



Rono & another v Abc Bank Limited & 2 others (Environment and Land Case Civil Suit 137 of 2017) [2023] KEELC 20896 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE CIVIL SUIT 137 OF 2017
MC OUNDO, J
OCTOBER 19, 2023**

BETWEEN

PETER KIPLANGAT RONO 1ST PLAINTIFF

SAMWEL KIPRONO SANG 2ND PLAINTIFF

AND

ABC BANK LIMITED 1ST DEFENDANT

IGARE AUCTIONEERS 2ND DEFENDANT

DAVID RONO 3RD DEFENDANT

JUDGMENT

1. Via the Plaintiffs' undated further amended Plaint filed on the 24th October 2018, they had sought for the following reliefs:
 - i. A permanent injunction against the Defendant restraining them from illegal and irregular demolition, Saleand/or transfer Kericho Municipality Blocks No. I/185 and I/186.
 - ii. That the purported sale/transfer of Kericho Municipality Blocks No. I/185 and I/186 be declared null and void.
 - iii. That the registration of Kericho Municipality Blocks No. I/185 and I/186 be restored in the names of the Plaintiffs.
 - iv. That the Defendants be compelled to produce all documents pertaining to the purported sale.
 - v. Compensation for loss of income compounded at court rates from the date of eviction.
 - vi. Restoration of the suit properties to their original state.
 - vii. Costs of the suit.



- viii. Any other and further relief the Court deems fit to grant.
2. The 1st and 2nd Defendants in their joint Further Amended Written Statement of Defence filed on 20th November 2018 denied the Plaintiffs' allegations stating that the suit properties were sold via public Auction on 26th September 2017 which Auction had been conducted legally and regularly.
 3. The 3rd Defendant filed his Defence & Counterclaim on 22nd June 2018 stating that the suit properties were Charged in favour of the 1st Defendant wherein they had been sold in the exercise of Statutory Power of Sale after the Plaintiffs failed to service the facilities as per relevant Charge agreements. The 3rd Defendant's Counterclaim against the Plaintiffs was in the sum of Kshs. 2,618,257.20/= being the amount he had incurred after fixing the suit properties which had been vandalized by the Plaintiffs and/or their agents/servants.
 4. Pursuant to the Parties having complied with the provisions of Order 11 of the *Civil Procedure Rules*, evidence was adduced in court on 26th February, 2019 wherein the 2nd Plaintiff Samuel Kiprono Sang testified as PW1 to the effect that he lived in Kericho town and was a businessman. That he owned some properties in Kericho town one of them being Kericho Municipality Block No.1/186. He produced the Certificate of Lease with regard to the said property as Pf Exhibit 1 and proceeded to testify that he had 109 residential single rooms on the said property which was valued at Kshs. 26,900,000/= as per a Valuation Report herein produced as Pf Exhibit 2.
 5. He testified further that the value of the plot was Kshs. 16,000,000/= wherein the developments therein were valued at Kshs. 10,900,000/=. That he had approached the 1st Defendant with a proposal for them to advance him a sum of Kshs. 14,000,000/= having written a project letter which he produced as Pf Exhibit 3. That he had received a response from the 1st Defendant to the effect that they could not advance him that sum of money but he could instead Charge the property wherein they could advance him a sum of Kshs. 10,000,000/= in the 1st installment and then increase the same gradually. He produced the said response as Pf Exhibit 4.
 6. He testified that whereas he had Charged his property being Kericho Municipality Block No 1/186 for Kshs. 10,000,000/=, his son the 2nd Plaintiff had also Charged his property Kericho Municipality Block No 1/185 for Kshs. 10,000,000/=. That the properties had been valued by 1st Defendant although he had not seen the valuation report. That the 1st Defendant had advanced them a sum of Kshs. 10,000,000/= wherein they had commenced their project under the 1st Defendant's supervision. That they had also started repaying the loan but somewhere along the line there had been a disagreement because whereas there had been an agreement that they were to be given a grace period of 6 months, the 1st Defendant started claiming that they were defaulting before the expiry of the 6 months.
 7. His evidence was that they had continued struggling with the repayment but things were not working because he had a health problem. That he never received any Notice that his property would be sold if he did not repay the loan but subsequently he had received a letter dated 11th October, 2017 from Mulondo Oundo & Muriuki Advocates demanding that he vacates from the premises. He produced the said Letter as Pf Exhibit 5.
 8. That he had then called one George an employee of the 1st Defendant who had informed him that the property had been sold through public Auction. That his tenants and workers had also called and informed him that they had been evicted. He produced copies of the receipts showing that the tenants were paying him rent and a medical report as Pf Exhibit 6 and Pf Exhibit 7 respectively
 9. He testified that he was no longer receiving rent due to an injunction placed by the court after he had filed the suit. That it was after the Defendants had filed their responses that he learnt that there had



been a newspaper advertisement with respect to the two properties. That he was surprised to learn that one of the conditions of the Sale had been that they had not guaranteed the condition of the property and therefore the intending buyers were to view the property and verify its details for themselves. That the second condition was that a deposit of 25% was to be paid in cash or vide a banker's cheque. The third condition was that the Sale was subject to a reserve price. That he also saw the Memorandum of Sale which Sale had taken place on 26th September, 2017 whereby the 3rd Defendant had been declared the highest bidder. That the two properties had been sold for Kshs. 22,000,000/=.

