



REPUBLIC OF KENYA



KENYA LAW
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**Warwathe v Equity Bank Limited & 2 others (Environment & Land Case
282 of 2016) [2023] KEELC 18409 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 282 OF 2016**

**MAO ODENY, J
JUNE 30, 2023**

BETWEEN

PETER KURIA WARWATHE PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

LYDIAH N WAWERU T/A PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

JOHN MAINA NDIRAGU 3RD DEFENDANT

JUDGMENT

1. By an amended plaint dated 24th May, 2019, the Plaintiff herein sued the Defendants seeking the following orders: -
 - a) A declaration that the Plaintiff is not entitled to pay Kshs. 31, 912,268.76 or any other figure above that as the amount due to the outstanding loan.
 - b) A declaration that the defendant has acted in contravention of the *Banking Act* Cap 488 Laws of Kenya and the defendant has applied interest rates on the Plaintiff's facility in breach of the specific terms of the contractual documents governing that facility.
 - c) An order for accounts to be taken on the loan amount herein due by such expert as the court may deem appropriate in accordance with the banking facility contract between the Plaintiff and the defendant taking into account the sums already paid by the Plaintiff and the amount be adjusted in accordance with the findings of such expert report.
 - d) A declaration that the suit premises were sold below market value and forced sale value hence the public auction was null and void.



- e) A declaration that no auction was conducted by the Defendants.
 - f) A declaration that the sale of the suit premises to the 3rd Defendant is illegal.
 - g) That the transfer of the suit premises was based on an improper auction.
 - h) Compensation based on the true market value.
 - i) Refund of Kshs. 1,767,958 illegally charged as collection fees.
 - j. Any other or further relief that this honourable court may deem fit to grant.
 - k) Cost of this suit.
2. The background to the Plaintiff's case is that by a loan facility dated 17th November 2011 the 1st Defendant advanced the sum of Kshs.17.5 million to the Plaintiff for the purpose of constructing a hotel on his property LR 18473/3 (CR 37197) which was registered as the security. The bank advanced a further sum of Kshs. 9.5 million on 6th August 2013, which was secured by a further charge over the suit property, making the aggregate sum Kshs. 27 million. According to the Plaintiff, the first facility was to be repaid within a period of 120 months at an interest of 25% per annum on a reducing balance and a further 6% in case of default; whilst the second at 18% and 6% respectively.
 3. The Plaintiff averred that he diligently paid up the loan until sometime in March 2014 when he defaulted and the Bank continued to issue various notices on diverse dates indicating the amounts owed by the Plaintiff. According to the Plaintiff, despite having made payments of up to Kshs. 21, 858, 012/-, the Bank indicated that the amount due was Kshs. 31, 912,268.76/- which amount seemingly went up to Kshs. 38, 860,284.21 on 22nd September 2017 and later on to Kshs. 35,338,111.21/- vide a statement dated 6th October 2017. The Plaintiff added that he even made payment of Kshs. 1,174,723/- which the Bank failed to capture and that the debt amount was unrealistic and the auction was undervalued.
 4. The 1st and 2nd Defendants entered appearance and filed a joint statement of defence dated 13th October 2021 wherein they denied the averments in the Plaint and admitted that indeed the 1st Defendant and Plaintiff entered into a loan agreement as averred in the Plaint, however, they denied that the Plaintiff had been making payments as stated. The Defendants admitted that the suit property was indeed advertised for sale on 13th April 2018 when the auction took place and the 3rd Defendant emerged the highest bidder.

Plaintiff's Case

5. PW1 Peter Kuria Waruath, adopted his witness statement dated 26th April 2021 as evidence in chief and produced as PEXH 1 -13 the documents attached in the list of documents and PEXH 14 and 15 in the further list of documents dated 3rd May 2021.
6. PW1 testified that when he took the loan in 2011, he had constructed a two storey building on the suit property and as at that time, the Bank valued the same at Kshs. 30 million. He converted the building into a five storey and upon completion, the Bank contracted the firm of Apollo and Associates who valued the property at Kshs. 35,885,535.91 for the work done excluding the value of the land.
7. PW1 stated that he challenged the 1st Defendant's action through the instant suit and on 28th April 2017, the Honourable Justice Olola found that the valuation report relied upon by the Defendants, and which formed the basis of the sale of the subject property did not represent a fair and professional estimation of the value of the property.



