



Ririani v Adan & another; Diamond Trust Bank Limited (Plaintiff to the Counterclaim); Ririani & 4 others (Defendant to the Counterclaim) (Environment & Land Case 189 of 2019) [2025] KEELC 1441 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 189 OF 2019
OA ANGOTE, J
MARCH 20, 2025**

BETWEEN

JANE WANJIRU RIRIANI PLAINTIFF

AND

ABDINUR HASSAN ADAN 1ST DEFENDANT

DIAMOND TRUST BANK 2ND DEFENDANT

AND

DIAMOND TRUST BANK LIMITED .. PLAINTIFF TO THE COUNTERCLAIM

AND

JANE WANJIRU RIRIANI DEFENDANT TO THE COUNTERCLAIM

ABDINUR HASSAN ADAN DEFENDANT TO THE COUNTERCLAIM

WILDROSE CONSTRUCTION COMPANY LIMITED DEFENDANT

TO THE COUNTERCLAIM

SALWA OMAR SHEIKH DEFENDANT TO THE COUNTERCLAIM

A.O. BASID LIMITED DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. This suit was instituted vide a Plaint dated 6th June 2019. The Plaintiff’s claim is that on 22nd February 2016, she purchased the suit property, Title No. I.R 29542 Land Reference Number 209/8294/119 Akiba United Estate South C Nairobi County, (hereinafter the ‘suit property’) from the 1st Defendant.



2. However, the Plaintiff avers, despite full payment of the purchase price within the completion period, the 1st Defendant has failed to forward the completion documents and is therefore in breach of the sale agreement.
3. The Plaintiff further claims that on 19th September 2016, the 1st Defendant wrongfully and fraudulently procured registration of a charge over the suit property by the 2nd Defendant, at which time the 1st Defendant did not possess any rights or interests in the suit property and that the 2nd Defendant thereafter on 27th May 2019 advertised the suit property for sale acting as chargee through a firm of auctioneers known as Dalali Traders.
4. The Plaintiff asserts that on 22nd February 2016, her and the 1st Defendant entered into an agreement for the sale of the suit property for Kshs. 12,500,000; that she paid the deposit of Kshs. 1,250,000 prior to the execution of the agreement on 11th February 2016 through a deposit paid to the 1st Defendant's account at the Diamond Trust Bank and paid the balance of the purchase price on 9th March 2016 to Cooperative Bank of Kenya.
5. It was averred that the 1st Defendant thereafter yielded vacant possession to her upon payment of the full purchase price and that the property had been charged to Co-operative Bank of Kenya Mombasa Branch and was to be discharged upon payment of loan balances from the proceeds of the sale.
6. The Plaintiff stated in the Complaint that the terms of payment were that the balance of the purchase price (90%) was to be deposited at Co-operative Bank of Kenya in exchange of the completion documents, which deposit was made; that the 1st Defendant thereafter requested HER to reverse part of the payment of the purchase price of Kshs. 7,577,000 purportedly to clear the outstanding loan balance, and to pay the sum directly to him in cash and that she paid the said sum to the 1st Defendant in cash and further advanced Kshs. 623,000/- over and above the purchase price.
7. The Plaintiff asserts that she is an innocent purchaser for value; that she paid the purchase price fully within the completion period, without notice of the 2nd Defendant's claim over the property; that she has been paying the land rates of the suit property; that she applied for amalgamation of the suit property with her other property, LR 209/8294/118 neighboring the suit property and that she paid Kshs. 20,000 for an application to the Nairobi City County for change of use, which is pending approval.
8. It is the Plaintiff's case that on 28th October 2016 upon completion of the renovations and part reconstructions, she leased the property out for rental income of Kshs. 60,000 to Fatuma Ali Jama.
9. According to the Plaintiff, as at 19th September 2016, when the charge was registered, the 1st Defendant did not have any interests or rights in the suit property capable of creating a valid or lawful charge, as the property had already been sold to her and that had the 2nd Defendant done proper due diligence, it would have discovered that she had made extensive improvements on the property costing Kshs. 5 million.
10. The Plaintiff averred in the Complaint that she was not served with any notice of the intended exercise of statutory power of sale by the 2nd Defendant as chargee as per Section 96 (1), (2) and (3) of the [Land Act](#), despite being in actual use, possession and occupation of the suit property from February 2016 up to date.
11. The Plaintiff averred that the 1st Defendant is in breach of contract, and acted fraudulently by failing to transfer the suit property despite receiving the full purchase price in March 2016; failing to provide the completion documents within 90 days and procuring registration of a charge with the 2nd Defendant.