10. He attacked the process of the Sale by stating that 25% of the purchase price, that is Kshs. 5, 500,000/= was paid to the 1st Defendant by RTGS even though according to the conditions of sale, the payment was to be paid either by cash or bankers cheque. That not only had the Defendants not complied with the aforementioned conditions of Sale but they had also not exhibited any RTGS document to support the payment. That according to the Memorandum of sale, the balance of Kshs. 16,500,000/= was to be paid within a period of 30 days. There had been no document exhibited by the Defendants to show that the said balance had been paid within the stipulated time period. He stated that although the Memorandum of Sale had been signed by representatives of the 2nd and 1st Defendants, one George Gateme Nyache on 26th September, 2017 yet the 3rd Defendant had signed the said Memorandum of Sale prior, on 1st September 2017.
11. When referred to paragraph 8 of the 3rd Defendant's witness statement; whereby the witness had stated that the advertisement was contained in the Star Newspaper on 11th September, 2017; the 2nd Plaintiff testified that it meant that the said 3rd Defendant had purchased the suit property before the advertisement.
12. When further referred to the Transfer by Charge in the Defendant's bundle of documents which showed that title No. Kericho/Municipality Block 1/185 had been transferred to the 3rd Defendant upon payment of Kshs. 11 million whereby the transferors affixed their photos and signed, he testified that the said document was not dated and there was no passport size photograph, Identity Card Number or KRA Pin number of the Transferee and that the document was not registered at the Lands office.
13. It was his testimony that the transfer by Charge in respect of No. Kericho/Municipality Block 1/186 showed that the transferor received Kshs 11 million but the document was not dated save for the year 2017. He reiterated that although the transferors had affixed their passport size photographs, Identity Card number and KRA Pin numbers, the same was not done by the transferee and the document was not registered.
14. He was further referred to the Valuation Report from Sedco valuers on behalf of the 1st Defendant, wherein he confirmed that the market value for title Nos. Kericho/Municipality Block 1/185 and No 1/186 had been Kshs. 29,000,000/= while the mortgage value had been Kshs. 23,200,000/=. That the forced Sale value was Kshs. 21,750,000/= and the improvement value at Kshs. 13,000,000/= while the land value was Kshs. 16,000,000/=.
15. He testified that he did not agree with the aforementioned property value because the two properties ought to have been valued separately. He explained that the improvements on his property and those of the 2nd Plaintiff's property were different. That on his plot No. Kericho/Municipality Block 1/186 there were 109 rooms and his valuer had valued the said plot at Kshs. 26,900,000/=. On the other hand plot title No. Kericho/Municipality Block 1/185 had 78 rooms and had been valued at Kshs. 23,500,000/=. That the value given to the both the pieces of land had been Kshs. 16,000,000/= yet his valuation showed that each plot had been valued at Kshs. 16,000,000/=. That the 1st Defendant had undervalued their property.



16. When referred to a police abstract from the 3rd Defendant's list of exhibits filed on 22nd June, 2018 showing that some items had been stolen on an unknown date by unknown people, he testified that he was not aware of the said theft.
17. He was also referred to a water Bill from Kericho Water & Sanitation Co Ltd which was addressed to a Mr. Patel to which he responded that the person was unknown to him and hence the said water bill was not his. His testimony was that the entire counterclaim had nothing to do with him. He sought that it be dismissed with costs.
18. When he was referred to the notification of Sale in the 1st Defendant's bundle of documents filed on 25th January, 2018 which Notice had shown that the Sale was to take place on 4th November, 2017, he testified that the newspaper advertisement had shown that the Sale was to take place on 11th August, 2017 and the second advert was that the same was to take place on 21st August, 2017 which sales had contradicted the information in the Memorandum of Sale. That he believed that there had been no Sale by Auction. That there was no document to support the purported Sale on 4th September, 2017.
19. When referred to paragraph 12 of his Further Amended Plaint, he testified that he had pleaded fraud because of the conflicting dates in the notification of Sale and Memorandum of Sale as well as the advertisement. That the advertisement was said to have been published in the Star Newspaper which had a limited circulation and that he was never served with the notification of Sale or any other document.
20. That the valuation done by the 1st Defendant was inaccurate since according to the notification of sale, the outstanding amount was Kshs. 12,924,995.15 and therefore since his property had been sold illegally, he was entitled to a refund. That he had not been paid any refund and neither had he been shown any document by the 3rd Defendant to show that the suit property was transferred to him.
21. He urged the court to restore their property back to them and declare the purported Sale null and void. That in case the titles had already been transferred to the purported buyer, the same should be cancelled. He also sought compensation for loss of income from the date of eviction from the suit property up to the date of judgment. He prayed for the costs of the suit.
22. The matter proceeded for further hearing on 14th May, 2019 when PW1 was cross examined. He confirmed having secured a loan of Kshs. 10,000,000/= from the 1st Defendant and signed a letter of offer confirming the terms of the loan although he did not get any advice from an advocate.
23. That indeed he had deposited title for No. Kericho/Municipality Block 1/186 as security for the said loan and consequently a Charge instrument had been drawn in respect of the said title, which instrument had contained the terms of the loan. He however could not confirm if it was stamped by an advocate.
24. That he had been repaying the loan even though he did not produce any bank statements as evidence. He maintained that the 1st Defendant did not issue him with Statutory Notices informing him of the default. That his address was P.O. Box 616 Kericho but he stopped using the said box number in December, 2016. He admitted that he did not inform the 1st Defendant that he had changed his address and as such the 1st Defendant continued to use the said address to communicate with him.
25. He confirmed that the 1st Defendant advanced him Kshs. 10,000,000/= which was less than the Kshs. 14,000,000/= as he had asked for and that the 1st Defendant's decision had been informed by the value of the security.



26. That he had taken a development loan and had constructed some houses for rental income whereby he had used the said rent to repay the loan. That although he did not provide any proof of repayment, the rental income was going into the loan account No. 0072XXXXXXXXXXXX00. That his property was not sold because he had defaulted.
27. That at the time he filed the instant suit on 14th December, 2017, the Sale had not yet taken place. He reiterated that no Auction took place as no Statutory Notice had been affixed to his premises to inform him of the intended sale.
28. He explained that he did not approach the 1st Defendant to request them to put off the sale, but rather he had informed one George Machio, who was the 1st Defendant's official, that he was unwell hence the fluctuation in his loan repayment. That when he fell into arrears, and even though he did not produce any document in support, he had requested for rescheduling of the loan.
29. He confirmed that the first letter of offer had disbursed to him Kshs. 10,000,000/=. While the second letter had disbursed Kshs. 800,000/=. He maintained that process of recovering the loan was fraudulent as there had been no valuation report.
30. He clarified that he was not seeking a refund of Kshs. 21,750,000/= but rather compensation because of the eviction. He confirmed that there had been Notice issued to him before the eviction wherein he had filed the instant suit before the eviction took place. He maintained that no Auction took place on 11th September, 2017 but admitted that there was a Notice by way of newspaper advertisement asking the public to attend an Auction on 11th September, 2017. He stated that he was challenging the fact that the 1st Defendant sold the 2 properties at the same time.
31. When referred to the deed of guarantee and indemnity dated 3rd March, 2014, he confirmed that indeed he had guaranteed the 2nd Plaintiff wherein the 2nd Plaintiff had also guaranteed him but the 1st Defendant should not have consolidated the securities upon default.
32. He testified that he did not remember getting any advice from his advocate and that he was not arrested for any criminal activity over the suit property. That he had never gone back to the suit property after it was sold and was aware that the said suit property was in the possession of a 3rd party.
33. Upon being re-examined, he confirmed about the advancement of a loan of Kshs. 10,000,000/= through his account, that there had been a valuation done before his property was Charged and that the said property was valued at over Kshs. 10,000,000/=. He reiterated that he was not aware of any Auction that took place in respect of the suit property and that he had repaid the loan according to the revised schedule. He explained that he did not manage to get any bank statements as he used to communicate with the 1st Defendant by email.
34. He also denied having received the Statutory Notices via email. That he could not remember when the Kshs. 10,000,000/= had been disbursed to his account. That Kericho/Municipality Block 1/186 was currently occupied by someone else who had carried out some demolitions. He maintained that he did not see the advert before the sale. That the star newspaper was not in wide circulation in Kericho thus he only learnt of the advert after he filed the instant suit.
35. The next witness, PW2 Peter Kiplangat Rono, the 1st Plaintiff herein testified to the effect that he lived in Kericho town and was a businessman. He acknowledged that he took a loan from the 1st Defendant. He adopted his witness statement dated 1st March, 2019 as his evidence in chief and testified that he was the proprietor of land parcel No. Kericho /Municipality Block 1/185. He produced a copy of the