8. He stated that despite the above order, the 2nd Defendant later advertised the subject property for sale on 13th April 2018 of which the Plaintiff attended the place notified as where the auction would take place, but no auction of the subject property was conducted.
9. That on 17th May 2018, the Plaintiff's Advocates wrote to the 1st and 2nd Defendant seeking for information of when the subject property was sold, how much it was sold and evidence of people who attended the auction but received no response.
10. PW1 admitted on cross-examination that there were months he either defaulted in payment or made less payments and further stated that before the property was sold, he agreed to sell the property for Kshs. 30million which was to be paid to the Bank. PW1 further stated that he consequently signed a sale agreement dated 1st March 2018 and another on 2nd March 2018. In the second agreement, he was to be paid Kshs. 5 million out of the purchaser's good will, however did not take place as he was waiting for a commitment letter from the Bank to waive the interests.
11. PW1 told the Court that he filed the present case because there was a dispute regarding the figures and valuation for the sale.
12. PW2 CPA David Gichugu, an auditor also adopted his written statement dated 26th April 2021 as evidence in chief and produced a report dated 24th April 2021 as PEXH 16. He testified that the loan disbursed was Kshs. 27 million and the plaintiff had repaid Kshs. 24, 542, 533/- as at 30th September 2018.
13. According to PW2, the Bank overcharged the Plaintiff by Kshs. 5,278,131/- by relying on interest between 26% and 31%, even after the interest had been lowered by the Central Bank in 2015.
14. On cross-examination by Mr. Kongere, the witness confirmed that he only relied on the documents given to him by the Plaintiff. PW2 was referred to his report particularly page 46 where he confirmed that the first disbursement was done on 4th January 2012 and the second on 18th April 2012.
15. On pages 48, 63 and 64, PW2 confirmed that the first entry was dated 30th September 2013 and this was when the first facility was cleared and the second facility disbursed. PW2 also confirmed that there was no entry of Kshs. 16 million on the statement. He added that he captured the repayments made by the Plaintiff on page 47. He also confirmed that as per the entries on page 51 and 66 of the said report, the Plaintiff did not pay the instalments as agreed.
16. PW2 further testified that before interest capping was introduced in the year 2015, the practice was that default interest was subject to change. PW2 was further referred to page 47 of his report and testified that there was a sum of Kshs. 1,174,723/- and a further Kshs. 968,000/- paid by the Plaintiff but could not be traced in the loan account.
17. On re-examination, PW2 stated that he did not include the first facility in his report and calculation because the same had been cleared.

Defendants' case

18. DW1 Gibson Kaloki, testified on behalf of the 1st Defendant and adopted his statement dated 13th October 2021 as evidence in chief and produced as DEXH 1-12 the documents in the list of documents.
19. DW1 testified that as at the time this court issued an injunction in 2016, the market value of the property was Kshs. 22 million, and the forced sale value Kshs. 16.5 million. He stated that a further



valuation was done following this court's order in 2017 and the market value was Kshs. 62, 500,000/- and forced sale value Kshs. 46, 875,000.

20. It was DW1's testimony that despite that valuation, the public auction conducted by the 2nd Defendant on 13th April 2018, the highest bid was only Kshs. 30 million, which the 1st & 2nd Defendants accepted.
21. DW1 stated that although the figure was below the forced sale value, the sale was not fraudulent because the Plaintiff was prepared to sell the Suit Property for that much in a proposed private sale which never took place and any duress or fraudulent sale is denied. DW1 stated that the Plaintiff had a choice in acceding to it, a choice he voluntarily took.
22. He told the court on cross-examination that the last disbursement was Kshs. 2.5 million in February 2014 prior to which a valuation report was done.
23. DW1 was referred to page 43 of their list of documents, and he confirmed that a customer was to be given 30 days' notice in case of change in interest rates.