12. The Plaintiff pleads that she stands to suffer irreparable loss because she is bound to lose her property through fraud and wrongful acts of fraud by the 1st Defendant and that the intended statutory sale by the chargee is unlawful, illegal and a nullity in law as the registration of charge was procured fraudulently.
13. The Plaintiff has prayed for judgment as follows:
 - a. declaration that:
 - i. The Plaintiff is the rightful owner of IR 29542 LR No. 209/8294/119, Akiba United Estate, South C Nairobi County having purchased and paid the full purchase price of Kshs. 12,500,000/- to the 1st Defendant and the 1st Defendant's rights and interests therein ceased to exist and were extinguished and incapable of procuring registration of a valid legal binding charge over the suit property after 22nd February 2016.
 - ii. The purported charge registered against the suit property IR 29542 LR No. 209/8294/119, Akiba United Estate, South C Nairobi County is wrongful, illegal and fraudulent as its registration was procured through fraud, illegalities and wrongful acts of the 1st Defendant who was not the owner of the said property and the purported registration of charge should be cancelled the register duly amended and the property discharged.
 - iii. The Defendants are holding the property in trust for the Plaintiff as owner and had no rights whatsoever to execute and procure registration of a charge over the suit property and a charge registered against the property is wrongful, illegal, null and void ab initio.
 - iv. The 1st Defendant Abdinur Hassan Adan should be compelled to pay to the 2nd Defendant all the money given to him by the 2nd Defendant secured by the fraudulent and wrongful charge and an order do issue to that effect.
 - v. The 1st defendant committed an offence pursuant to S. 157 (1)(c)(d) of the Land Act No. 6 of 2012 by wrongfully and fraudulently procuring the registration of a charge over the suit property LR No. 209/8294/119 which he had sold to the Plaintiff and consequently the Director of Criminal Investigations or any other state agencies within requisite mandate do investigate for the 1st Defendant for eventual prosecution for fraud.
 - vi. The 2nd Defendant Charge on the suit property is unlawful, illegal and incapable of creating a valid charge over the suit property as it was registered without any due diligence to ascertain any other interests and rights over the property by the Plaintiff, the intended exercise of the 2nd Defendant's statutory power of sale by Chargee is unlawful, illegal, null and void ab initio.
 - b. A permanent injunction do issue restraining the 1st Defendants, by themselves, their servants or agents or any other person whomsoever and whatsoever from selling, or exercising any statutory power of sale pursuant to the purported charge evicting, or in any manner whatsoever from interfering with the Plaintiff's rights and interests in Plot No. IR 29542 LR No. 209/8294/119, Akiba United Estate, South C Nairobi County.
 - c. A Mandatory Injunction do issue:
 - i. To compel the 1st Defendant to pay the 2nd Defendant all the amount granted to him pursuant to the fraudulent charge in order not to affect the Plaintiff's rights and



interests in the suit property IR 29542 LR No. 209/8294/119, Akiba United Estate, South C Nairobi County.

- ii. To compel the Defendants to execute all the requisite and necessary documents to effect the immediate transfer and registration by the Registrar of the suit property to the Plaintiff's name as the registered owner upon cancellation of all entries in the register that may negate her proprietary rights and interests.
 - iii. To compel the Defendants to transfer the Plot No. IR 29542 LR No. 209/8294/119, Akiba United Estate, South C Nairobi County to the Plaintiff failing which the Registrar of Titles to effect the same accordingly upon execution of all requisite documents by the Registrar of this Honourable Court.
 - iv. An order compelling the 2nd Defendant to discharge the purported charge registered against IR 29542 LR No. 209/8294/119, Akiba United Estate, South C Nairobi County failing which the Registrar of this court do execute all requisite documents to effect discharge of the purported charge accordingly.
- d. Any other remedy the court may deem proper and just to grant in the circumstances.
 - e. Costs of the suit.”
14. The 2nd Defendant opposed the suit through a Statement of Defence and Counterclaim dated 10th June 2022. According to the 2nd Defendant, sometime in May 2016, the 1st Defendant approached the 2nd Defendant seeking a takeover of a financial facility obtained from Co-operative Bank of Kenya which had a balance of Kshs. 12,416,817.52 as at 30th May 2016.
 15. According to the 2nd Defendant's Defence, the Bank acceded and issued to the 1st Defendant a letter of offer dated 10th May 2016 and a supplementary letter of offer dated 20th June 2016 and that the 2nd Defendant extended banking facilities aggregating to Kshs. 17,600,000 to a company known as Wild Rose Construction Company Limited, in which the 1st Defendant was a director and guarantor and that it issued a term loan facility of Kshs. 12 million and an overdraft facility of Kshs. 5.6 million.
 16. The 2nd Defendant states that it issued to Cooperative Bank a letter dated 7th June 2016 informing it of its intention to take over the outstanding facility issued to the 1st Defendant and requested the Bank to release the original title and an executed a discharge of charge over the property and that on the strength of this undertaking, through a letter dated 10th June 2016, Cooperative Bank of Kenya released and forwarded the original title and an executed Discharge of Charge over the suit property.
 17. It was averred that the 1st Defendant then proceeded to discharge the previous charge by Co-operative Bank of Kenya and charged the suit property to the Bank vide a Legal Charge dated 17th June 2016 and registered on the 19th September 2016 and that the facility was secured by a covenant to create a charge dated 17th June 2016, a Deed of Guarantee dated 17th June 2016 by Abdinur Hassan Adan, a Deed of Guarantee dated 17th June 2016 by Abdinur Hassan Adan & Salwa Omar Sheikh and a Corporate Deed of Guarantee dated 17th June 2016 by A.O. Basid Limited.
 18. The 2nd Defendant averred that the 1st Defendant, after receiving the term loan facility, failed to pay the sums as and when they were due and if payment was made, it was piecemeal contrary to the agreement and that despite requesting the borrower to regularize the same, he failed and/or neglected to attend to the default.
 19. It is the 2nd Defendant's case that the Bank then issued a three month's statutory notice pursuant to the provisions of Section 90 (3) of the Land Act on 23rd October 2018 and that the 1st Defendant failed



to regularize his accounts prompting the Bank to issue a Notification of Sale on 7th February 2019 in accordance with Section 96 (2) of the Land Act.

