncharpi Leiyagu vs IEBC* (2013) eKLR the Court of Appeal held the raising of the issue of omissions at the hearing of an appeal could not aid the respondent since the pendulums have swung and courts had shifted towards addressing substantive justice and were no longer worshipping at the altar of technicalities.

49. Given the foregoing case law, the 1st & 2nd respondents never raised a preliminary objection at the very inception of the appeal. It was the 1st & 2nd respondents who should have sought and obtained the decree to execute the lower court judgment. They were aware of it and have not told this court what prejudice this has occasioned on them. If the objection would have been raised at the initial stages, the appellants would have filed a supplementary record of appeal as held in *Private Development Co Ltd vs Rebecca Nyongo & 2 others* (2018) eKLR. This court takes the view expressed in *Leiyagu* (*supra*) and *Andy Abdirahman Abdi vs Safi Petroleum Products Ltd & others* (2011) eKLR, that the overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay, and to focus on substantial justice. See also D. *Chadulal K. Vora & Co. Ltd vs KRA* (20110 eKLR.

50. Further and as held in *Nyota Tissue Products vs Charles Wanga Wanga & others* (2020) eKLR that the filing of the judgment as per Order 42 Rule 13 (4) (f) of the *Civil Procedure Rules* was sufficient since

the rule uses a conjunction "or" meaning it was not a mandatory obligation for a decree under Section 2 of the *Civil Procedure Act* also includes a judgment.

51. The next issue is whether there was a default by the 1st and 2nd respondents in servicing the loan. It is trite law that parties are bound by their pleadings. In paragraphs 8, 9, 10, 11, 12 & 13 of the amended plaint, the primary plaintiffs admitted obtaining a loan of Kshs 405,000 from the 2nd appellant which they paid a down payment for than processing of Kshs 32,800/= on 30.8.2014. As of 15.5.2015, the 1st & 2nd respondents admitted that they were in arrears of Kshs 103,278/=. No evidence was tendered as to whether after the demand notice was made, the arrears were cleared and or payments regularized. PW1 was silent on what happened between 2015 and 2018. He did not also plead or testify on what action he took after they were notified of the arrears between May 2015 and 2016.

52. The 2nd appellant filed an amended defense dated 24.8.2020 and in paragraphs 4, 5, 6 & 7 thereof, the 1st appellant pleaded that the 1st respondent had defaulted in servicing the loan even up to a point that they failed to respond to the demand notices and issued dishonored cheques. The case summary and the witness statement by DW 1 contained the chronology of events on the default and the correspondence sent to the 1st & 2nd respondents. The terms in the credit applications and the agreement dated 15.9.2014 were signed by PW 1. The terms and conditions were clear as to the payment of Kshs 22,404/= for a period of 48 months with effect from November 2, 2014. PW1 collected a cheque of Kshs 340,480/= on 6.10.2014 as the loan and offered his land as security. Clauses numbers 1-11 of the agreement were binding on the 1st respondent. Further to this, the 1st respondent signed the charge registered on 2.10.2014 and gave his address as P. O Box 105-60202 Nkubu. He bound himself to clauses 1-11 of the charge and admitted that he had been explained the implications of Sections 82, 83, 90(1) & 96 of the *Land Act, 2012*.

53. The 2nd respondent also willingly executed the spousal consent dated September 16, 2014 and swore that she was aware of the remedies and the effect of Section 90 of the *Land Act*. She unconditionally and irrevocably granted the chargee rights under the said sections over the land offered as security. DW 1 produced before the trial court documents on indebtedness as evidence and documents showing the outstanding loan arrears. These arrears were admitted by the 1st & 2nd respondents. In the absence of any rival evidence the total payments by the 1st & 2nd respondents would have been Kshs 1,075,392/= had they been consistent in paying the installments on their due date in 48 months.

54. As of May 2018, the 1st & 2nd respondents should have paid Kshs 134,424/= if the same were consistent. If then the demand letter dated 15.5.2015 was for Kshs 103,279/=, it means that for six months, the loanee had only Kshs 37,145/= loan. Likewise, the defense by the 2nd appellant was not replied to by way of a reply to the defense to refute the issuance of the statutory notices. The address used in the said notices or letters dated 3.9.2015 was the same address that the loanee had indicated in the loan agreement and the charge. The letter indicated that the defaults and penalties were due for five months and in arrears of Kshs 232,207/=.

