



**Okengo v Mwakio & 4 others (Environment & Land Case
73 of 2010) [2023] KEELC 18266 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 73 OF 2010
LC KOMINGOI, J
JUNE 15, 2023**

BETWEEN

FEDRICK OKEYO OKENGO PLAINTIFF

AND

GODDY MWAKIO 1ST DEFENDANT

**MENELIK MAKONNEN ALIAS MENELIK KWAMLA MAKONNEN 2ND
DEFENDANT**

JAMES ODWAKO 3RD DEFENDANT

MACHARIA-MWANGI & NJERU (A FIRM) 4TH DEFENDANT

**KENYA COMMERCIAL BANK (SUCCESSOR TO SAVINGS AND LOAN
KENYA LTD) 5TH DEFENDANT**

JUDGMENT

1. By a plaint dated 19th February 2010 and amended on 11th March, 2010, the Plaintiff prays for judgment against the Defendants jointly and severally for orders;
 - a. An injunction restraining the 5th Defendant from advertising, selling or offering for sale by public auction or howsoever L.R No. 12422/465.
 - b. A declaration that the charge over L.R No.12422/465 dated 5th April, 2007 and registered on 2nd May, 2007 as entry No. I.R.87166/5 is inconsistent and at variance with the letter of offer dated 3rd October, 2005 and the Plaintiff is entitled to have it rescinded or repudiated.
 - c. A declaration that the charge dated 5th April, 2007 and registered on 2nd May, 2007 as entry No. I.R 87166/5 is complete nullity for want of compliance



with the provisions of the law of contract and the transfer of property Act 1882 of India.

- d. A declaration that the Plaintiff is under no obligation to pay the 5th Defendant the amounts set forth in the charge dated 5th April, 2007.
 - e. The land register in respect of L.R. 12422/465 be rectified by cancellation of entry no. I.R. No.12422.465 made on the 2nd May,2007.
 - f. The restitution by the 4th Defendant of the sum of Ksh.72,500/= with interest at 12% from 1st April,2007 until payment in full,
 - g. Costs of the suits.
2. The Plaintiff claims he was allocated undeveloped residential plot No.51 House Type B later registered as L.R.12422/465 (grant No. I.R.81766) in 2004 upon payment of Ksh.640, 000/= and Ksh.350, 000/= as consideration and infrastructure costs respectively. Through an offer letter dated 3rd October, 2005, he was offered a Ksh.3,256,165.20/= mortgage facility at 14% p.a for twelve (12) years. Subsequently, he paid legal fee for a charge instrument executed on 3rd December, 2005 and drawn on 3rd January, 2006 in favor of the advanced loan. According to the Plaintiff, a Ksh.100,000,000/= mortgages facility advanced by the 5th Defendant to develop 276 housing units on a 27 acre land was secured by L.R. No.12422/400-516 titles comprising the suit property. Construction of houses on the said properties would only be undertaken by their respective owners.
 3. According to the Plaintiff, the 5th Defendant refused to release to him the mortgage facility despite payment of construction deposit amounting to Ksh.1,700,000/= to Balozi on 10th November,2005.He avers that through a letter dated 4th October 2006, the 1st and 2ndDefendants fraudulently misrepresented to Balozi Housing Cooperative Society Ltd that they would service the mortgage repayment and complete construction of his house within two months yet they were not party to the mortgage agreement. He claims, the 5th Defendant was also a party and privy to the said fraudulent misrepresentation since it knew that construction would be done without any hindrance. It also requested Shelter Afrique through the 4th Defendant to release the plaintiff's title to the land against an undertaking to pay Ksh.25,000,000.Considering such acts were in total disregard of banker-customer fiduciary and confidentially duties, the Plaintiff was exposed to a risk of unpaid Ksh.100,000,000/= loan advanced to Balozi Housing Cooperative Society Ltd by 5th Defendant.
 4. It is the Plaintiff's case that neither Balozi Housing Cooperative Society Management Committee nor its membership authorized repayment of the said mortgage. It undertook to complete construction of dwelling houses within two (2) months. Additionally, the 1st, 2nd and 3rd Defendants knew that the Ksh.25, 000,000/= and Ksh.3, 256,165.20 was to settle Balozi Housing Cooperative Society Limited indebtedness to Shelter Afrique. Accordingly, the Charge instrument dated 5th April, 2017 prepared by the 4th Defendant under the instruction of the 5th Defendant misrepresented that the Plaintiff was the registered owner of the suit property as at 5th April, 2017.He avers that the 3rd Defendant advised him to apply for an additional mortgage facility of Ksh.2, 000,000/= when he discovered that construction of his residential house would not proceed as planned. He also obtained extra mortgage facility of Ksh.3, 974,000 from Mwito Co-operative Savings and Credit Society Limited and Barclays Bank of Kenya.
 5. It is his case that the charge instrument registered on the suit property on 5th April, 2007 was in violation of Section 11(h) of the *Banking Act*. In particular, Ksh.3, 256,165.20/= was used to settle Shelter Afrique's debt while the charge instrument drawn by the 4th Defendant varied the terms of the letter of