20. The 2nd Defendant contended that despite receipt of the demand letters, the borrower has still persisted in its default; that the principal in arrears on the Term Loan facility was a cumulative sum of Kshs. 1,816,595.87 as at 11th June 2019 and the loan had been constantly in arrears for a period of 365 days, while the interest in arrears is Kshs. 1,914,994.32 as at 11th June 2019 and had constantly been in arrears for a period of 365 days.
21. The 2nd Defendant avers that it advertised the suit property for sale on 27th May 2017 and 3rd June 2019; that the auction scheduled for 12th June 2019 did not take place owing to interim orders issued by this court and that owing to the 1st Defendant's persistent default, the Bank's right to exercise its statutory power of sale has clearly accrued.
22. The 2nd Defendant stated that the Plaintiff's purchase of the suit property was fraudulent, null, void and illegal because she was aware of the charge to Cooperative Bank and failed to inform them or to obtain the consent of the Chargor to purchase the suit property contrary to Sections 87 and 88(g) of the Land Act.
23. According to the 2nd Defendant, it was a term of the charge dated 3rd March 2014 that the 1st Defendant could not transfer the suit property by way of sale without the prior written consent of the Bank, and that the Plaintiff cannot maintain a claim as against the 2nd Defendant nor can it bar the exercise of the statutory power of sale.
24. In its Counterclaim, the 2nd Defendant averred that the legal charge dated 17th June 2016 was lawfully and legally entered into by the 2nd Defendant to the Counterclaim and all the necessary consents were obtained prior to the registration of the said charge on 19th September 2016, including consent from the previous chargee, the Co-operative Bank of Kenya and that the Plaintiff to the counterclaim is entitled to exercise its statutory power of sale over the suit property to recover the sum secured by it.
25. It is its claim that the 4th Defendant to the counterclaim failed to pay the amounts due and owing under the financial facility, causing the same to be in arrears of Kshs. 3,761,590.19 as at 11th June 2019 and as a result, the Plaintiff to the counterclaim initiated the lawful recovery procedures.
26. Without prejudice, the 2nd Defendant contended that if the chargor, the 1st Defendant/2nd Defendant to the counterclaim sold the suit property to the 1st Defendant to the counterclaim/Plaintiff, then the sale agreement dated 22nd February 2016 was illegal, null and void as the Plaintiff/ 1st Defendant to the counterclaim failed to obtain the written consent of Co-operative Bank of Kenya Limited.
27. The Plaintiff to the counterclaim averred that the 2nd and 3rd Defendants to the counterclaim, being the directors of the 4th Defendant, were fully aware and participated in the fraudulent and illegal acts set out above and that it seeks damages for fraud against the 2nd to 4th Defendants to the counterclaim.
28. Further, it was contended, if any damage or loss has been incurred by the 1st Defendant to the counterclaim, as set out in the Plaint, then the 2nd to 4th Defendants to the counterclaim are jointly and severally liable to the 1st Defendant to the counterclaim and the Plaintiff is entitled to indemnity from the 2nd to 4th Defendants.
29. In the alternative, it was averred, the 3rd Defendant to the counterclaim has been in breach of the terms of the letters of offer and the charge and failed to repay the term loan facility as and when it fell due, causing the facility to fall into arrears of a cumulative sum of Kshs. 3, 761,590.19 as at 11th June 2019, and the said term loan has been constantly in arrears for a period of 365 days.



30. The Plaintiff in the counterclaim stated that the arrears continue to accrue interest at the rate of 23% per annum being the interest rate of 13% per annum plus the default interest rate of 10% per annum. According to the Plaintiff to the counterclaim, the entire outstanding loan of Kshs. 24,400,485.35 as at 11th June 2019 continues to accrue interest at the said rate of 23% until payment in full.
31. Furthermore, it was averred, the 3rd Defendant to the counterclaim caused its account number 0232311001 to be overdrawn to the tune of Kshs. 194,655.44 as at 11th June 2019 which sum continues to accrue interest at the base lending rate of 13% per annum and the Plaintiff to counterclaim claims the said sum.
32. The Plaintiff to the counterclaim asserted that the 2nd, 3rd and 5th Defendants to the Counterclaim are jointly and severally liable for the said debt as guarantors of the 4th Defendant whose debt it claims. The Plaintiff to the Counterclaim prays for Judgment against the Defendants to the Counterclaim jointly and severally for:
 - a. A declaration that the Legal Charge dated 17th June 2016 and registered on 19th September 2016 over the property known as Land Reference Number 2019/8294/119 Nairobi is valid, legal and enforceable as against the Chargor.
 - b. A declaration that the Plaintiff to counterclaim is entitled to exercise its statutory power of sale over the property known as Land Reference Number 209/8294/119, Nairobi to recover the sums secured by the Legal Charge dated 17th June 2016.
 - c. A declaration that the Plaintiff to counterclaim is entitled to indemnity and/or contribution on a full and unqualified basis for any damages, loss and/ costs for fraud by the 2nd to 4th Defendants to counterclaim.
 - d. The sum of Kshs. 24,400,485.35/- plus interest at the rate of 23% per annum from 11th June 2019 until payment in full from the 2nd to 5th Defendants to the Counterclaim.
 - e. The sum of Kshs. 194,655.44/- plus interest at the rate of 13% per annum from 11th June 2019 until payment in full from the 2nd to 5th Defendants to the counterclaim.
 - f. General damages for fraud against the 2nd, 3rd and 4th Defendants to Counterclaim.
 - g. The costs of this suit together with interest thereon at court rates from the date of the judgment until payment in full.
 - h. Such other and further relief as this Honourable Court may deem just and fit.
33. The Plaintiff, in her Reply to Defence and Defence to Counterclaim, maintained that the 2nd Defendant obtained the charge by fraud and illegalities, rendering the entire process illegal, null and void. She urged that she is an innocent purchaser for value without notice of any adverse claims and that she purchased the suit property before the 2nd Defendant's claim.
34. She further emphasized that the Bank never conducted any due diligence before it entered into the said contract to charge the suit property to establish possession before making its decision to create a charge over the suit property.
35. She argued that the contract of sale with the 1st Defendant to the counterclaim was first in time, having been executed on 22nd February 2016 and possession given upon payment of the full purchase price only, and that the bank is holding the title in trust.