55. PW 1 in his cross-examination admitted taking the loan and signing D. Exh No. (11). He admitted that he was unable to repay the loan after February 2015. He admitted receiving the letter dated 15.5.2015 through the address that he had disclosed in the loan agreement and which was under his use. He admitted he had omitted in his list of documents dated 14.9.2014 the charge, the spousal consent, and many other letters that he had received from the 2nd appellant. Further, the loanee admitted receiving D. Exh No. (8) through the same address giving him a three months' notice. Further, he admitted that D. Exh No. (9) was written to him by the auctioneers while D. Exh No. (14) was written to him by the 2nd appellant using the same address. Additionally, PW1 admitted issuing cheques that bounced

on 5.1.2015, 3.2.2015, 3.3.2015, 3.6.2015, and 5.8.2015. All those cheques were produced as D. Exh No. 5.

56. In my view therefore, the indebtedness of the 1st and 2nd respondents to the 2nd appellant was not only pleaded and proved but was also admitted by PW 1 in his testimony before the trial court. Therefore, the rights of the 2nd appellant to recall the loan and realize the security had matured.

57. The next issue is whether the 2nd appellant followed the law in recalling the loan and disposing of the security. Since it has been established above that the 1st respondent fell in arrears and issued bouncing cheques as of 5.8.2015 prompting the 2nd appellant to issue a notice dated 2.9.2015, I find and hold that its statutory power of sale under Section 90 of the *Land Act* had crystallized. Subsequently, under Section 96 (2) of the *Land Act*, the 2nd appellant was required to issue a 40-day notice and thereafter instruct the auctioneer to issue a 45-day notification of sale as per Auctioneers Rules 1997 for the 1st respondent to redeem the property.

58. The 2nd appellant pleaded that there was full compliance with the law. This was contained in paragraphs 8, 9, 10, 11, & 12 of the amended defense dated 24.8.2020. There was no reply to the defense by the 1st & 2nd respondents to deny those averments. The 2nd appellant through DW 1 produced all the notices issued to the 1st respondent. PW 1 did not deny that the address used in all those notices was not his and or say that it was no longer an active address. In cross-examination, PW 1 acknowledged the receipt of various notices from the 2nd appellant which he regretted to have omitted in his list of documents.

59. To exercise its statutory power of sale, the 2nd appellant had to establish that the chargor was indebted or was in breach of the obligations under the charge for a period of at least one month as a prerequisite, before issuing a 90-day notice under Section 90 of the Act, failure of which the chargee shall proceed to sell the subject property within 90 days from the date of the service of the notice. Once the notice was issued and the chargor failed to comply with the notice, the chargee was required to issue a notice to sell the security under Section 96 of the *Land Act* telling the chargor that it will sell the security after 40 days in the event the default was not remedied.

60. From the evidence, the 1st respondent did not dispute the 90-day statutory notice that was issued to him on September 3, 2015. PW 1 told the court that there were letters that he had received from the chargee but which he did not produce before the court. The list of documents dated 30.1.2019 accompanying the plaint listed as items No. 5 & 6 letters dated 15.5.2015 and 8.3.2018 from the 2nd appellant bearing his address, which the 1st respondent had included as the personal information in the loan agreement.

61. The demand notice dated 3.9.2015 indicated the outstanding amount at the time. The 1st respondent was given sufficient time to clear the loan and was warned of the consequences of not complying and the action likely to be taken against him. There was no evidence tendered that PW 1 adhered to the notice. The expiry of the notice was after 3 months, that is on 3.12.2015. After that, the 2nd appellant through Regent Auctioneers issued a notification of sale dated 7.1.2016 (D. Exh No. (9), using the address of the 1st respondent, stating the date of the auction as 16.3.2016, the advertisement on February 29, 2016, and the amount due as Kshs 1,075,392/= D. Exh No. 10 was the advertisement on February 29th, 2016. From 7.1.2016, the 45 days were expiring on 22.2.2016. This was in line with Section 96 (2) of the *Land Act* and Rule 15 (d) a (e) of the Auctioneers Rules 1997. The sale was scheduled for 16.3.2016. Between 29.2.2016 and 16.3.2016, there was a difference of 16 days. This complied with Rule 15 (d) of the Rules.

62. In *Kamunyori & Co. Advocates vs Cannon Assurance (K) Limited* (2006) eKLR, the court placed the evidentiary burden on the charger to show that he did not receive any notices due to some omissions by the charge. See *Nyangilo Ochieng & another vs Fanuel Ochieng and others* (1995-1998) 2 E.A.

63. In *Trust Bank Ltd vs Eros Chemist Ltd & another* (2000) eKLR, the central question was what constituted a valid notice. The court said that the law intended to protect the mortgagor in his right to redeem and warn him of the intended right of sale and that for that right to accrue, the statute provided for three months to lapse after service of the notice. The court held the notice must state that the sale will take place after three months, otherwise to omit to say so rendered the notice invalid.