- title to the said property as Pf Exhibit 8 and confirmed that together with the 2nd Plaintiff, they had been advanced a sum of Kshs. 10,000,000/= after charging the two suit properties.
36. That they had repaid the loan as required but had only received blank bank statements. He produced the emails and attached bank statements as Pf Exhibit 9 (a) & (b) and Pf Exhibit 10 (a) & (b) respectively and testified that his efforts of proving to the court how much they had paid remained futile.
 37. That the said loan was disbursed to them in March 2014 whereby the repayments were to be deducted from their account. That although they had a 6 months' grace period, the 1st Defendant had started making deductions in April 2014 before the expiry of the said 6 months. He contended that they were not served with any Statutory Notices.
 38. It was his further testimony that they were only served with a Notice to vacate the suit premises via email. He sought that the Sale be nullified as there had been no public Auction. That although he did not see the advertisement in the Star Newspaper, according to the said advertisement, whereas the Sale was to take place on 26th September, 2017 outside Kericho Post Office, yet the Memorandum of Sale showed that the Sale took place on 1st September, 2017 before the date of the intended Auction. He confirmed that he had seen the transfer documents showing that the property had changed hands.
 39. His evidence was that he had neither been served with the 45 days' Redemption Notice nor a notification of Sale and therefore he did not attend the said Auction that was to take place on 4th September, 2017 because he was unaware of the same. He produced the valuation report in respect of Kericho/Municipality Block 1/185 dated 3rd April, 2017 as Pf Exhibit 11.
 40. On cross-examination. He confirmed that he was the registered owner of land parcel No. Kericho/Municipality Block 1/185 as per the copy of the title he had produced and which copy did not have the encumbrances section because the original title had been Charged to the 1st Defendant to secure a loan of Kshs. 10,000,000/=.
 41. That prior to the loan being disbursed, he had signed a letter of offer and a Charge instrument. He explained that the 1st Plaintiff was his father and the owner of Kericho /Municipality Block/1/186. That they had taken the loan together where each of them had signed a Guarantee and Indemnity Deed. He clarified that the 1st Defendant did disburse Kshs. 10,000,000/= into the 1st Plaintiff's account.
 42. He insisted that there had been a 6 months' moratorium for the loan but the 1st Defendant had started deducting the repayments one or two months after the loan had been disbursed although he had no proof to support this piece of evidence. That he was aware that a loan came with obligations which included repayment, interest and other Charges.
 43. He admitted that he had no proof that they repaid the loan and that the 1st Defendant did not revise the interest rate. He confirmed that the loan was supposed to attract interest and default interest if no payment was done. That he had neither been put on Notice of default nor had he received any Statutory Notice. He confirmed that his postal address was P.O. Box 616 Kericho which was the address they had given the bank.
 44. That he had only seen the Statutory Notices sent via his postal address indicating the outstanding amount as at the time of the Notice. That he was not advised on the law regarding service of Statutory Notices. He confirmed he had been informed by one George Ratemo that the Sale had taken place on 26th September, 2017.
 45. He confirmed that he received the Notice to vacate on 11th October, 2017 where the said Notice had indicated that the Sale had taken place on 26th September, 2017. That he however believed that there



had been no advertisement of the public Auction because he did not see it and that the 1st Defendant did not comply with the legal requirements.

46. His evidence was that he had been informed that the suit property had been sold to the 3rd Defendant and that although in the Further Amended Plaintiff, he had indicated that the purchaser did not deposit any money with the 1st Defendant, he had no proof of the allegation although the same ought to have reflected in his account.
47. That the bank statement would prove their repayments and the amount paid by the purchaser. That the 1st Defendant did not conduct any valuation of the suit property prior to the Auction and that he disputed the amount owed to the bank. He admitted that the bank had the sole discretion to vary interest and advise the borrower in writing but he did not have proof that he had approached the bank after the interest had been varied.
48. On being re-examined, he confirmed that they had been jointly advanced Kshs. 10,000,000/= vide account No. 007215001001100 although the properties were not jointly owned. That they had only received blank statements via email and the Notice to vacate. He reiterated that Mr. George Ratemo informed him that the Sale took place on 26th September, 2017. That although the 1st Defendant ought to have communicated to him in case they decided to vary the interest, there had been no such communication.

The Plaintiffs thus closed their case.

49. The defence opened their case on 3rd July, 2019 with the evidence of Joel Ulembe Nyahera who testified as DW1 to the effect that he lived in Nairobi and was a Credit & Recovery Manager for the 1st Defendant. That he knew the Plaintiffs as the 1st Defendant's clients. He adopted his witness statement dated 9th May, 2019 as evidence in chief and testified that the Plaintiffs had approached the 1st Defendant for a loan facility of Kshs. 10,000,000/= in the year 2014. That subsequently they had written an offer letter dated 27th January, 2014 to the Plaintiffs who had accepted the offer and signed it. That the said Offer Letter was also signed by the 1st Defendant's representative. He produced the said Offer Letter as Df Exhibit 1.
50. That they had then registered two Charges over L.R Nos. Kericho /Municipality Block/1/ 185 and Kericho /Municipality Block /1/186 on 5th March, 2014. He produced the Charge documents as Df Exhibit 2(a) & (b) respectively. That they had then disbursed the sum of Kshs. 10,000,000/= and that the titles to the said suit properties were being held by the 1st Defendant. He produced the certificate of lease for Kericho/Municipality Block/1/185 and Kericho/Municipality Block/1/ 186 as Df Exhibit 3(a) and 3(b) respectively as well as the deeds of guarantee and indemnity of Peter Kiplangat Rono and Samwel Kiprono Sang as Df Exhibit 4(a) & 4(b) respectively.
51. He further produced the Credit agreements as Df Exhibit 5(a) & (b) respectively while copies of letters of instalments were produced as Df Exhibits 6(a) and 6(b) respectively and the demand promissory note as Df Exhibit 7.
52. It was his evidence that the Plaintiffs did not repay the loan as per the agreement whereby they had been issued with a Statutory Notice through their address. That they had been issued with a 30 days' demand Notice on 30th September, 2016 which demand Notices and the certificate of posting he produced as Df Exhibit 8(a), (b) & (c) respectively.
53. That failure to receive any payments, they had then issued a 90 days' Statutory Notice dated 2nd February, 2017 addressed to both Plaintiffs which Statutory Notices and certificates of posting he produced as Df Exhibit 9(a) (b) and (c) respectively.