- offer 3rd October, 2005. The 5th Defendant's authorization to the 3rd Defendant caused the Plaintiff to pay the 4th Defendant Ksh.206, 533/= and Ksh.99, 702/= being stamp duty and legal fee respectively.
6. The Plaintiff contends that considering that the 3rd, 4th and 5th Defendant never informed him that he had a right to seek independent legal advice, then charge instrument executed by the 4th Defendant is voidable since it is not in compliance with the *law of Contract Act* and Transfer of Property Act. He also denies ever instructing the 4th Defendant to act for him in registering the charge over the suit property and for this reasons, he entitled to recover the legal fee and VAT of Ksh.62, 500/= and Ksh.10, 000/= wrongfully paid.
 7. It is asserted that the notice for statutory power of sale issued by the 5th Defendant to the Plaintiff for repayment of Ksh.4, 235,898.95 at an interest of 15% p.a in default of which the suit property would be sold is unlawful since it is based on unlawful contract. He accuses the 5th Defendant of undervaluing the suit property at a force price of Ksh.6, 700,000/= instead of its market price of Ksh.9,500,000/= .This was despite the fact that the property was valued at Ksh. 5,000,000/= for purposes of stamp duty yet the 5th Defendant valued it at Ksh.2,500,000/=.The valuation of the improvements at Ksh. 7,000,000/= also never took into consideration the value of paved driveway, forecourt, backyard, fences and other valuable items.
 8. The Plaintiff claims are denied by the Defendants in their respective statement of defences who pray that it be dismissed with costs.

The 1st Defendant case

9. Through a statement of defence dated 6th April, 2010, the 1st Defendant confirms that he was the chairperson of Balozi Housing Co-operative Society Limited, Management Committee for which the Plaintiff is a member. It is his contention that the society membership inclusive of the Plaintiff approved the borrowing of monies from Savings and Loan (K) and that the society property was charged in favor of the 5th Defendant. Considering the property belonged to the Society and not the Plaintiff, the construction deposit was paid directly to Diplomat Housing Construction Co. Ltd by respective land owners in line with the societies by laws. He therefor denies any fraudulent misrepresentation to the Plaintiff.

The 2nd Defendant case

10. The 2nd Defendant asserts in a statement of defence dated 16th June, 2010 filed on 21st June, 2010 that the plaintiff suit should be struck out because no cause of action has been disclosed against it.

The 3rd Defendant case

11. On 5th July, 2010, the 3rd Defendant filed a statement of defence on the same date where he claims that the 25th October, 2005 letter of offer was executed by the Plaintiff in his presence of an advocate. However, he is not aware whether the Plaintiff paid Ksh.1, 700,000/= to Balozi Housing Society Limited nor obtained a loan of Ksh.3, 974,000/= to complete construction of his house. He asserts that the 5th Defendant never exposed nor misrepresented to the Plaintiff that Balozi Housing Society Limited failed to service a Ksh.100,000,000/= loan.
12. The 3rd Defendant asserts that the 4th Defendant was instructed by the 5th Defendant to prepare a charge instrument dated 5th April,2007 and that the 5th Defendant in delivering the mortgage facility to the Plaintiff was justified when it caused a charge to be registered on the suit property. Therefore, the charge instrument dated 5th April, 2007 never departed nor varied the terms of the letter of



offer. It is the 3rd Defendant's case that the 5th Defendant did not fraudulently offer the Plaintiff a Ksh.3,256,165.20 mortgage facility, breach Section 11(h) of the *Banking Act* nor failed to inform him to seek independent legal advice on matters relating to the charge instrument. He holds the view that that the Plaintiff was rightfully issued with a statutory demand notice by the 5th Defendant seeking payment of Ksh.4,235,899.95/= inclusive of interest rate of 15% pa in default of which the property would be sold.

The 4th Defendant case

13. The 4th Defendant through a defence dated 12th April,2010 filed on the same date admits that the 5th Defendant, being a predecessor of Savings and Loan Kenya Limited instructed him to undertake conveyance transactions for Balozi Housing Society Limited property which were previously charged to Shelter Afrique. It denies ever misrepresenting nor breaching the Plaintiffs contract. This is because it gave professional undertaking to Shelter Afrique Counsel and Waruhiu, Kowade & Nyanga Advocate to redeem fourteen (14) Balozi Housing Society Limited properties inclusive of the suit property on instruction of the 5th Defendant. The 4th Defendant explains that upon procuring a discharge of charge discharge from Shelter Afrique, a transfer and charge over the suit land was ultimately acquired by the Plaintiff when he became its registered owner in line with Kenya's conveyance practice. This clearly proved that the 3rd October, 2005 letter of offer was not in variance with the charge instrument.
14. It is the 4th Defendant's case that the Plaintiff voluntary appeared before it to execute the transfer and charge documents, surrender his passport card and subsequently pay legal, stamp duty and other fees leading to registration of transfer and charge documents. Therefore his allegations are completely scandalous, frivolous, and vexatious and lack any foundation as the transfer and charge documents were duly witnessed and attested in compliance with the law. In addition, his objection that he never consented to have the 4th Defendant legally represent him yet he frequently visited its offices and paid legal fee has risen as obfuscate when he defaulted in repaying the outstanding mortgage debt. According to the 4th Defendant, the Plaintiff suit should be transferred to Nairobi Commercial Division because it is commercial in nature.

The 5th Defendant case

15. The 5th Defendant in a statement of defence dated 7th April, 2010 filed on 12th April, 2010 admits that it offered the Plaintiff a twelve (12) year mortgage facility of Ksh.3, 256,165.20 at an interest rate 14% p.a through a letter of offer dated 3rd October, 2005 and afterwards instructed the 4th Defendant to prepare a charge instrument dated 5th April,2007. It denies ever breaching clause 16(f) of the offer letter dated 25th October, 2005 duly executed by the Plaintiff before an advocate neither was it involved in any fraudulent misrepresentation which exposed the Plaintiff to any disadvantage. It also never knew the Plaintiff paid Ksh.1, 700,000/= to Balozi Housing Society Limited. It denies knowledge of Ksh.3, 974,000/= allegedly borrowed by the neither plaintiff nor use of his income monies amounting to Ksh.1, 700,000/= to facilitate completion of construction of his dwelling housing. The 5th Defendant maintains that it rightfully issued statutory notices to the Plaintiff demanding payment of Ksh.4,235,899.95 inclusive of 15% interest per annum failure to which the suit property would be sold to recover its monies.