Plaintiff's Submissions

Counsel for the Plaintiff identified five issues for determination, namely:

- a. Whether the 2nd Defendant conducted an auction of the property LR No.18473/3 (CR.37197) on 13th April 2018 or at all?
 - b. Whether the Defendants connived to illegally sell and acquire the subject property?
 - c. Whether the 1st and 2nd Defendants obtained the best available price for the subject property?
 - d. Whether the 1st Defendant contravened the terms of the Further Charge by varying interest without notice and computing the outstanding loan and or loan arrears by using exaggerated interest rates?
 - e. Whether the 1st Defendant illegally deducted and charged the Plaintiff collection charges fees amounting to Kshs.1, 767, 958/=?
24. Counsel submitted that the Plaintiff having demonstrated that no auction took place on 13th April 2018 as scheduled, and the Defendant having failed to prove their averment that the auction was held as planned, the Plaintiff's evidence remains uncontroverted.
 25. Counsel further submitted that the 1st Defendant's witness Gibson Kaloki testified that he cannot speak about the auction as he neither attended nor was he involved in the advertisement and or sale by auction. Mr. Kaloki admitted that he had no instructions and or authority to testify on behalf of the 2nd Defendant. Counsel relied on the Cases of *Kyalo Elly Joy v Samuel Gitabi Kanyeri* [2021] eKLR on standard of proof; and *CMC Aviation Ltd v Kenya Airways Ltd* [1978] eKLR.
 26. On the second issue as to whether the Defendants connived to illegally sell and acquire the suit property, counsel submitted that the Plaintiff's evidence on how the 3rd Defendant was introduced to him by officials of the 1st Defendant as a potential buyer was uncontroverted and as such the only evidence to be relied upon was the Plaintiff's in this case. Counsel relied on the case of *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter and another* [1997] eKLR.
 27. On the 3rd issue as to whether the 1st and 2nd Defendants obtained the best available price for the subject property, counsel laid out the various valuations done since 2011. He submitted that under Section 97 of the *Land Act* a Chargee has a duty of care to a charger to obtain the best price reasonably obtainable at the time of sale, which the 1st Defendant herein failed to meet and counsel relied on the case of *Equip Agencies Limited v I M Bank Limited* [2018] eKLR.



28. Counsel further submitted that the Valuation report used by the 1st and 2nd Defendant to sell the Plaintiff's property had a market value of Kshs. 62, 500, 000/= and a forced sale value of Kshs.46, 875, 000/= but the property was allegedly sold to the 3rd Defendant at Kshs.30, 000, 000/=.
29. Counsel stated that the sale value of Kshs. 30,000,000/= was way below seventy-five percent of the market value (Kshs. 46,875,000/=) and further submitted that taking into account the factors above stated on the amount of money invested, demand for hotel business in the area and appreciation of land as admitted by the 1st Defendant's Valuer, it shows that the Defendant failed and refused to obtain the best price for the property.
30. On the issue as to whether the 1st Defendant contravened the terms of the Further Charge by varying interest without notice and computing the arrears using exaggerated rates. Quoting clause 2 i and iii of the second Charge, and DW1's testimony, counsel argued that no such notice to vary the interest was issued to the Plaintiff. Counsel relied on the case of *Stephen Kinini Wangonde v The Ark Limited* [2016] eKLR where the court held that expert testimony like all other evidence must be given only appropriate weight.
31. On the issue as to whether the 1st Defendant illegally deducted and charged the Plaintiff collection charges amounting to Kshs. 1,767,958, counsel submitted that the 1st Defendant failed to give evidence in form of statements and receipts to confirm the reason for deducting the said amount. He submitted that the Plaintiff through (Exhibit 12) produced bank statements which shows that the 1st Defendant charged and deducted the Plaintiff's account several monies disguised as collection charges fees That is.
 - 1st December 2016 Kshs. 471, 564/=
 - 22nd June 2017 Kshs. 205, 150/=
 - 16th May 2018 Kshs.1, 091, 244/=
 - Total Kshs. 1, 767, 958/=
32. Counsel added that in the absence of such proof the 1st Defendant was not justified to deduct the said sum as it did and relied on the case of *Paul Wandati Mbochi v National Bank of Kenya Limited* [2013] eKLR where the court held that the Applicant was supposed to have been notified as to the extent of the fees and charges of the valuers and the auctioneers.
33. Counsel submitted that without fee notes, evidence of payment as alleged by the 1st Defendant and or costs granted by this Court as legal fees, the alleged fee collection charges are illegal, unlawful, and amount to unjust enrichment and prayed that the Court orders the 1st Defendant to refund the said amount of Kshs.1, 767, 958 to the Plaintiff.