54. That because they did not receive any response, the 1st Defendant had consequently issued a 40-days' Notice of Sale to both Plaintiffs which Notices and certificate of posting he produced as Df Exhibit 10(a) (b) and (c) respectively. That failure by the Plaintiffs to respond to the said Notices had then prompted the 1st Defendant to instruct Igare Auctioneers to issue a 45-days' Redemption Notice which Notice was issued and thereafter the Auction had been conducted on 26th September, 2017.
55. That it was not true that the Plaintiffs had fully repaid the loan hence there had been no basis to stop the Sale that already took place on 26th September, 2017. That there was no collusion between the 1st Defendant and the 3rd Defendant as well as the Auctioneer as they had operated within the confines of the law.
56. That the 1st Defendant had valued the suit properties through Sedco Valuers Ltd as per the valuation report herein produced as Df Exhibit 11 He sought for the dismissal of the Plaintiff's suit.
57. On being cross-examined by Counsel for the Plaintiffs, he clarified that he had worked with the 1st Defendant for a period of 6 months and was conversant with the procedure of public Auctions conducted on the 1st Defendant's instructions. That they had registered two Charges over the suit properties where one Charge was for the 1st Plaintiff and the other one was for the 2nd Plaintiff. That they had valued the two properties jointly where the valuation report had given an amalgamated value for the two properties. That the improvement value of the two properties had been Kshs. 13,000,000/=.
58. That the properties had been jointly developed and it was procedural to value property before charging it. He admitted that he did not have the valuation report that was done before the property was Charged and proceeded to clarify that they first Charged the two properties for a sum of Kshs. 10,000,000/= and later advanced a further sum of Kshs. 900,000/= as a further Charge on both properties where they had registered the further Charge.
59. He confirmed that the 2nd Plaintiff signed a deed of guarantee to guarantee the 1st Plaintiff while the 1st Plaintiff guaranteed the 2nd Plaintiff and the said guarantees was signed in March 2014. He explained that the guarantee was in respect of a loan of Kshs. 10,000,000/= and the Charges were aggregated hence the 1st Defendant sold the two properties to recover Kshs. 12,000,000/=. He confirmed that they sold the properties for Kshs. 22,000,000/= and that the Sale was conducted by Igare Auctioneers.
60. He confirmed that the money was deposited to the 1st Defendant and though the property had not been transferred to the 3rd Defendant, the transfer forms had been executed. He confirmed that the transfer had not been registered and the transfer documents were not dated. He further confirmed that the letter of offer provided that the 1st Defendant would appoint an agent for purposes of collection of rent although he admitted that they did not appoint the said agent.
61. He also confirmed that in schedule 2 of Df Exhibit 1(a) it had been provided that the Plaintiffs were to be given a moratorium of 6 months on the principal sum only but he had not produced any document to show that this was adhered to.
62. On being further cross-examined, he reiterated that they had served the Plaintiffs with a 30-days' demand Notice and that the certificate of posting bore the Plaintiffs' names. He admitted that the certificate of posting for the 90-days' Statutory Notice bore the names Kimaiyo and Peter Rono and acknowledged that the name Jonah Kimaiyo was a mistake.
63. He also admitted to not having any document to show that the 1st Plaintiff herein Samwel Kiprono Sang was served and that Df Exhibit 10 indicated that the documents were sent to Samwel Kiprono



- Sang and Irene Chepkorir. He confirmed that according to the certificate of posting, the 40 days' Notice was served upon the 1st Plaintiff but not the 2nd Plaintiff. He also confirmed that the Sale took place on 26th September, 2014 and the payment was made on the same date. He admitted that the valuation report (Df Exhibit 11) was dated May 2017 and did not give a specific date.
64. He explained that the letter of offer was prepared on 27th January, 2014 and reiterated that the two Charge documents were prepared in respect of Kshs. 10,000,000/=. He stated that he could neither confirm if the bank supplied the Plaintiffs with bank statements nor how much was outstanding as at the date of the Auction. However, he later confirmed that by the time the Statutory Notice was issued the amount outstanding was Kshs. 12,994,995.15. That they sold the property for Kshs. 22,000,000/= whereby they recovered the full amount that was outstanding at the time wherein they had deposited the balance into the Plaintiffs' account.
 65. On re-examination, he confirmed that the two suit properties were Charged for a loan of Kshs. 10,000,000/= where the Plaintiffs had signed the offer letter after getting advice from their advocates. He insisted that they had followed the law in realizing the security and that the Plaintiffs did not fully repay the loan. That the Plaintiffs neither furnished any evidence that they did not benefit from a 6-month moratorium nor did they complain that they had not been given a 6 months' moratorium.
 66. He explained that the 1st Defendant did not appoint an agent to collect rent because it had opted to sell the suit properties to the 3rd Defendant. That the Plaintiffs never requested for bank statements.
 67. Margaret Anindo testified as DW2 to the effect that she resided in Eldoret and was a licensed Auctioneer trading as Igare Auctioneers. That she had a copy of her license classified as "Class B" which allowed her to repossess, sell movable or immovable property in Kenya, and execute court orders in specific counties as directed by the Auctioneer Licensing Board.
 68. She adopted her witness statement dated 20th June, 2018 as evidence in chief and testified that on 20th June, 2017 she had received instructions from the 1st Defendant to serve a 45 days' Notice upon the Plaintiffs. That on 23rd June, 2017 in the company of her colleague, she had travelled to Kericho to serve the said Notices upon the Plaintiffs. That she went to the suit premises described in the Notice and found a tenant at the suit premises who directed her to the caretaker. That the said tenant gave her Mr. Rono's telephone number and she spoke to the said Mr. Rono on phone and explained the purpose of her visit after which he advised her to leave the Notices with the caretaker one Mr. Songa who accepted service but declined to sign.
 69. She proceeded to testify that after expiry of the 45 days' Notice she called the 1st Defendant to inquire if the Plaintiffs had paid the debt where the 1st Defendant had directed her to proceed with the Sale as the debt had not been paid. She explained that the redemption Notices which she produced together with the notification of Sale and schedule of property as Df Exhibit 12 (a) (b) and (c) respectively were in respect to land parcel Nos. Kericho/ Municipality Block 1/185 and Kericho/Municipality Block 1/186.
 70. It was her further testimony that on 11th September, 2017 she advertised the property for Sale in the Star Newspaper. She marked a copy of the said advert as a DMFI 13 and proceeded to testify that she conducted the public Auction on 26th September, 2017 outside Kericho Post Office. That she took several bids ranging between 12,000,000/= and 22,000,000/= from different bidders in consultation with the 1st Defendant's representative who was present during the Auction. Consequently, she declared the 3rd Defendant as the highest bidder since his offer was Kshs. 22,000,000/=