Evidence of the Plaintiff

16. PW1, Fredrick Okeyo Okengo, the Plaintiff herein testified that he joined Balozi Housing Co-operative Society Limited in January, 2003 with the intention of getting a plot to construct a dwelling house.



- This is due to the fact that the Society had a 400 housing gated plan with a swimming pool, shopping mall, paved roads, electricity, security, street lighting, drainage and water. Upon purchasing the land, he paid Ksh, 350,000/=, Ksh.650, 000/= and 1.7 million for infrastructure, plot and construction to Balozi Housing Society Limited. He produced payment receipts to support the said disbursement.
17. It was his case that he took a mortgage facility of 3,256,165.20/= to facilitate completion of construction of the house which was secured with the title to the suit land.
 18. He testified that the construction was delayed and was not finalized as scheduled. The 1st and 2nd Defendant indicated that this was occasioned by unexpected unit costs. As a result, they recommended that he does apply for mortgage facility from Savings & Loan Limited to cater for the deficit short flow. He explained that he applied for a 3,256,165.20/= from Savings & Loan Limited which he subsequently authorized the 5th Defendant to disburse to the Balozi Housing Society Limited to facilitate completion of construction of the house. He also borrowed additional loans and used his other income revenue to cater for additional monies demanded by the society so that construction of the house would be completed and handed over to him. It was his testimony that he discovered that the 5th Defendant did not been disburse the monies to the society as authorized but issued Balozi Housing Society Limited it to Shelter Afrique to repay an existing loan taken by Balozi Housing Society Limited. Upon full repayment of the said loan, the 4th Defendant on the instruction of the 5th Defendant created a charge over the suit property in its favor. The plaintiff demands refund of Ksh.99,702/= and Ksh.206,500/= being legal fee and stamp paid to the 4th Defendant with regard to drawing of a transfer of the suit land to his name and charge instrument in favor of the 5th Defendant. This is because he never appointed him as his legal representative and for this reasons the charge is void and invalid. It was his testimony that he was not informed at the time of purchase that his suit property was being charged in favor of the 5th Defendant. According to him, he was given the said funds on condition that the construction of his dwelling house would be completed. He explained that the 4th Defendant gave an undertaking to pay Ksh.125 Million to Shelter Afrique over a loan advanced to Balozi Housing Society Limited so that the charged properties including that of the plaintiff would be released. Subsequently, it caused a charge to be registered over the said property notwithstanding whether construction was complete or not. He denies being a party to the 25 million transactions between Balozi Housing Society Limited and Shelter Afrique which transaction he discovered when the 1st Defendant gave him access to his personal file. According to his testimony, he authorized the 5th Defendant to release the 3,256,165.30 mortgage proceeds to Balozi Housing Society Limited to complete construction of his house but instead released the monies to Shelter Afrique for repayment of a loan which he was neither a party to nor had knowledge. He therefore accuses the Defendants of fraudulently misrepresenting in him and misdirecting his loan proceeds without his authority yet he trusted them.
 19. The plaintiff therefore urged the court not to allow the 5th Defendant to exercise its statutory power of sale since the charge instrument is void. In addition, the 5th Defendant also devalued the suit property.

Evidence of the Defendants.

20. DW1, James Opondo Odwako, the Banks Mortgage Administrator while relying on his witness statement dated 27/04/2012 and 4th Defendants lists of documents dated 27/04/2012 and 7/03/2013 adopted them in support of the 3rd to 5th Defendants' case. He explained that he did not know why he was sued in person yet he was an agent of the 5th Defendant. It was his case that the 5th Defendant was not party to the sale agreement between the Plaintiff and Balozi Housing Society Limited over the property that was previously charged in favour of Shelter Afrique for Kshs. 250 million loan. In