Hearing and Evidence

36. The Plaintiff, PW1, adopted her statement and produced her bundle of documents as PEXB1. She testified that she bought the land from the 1st Defendant, with whom she signed an agreement and paid the full purchase price through Cooperative Bank.
37. PW1 stated that as soon as she paid the 10% deposit, the 1st Defendant gave her possession of the land; that the Defendant however never transferred the house to date and that after she paid Kshs. 8.2 million to the 1st Defendant, no acknowledgment was issued by the 1st Defendant.
38. It was the evidence of PW1 that she lent the 1st Defendant an extra Kshs. 600,000/- as he was friendly and a neighbor; that they did not have an agreement in writing on the said amount; that she never saw, neither did she receive the original title, and that she does not have a copy of the duly signed transfer document or the letter of consent from the bank.
39. It was the evidence of PW1 that she was aware that the land was charged to Cooperative Bank; that time was of the essence and the completion date was never extended and that she only received a copy of the title from the 1st Defendant, which shows that that he obtained the title on 11th April 2014 and charged it to Cooperative Bank on the same day.
40. The Plaintiff admitted that there is no evidence to show that Cooperative Bank was aware of the sale of the land to her; that she spent Kshs. 5 million to repair the house, but did not keep the receipts to show the same and that she was not served with the statutory notices by the 2nd Defendant.
41. She testified that she was living on the neighboring property, Plot 118 while she had a tenant on Plot No. 119. She stated that the 1st Defendant is still the registered owner of the land and that she did not get the consent of Cooperative Bank before buying the land from the 1st Defendant.
42. PW2, Joseph Martin Ririani, the Plaintiff's husband, relied on his statement as his evidence in chief. He testified that the house was purchased by the Plaintiff; that the purchase price was paid in full; that the 1st Defendant knew they wanted to amalgamate Plots 118 and 119, and the 1st Defendant assisted PW2 to apply for amalgamation of the two parcels of land at City Hall, and that he personally paid Kshs. 20,000/- for the amalgamation.
43. It was his evidence that that they had a copy of the title which the 1st Defendant gave them and that they never dealt with the Cooperative Bank.
44. The Debt Recovery Officer with the 2nd Defendant, DW1, relied on his written statement and produced a bundle of documents as 2DEXB1. DW1 stated that a copy of the title shows that the owner of the title is Abdinur Hassan Adan, the 1st Defendant and the suit property was charged to Co-operative Bank; that it was later discharged and charged to DTB, the 2nd Defendant on 19th September 2016 and that the 1st Defendant borrowed a term loan of Kshs. 12,416,817.52 and an overdraft of Kshs. 8 million.
45. It was the evidence of DW1 that the purpose of the loan was to pay the loan balance to the Co-operative Bank; that the arrangement was a takeover credit facility, where credit moves from one bank to another and that the 1st Defendant obtained the consent of C-operative Bank for the said takeover.
46. DW1 stated that Cooperative Bank handed to them the original title deed, the charge and the executed discharge of charge both dated 17th June 2016. He stated that he registered the charge on 19th September 2016. He sought that the suit be dismissed and the counterclaim be allowed with costs.



47. In cross-examination, DW1 stated that he did not have the loan statement of the 1st Defendant with Co-operative Bank; that the 2nd Defendant gave an undertaking to Cooperative Bank and it released the title and the discharge; that the 1st Defendant and his wife were directors of Wildrose Construction Limited, the borrower company, and that the title is in the name of the 1st Defendant.
48. He stated that the charge to Co-operative Bank dated 3rd March 2014 was for Kshs. 12,150,000, and that they paid Kshs. 12,416,817/- in 2016, which accounts for a difference of Kshs. 240,000.

Submissions

49. The Plaintiff's counsel submitted that the Plaintiff paid the Defendant Kshs. 13, 123,000 as consideration for the suit property which included an advance of Kshs. 623, 000; that the two were neighbours and were transacting in trust and good faith and that the 1st Defendant, however, defaulted, and failed to perform his part of the sale agreement and failed to transfer title to the Plaintiff.
50. It was submitted that the Plaintiff was made aware of the fraud on 27th May 2019 when she saw the Nation Newspaper advertise the suit property for sale on the instruction of the 2nd Defendant Bank; that the Plaintiff fully performed her part of the agreement by paying the full purchase price and took up physical possession and user of the suit property and that upon receipt of the purchase price and after giving the Plaintiff vacant possession, the 1st Defendant did not retain any further interest or rights in the suit property.
51. The Plaintiff's counsel submitted that there exists a constructive trust by virtue of the sale agreement dated 22nd February 2016 and the 1st Defendant being a fiduciary or a trustee, holds the property in trust for the Plaintiff's benefit. Counsel relied on the Supreme Court case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 Others* [2023] KESC 106 (KLR).
52. It was Counsel's submission that the protection of the right to property under Article 40 of *the Constitution* is not absolute, because under Article 40(6), the right to property does not extend to any property that has been found to have been unlawfully acquired.
53. Counsel also relied on Section 25(c) of the *Land Registration Act*, on the rights of the proprietor, which states that nothing in that provision shall be taken to relieve a proprietor from the duty or obligation to which the person is subject to as a trustee.
54. Counsel submitted that under Section 26 of the *Land Registration Act*, a Certificate of Title issued by the Registrar is absolute and indefeasible, but provides that a title can be subject to challenge on the ground of fraud or misrepresentation or where the Certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.
55. Counsel further relied on Section 28(b) of the *Land Registration Act* on overriding interests which may subsist without being noted on the register, which includes constructive trusts, and Section 43(3), which requires all instruments affecting a disposition in land to be in writing and to be registered in order to take effect, but does not apply to exempted dispositions such as trusts.
56. Counsel argues that under Article 10(2)(b) of *the Constitution*, equity has been elevated as a principle of justice to a Constitutional principle, and courts in exercising judicial authority are enjoined to protect and promote that principle and that the equitable doctrines of trust such as constructive trust and proprietary estoppel are applicable and supersede Section 96 of the *Land Act*.
57. According to Plaintiff's Counsel, the 1st Defendant was legally precluded from charging the suit property to the 2nd Defendant by virtue of constructive trust and proprietary estoppel and that by the