71. That thereafter the said 3rd Defendant deposited 25% of the purchase price with the 1st Defendant and after confirming that the money had been received she issued a memorandum of Sale to the said 3rd Defendant which she produced the as Df Exhibit 14.
72. She testified that it was not true that she did not conduct the Auction. That indeed she had conducted the Sale in the presence of the 1st Defendant's representative and that she had the list of bidders as proof that the Sale took place. That no report had been made against her for purportedly conducting an illegal sale.
73. On cross-examination by Counsel for the Plaintiffs, she confirmed that she received instructions from the 1st Defendant although she did not produce the letter as an exhibit. She clarified that she was instructed to recover Kshs. 12,924,995.15/= but she recovered Kshs. 22,000,000/=. She further confirmed that 25% deposit was paid to the 1st Defendant on the date of Sale while the rest was paid at a later date. That she did not receive any of the amount paid.
74. When referred to DMFI 13, the newspaper advert, she explained that the 25% deposit was normally paid either in cash or by a banker's cheque. She reiterated that she adhered to the conditions of Sale and that the balance was paid to the 1st Defendant though she did not have the details. That her contract ended after she conducted the Sale hence the confirmation as to when the balance was paid could only come from the 1st Defendant.
75. She confirmed that she advertised the property for Sale once on 11th September, 2017 but when further refer Df Exhibit 12, that is, Notification of Sale with respect to parcel No. Kericho/Municipality Block 1/185 belonging to Peter Kiplangat Rono (the 2nd Plaintiff herein), she confirmed that the same contained the following words; "First advertisement – 11th August, 2017 and second advert 21st August, 2017". That there had been no mention of the advert made on 11th September, 2017.
76. That although according to the notification of sale, the public Auction was scheduled to take place on 4th September, 2017 outside Kericho Post Office at 12:00 noon, the same did not contradict her earlier testimony that the public Auction was conducted on 26th September, 2017.
77. Upon being referred to Df Exhibit 2, she confirmed that the same did not provide for another date. That the 1st Defendant's representative who attended the Sale was called George and before the said Sale the 1st Defendant had given her a valuation report with respect to both properties.
78. She explained that there was a reserve price of Kshs. 21,750,000/= which was the reserve price for both properties. Upon being referred to Df Exhibit 12 (c), she testified that although according to the schedule of property for parcel No. Kericho/Municipality Block 1/185, the forced Sale value was Kshs. 21,750,000/=: that did not mean that the reserve price was for one property because the reserve price referred to both properties.
79. She confirmed that she did not sell the property for Kshs. 21,000,000/= but rather she sold both properties for Kshs. 22,000,000/= as both properties were valued together and given a value of Kshs. 21,000,000/=:
80. She reiterated that she served the Redemption Notice on 23rd June, 2017 and that she did not send someone to serve the Notice as the caretaker at the suit premises called the 2nd Plaintiff who directed him to receive the copies of the Notice. That she took the 2nd Plaintiff's mobile number which was 0711XXXX18 and that she had not interacted with the said 2nd Plaintiff before service of the Notice. That she believed the person she spoke to was the 2nd Plaintiff because he had told her that he was aware of the matter.



81. She confirmed that she did not speak to the 1st Plaintiff and that she had not made any previous attempt to serve the Plaintiffs. She reiterated that there were several bidders at the Sale although she did not have the names of the said bidders. That the memorandum of Sale was signed on 26th September, 2017 at Kericho by the 1st Defendant Representative, herself and the purchaser and the public Auction had been conducted between 12:00 noon and 4:00pm.
82. When referred to the copy of the Memorandum of sale, she confirmed that George Ratemo Mecheo had signed it on 26th September, 2017 while David Kipruto Rono (the 3rd Defendant herein) had signed it on 1st September, 2017. She admitted that the Memorandum of Sale had indicated that the 3rd Defendant had signed it before the date of the Auction, however, she clarified that it so appeared because the said date was erroneous. She confirmed that she had issued a certificate of Sale on 26th September, 2017.
83. On re-examination, she confirmed that there had been two dates indicated on the notification of Sale and that the 1st Defendant's instructions were that she reverts to them prior to advertising the property for sale.
84. That after consulting with the 1st Defendant, she had gone to Kericho and affixed the adverts on the two suit properties. She reiterated that she was furnished with a current valuation report of the two properties which she used as a guide during the public Auction. She further confirmed that the memorandum of Sale referred to the Sale of the two properties.
85. The matter did not take of immediately for further Defence hearing as the Court went on transfer and the file was transferred to Kisii Law Courts. However, vide an application dated 12th October, 2021, the Plaintiffs sought that the matter be heard by the Environment and Lands Court in Kericho. Consequently, on 14th February, 2022, by consent the said application dated 12th October, 2021 was compromised with the orders that the instant matter be heard by the ELC, Kericho , from where it had stopped.
86. On 5th October, 2022, Margaret Anindo, DW2 produced DMFI 13, the advertisement in the Star Newspaper dated 11th September, 2017 as Df Exhibit 13.
87. David Kipruto Rono testified as DW3 on 7th February, 2023 to the effect that he resided in Kericho and was a business man. That he was in court in relation to the property he bought from the 1st Defendant and also in relation to the Counter Claim he filed in relation to the partly destruction of the said property.
88. He adopted his statement dated 23rd May, 2018 as evidence in chief and proceeded to testify that on 11th September, 2017 he had seen an advertisement in the Newspaper that two properties Kericho/Minicipality block 1/185 and Kericho /Municipality block1/186, were on Auction which was to be carried out on 26th September, 2017. Consequently he registered his interest with the Auctioneer and waited for the Auction whereby he bided and was declared the highest bidder of Kshs. 22,000,000/=.
89. That he paid 25% of the purchase price which was Kshs 5,500,000/= to the 1st Defendant through RTGS as required by the Auctioneer. He produced the Bank Statement from 14th December, 2017 to 1st October 2020 as Df Exhibit 15 (a – G) and further testified that on 26th September, 2017 after the first payment was made, himself and the Auctioneer in the presence of the 1st Defendant's representative had signed a Memorandum of Sale.
90. That he had signed the Sale Agreement but the same had an error because instead of him indicating the date of 26th September, 2017, he had signed and indicated a date of 1st September, 2017 but that the