- order to secure its advanced loan to the Plaintiff, the 5th Defendant repaid Shelter Afrique existing loan and subsequently registered a charge in its favor over the Plaintiffs' suit property. This according to him, all these was explained to the Plaintiff. He stated that he only dealt with the Plaintiff when the 5th Defendant sought to exercise its statutory power of sale after he defaulted in repaying the loan since the monies had to be recovered.
21. On being cross examined, he confirmed that when the Plaintiff approached the 5th Defendant for a mortgage facility, the property was in the Society's name even though the suit land sale agreement was between the Plaintiff and the Society. Further, the Ksh.3,256,165/20 loan was advanced when construction of the dwelling house was already ongoing as confirmed during the site visit. He explained that the mortgage proceeds were to complete construction of the house. The 4th Defendant also issued a professional undertaking that Shelter Afrique would release the titles once the outstanding loan owed to it was repaid. According to the Valuation report undertaken during the site visit by the 5th Defendant, the value at the current stage was Ksh.1,000,000/= while the value for mortgage purposes was Ksh.8, 000,000/=. The open market value upon completion was Ksh.5, 750,000/=.
 22. He indicated that the 5th Defendant did not breach the terms and conditions of its offer letter to the Plaintiff. He confirmed that the 5th Defendant released the Ksh.3, 256,052/= to Shelter Afrique instead of Balozi Housing Society Limited as authorized by the Plaintiff. He also confirmed that he did not have any supporting documents to prove that the 5th Defendant auctioneers issued the Plaintiff with a notice of intention to sell the suit property.
 23. DW2, Macharia Njeru, a senior partner and advocate in the 4th Defendant's firm gave his testimony on 29/06/2021 during which he adopted his witness statement and bundle of documents in support of his case. He confirmed he was instructed by Savings & Loan Limited to prepare a charge instrument in their favour for a Ksh.3,256,165.20/= loan advanced to the Plaintiff. At that time the property was secured in favor of Shelter Afrique for a loan advanced to Balozi Housing Society Limited to construct houses for its members. He however did not have any supporting documentation to prove these assertions. It was his case that when the suit property was discharged from Shelter Afrique upon repayment of the loan, he drew a charge in favor of the 5th Defendant for the Ksh.3,256,165.20/= loan. He also drew a transfer instrument of the suit land in favor of the Plaintiff as instructed by Balozi Housing Society Limited. He avers that the Plaintiff was aware the suit property was charge by Shelter Africa and Society's member's resolved in their Annual General Meetings that the same be discharged upon which it be transferred to the members. He confirmed that he attended various meeting with the Society and Raynold Logistics Limited. He also stated that he met the Plaintiff twice. While engaging with him, he gave the Plaintiff the option of having him as his lawyer or getting his own. Instead, the Plaintiff opted to have him represent him. He maintained that the plaintiff was fully aware of all these transactions since he not only visited his office but also paid legal fee and stamp duty with respect to a charge instrument drawn created over the suit property in favour of the 5th Defendant
 24. DW3, Menelik Kwamla Makonnen, the 1st Defendant and the Chairperson of Balozi Housing Co-operative Society Management Committee gave his testimony on 16/03/2020 and denied ever making any fraudulent representations to the Plaintiff. He told the court that engagement of the 5th Defendant Balozi Housing Society Limited was authorized by its members during the Annual General Meeting attended by the Plaintiff. He however did not have any documents to show that the plaintiff attended the said meetings. According to him, the Plaintiff ought to have sued Balozi Housing Society Limited and not him in his personal capacity. He confirmed that he authored a letter to the Plaintiff indicating that Balozi management committee undertaking to repay the Plaintiffs' loan if construction of the house was not completed as scheduled .He however did not have any minutes to support such undertaking by Balozi Housing Cooperative Society Limited. He stated that the members were advised



to apply for mortgage to construction their houses from Savings & Loans. Raynolds Logistics EA were engaged by Savings & Loans to encourage members to apply for the mortgage. It was his testimony that as at the time when the Plaintiff bought the suit property, it was charged in favour of Shelter Afrique. The Plaintiff mortgage proceeds of Ksh.3, 256,000/= was therefore used to repay the said loan before a charge could be registered over the suit property in favor of the 5th Defendant. This was despite the Plaintiff authorization that such funds be disbursed to Balozzi Housing Society Limited. He confirmed that neither the defendant nor the 3rd - 5th Defendants participated in construction of the dwelling house.

25. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiffs Submissions.

26. They are dated 20/6/2022. They raise the following issues for determination;

- a. Who is the legal/beneficial owner of L.R No. 12422/475?
- b. Was the 5th Defendant in breach of clause 16(f) of the letter of offer dated 3rd October,2005 by failing to process the Plaintiff mortgage facility of Ksh.3,256,165.20/=?
- c. Whether the 5th Defendant failed /neglected to process and disburse Ksh.3,256,165.20/= as represented in the letter of offer?
- d. Whether the 5th Defendant furnished consideration to validate and justify the registration of the charge?
- e. Whether the 1st, 2nd and 3rd Defendants made the representations pleaded in paragraph 8(a),(b) and (c) of the amended plaint to the Plaintiff?
- f. Whether the 1st Defendant letter and the 2nd Defendants email dated 4th October, 2006 contained fraudulent representations and whether the 5th Defendant was complicit in, party to and privy to them?
- g. Whether the fraudulent representations by the 1st and 2nd Defendants enabled the 5th Defendant to addresses concerns touching upon its loan of Ksh.100, 000,000/= made to Balozzi Co-operative Society Ltd and thereby disadvantage the Plaintiff?
- h. Whether the instrument of charge dated 5th April,2007(herein after ‘the charge) unilaterally varied the stipulations in the offer letter by purporting the Plaintiff was the registered owner of LR.No.12422/465 as the date of the charge and that the 5th Defendant had advanced to the Plaintiff the sum of Ksh.3,256,165.20/=
- i. Whether the charge varied and departed from the letter of offer and failed to embody the actual agreement and intentions of the parties to the 13 offer letter?
- j. Whether the 3rd, 4th and 5th Defendants failed and neglected to inform the Plaintiff of his right to seek independent legal advice concerning the stipulations in the charge 14?