time of registration of the charge in September 2016, the property had been sold on 22nd February 2016 to the Plaintiff.

58. It was submitted that the Plaintiff was not aware of the charge until the advertisement in the newspaper; that as the sale was founded on illegalities, fraud and misrepresentation, the charge cannot bind the Plaintiff and that the 2nd Defendant is precluded from exercising its power of sale against the Plaintiff's suit property.
59. Counsel contended that registration of the charge was procured contrary to Section 157 of the [Land Act](#). Counsel relied on the cases of *Samboyan Ole Samera v Katika Flowers Limited v Another* [2021] eKLR and *Festus Ogada v Hans Millins* [2009] eKLR on the maxim *ex turpi causa no oritur action*, that no court ought to enforce an illegal contract.
60. It was the Plaintiff's counsel submission that under Section 88 of the [Land Act](#), there are implied covenants that are binding on the chargor, the 2nd Defendant; that upon issuance of the letter of offer on 10th May 2016, it was under a duty as part of its due diligence to inquire and obtain evidence of full compliance with the terms of the covenants therein to Cooperative Bank from 11th April 2014, which it did not do and that the chargee would have easily discovered by a valuation report that the 1st Defendant had actually sold the land and the Plaintiff was in actual possession of the property. Counsel relied on the case of *Said v Shume & 2 others* [2024] KECA 866 (KLR) on the need for due diligence.
61. Counsel for the 2nd Defendant submitted that the Plaintiff failed to prove her case as the sale agreement dated 22nd February 2016 was null and void for failure to obtain the written consent of the chargor, the Cooperative Bank of Kenya Limited, contrary to Section 87 and Section 88(g) of the [Land Act](#).
62. It was submitted that the Plaintiff was aware of the charge to Co-operative Bank Kenya Limited and still purported to purchase the suit property without seeking prior written consent from the chargee and therefore any such agreement is null and void.
63. Counsel relied on the decided cases of *China Wu-Yi Company Limited v Suraya Property Group Limited & 2 Others* [2020] eKLR, *Erdeman Properties Limited v KCB Bank Limited* [2023] KEHC 26589 (KLR), *Innercity Properties Limited v Housing Finance & Another, Josphine Mukuhi & another (Interested Parties)* [2020] eKLR, *Paul Gatete Wangai & 13 others v Capital Realty Ltd & another* [2020] eKLR and *Monica Waruguru Kamau & Another v Innercity Properties Limited & 2 Others* [2020] eKLR.
64. Counsel further quoted Section 29 of the [Land Registration Act](#), and Halsbury's Laws of England Vol. 26 (2004 Reissue) pg. 13 para 616, and submitted that the Plaintiff is presumed by law to have been aware of the existence of the charge to Co-operative Bank and that the existence of the charge is expressly mentioned in the sale agreement dated 22/02/2016, under which clause the Plaintiff was to give the bank an acceptable professional undertaking to secure the original title from Co-operative Bank of Kenya Limited.
65. The 2nd Defendant's Counsel further submitted that the Plaintiff and her husband testified that after paying the purchase price to Cooperative Bank, they recklessly/ fraudulently failed to ensure that a discharge was issued and in collusion with the 1st Defendant, sought to defraud Co-operative Bank.
66. The 2nd Defendant submitted that in contrast to the Plaintiff, the 2nd Defendant directly engaged Co-operative Bank to obtain a valid discharge of the existing charge and proceeded to charge the suit property itself.
67. Counsel submitted that the Plaintiff was not a bona fide purchaser for value and did not acquire a valid title to the suit property. Counsel relied on the definition of a bona fide purchaser as defined



in Black's Law Dictionary 8th Edition as well as the case of Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney Mwaura v Attorney General & 4others [2017] eKLR.

68. The 2nd Defendant's counsel submitted that although the Plaintiff claimed that she paid Kshs. 8,200,000, she did not produce a receipt or acknowledgement by the 1st Defendant and that it is highly unlikely that a seasoned businessman such as PW2 would make a cash payment of such a colossal sum of money without being issued a receipt or acknowledgement to demonstrate payment.
69. It is Counsel's submission that once a charge is duly registered, the onus is on the Plaintiff to lead evidence challenging its legality; that the Plaintiff failed to produce any evidence to show fraud and that parties are bound by the terms of their contracts and a court of law will not normally intervene in the parties' freedom to contract.
70. It was urged that the case against the 2nd to 5th Defendants to Counterclaim was uncontroverted as they failed to enter appearance and that default Judgement was therefore entered against them on 10th May 2023 and that this court should enter judgement against them as prayed in prayer (d) of the 2nd Defendant's Defence and Counterclaim. Counsel relied on the case of Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR.
71. The Plaintiff's counsel filed further submissions in which he stated that upon payment of the purchase price of Kshs. 8,200,000 to the 1st Defendant on 9th March 2016, the impugned charge to the 2nd Defendant was nonexistent as it had not been executed nor registered and that consent from Co-operative Bank was not required because the Plaintiff had contracted with the 1st Defendant to clear the outstanding loan balance with Co-operative Bank. This, he argues, was to lead to automatic Discharge of Charge without the need for consent from Co-operative Bank.