Sale Agreement had indeed been on the 26th September, 2017. He produced the said Sale Agreement as Df Exhibit 16

91. He proceeded to testify that since he was a member of the 1st Defendant, he had applied for a loan of Kshs. 15,000,000/= from the said 1st Defendant to enable him to pay the balance of the purchase price which he had paid after 90 days and not after 30 days as was required in the agreement. That he had however complied with the terms of the said agreement.
92. That he subsequently took over the property but later his caretaker one Ruto Richard (now deceased) had informed him that the property had been destroyed. The said Ruto Richard passed who passed away in the year 2022 had filed a report to the police before his demise, which report, dated 14th November, 2017 OB No.31/14/1/2017 the 3rd Defendant produced as Df Exhibit 16. He proceeded to testify that after he inquired from the caretaker and the people around there of the likely perpetrator, he had been informed that it had been the Plaintiffs who had destroyed the property.
93. That he had then engaged the services of a valuer. He produced the valuation report as DMFI 17. That after the valuation had been done, they had filed a counter claim on 23rd May, 2018 for a sum of Kshs. 2,618,257.20/= That to date, there had been no response to the said Counter-Claim.
94. On cross-examination by Counsel for the Plaintiffs, his response was that both the suit properties, had been destroyed as per the valuer's report. That when he bought the two properties, he did not take Notice of the reserved value but just paid the amount he bided during the Auction.
95. When referred to Df Exhibit 12 (b) (c), that is the force Sale value, he confirmed that he was not privy to that information and did not see the force Sale value. That he saw from the document concerning Kericho/Municipality Block 1/185 that the open market price was Kshs. 29,000,000/- but the forced Sale was Kshs. 21, 750,440/=. He confirmed that he had bought the two properties for Kshs. 22,000,000/=.
96. When referred to Df Exhibit 15, he explained that from his fixed deposits, he had financed the savings account in his account with the 1st Defendant on 26th September, 2017 and that he did not know if there was a transaction showing that his account was credited to finance the loan. That the statement had showed transfer of Kshs. 1,500,000/= from his account to his partner ASACES and Light. He confirmed that the property was sold by public Auction through an advertisement in the Star Newspaper.
97. When he was referred to Df Exhibit 13, being the condition for sale, he confirmed that it showed that the deposit ought to have been paid by cash or bankers cheque by the fall of hammer. He however clarified that the money was in his bank account.
98. Upon being further referred to Condition No. 2 in the said Df Exhibit 13, on the need for the Deposit to be paid within 30 days, he confirmed that he paid the deposit on 24th December, 2017 and that he did pay the same based on the Sale Agreement. He was referred to Df Exhibit 14 and he confirmed that the same referred to the balance being paid after 30 days and upon being referred further to Df Exhibit 15, he confirmed that he completed payment on 14th December, 2017.
99. It was his further testimony that the transaction of 14th December, 2017 was a loan of Kshs. 15,000,000/= from the 1st Defendant and the same was withdrawn to settle the sale. When referred to the bank statement, he confirmed that the same was a statement from the bank and though he did not understand the said statement, the amount contained therein was for payment of the sale.



100. He stated that he did not get the benefit of reading the Plaintiff's pleadings and that it was not true that he colluded with the 1st Defendant. He further testified that it was not true that the 1st Defendant gave him a loan way after the sale.
101. His evidence was that he did not know what reserve price had been set for land parcel number Kericho/ Municipality Block 1/186.
102. When cross-examination by Counsel for the 1st and 2nd Defendants, he confirmed that he had participated in an Auction conducted on 26th September, 2017 whereby he was one of the bidders. That he had paid Kshs. 22,000,000/= for the acquisition of the properties which acquisition was completed with the conclusion of payment of 25% deposit.
103. He testified that prior to the transaction, he had always been a customer to the 1st Defendant and that the 25% deposit was paid from one of his accounts by way of RTGS to the accounts that is a subject of the instant transaction. He explained that he was financed by the 1st Defendant through a loan to pay the balance of purchase price.
104. It was his further testimony that the Plaintiffs did not bring to his attention that a bank could not finance its customers. When referred to Df Exhibit 15, he confirmed that the same reflected the balance of the purchase price although he did not have access to the Plaintiffs' bank account.
105. When the Defendants was referred to Df Exhibit 13, he clarified that the payment of the purchase price was made outside 30 days based on the Memorandum of Sale made by the Auctioneer, signed and witnessed by the 1st Defendant's representative and that he complied with the terms of the memorandum of sale. When referred to Df Exhibit 12, he testified that he was not privy to information on the forced Sale value that a bank could place on the property.
106. In re-examination, he was referred to Df Exhibit 15 where he clarified that on 26th September, 2017 there had been an inter-bank transfer of a withdrawal of Kshs. 1,500,876.85/= and a cash withdrawal of Kshs. 4,503,361.50/=. He confirmed that the 25% payment was to be paid in cash or bankers cheque and that he had complied with that condition. He later changed his mind and stated that, there had been a withdrawal of Kshs. 15,000, 00/= in the transaction of 14th December, 2017.
107. DW4, Washington Kirui testified to the effect that he had been in the construction industry for about 12 years. That he held a diploma in building and construction from Kabete technical institute having done his final examination in the year 2012. That his company's name was "Valid Construction Limited" which was registered on 14th April, 2015. That he had the certificate of registration from National Construction Authority (NCA) which was issued 13th July, 2017 as well as a license for construction issued on 1st July, 2017 by NCA.
108. He testified that he knew the 3rd Defendant through his brother Robert Kirui who was a surveyor. That he had a list of materials for the proposed renovation for 126 single rooms in Land Parcel No. Kericho/Municipality Block 1/185 and Kericho/Municipality Block 1/186 for the 3rd Defendant which proposed renovation material document he had signed and placed his rubber stamp.
109. That the 3rd Defendant had informed him that after he had bought the suit properties through Auction, somebody had demolished the structure. That the iron sheets, window frames and the likes had been demolished. That he assessed all the houses that were demolished and came up with a list of material for every item that needed to be replaced. That even pipes had been vandalized and KEWASCO had to reconnect the water.