1st and 2nd Defendants' Submissions

34. Counsel for the Defendants identified three issues for determination namely- whether the 1st Defendant levied lawful interest and collection charges; whether the 1st and 2nd Defendants lawfully sold the suit property; and whether the Plaintiff is entitled to the reliefs sought.
35. With regard to the first issue, counsel argued that the bank was justified to deduct collection charges as per the contents of the Charge, particularly clauses 1 and 3 of the Charge and Further Charge, wherein the Plaintiff agreed to cater for all costs incurred by the Bank. That the costs incurred were costs to the valuers, auctioneers and advocates. Such costs, counsel argued, were lawfully recoverable and codified under section 101 of the *Land Act*, 2012.



36. Counsel further relied on the cases of *Maggie Mwaiki Mtalaki v Housing Finance Company of Kenya* [2015] eKLR and *Daima Bank Limited [in liquidation] v David Musyimi Ndetei* [2018] eKLR. and also relied on section 176 of the *Evidence Act*.
37. On variation of interest rates, counsel submitted that there was no variation of interest except as per the terms of the Charges. Counsel further stated that that, although the expert witness evidence was not controverted, it had to be tested against known facts as it was held in *Stephen Kinini Wang'ondou v The Ark Limited* [2016] eKLR.
38. Counsel faulted the report by PW2, the expert witness, on the grounds that the same wrongfully relied on documents provided to him by one side; and that he ignored the express contractual provisions on default interest and cited the cases of *KCB Limited v Rupa Ltd and 2 others* [2014] eKLR, and *Farmers Partner Limited and 2 others v Barclays Bank of Kenya Limited* [2009] eKLR.
39. On the second issue, counsel submitted that it was the duty of the Plaintiff to prove the allegations of fraud, duty which he failed and relied on the case of *Jose Estates Limited v Muthumu Farm Limited and 2 others* [2019] eKLR, and submitted that fraud being a serious charge, must be pleaded and proved to a standard higher than a balance of probabilities. It was counsel's submission that stating that no auction was conducted or that the Defendant sourced a buyer was not sufficient to meet the threshold in fraud cases.
40. Counsel further argued that under Section 97 of the *Land Act*, 2012, the yardstick on sale by Chargee was 25% as opposed to the 75% of the market value as stated by the Plaintiff's counsel. Counsel relied on the cases of *Patrick Kangethe Njuguna and 2 others v Cooperative Bank of Kenya Ltd and 4 others* [2017] eKLR; and *Petiro Ongwacho Ongwacho t/a Bluu Nile International Hotel v KCB Limited* [2020] eKLR. Mr Kongere explained that if at an auction the highest bid was less than 75% of the market value, the Chargee could lawfully accept it.

Analysis and Determination

41. The issues for determination that arise from the pleadings are as to whether
 - a) Whether the interest rates charged by the 1st Defendant were lawful.
 - b) Whether the sale of the suit property to the 3rd Defendant was lawfully done.
 - c) Whether the sum of Kshs. 1,767,958 was lawfully deducted from the Plaintiff's account.
 - d) Whether the Plaintiff is entitled to the prayers sought.
42. The undisputed facts in this case are that the 1st Defendant advanced two loan facilities to the Plaintiff on different dates. First one for Kshs. 17,500,000/- was secured by a legal Charge dated 15th December 2011 and the other for Kshs. 9,500,000/- by a further Charge dated 6th September 2013. The terms of repayment of the first facility were in monthly instalments of Kshs. 398,113 for a period of 120 months. The loan would also attract an interest rate of 25% per annum on a reducing balance and a further interest of 6% per annum in case of default. In relation to the further charge, the monthly instalments were of Kshs. 486, 501/- at an interest of 18% per annum and an additional 6% in the event of default.
43. It was also not in dispute that the Plaintiff fell into arrears sometime in March 2014 when the Bank demanded payment of arrears in the sum of Kshs. 967,635.66 in addition to the total liability indicated as 27,203,871.66. On 2nd March 2015 the Bank issued another demand notice indicating the arrears to be Kshs. 1,996,776.51 and total liabilities at Kshs. 27, 374, 637.31. On 22nd July 2015 the bank issued