Analysis and Determination

72. This court has carefully considered the pleadings, the testimony and evidence of the parties. The issues for this court's determination are as follows:
 - a. Whether the Plaintiff is a bona fide purchaser of the suit property.
 - b. Whether the 2nd Defendant lawfully created a charge over the suit property.
 - c. Whether the 2nd Defendant's Counterclaim is merited.
73. The Plaintiff filed this suit in 2019. The crux of her claim is that she lawfully purchased the suit property, L.R. 29542 L.R. 209/8294/119 Akiba United Estate in South C Nairobi County from the 1st Defendant, through a Sale Agreement dated 22nd February 2016. She asserts that she duly paid the agreed purchase price of Kshs. 12,500,000 and even paid an extra amount of Kshs 623,000.
74. It is her case that the 1st Defendant thereafter gave her vacant possession of the suit property, even before the registration of her interest in the property. The Plaintiff acknowledges in her Plaint, and in her witness statement, that as at the time she bought the suit property, it was charged to Co-operative Bank of Kenya. According to the Plaintiff, she was required to pay the 90% balance of the purchase price to Cooperative Bank of Kenya in exchange for the completion documents.
75. The Plaintiff informed the court that she duly made the deposit to Cooperative Bank of Kenya but that the 1st Defendant directed her to reverse the payment of Kshs. 7,577,000/- which she did, and paid to the 1st Defendant directly, leaving Kshs. 3,673,000 in the account. According to the Plaintiff, she fulfilled all the terms of the agreement, but the 1st Defendant, in breach of the contract, acted fraudulently and failed to deliver the completion documents.



76. The Plaintiff has also challenged the validity of the charge procured by the 2nd Defendant over the suit property on 17th June 2016 and registered on the 19th September 2016. It is her claim that at that time, the 1st Defendant no longer had any interest in the land and held it in trust for her.
77. The Plaintiff further argued that the 2nd Defendant failed to conduct the necessary due diligence and that had it done so, it would have found that the suit property had been sold to her because she was in possession of the suit property. She urged that the charge was procured illegally and that the 2nd Defendant can therefore not exercise its statutory power of sale.
78. The 2nd Defendant, on its part, has challenged the validity of the sale agreement between the Plaintiff and the 1st Defendant and argued that the same is invalid for failure by the Plaintiff to obtain consent from the Cooperative Bank of Kenya and to Discharge the Charge. The 2nd Defendant urged that the charge it holds over the suit property was validly obtained. It further asserts that the 1st Defendant is in breach of the terms of the loan and that the Bank has the right to exercise its statutory power of sale.
79. In the alternative to the exercise of its statutory power of sale, the 2nd Defendant has sought to be indemnified by the 2nd to 5th Defendants to the Counterclaim against any claims from the Plaintiff should this court disqualify its charge. The Plaintiff has further sought for the sum of Kshs. 24,400,485.35/- plus interest at the rate of 23% per annum from 11th June 2019; the sum of Kshs. 194,655.44/- plus interest at the rate of 13% per annum from 11th June 2019 until payment in full and general damages for fraud against the 2nd 3rd and 4th Defendants to the Counterclaim.
80. As I have stated above, the Plaintiff's case is that she lawfully purchased the suit property from the 1st Defendant through the sale agreement dated 22nd February 2016. She adduced several documents before this court to support her case, including a copy of the said sale agreement which is duly executed by the parties and signatures witnessed by a third party.
81. The Plaintiff also adduced in evidence a copy of an RTGS form dated 11th February 2016 indicating transfer of funds of Kshs. 1,250,000/- from Jane Ririani to Abdinur Hassan Adan; a further RTGS form dated 22nd February 2016 indicating a transfer of Kshs. 11,250,000 from Charles Ririani to Cooperative Bank and Bank Statements of the account owned by Charles Ririani indicating the return of Ksh. 7,577,000/- to the account.
82. The Plaintiff contends that they thereafter paid the sum of Kshs. 7,577,000/- and a further sum of Kshs 623,000/- to the 1st Defendant directly.

76. Black's Law Dictionary, 8th edition defines a "bona fide purchaser" as:
 "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

83. The Plaintiff has established that she entered into a valid contract with the 1st Defendant, who is the registered proprietor of the suit property. She has also presented documentary proof of payment of the deposit of the purchase price to the 1st Defendant and the initial payment of the balance of the purchase price to Cooperative Bank of Kenya.