110. That the 3rd Defendant had informed him that although he knew that previously that the premises had been a student hostel, yet he did not know the owner. That after assessing the damage, he had come up with a budget of Kshs. 2,618,257/=. That he did not take up the work of renovation because he had been busy and therefore the 3rd Defendant had given it to other fundis.
111. That he had also taken photographs of the premises. He also confirmed that all the documents came from his office, they had his email, rubber stamp, signature, certificates and practicing license which were valid. He produced a Certificate of incorporation, NCA Certificate of Registration, NCA construction licence for 2017, Pin for valid construction Limited, List of materials and Photographs (I – iv) of the demolished structures as Df Exhibit 17(a), (b), (c), (d), (e) and (f).
112. On cross-examination, the witness explained that he had analyzed/quoted the amount reflecting the damage caused on the property and had not been shown any report that contradicted his report. He also confirmed that he had neither carried his Diploma certificate nor did he hold a professional certificate.
113. He further explained that they had prepared the BQ and for certification but did not have a certification from a Quantitative surveyor (QS). That although he gave a costing of a proposed renovation, he could not confirm that the work was done since he was not the one who did it.
114. He testified that he did not know who caused the demolition although previously it had been in good condition. That by the time he was called to assess the damage, the 3rd Defendant was in possession although he had not known for how long.
115. In re-examination, he explained his company had been issued the license after registering and presenting their documents to NCA. He confirmed that he visited the site on 14th July, 2017.
The Defence thus closed their case
116. Despite parties having been directed to file their written submissions, only the Defendants complied and which submissions I shall summarize as herein under.

1st and 2nd Defendants' written submissions.

117. The 1st and 2nd Defendants' framed the issues for determination as follows;
 - i. Whether the Plaintiffs defaulted in the repayment of the loans secured by the Charges dated 34 March, 2014 over the Plaintiffs' properties Kericho Municipality Block 1/185 and 1/186.
 - ii. Whether the 1st Defendant's Statutory Power of Sale over properties Kericho Municipality Block 1/185 and 1/186 had arisen at the time of the Sale thereof to Plaintiff on 26 September, 2017?
 - iii. (Whether the Sale and transfer of properties Kericho Municipality Block 1/185 and 1/186 was undertaken as a result of collusion, fraudulently, irregularly and unlawfully.
 - iv. Whether the Sale and transfer of properties Kericho Municipality Block 1/185 and 1/186 to the 3rd Defendant was undervalued.
 - v. Whether after the sale, the Plaintiffs have any enforceable legal or equitable right over properties Kericho Municipality Block 1/185 and 1/186.



- vi. Whether the 3rd Defendant was entitled to vacant possession of properties Kericho Municipality Block 1/185 and 1/186 upon the Sale and transfer of the properties by the Defendants.
 - vii. Who should bear the costs of this suit"
118. On the first issue for determination, the Defendants summarized the evidence adduced in trial before submitting that the Plaintiffs had admitted that there had been a default in servicing the loans by virtue of which the 1st Defendant's (hereinafter the Bank) right to sell had crystallized. That the Statutory Notices had been correctly addressed to the postal address they had availed to the Bank at the time of loan uptake. That they had issued;
- i. 90 days' Statutory Notice as required by Section 90 of the Land Act but the same elicited no response.
 - ii. 40 days' Notice to sell as required by Section 96 (2) of the Land Act with proof of registered postage but the same elicited no response.
 - iii. 45 days' Redemption Notice as well as a Notification of Sale pursuant to Rule 15 (b) of the Auctioneers Rules through its agents Igare Auctioneers which Notices were affixed on a prominent place on the Plaintiffs' properties.
119. That it was trite law that non-compliance with Statutory Notices is an outright justification for the exercise of the Power of Sale by the Chargee. That compliance with Statutory Notices was a condition precedent. They relied on the decision in the case of Rajnikantkhetshi Shah vs. Habib Ban AG. Zurich [2016] eKLR to submit that nowhere in their Further Amended Plaintiff had the Plaintiffs lead evidence of fraud or illegality on the part of the Bank or the Auctioneer and further did not prove allegations of wrongdoing upon the Bank.
120. In regard to the second issue for determination as to whether the 1st Defendant's Statutory Power of Sale over properties Kericho Municipality Block 1/185 and 1/186 had arisen at the time of the Sale thereof to Plaintiff on 26 September, 2017, the 1st and 2nd Defendants' submission was that since the Plaintiff had admitted to the Charge in respect of a loan in the sum of Kshs 10,000,000/= and a further disbursement of Kshs 900,000/= wherein an offer had been made on or about 27th January 2017 and an amended letter of offer was made on 23rd September 2015, a Charges had been created over the suit properties. That the Bank thus reserved the right to recall the facility at any time in case of default. That there had been evidence submitted to the effect that the Plaintiffs had a different postal address from the one they had given in the mortgage being P O Box was 616 -20200 Kericho through which all Notices and communications between themselves and the Bank were to be sent.
121. That the consequence of default was that the security would be sold. That clause 7 in the Charge Document dated 3rd March 2017 had listed the eventualities of a Default and Plaintiff PW1 had reiterated throughout his testimony that he had been in default. He had also accordingly conceded that from the 1st Defendant's bundle of documents that there had been Statutory Notices sent to their last known address that the Redemption Notice and notification of Sale had been served upon them by the Auctioneers when it was affixed on the suit properties. That indeed the Third Party's Bank's Statutory Power of Sale over the suit property had arisen at the time of the Sale thereof on the 26th September 2017.
122. In regard to the third issue as to whether the Sale and transfer of the suit properties had been undertaken as a result of collusion, fraud, irregularity and unlawful act, the 1st and 2nd Defendant's submission was in the negative. That there had been no evidence whatsoever submitted throughout the