- k. Whether the Plaintiff appeared before the said advocate for purposing of executing the charge?
 - l. Whether notwithstanding that the Plaintiff was not servicing the Ksh.3,256,165.20/= loan, the 3rd Defendant advised him to apply for an additional facility of Ksh.2,000,000/= to complete construction of his residential house?
 - m. Whether the Plaintiff borrowed Ksh.3, 974,000/ from Mwita Sacco Society Limited and Barclay Bank of Kenya Limited to complete his residential house?
 - n. Whether the mortgage facility of Ksh.3, 256,165.20 was transacted fraudulently and recklessly in breach of Section 11 (h) of the Banking Act?
 - o. Whether the effect of Section 69 and 100A (1) of the Transfer of property Act of India was explained to the Plaintiff?
 - p. Whether the certificate endorsed at Page 12 and 13 of the Charge are false, pretensions and contrived and the charge is void or voidable for want of compliance with Law of Contract and the Transfer of Property Act 1882 of India?
 - q. Whether the Plaintiff instructed the 4th Defendant to act as advocate in the registration of the Transfer of LR.12422/465 and whether the 4th Defendant is under duty to restitute the amounts paid to the Plaintiff?
 - r. Whether the “authority” in the letter written by the Plaintiff justified and validated the 5th Defendant payment of Ksh.3,256,165.20/= to the company for habitat and housing in Africa (shelter afrique)?
 - s. Whether the 5th Defendant is entitled to exercise a statutory power of sale over LR.No.12422/465?
 - t. Whether the Market value of Ksh.9, 500,000/ and the forced sale value of Ksh.6, 700,000 amounts to a gross undervaluing of LR.12422/465?
 - u. Whether the Plaintiff is entitled to judgment as prayed for in the plaint?
27. The Plaintiff’s counsel acknowledges that the Plaintiff was the registered owner of the suit property as confirmed by valuation report of Prestige Management Valuers Limited, the grant and Savings & Loan charge instrument. This fact is further supported by the fact that when the 3rd,4th and 5th Defendant were dully executing transfer and charge documents in respect of the suit land, they dealt directly with the Plaintiff. This is hence a prima facie case that the plaintiff is the registered owner as supported by Section 23(1) and 24 of the Registration of Titles Act.
28. Counsel for the Plaintiff questioned why the manner in which the Ksh.3, 256,165.20 mortgage facility was not disbursed to the Plaintiff nor Balozi by the 5th Defendant but disbursed it to Shelter Afrique yet they did not have contractual relationship. These arguments are supported by Section 2 and 46 of the Registration of Title of Property Act 1882. To make matters worse, the Plaintiff was not informed of such arrangement. This was therefore undertaken when the property had not been charged in favor of Shelter Afrique.



29. Counsel further submitted that such fraudulent misrepresentation was committed by 1st, 2nd and 3rd Defendants. The Court is urged to take judicial notice that the Plaintiff is the owner of the suit land owner whose title was charged in favor of the 5th Defendant. It is also submitted that the 4th Defendant was conflicted when he rendered legal services and acted for Balozi Housing Society Limited, 5th Defendant and event attended meetings organized by Raynolds E.A Limited.
30. According to the Plaintiff's counsel, the plaintiff never defaulted in repaying the mortgage facility and therefor the court should not allow the Defendants to benefit from manipulation of the Plaintiffs through fraud, mischief and deceit.
31. It is also submitted that the 5th Defendant should not be allowed to exercise statutory power of sale of suit property because the monies which is being claimed was never disbursed to the plaintiff. In addition, the suit property was undervalued.
32. It is submitted that the Plaintiffs claims should be allowed as prayed since he has provided documentary evidence in support of his case.

The 1st Defendant's Submissions.

33. They are dated 11/10/2022. It is submitted that the plaintiff sued the 1st Defendant in his personal capacity and not as the Chair of the management committee, yet every action he undertook was in his capacity as the Chair.
34. Counsel further submitted that no order has been sought against the 1st defendant personally yet he has been sued in his personal capacity.
35. It is also submitted that all he did was as the Chair of the Management Committee of Balozi Housing Co-operative Society and all decisions were executed in that capacity.
He prays that the Plaintiff's suit be dismissed with costs.

The 3rd, 4th & 5th Defendants Submissions.

36. They are dated 18th October, 2022. They raise five issues for determination.
 - i. What nature of contract existed between the plaintiff and the 3rd, 4th and 5th defendants respectively?
 - ii. Did the 3rd Defendant misrepresent the Plaintiff?
 - iii. Whether the 4th Defendant misrepresented the Plaintiff.
 - iv. Whether the 5th Defendant misrepresented the Plaintiff and or acted in breach of the contract.
 - v. Whether the 5th Defendant is entitled to exercise its statutory power of sale.
37. On the first issue counsel submitted that the plaintiff failed to demonstrate that the 3rd Defendant owed him (Plaintiff) a duty of care. The 3rd Defendant discharged his duties in his capacity as an employee of the 5th Defendant which is a corporate entity.
38. It is also submitted that the 4th Defendant, was appointed by the 5th Defendant to prepare and register the charge and plaintiff was duly notified. That the plaintiff failed to demonstrate that the 4th Defendant was his Advocate and owed him a fiduciary duty.



39. It is also submitted that neither the 3rd, 4th or 5th Defendants were parties to the agreement of Sale entered as between the Plaintiff and Balozi Housing Cooperative Society Limited have no rights arising from the said agreement for sale can be maintained against them.
40. On the second issue, he submitted that the Plaintiff failed to prove to the court that the 3rd Defendant denied him an opportunity to seek independent legal advice.
41. On the third issue, counsel submitted that the Plaintiff failed to demonstrate that the 4th Defendant gave him erroneous legal advice or influenced him to execute documents or misrepresented to him on any aspect regarding the process leading to the registration of these securities.
42. The Plaintiff did not tender any evidence to demonstrate that the 4th Defendant denied him an opportunity to seek independent legal advice.

It is also submitted that the Plaintiff did not prove any act of fraudulent misrepresentation on the part of the 4th Defendant.

43. On the fourth issue, it is submitted that the relationship between the Plaintiff and the 5th Defendant was that of the bank and customer. That it is not in dispute that the 5th Defendant disbursed funds to Balozi Housing Cooperative Society Limited.
44. There is evidence that the Plaintiff was aware that the property was charged to Shelter Afrique and the charge was subsisting prior to the Plaintiff executing a sale Agreement with Balozi Housing Cooperative Society Limited

The Plaintiff did not enjoin Balozi Housing Cooperative Society Limited in these proceedings.