84. Whether the Plaintiff indeed paid to the 1st Defendant Kshs. 8,300,000 in cash as claimed in this suit has not been proven to the requisite standards. The said payment has not been supported by any document or independent testimony, save for the testimony of the Plaintiff and her husband.
85. The Plaintiff has also asserted that she was in occupation of the suit property since 2016, after she paid the purchase price. On the basis that she paid the full purchase price and has been in occupation of the suit property, she contended that the 1st Defendant holds the title to the suit property in trust for her, pending registration of the same in her favor.
86. The Plaintiff relied on the Supreme Court case of *Shah & 7 Others v Mombasa Bricks & Tiles Limited & 5 Others* [2023] KESC 106 (KLR), in which the Supreme Court declared that a constructive trust can be imported into a land sale agreement to defeat a registered title therefrom.
87. The Court of Appeal in *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 Others* [2015] eKLR held as follows on the doctrine of constructive trust:
- “A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.”
88. In this case, the Plaintiff paid the purchase price and entered into possession of the suit property, and it is for this reason that the Plaintiff argues that a constructive trust took effect and that the 1st Defendant held the suit property in her favor.
89. The 2nd Defendant however contends that the sale agreement between the Plaintiff and the 2nd Defendant is voided by the failure of the Plaintiff to obtain consent from the chargor, the Co-operative Bank of Kenya, before getting into the sale agreement with the 1st Defendant.
90. While the Plaintiff in her oral testimony attempted to deny that she was aware that the suit was charged to Co-operative Bank of Kenya, she has expressly admitted to the same in the Plaintiff and in her witness statement.
91. Furthermore, under clause 4 of the sale agreement, it is noted that the property was charged to Cooperative Bank of Kenya and the purchaser was required to pay to Cooperative Bank to secure the original title and discharge of charge. The Vendor, on his part, was to give an acceptable professional undertaking to secure the original title from Co-operative Bank of Kenya.
92. Under Section 87 as read with Section 88(1)(g) of the [Land Act](#) and Section 59 of the [Land Registration Act](#), it is an implied covenant that a chargor cannot sell property that is charged without the written consent of the Chargee/Bank.
93. Section 87 of the [Land Act](#) provides as follows:
- “If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.”



94. Similarly, Section 59 of the *Land Registration Act* provides that:
- “If a charge contains a condition, express or implied by the borrower that the borrower will not, without the consent of the lender, transfer, assign or lease the land or in the case of a lease, sublease, no transfer, assignment, lease or sublease shall be registered until the written consent of the lender has been produced to the Registrar.”
95. Section 88(1) (g) of the *Land Act* additionally provides that there shall be implied in every charge covenants by the chargor with the chargee binding the chargor not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld.
96. In the charge dated 3rd March 2014 between the 1st Defendant and Co-operative Bank of Kenya, Clause 6 (n) provides, as a covenant by the chargor, that he shall ensure that no person (other than the chargor) shall during the subsistence of the charge and without the prior consent in writing of the Bank be registered as the proprietor of the premises or any part thereof or any interest therein.
97. The Plaintiff admitted during cross examination that she did not obtain consent from Co-operative Bank of Kenya before purchasing the land from the 1st Defendant. The Plaintiff’s husband admitted that they did not in any way deal with Cooperative Bank of Kenya. The Sale Agreement between the 1st Defendant and the Plaintiff is therefore unenforceable for want of consent by the chargee.
98. Contrary to the Plaintiff’s arguments that a claim of equity supersedes a legal claim, it is trite that the bank being the holder of the charge would have first priority over the suit property as long as the land remains charged.
99. In the case of *Innercity Properties Limited v Housing Finance & another; Josephine Mukuhi & Another (Interested Parties)* [2020] KEHC 9499 (KLR), the court held as follows:
- “The Interested Parties’ case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank’s consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour...”
100. The 1st Defendant could therefore not have purported to sell the suit property to the Plaintiff without obtaining the requisite consent from the Co-operative Bank of Kenya, which must have been within his knowledge.
101. The conduct of the 1st Defendant, in contracting to sell the suit property to the Plaintiff, giving the Plaintiff account details with Co-operative Bank to offset the loan, and then later requesting her to reverse a large portion of the purchase price and to pay the same directly to him, and only a few months later approaching the 2nd Defendant for a takeover loan of Kshs. 17.6 million, can only be termed as fraudulent as against the 1st Defendant. The Plaintiff has however not sought any relief or damages against the 1st Defendant.
102. Considering that the chargee, Cooperative Bank Limited, did not give any undertaking to the Plaintiff that it will discharge the property, and the Plaintiff having reversed the payment she had made to the



- Cooperative Bank, a constructive trust cannot subsist over the suit property in the Plaintiff's favor. The Plaintiff's prayer for specific performance is found to be without merit.
103. Accordingly, the Plaintiff's case against the 1st and 2nd Defendants fail. She did not obtain any rights or interests over the suit property, which was already charged, through the sale agreement dated 22nd February 2016.
 104. The 2nd Defendant's counterclaim is rooted on the claim that it lawfully charged the suit property as a security for the sum of Kshs. 17,600,000 which was advanced to the 1st Defendant and his company, Wild Rose Construction Company.
 105. The 2nd Defendant has adduced a copy of the letter of offer dated 10th May 2016; the supplemental letter of offer dated 20th June 2016; the letter of undertaking dated 7th June 2016 to Co-operative Bank of Kenya; the letter dated 10th June 2016 from Co-operative Bank of Kenya through which they released the original title to the suit property, the counterpart charge dated 3rd March 2014 and the duly executed Discharge of Charge in triplicate over the suit property.
 106. Further, the 2nd Defendant also produced in evidence the charge between the 1st Defendant, the 2nd Defendant and Wild Rose Construction Company dated 17th June 2016 which was registered on 19th September 2016; Deeds of Guaranty dated 17th June 2016 respectively signed by the 2nd and 4th and 5th Defendants to the Counterclaim; a Corporate Guarantee signed by the 5th Defendant to the Counterclaim; RTGS certificate dated 20th June 2016 for Kshs. 12,416,817.52 from the 2nd Defendant to Co-operative Bank of Kenya and spousal consent.
 107. There is no dispute that the 2nd Defendant's charge over the suit property was registered on 19th September 2016. From the documents produced by the 2nd Defendant, this court is satisfied that the process of taking over the charge held by the Cooperative Bank was undertaken lawfully and procedurally.
 108. It is a trite principle in law that he who alleges must prove. As it was the Plaintiff who alleged that the charge was invalid, she bore the onus of presenting before this court the necessary evidence to prove that the said charge was indeed unlawful.
 109. The Plaintiff has not produced any cogent evidence to show that the said registration was procured fraudulently or through illegality. Indeed, although the Plaintiff purports to have bought the suit property from the 1st Defendant, she did not clear the loan that was due and owing to Cooperative Bank.
 110. What happened is that the 1st Defendant who did not testify in this case collected money from her but never discharged the property. Instead, he instructed the 2nd Defendant to take over the loan from Cooperative Bank and made further borrowings. All along, neither the 2nd Defendant nor Cooperative Bank was aware that that the 1st Defendant had entered into a sale agreement with the Plaintiff over the suit property.
 111. Therefore, on the weight of the evidence that has been presented by the 2nd Defendant, this court is satisfied that the 2nd Defendant's charge, which took over the interest held by the Co-operative Bank of Kenya was validly and legally created.
 112. The 2nd Defendant has sought for several remedies through their counterclaim, including the claim that it is entitled to exercise its statutory power of sale, and that in the alternative, the 2nd to 5th Defendants to the Counterclaim pay the outstanding sums of Kshs. 24, 400, 485.35/- plus interest at the rate of