another notice indicating the total liabilities as Kshs. 27, 437, 466.86. A further notice was issued on 19th February 2016 indicating the total liability at Kshs. 31,313,194.61.

44. According to the Plaintiff, these figures did not add up since he continued to make payments which prompted him to hire accountants who drafted a report dated 24th October 2018 indicating that the Bank had failed to account for some of the deposits and continued to levy unrealistic interests.
45. The Plaintiff's contention was that in February 2012 and March 2012 the Bank charged interest rate at 29.5% which according to him was contrary to the terms of the facility. This allegations of the interest rate being charged without notice of the variation were not substantiated by the plaintiff because as at this time, the parties had not entered into the second loan agreement, therefore the interest then was still 25% per annum plus a default interest of 6%. Looking at the said report the interest rate charged in the year 2012 before the Further Charge was 25% per annum as per the existing Charge.
46. Further, the Plaintiff's argument was that the interest rate as at January 2016 and October 2016, was as high as 30%. I have carefully perused the report by PW2, I do not see any document in support of this allegation. The Plaintiff's documentary evidence does not go hand in hand or tally with his averments and oral evidence. In the circumstances, and in the spirit of Section 107 of the Evidence Act, Cap 80, I do find that that the Plaintiff has failed to meet the standard of proof on a balance of probabilities and that the Bank levied lawful interest rates in accordance to the terms of the agreement. In any case, this issue was adequately addressed in the ruling dated 28th April 2017.
47. It was also undisputed that at the point of the first lending the suit property was valued at Kshs 30,000,000/-, and prior to the further charge at Kshs. 35, 885, 535/- when the construction was 82% complete. This second valuation was done by Apollo Associates hired by the Bank. Notably again, the Bank hired another valuer on 2nd September 2016 who valued the property at Kshs. 22 million. It was also common ground that following a ruling delivered on 28th April 2017, this court directed another fair valuation be done within 120 days in the following conditions;
- “...I will peg the duration of the injunction herein to a limited period of 120 days to enable the 1st Defendant to carry out a fair and professional estimation of the charged property inclusive of a forced sale value. If with the new valuation in place the Applicant herein remains in default of his contractual obligations upon expiry of the said 120 days, the Respondent shall be at liberty to exercise its statutory power of sale...”
48. Consequently, the 1st Defendant forwarded a Valuation Report dated 2nd June 2017 indicating the market value of the suit property as Kshs. 62, 500,000/-; Replacement value Kshs. 39,500,000/-; and Forced sale value at Kshs. 46, 875,000/-.
49. The Plaintiff does not contest the Bank's statutory power of sale but questions how the sale was conducted. He pleaded particulars of illegality that the sale was finalized without conducting an auction and that the suit property was sold at a price that was way below 75% of the market value.
50. Sale of properties by auction are governed under the Auctioneers Act. The Auctioneers' Rules, 1997 provide at Rule 15 and 16 as follows; -

Rule 15: the Auctioneer should:

- a) record the instructions in the register;
- b) prepare a notification of sale (Form 4);



- c) locate the property and serve the notification of sale of the property on the registered owner;
- d) give in writing to the registered owner a notice of not less than forty five days within which time the owner may redeem the property by payment of the outstanding debt;
- e) on expiry of the forty five days without payment arrange the sale of the property not earlier than fourteen days after the first newspaper advertisement;

Rule 16: the Advertisement should include:

- a) the date, time and place of the proposed sale,
- b) the conditions of sale,
- c) time of viewing the property to be sold; and
- d) all information required to be contained in the letter of instruction except the amount to be recovered and the exact amount of any reserve price.