45. On the Fifth issue, it is submitted that there is evidence tendered to show that the plaintiff defaulted in repayment of the loan advanced to him by the 5th Defendant.

That the charge instrument grants the 5th Defendant the right to exercise its Statutory Power of Sale.

46. It is submitted that the Statutory Power of Sale of the 5th Defendant has accrued and there is no legal or justifiable basis for the court to interfere with the same.
47. Counsel further submitted that the Plaintiff's claim if any lies against the Balozi Housing Cooperative Society Limited who is not a party to these proceedings.

They pray that the Plaintiff's suit be dismissed with costs.

48. In response to the Defendants' submissions the plaintiff filed the submissions dated 1st November 2022. Counsel submitted that the 1st Defendant did not tender evidence, any memo or minutes of the Management Committee of Balozi Housing Cooperative Society to extricate himself from the Plaintiff's averments to show that the letter dated 4th October 2006 was written at the behest of the Management Committee hence the Plaintiff's evidence stands uncontroverted and unchallenged.
49. Counsel also submitted that the mortgage facility in the sum of Kshs.3,256,165/20 was never released as contemplated and agreed by the plaintiff and the 5th Defendant instead the money was used to clear a debt owed by Balozi Housing Cooperative Society Limited to Shelter Afrigue.
50. It is submitted that the Plaintiff has discharged the burden and judgement ought to be entered in his favour as prayed in the amended plaint with costs.



51. I have considered the pleadings and the evidence on record. I have also considered their written submissions. The issues for determination are;
- i. Whether the charge registered over LR NO.12422/465 in favour of the 5th Defendant was fraudulently acquired.
 - ii. Whether the 1st, 3rd, 4th Defendants made any misrepresentations to the Plaintiff or regards the whole transaction.
 - iii. Is the plaintiff entitled to the reliefs sought?
 - iv. Who should bear costs of this suit?
52. The 4th Defendant pleads that this suit should not be heard by this court but ought to have been transferred to the Commercial Division. The Commercial division in this case is the High Court. Environment and Land Court and the High Courts are both courts of equal status. The jurisdiction of this court is vested on Article 162(2) (b) of *the Constitution* and Section 13(1),(2),(3) and (4) of the *Environment and Land Court Act*. A plain reading of these provisions clearly shows that this matter is rightfully before this court. This court therefor has jurisdiction to hear and determine it.
53. Before delving further on deliberation of the above stated issues, it is important to fact bring into perspective some of the factual issues pleaded in this suit based on parties' testimony and material evidence placed before this court.
54. It is not in dispute that the Plaintiff bought the suit property from Balozi Housing Cooperative Society Limited for construction of a dwelling house. The land which was previously owned by Anastasia Wanjiru was allocated to the Plaintiff by the Society through a letter dated 20th November, 2014
55. According to the undated duly executed sale agreement, the provisional purchase price was Ksh.4, 932,407/= which comprised of construction and infrastructure cost but not the cost of the suit land. 40% of the purchase price being Kshs.1, 832,963/= and Ksh.350, 000/= for infrastructure and construction cost was to be paid before execution while the balance of Ksh.2, 749,444/= was to be paid during construction. The agreement also provided that the property was free from any encumbrances.
56. On various dates between 9/1/2003 and 10/11/2005, the Plaintiff paid Balozi monies amounting to Ksh.2, 738,700/= which comprised of among others Ksh.9,200/=, 350,000/=, 520,000 and 1,700,000/= for membership, infrastructure, plot cost and construction respectively among others.
57. On 13th May, 2005, the management of Balozi Housing Cooperative Society Limited was informed by Savings & Loan that the Society's loan mortgage facility application of Ksh.100 Million to construct 276 houses on its 27 acres land in Muthaiga had been approved at an interest rate of 13% p.a. The Manager was also informed that the chargeable interest during the construction would be serviced from Balozi reserve fund while the repayment was going to be within 24 months of sale of the completed houses. This loan also secured. Consequently to this events , the then chairperson, the 1st Defendant herein, informed the Plaintiff in a letter dated 31st July,2005 to pay 1,565,694/= to cater for cost variance so that construction of his dwelling houses can be completed. He suggested to Plaintiff to pay either in cash or mortgage.
58. To raise monies required to facilitate completion of construction of his dwelling house, the Plaintiff applied for a mortgage facility of Kshs. 3,256,165.20 from Savings & Loan. The facility was approved through a letter of offer dated 3rd October, 2005. According to the offer letter, the said monies were to be utilized in completing construction of the dwelling house on the suit property. The facility whose



interest rate was 14% p.a with a 3% p.a default rate chargeable on amounts in exercise of the authorized limited was secured with the suit property title. A duly executed charge in respect of the said facility was drawn by the 4th Defendant in favor of Savings & Loan. Balozi Housing Cooperative Society Limited was to undertake construction of the house until its completion upon payment of monies by the Plaintiff.