23% per annum from 11th June 2019 until payment in full, and the sum of Kshs. 194,655.44/- plus interest at the rate of 13% from 11th June 2019 until payment in full.

113. The 1st Defendant has also sought for general damages for the fraud committed by the 2nd to 5th Defendants to the Counterclaim.
114. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR held that this court does not have the jurisdiction to determine disputes concerning charges with respect to the issuance of the statutory notices by the chargee or the tabulation of sums owing. The Appellate Court held that:

“... the jurisdiction of the Environment and Land Court to deal with disputes relating to contracts under Section 13 of the *Environment and Land Court Act* ought to be understood within the context of the Court’s jurisdiction to deal with disputes connected to ‘use’ of land. Such contracts, ought to be incidental to the ‘use’ of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. By parity of reasoning, the dominant issue in the instant case was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender.

42. While exclusive, the jurisdiction of the Environment and Land Court was limited to the areas specified under Article 162 of *the Constitution*, Section 13 of the *Environment and Land Court Act* and Section 150 of the *Land Act*; none of which concerned the determination of accounting questions. Consequently, the dispute did not fall within any of the areas envisioned by those provisions. On the other hand, the jurisdiction of the High Court over accounting matters was without doubt, as evidenced by article 165(3) of *the Constitution*. The Appellant’s objection on jurisdiction was rightly dismissed.”

113. In determining whether the 2nd Defendant is entitled to exercise its statutory power of sale, this court would have to undertake a foray into the accounts held by the 3rd Defendant and would have to review the statutory notices that were issued to the 3rd Defendant to the Counterclaim. Such an accounting exercise is however the preserve of the High Court, as stipulated by the Court of Appeal in the *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* [2017] eKLR. This court does not have the jurisdiction to determine these issues as raised by the 2nd Defendant in the Counterclaim.
114. Similarly, in the alternative reliefs sought by the 2nd Defendant/Plaintiff to the Counterclaim, it has sought that this court make findings as to the amounts that are in fact outstanding and the interest rates applicable thereto. These issues are however the preserve of the High Court and do not fall within this court’s jurisdiction.
114. As to whether the 2nd Defendant is entitled to general damages for the fraud, this court is persuaded by the reasoning in *Mustek East Africa Limited v Mtawa Technologies Limited & 3 Others* [2024] KEHC 11119 (KLR), that general damages are awarded for non-quantifiable harms which the claimant must prove the fraud resulted to.

“General damages, on the other hand, are awarded for non-quantifiable losses such as pain and suffering, emotional distress, or loss of reputation. In cases of fraud, general damages may be considered if the plaintiff can demonstrate that the fraud resulted in



non-quantifiable harm beyond the specific financial losses covered by special damages. Halsbury's Laws of England, Volume 12(1), paragraph 880, acknowledges that:

“General damages do not need to be specifically proved. However, the plaintiff must plead the material facts giving rise to the claim for general damages and provide the necessary evidence to support such a claim.”

114. The 2nd Defendant/ Plaintiff to the Counterclaim has not pleaded the particular harms it has suffered nor has it presented any evidence of the same. Indeed, the suit property is still charged in favour of the 2nd Defendant. It is therefore the finding of this court that the 2nd Defendant has not sufficiently established that it ought to be awarded general damages for fraud.
114. In conclusion, this court has found that the Plaintiff's suit is devoid of merit and the is dismissed. However, seeing that the Plaintiff is a victim of the 1st Defendant's fraud, I will not condemn her to pay costs.
114. For those reasons, the 2nd Defendant's Counterclaim is partially merited and the following orders do hereby issue:
- a. A declaration be and is hereby issued that the Legal Charge dated 17th June 2016 and registered on 19th September 2016 over the property known as Land Reference Number 2019/8294/119 Nairobi is valid, legal and enforceable as against the Chargor.
 - b. The 1st Defendant shall bear the costs of this suit and the counter claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF MARCH, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kisinga for 2nd Defendant

Mr. Opullu for Plaintiff

No appearance for 1st Defendant

Court Assistant: Tracy