Rule 17 further provides that;

- a) a public auction shall take place between the hours of 10.00 a.m. and 10.00pm; and in a venue open to and accessible to the public; and
- b) sub-rule 4; The highest bidder shall be the purchaser subject to compliance with the conditions of sale.

51. On the one hand, the Plaintiff complained that the auction scheduled for 13th April 2018 did not take place since he went to the advertised venue but there was no such event. On the other, DW1 testified that the auction took place as scheduled. I have perused the documents exhibited by DW1. There is a copy of the list of bidders; a memorandum of sale dated 13th April 2018 between the auctioneer and the 3rd Defendant; and a copy of RTGS receipt for Kshs. 15,000,000/- paid by the 3rd Defendant to Top Motors, a business name used by the Plaintiff. The RTGS is dated 13th April 2018.
52. From the above evidence it shows that the auction indeed took place as scheduled and it should be noted that the Plaintiff had to wait until 17th May 2018 to write to the bank asking for the details of the sale when he could have immediately taken some sort of action on the auction date when the 15 million was paid into his account. My conclusion is that the auction took place as scheduled and the Plaintiff was aware of the same.
53. One of the conditions of sale listed in the newspaper advertisement was that a deposit of 25% must be paid at the fall of the hammer. The 3rd Defendant indeed satisfied this condition and was awarded the bid. The Plaintiff's argument that the sale was fraudulent on the grounds that the auction did not take place and that the highest bidder was a buyer preferred by the bank does not hold any water. In other words, the Plaintiff failed to meet the standard of proof required in allegations of fraud, which is a standard higher than that required in civil cases, and such allegations cannot be left to be inferred from the facts.
54. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR where the court held as follows:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it



was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

55. Further, section 97 of the *Land Act*, No. 6 of 2012 provides as follows :-

97. Duty of chargee exercising power of sale

- (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
- (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
 - (a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
 - (b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).

56. The Court in the case of *Patrick Kangethe v Co-operative Bank of Kenya Ltd & Others* [supra] cited by counsel for the 1st Defendant, explained the above provision as follows; -

“My reading of sub-section 97(2) & (3) *Land Act* give me the understanding that once the valuation is undertaken, a chargee would only be deemed to have failed or breached its duty of care where the sale is at a price of not more than 25% of the given market value”

57. As already established, the final Valuation Report indicated the market value at Kshs. 62, 500,000/-; the suit property was auctioned at Kshs. 30,000,000/- which from simple calculations is way more than 25% of the market value as stipulated under Section 97 above.

58. Having said that, I find that the sale of the suit property to the Defendant by way of auction was proper and cannot be set aside. The Plaintiff’s argument that the sale was undervalued, is not tenable. It is on record that the Plaintiff had agreed to sell the suit property for Kshs. 30,000,000/- in the first place.

59. Section 99 of the *Land Act* No. 6 of 2012 offers protection to purchasers of charged properties in exercise of the chargee’s statutory power of sale as follows:

This section applies to—



- (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser;...
- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
60. Under Section 99 (3) above, the purchaser is protected unless there is evidence of fraud, misrepresentation or dishonest conduct on the part of the chargee of which the purchaser had actual or constructive notice. In the present case, having failed to prove fraud as already established, purchaser of the suit property, the 3rd Defendant herein, is therefore protected.
61. On the issue as to whether the Plaintiff is entitled to a refund of collection charges fees, the Plaintiff gave evidence and produced documentary evidence to show that this amount was not accounted for and the Defendant did not give an explanation as to why they did not capture these amounts. The Plaintiff through (Exhibit 12) produced Bank Statements which shows that the 1st Defendant charged and deducted the Plaintiff's account several monies disguised as collection charges fees
- 1st December 2016 Kshs. 471, 564/=
- 22nd June 2017 Kshs. 205, 150/=
- 16th May 2018 Kshs.1, 091, 244/=
- Total Kshs. 1, 767, 958/=
62. These amounts were not accounted for by the 1st Defendant and I therefore find that the Plaintiff is entitled to a refund of Kshs. 1,76,958/ with interest on the amount.
63. Apart from the prayer for refund of the above amount the rest of the claim is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