59. It is also not in dispute that the Plaintiff authorized Savings & Loan to release mortgage proceeds to the society since he would be handed over his house within a month upon which he would commence repayment of the mortgage facility. Kenya Commercial Bank was the successor of Savings & Loan. The 5th Defendant confirmed receipt of the Plaintiff authorization. Through a response dated 22nd July, 2009, it informed the Plaintiff that that the monies were paid to the vendor and property owner. DW1, while testifying on his behalf and that of the 5th Defendant stated that the said monies were released to Shelter Afrique instead of Balozi Housing Cooperative Society Limited. This was also confirmed by the 4th Defendant. It was the Plaintiff's testimony that he discovered that the mortgage proceeds had been paid to Shelter Afrique instead of Balozi Housing Cooperative Society Limited when he was granted access to his personal file.
60. It is not in dispute that the Plaintiff was not party any transaction with Shelter Afrique which would have occasioned it be given his mortgage proceeds. This was confirmed by all the witnesses during the hearing. Although the 1st and 4th Defendant during their testimony asserted that the Plaintiff was aware of Balozi transaction with Shelter Afrique, he never placed any material documents before this court to support such allegations.
61. On 27th February, 2006, Raynolds Logistics East Africa on instruction of Savings and Loan Limited instructed the 4th Defendant to create a charge in its favor over the advanced Ksh.3, 256,000/= mortgage facility. To facilitate registration of the said charge instrument, the 4th Defendant instructed M/S Waruhiu K'owade & Nga'nga Advocates in a letter dated 17/10/2006 to release the suit land original title deed. Upon receipt of the said title, the 4th Defendant informed Savings and Loan (K) Limited in a letter dated 1/09/2006 that the charge in favour of Savings and Loan Limited would not be registered because the property had been charged to Shelter Afrique. It therefore proposed that, once repayment is done, the suit land title would be discharged irrespective of whether construction of the dwelling was complete. These facts are supported by a charge instrument executed on 20th June, 2002 between Balozi Housing Cooperative Society Limited (chargor) and Shelter Afrique(lender) for a Ksh.125,000,000,000 loan. Some of the properties charged as security for this loan included the suit property.
62. Although the 2nd Defendant informed the Plaintiff that construction of his house would be completed in two months through an email of 4/10/2006, the Society's undertaking to service the mortgage would however cease once the mortgage monies was released by Savings & Loan Limited while its interest would stop accruing. These sentiments were repeated by the 1st Defendant in a letter dated 4th October 2006. Through the letter, he informed the Plaintiff that Balozi Management Committee undertook to service repayment of S & L loan once the house was released to the Plaintiff. This was also confirmed by Savings & Loan Limited through its letter dated 13th June,2008 addressed to Chairperson of Balozi Housing Cooperative Society Limited which indicated that the Society had an outstanding loan of Ksh.100,745,947/= as 5th June,2008 since the loan was serviced through monthly payments. The letter explained that though Balozi had undertaken to reduce unserviced interest by Kshs.2 million. Balozi was there for urged to impress on its members especially the Plaintiff whose outstanding arrears were Ksh.400, 245/= to clear the debt. The contents of the said letter were not disclosed to the Plaintiff.



63. On 14th July, 2009, the Plaintiff sought explanation from 1st, 2nd and 5th Defendant why he had outstanding loans yet he had paid Balozi Ksh.5,306,165.20/= for construction of his house.
64. When the Plaintiff inquired from Chairperson of the Society why construction of his house had not been completed by 21/03/2008, the treasurer explained to him in a letter dated 19th June, 2008 that this was occasioned by cash flow constraints and increased components prices. Further, Savings & Loan Limited had offered to refinance him Ksh.2, 276,000/= being the value of outstanding construction works of his house. These monies were however not disbursed because the Plaintiff never accepted the offer letter a fact that the Plaintiff, DW1 and DW2 confirmed during the hearing.
65. The Plaintiff contends that he sourced for additional funding to pay for the completion of the house.
66. Documents placed before this court shows that the 4th Defendant acted for the society, Savings & Loan Limited and the Plaintiff. In fact, it issued the Plaintiff a Ksh.99, 702/= and Ksh.213, 883/= fee note and stamp duty respectively for transfer and creation of charge instrument over the mortgage facility. The plaintiff now claims refund of the said monies paid through banks cheque for Commercial Bank dated 4th and 12th April, 2007 on the basis that he never instructed the 4th Defendant to represent him. While testifying, the 4th Defendant stated that even though he informed the Plaintiff that he had a right to be represented by a counsel of his choice, the Plaintiff chose to have it draw the transfer and charge instrument with regards to the suit property. He further stated that the Plaintiff never objected to representation by the 4th Defendant. The Plaintiff's claims alleges therefore do not hold water since he was aware all along that the 4th Defendant was his counsel as seen from the duly drawn and executed charge and transfer instrument. If at all the 4th Defendant was not his counsel, he would have objected when he received the fee note and refuse to pay but instead he willingly made the said payment.
67. On 11/09/2007, 4/10/2007 and 10/11/2007, Savings & Loans Limited informed the plaintiff to pay his outstanding loan dues. It also served him with statutory notice dated 16/10/2009 stating that the outstanding loan Ksh.4,235,898/= should be paid within 3 months in default of which disputed property would be sold through public auction to recover the said monies. In addition, the statutory notice stating Ksh.4,422,847.75/= was owing as at 31/01/2020 had expired on 16/1/2010.
68. Although the Plaintiff alleges that the 5th Defendant undervalued his suit property based on a valuation conducted by its agent, Prestige management Valuers Limited, he has not placed before this court any contradictory report to support his assertion. According to its valuation report, the open market value of Ksh.9, 500,000/= comprised of Ksh.2, 000,000/= and Ksh.7, 000,000/= as plot and improvements respectively. In addition, the mortgage value, forced sale value and capital value for insurances purposes was Ksh.8, 000,000/=, Ksh.6, 700,000/= and Ksh.7, 000,000/= respectively. The 5th Defendant sought to excise its statutory power of sale to the suit property which had secured the Ksh.3,256,165.20/=.
69. Both the Plaintiff and the Defendants have placed before this court a duly executed charge instrument over the suit property in favor of the 5th Defendant. The Plaintiff claims the same is invalid since it was drawn by the 4th Defendant yet he never instructed him. The 3rd, 4th and 5th Defendants on their part claim the Plaintiff was fully aware of the said charge instrument. The charge instrument was drawn after execution of transfer of the suit property to Balozi Housing Cooperative Society Limited. Considering the Plaintiff has not placed any material evidence before this court to prove his allegations, the court finds that the said charge to be valid, legal and enforceable.
70. The Plaintiff applied for some mortgage facility from Savings & Loans (K) Ltd to raise monies for construction. From the Pleadings on record, it is not clear whether the Plaintiff knew a charge had been created on favor of Shelter Afrique before he bought the property suit property. It is not clear whether Balozi informed the Plaintiff that the suit properties had been charged to Shelter Afrique when the



Plaintiff as at the time of purchase. This notwithstanding, the Plaintiff was obligated to conduct due diligence before he decided to purchase the suit property.