64. In this matter, the PW1 in his testimony admitted receiving the letter dated 15.5.2015. He produced it as D. Exh No. 5. The court finds it more probable and unbelievable that PW1 would receive this letter and not the other notices, which admittedly he said he had left at home and did not see the need to produce them before the court. The inference is that he conveniently left them out to create an impression of non-service. PW1 did not explain how he came to possess that letter and not the other notices. The property was also advertised in the daily newspaper as per the original newspaper advertisement before the court. Therefore, the court finds no reason to doubt that the requisite legal steps were followed before the auction sale took place. See *EuroBank Ltd vs Twictor Investments & other*s (2020) eKLR & *Moses Kibiego Yator vs EcoBank Ltd* (2014) eKLR.

65. As to whether there were irregularities during the public auction, the contention was that no valuation was done. The 2nd appellant produced a valuation report as D. Exh No. 4. No rival report for the year 2016 was produced to show that there was gross undervalue and that Kshs 1,240,000/= was not reflective of the fair market price for the property. There exists in law no obligation on the chargee to sell at the prevailing market price, so long as it acted in good faith and followed the dictates of the law. I find that their sale complied with Section 97 of the *Land Act* in the absence of any evidence in rebuttal by the 1st respondent that there was a breach of the duty to obtain the best price. *Omari Nyambati vs Small Enterprises Finance Co. Ltd* (2015) eKLR, *Minolta Ltd vs NBK* (2018) eKLR, *Palmy Co. Ltd vs Consolidated Bank of Kenya Ltd* (2014) eKLR, *Silas Misoi Yego t/a Siro investments vs Transnational Bank Ltd* (2020) eKLR.

66. The next issue is whether the 1st appellant was liable for any alleged mistakes, irregularities, or breaches of the duty of care against the 2nd appellant and the rest of the respondents.

67. Section 98 of the *Land Act* places the burden on the chargee to publicly, advertise the public auction to intending bidders. Once a property was sold the 1st & 2nd respondent's equity of redemption was extinguished and any successful bidder was protected under Section 99 of the *Land Act*, following the fall of the hammer at the auction.

68. In *Joyce Wairimu Karanja vs James Mburu Ngure & another* (2018) eKLR, the court said that a purchaser of property sold at an auction in the exercise of a statutory power of sale was protected even in cases where the person had actual notice of the charge had not properly realized that the statutory power of sale in terms of procedure. The court went on to say that since there was no evidence that the appellant had any notice of irregularities in the planned sale and evidence suggested that there was none, he was therefore inoculated by Section 99 of the *Land Act* from any action to recover the suit property.

69. In *Simon Njoroge Mburu vs Consolidated Bank* 2016 eKLR the court said that Section 99 of the *Land Act* statutorily encompasses the right of the chargor prejudiced by an unauthorized, improper, or irregular exercise of the power of sale to have a remedy in damages.

70. In this matter, the burden was on the 1st and 2nd respondents to establish facts and contention which would support their assertions that there were irregularities, illegalities, and unprocedural issues in the manner the statutory power of sale was exercised.

71. It was not enough to merely claim undervaluation without a rival and a recent valuation report of the year 2016. As held in *Raila Amolo Odinga and another vs IEBC & others* (2017) eKLR, the evidential burden is on he who would lose if no further evidence were introduced. Under Section 112 of the *Evidence Act*, the burden was on the 1st and 2nd respondents to prove or disprove non-compliance with the law as to valuation. As indicated above, after the 1st and 2nd appellants filed their defenses, the 1st and 2nd respondents omitted to make any replies to the said pleadings and or challenge the pleaded compliance with the law or procedure and specifically state that the 1st appellant was privy to the alleged irregularities during the public auction.

72. In *CMC Aviation Ltd vs Crusair Ltd* (1987) KLR 103, the court said that pleadings in a suit were not evidence, which is ordinarily given on oath, and that a pleading depends upon evidence for proof of their contents. In this matter, no specific evidence was given by PW 1 on any irregularities or breaches of the duty of care against the 1st and 2nd appellants.

73. The 1st & 2nd respondents failed to sue the auctioneers who conducted the public auction and relate their actions to the 1st appellant or the 2nd appellant.