71. Section 107 of the *Evidence Act* provides “that any person who alleges or asserts the existence of certain facts the burden of proof lies on that person to prove that those facts exists”

72. In *Charterhouse Bank Limited (Under Statutory Management Vs. Frank N. Kamau (2016) eKLR* it was stated;

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities, by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff on his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgement cannot be entered for the plaintiff merely because the defendant, has not testified. The plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convince the court that on a balance of probabilities, it proves the claim. Without such evidence the plaintiff is not entitled to judgement merely because the defendant has not testified”.

73. Section 99 (4) of the *Land Act* provides that;

“A person prejudiced by an unauthorized, improper or irregular exercise of the Power of Sale shall have a remedy in damages against the person exercising that Power”.

I have gone through the prayers sought by the plaintiff herein as against the 5th defendant and there is no prayer for damages.

74. The Plaintiff has not informed this court whether he paid the outstanding loan amounts to the 5th Defendant. The 5th Defendant is empowered by Section 97 of the *Land Act*, 2012 to recover its monies through sell of the security, in this case the suit property.

75. Where the Plaintiff was cross-examined by Mr. Bundotich for the 3-5th Defendants he admitted that he did not conduct due diligence to confirm whether or not the suit property was charged to Shelter Afrique before he signed the Sale Agreement with Balozi Housing Cooperative Society Limited.

76. DW2 Macharia Njeru a Senior Partner with the 4th defendant told the court that he gave the Plaintiff the option of engaging his own advocate but he declined to get an Advocate of his choice.

He also told the court that he attended several meetings of Balozi Housing Cooperative Society Limited and all the members were aware of the debt owed to Shelter Afrigue.

77. DW3, the 1st Defendant told the court that he was the Chair of the Management Committee and that all decisions were approved by the Special General Meeting of the members. He further stated that the plaintiff was present in all meetings.

He told the court that he could not produce the minutes or the attendance registers as they are in the offices of Balozi Housing Cooperative Society Limited and since it was not joined in these proceedings he was unable to obtain them and avail them to court.

78. I find that the plaintiff failed to prove that the 1st – 5th defendants made fraudulent misrepresentations to him. I rely on the case of *R.G. Patel Vs. Lalji Makanji (1957)EA 314*.



79. In the case of Beatrice Atieno Onyango Vs. Housing Finance Company Limited & 3 Others (2020) eKLR D.S. Majanja J observed thus;

“Under Section 97 of the Land Act, 2012 the Chargee has a duty of care to the charger to obtain the best price reasonably obtainable at the time of sale and in that regard it is required to ensure a forced sale valuation is obtained....

The collective effect of these provisions is that the Bank is required to obtain a forced sale valuation of the property within the year of the intended sale-----”.

80. Also in Palmy Company Limited Vs. Consolidated Bank of Kenya Limited (2014)eKLR , it was observed as follows;

“The court needs cogent evidence and material in order to say that prima facie there has been under valuation of the suit property which is an infringement of Section 97(2) of the Land Act by the defendant as to call for an explanation or rebuttal from the defendant-----”.

81. Similarly in Tom Otwoma Omosa & Another Vs. Bank of Africa (K) Ltd & Another (2021)eKLR it was observed thus;

“I find that the Applicants have failed to demonstrate that their rights would be infringed. It is not in dispute that the 1st Applicant failed in his obligation to repay the loan amounts due under the loan to the 1st Respondent. The 1st Respondent served him with all the notices to his postal address and this court finds no reason to deny the 1st Respondent its right to Statutory Power of Sale”.

82. I find that the plaintiff has failed to demonstrate that the 1st,3rd-4th defendants made any misrepresentations to him as regards the loan facility he got from the 5th Defendant.

83. By a letter dated 4th October 2006 the Plaintiff authorized the Branch Manager Savings and Loan (K) Ltd to release the mortgage proceeds to Balozzi Housing Cooperative Society Ltd.

It is rather curious for the plaintiff to state that he has no claim against Balozzi Housing Cooperative Society Limited. He did not enjoin it in these proceedings. In my view Balozzi Housing Cooperative Society Limited was a necessary party in these proceedings especially in view of the debt owed to Shelter Afrique, which had to be paid in order for Shelter Afrique to release the Titles.

84. In conclusion I find that the 5th Defendant did not breach any contract between it and the Plaintiff as it released the mortgage proceeds to Balozzi Housing Committee Society Limited on the instructions of the Plaintiff.

85. In essence I find that the plaintiff is not entitled to the reliefs sought.

86. The upshot of the matter is that I find that the plaintiff has not proved his case as against the defendants on a balance of probabilities.

Accordingly the suit is dismissed with costs to Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JUNE 2023 AT KAJIADO.

L. KOMINGOI

JUDGE

In the presence of:



Mr. Amolo for the Plaintiff.

Ms. Makori for the 1st Defendant.

Mr. Bundotich for the 3rd-5th Defendants.

Court Assistant – Mutisya.