74. There was nothing brought by way of pleadings and or evidence that the 1st appellant who did not even participate in the auction was privy to the public auction and or of any events before, during, and after the property was transferred to the 4th respondent. The 1st and 2nd respondents in their pleadings and testimony did make an offer to clear the outstanding loan even if the court were to find that the 2nd appellant had breached the duty of care. No proposal or request was made to consider and to determine if the outstanding loan as indicated by the 2nd appellant before the auction was genuine and or inflated. The 2nd respondent never testified yet she had executed a letter of guarantee and indemnity. No indication or complaint was made by the 1st & 2nd respondents, that they were not being supplied with regular statements of account to know the status of the loan. Further, the 1st & 2nd respondents did not explain the delay of over 3 years in establishing that their property had been sold by the 2nd appellant. The conduct of the 1st and 2nd respondents show that they were least concerned with the outstanding loan, yet a notice had been issued threatening to dispose off the property by way of public auction. At the very least one would have expected that the 1st & 2nd respondents would be vigilant to safeguard their rights to the property and also show concern to the 2nd appellant by either seeking for the rescheduling of the loan repayment or by seeking a grace period to repay it. So, if the 1st and 2nd respondents failed to pay the loan in 48 months or at all, despite the statutory notice which the 1st respondent acknowledged receipt of, on what basis would they be challenging the sale after their equity of redemption was extinguished?

75. The 1st and 2nd respondents had the onus to satisfactorily demonstrate before the trial why the valuation report relied upon during the public auction could not give the best price obtainable at the material time. See *ZumZum Investments Ltd vs Habib Bank Ltd* (2014) eKLR.

76. As to the alleged late payment of the balance, the 1st & 2nd respondents did not explain how that affected them since their equity of redemption had already been extinguished on the fall of the hammer. In *Mbuthia vs Jimba Credit Finance Corporation & another* (1988) eKLR. where the auctioneer had not been sued or called to testify by any of the parties. Nevertheless, the court held that an omission to comply with Rule 15 of the Auctioneer's Rules was a mere irregularity that should not invalidate an auction sale. See *Erick Odindi vs NBK* (2008) eKLR & *Jacob Ochieng Maganda vs HFCK* (2002) eKLR.

77. As regards the claim on general damages, the 1st & 2nd respondents did not plead any special loss or damage on the way the auction was conducted. They had not demonstrated how the property had appreciated at the time of the auction sale, as opposed to the sum paid at the auction. The irregularities at the auction and sale were also not proved during the hearing. On the timelines to receive the balance, after the auction, the 1st & 2nd respondents did not sue the auctioneer who conducted the public auction. They did not put any specific complaints about him in their pleadings. Even though there was a delay in clearing the balance that alone could not amount to a material default that would invalidate the auction sale and be a basis for the suit property to revert to the 1st respondent who upon the fall of the hammer lost his equity of redemption.

78. In any event, as of August 2016, there is no indication if the 1st & 2nd respondents had cleared the outstanding loan. He was therefore estopped in law from complaining that the sale was not lawful or properly conducted. See *David Isoe Ayubu vs I & M Bank Ltd & another, Kipsosion Rerimoi Kipkorir (Interested Party)* 2020 eKLR, *Kamulu Academy Ltd & another British American Insurance (K) Ltd* (2018) eKLR.

79. On the reliefs sought by the 1st & 2nd respondents, the statutory and decision law is that a sale destroys the equity of redemption in the mortgaged property. In Zeyu Yang vs Nova Industrial Products Ltd (2003) 1 E. A 362, the court said that an existence of a valid sale agreement extinguishes the equity of redemption and the applicant had no remedies touching on the property both as against the former mortgagee and the person exercising the power.

80. In J*oyce Wairimu Karanja vs James Mburu Ngure & others* (2018) eKLR, the court held a remedy for a mortgagee who had suffered damages as a result of an improper auction was not to reverse the auction against an innocent purchaser but in damages. This was also repealed in *Bomet Beer Distributors Ltd and another vs KCB & 4 others* (2005) eKLR, that once a property was knocked down and sold in an auction, the only remedy was to file for special and general damages.

81. Consequently, my finding therefore is that the 1st and 2nd respondents did not prove any loss or damage which they may have suffered otherwise the court would be perpetuating an illegality and redrawing the contract that they made with the 2nd appellant whose terms and conditions were clear as to each parties' duties and obligations.

82. As to whether the 1st appellant is entitled to any relief, the defense filed herein had no counterclaim. Parties as indicated above are bound by their pleadings and issues flow from pleadings. All that the 1st appellant pleaded was that he was an innocent purchaser for value. There were no specific claims made against the 1st & 2nd respondents.

83. The upshot is I find the two appeals with merits. The two are allowed. The lower court decision is set aside and substituted with an order dismissing the suit. Costs of this appeal and in the lower court to the 1st and 2nd appellants.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 17TH DAY OF MAY 2023

In presence of

C.A John Paul

Kinyanjui for 1st appellant

Miss Masamba for 2nd appellant

HON. C.K. NZILI

ELC JUDGE