- Plaintiff's testimony. Reliance was placed on the decision in the case of *Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd & Another* [1979] KLR 76: 1976-80 1 KLR 1168 to submit that allegations of fraud must be strictly proved to something more than a mere balance of probabilities.
123. As to whether the Sale and transfer of properties Kericho Municipality Block 1/185 and 1/186 to the 3rd Defendant was done at an under value, again the respondents response was in the negative. That there had been no attempt to pin down the value of the suit lands by way of an opinion from an expert valuer. This was worsened by the fact that the Defendant (sic) had relied on a valuation report made after the Auction had taken place.
124. That whereas the 1st Defendant had relied on a valuation report dated May, 2017 by Sedco Valuers (K) Limited who had valued the suit property as Open market value of Kshs. 29,000,000/-, Mortgage value of Kshs. 23,000,000/=, Forced Sale value of Kshs. 21,750,000/=, and capital value for Insurance purposes at Kshs. 13,200,000/=, the Plaintiff's own independent valuation by Kericho technical Institute had put the value of the suit property allegedly at Kshs. 23,700,000/=.
125. That Valuation was a matter of opinion hence it was prudent that evidence touching on the value of properties be based on some empirical evidence or data in the absence of which the standard expected could not be met.
126. That is was trite law that whereas the Chargee was expected to exercise the Power of Sale in a prudent way, with due regard to the interests of the Chargor on the surplus Sale moneys, the Charge was not a trustee for the Chargor as regards the exercise of the Power of Sale and has his own interest to consider as well. The Bank had complied with the provisions of Section 97(2) the *Land Act* by undertaking the forced Sale valuation of the suit properties and it had been upon the Plaintiffs to prove that the value arrived at by the Bank's valuer was not the best price reasonably obtainable at the time. Reliance was placed on the decision in *Zum Zum Investment Limited vs Habib Bank Limited* (2014) eKLR.
127. As to whether after the sale, the Plaintiffs had any enforceable legal or equitable right over the suit properties, the 1st and 2nd Defendants submitted that the moment the Plaintiffs defaulted on loan repayment, the Bank's Statutory Power of Sale was legally taken to have arisen and therefore, Plaintiffs had no enforceable legal or equitable right over the suit properties and in the absence of a Court order restraining their eviction, they were rendered trespassers in the suit premises. They could thus not hold onto the property as against the 3rd Defendant. Reliance was placed on the decision in the case of *Bomet Beer Distributors Ltd & Another vs. KCB Ltd & 4 Others* [2005] eKLR and the provisions of Section 99 (4) of the *Land Act*.

The 3rd Defendants submissions.

128. The 3rd Defendants submissions were to the effect that in a Sale by Auction the 3rd Defendant had been declared the highest bidder at the fall of the hammer where he had been issued with a certificate of lease and became a bonafide purchaser for value of the suit properties herein. That there had been no proof of fraud or any knowledge of fraud against the 3rd Defendant because the burden of proof of fraud had fallen on those alleging fraud and which burden had not been discharged.
129. The 3rd Defendants relied on the provisions of Section 26 of the *Auctioneers Act* to submit that irregularity on the part of the Auctioneer would not invalidate the Sale and a remedy of a person proving the irregularity could be indemnified by damages against the Auctioneers. That the manner and time to which the 3rd Defendant paid the purchase price could not vitiate the sale. That nothing precluded the 3rd Defendant from benefiting from the loan facility from his bank despite it being the mortgagor in a different transaction.



130. The 3rd Defendants relied on the decision in *Mubani & Another vs. National Bank of Kenya Limited* [1990]eKLR to submit that the Sale of the suit property to the 3rd Defendant extinguished the Plaintiffs' equity of redemption and they had no remedy touching on the property.
131. The 3rd Defendant further relied on the provisions of Order 7 Rule 3 of the *Civil Procedure Rules* to submit that the Plaintiffs neither defended the counterclaim he had put forward and neither had they challenged the proof brought forward in his evidence of the destruction of the suit properties by the Plaintiffs in protest of the Sale of the property to him by the first Defendant. That since he had not been served with any response to the counterclaim that the same be decided in his favour. He sought that the suit herein be dismissed and his counterclaim be upheld.

Determination.

132. I have considered the evidence herein adduced, the authorities cited and the provisions of the law. The gist of matter arising herein and which matters are not in contention revolves around the suit properties herein being No. Kericho Municipality Block No.1/186 and Block 1/185 which had been registered to the 2nd Plaintiff and 1st Plaintiff respectively. That by a legal Charge dated the 3rd March 2017 over the two parcels of land, the 1st Defendant had advanced both the Plaintiffs a loan facility of Ksh.10,000,000/= and when the Plaintiffs defaulted in the repayment of the loan, the 1st Defendant, through the 2nd Defendant sold the said properties to the 3rd Defendant in a public Auction whereby the Plaintiffs and their tenants were evicted from the suit premises.
133. Pursuant to the facts herein above stated, the Plaintiffs' being dissatisfied with the actions of the Defendants and which dissatisfaction forms matters of contention, then filed the present suit seeking orders as herein above. The Plaintiffs' argument was that the Sale of the suit properties to the 3rd Defendant was shrouded in fraud for reasons that the signing of the Memorandum of Sale was on 1st September 2017 long before the public Auction had taken place. Secondly that the 3rd Defendant had deposited the money for the purchase of the suit properties almost six months after the sale, contrary to the conditions of the sale, that further there had been no Notices served upon the Plaintiffs, last but not least that there had been no proper valuation of the suit properties and lastly that the Defendants had carried out an irregular and unlawful public Auction prior to the disposal of the suit properties.
134. The Defendants' stand on the other hand and in their defence, was that the Plaintiffs having failed to service their loan facilities, the 1st Defendant had exercised its Power of sale. That their actions prior to the Sale of the suit properties was not illegal or irregular. That they had served upon the Plaintiffs all the relevant Notices in line with the law and the Sale of the properties was done through a transparent and fair transaction. The 3rd Defendant in his counterclaim against the Plaintiffs was in the sum of Kshs. 2,618,257.20/= being the amount he had incurred after fixing the suit properties which had been vandalized by the Plaintiffs and/or their agents/servants.
135. I find the matters arising herein are as follows;
- i. Whether the Defendants had served the Plaintiffs with a Statutory Notice pursuant to Section 90(2) of the *Land Act* ;
 - ii. Whether there was gross undervaluation of the suit properties by the 1st and 2nd Defendants.
 - iii. Whether the 1st Defendant's right of Statutory Power of Sale had accrued.
 - iv. Whether the 3rd Defendant's Counterclaim should be upheld.



136. On the first issue for determination, I find that the evidence on record was to the effect that after the Plaintiffs failed to service the loan as per the parties agreement, they had been issued, through their postal address, P.O box 616-20200 Kericho; a 30 days' demand Notice on 30th September, 2016 demanding payment of a total sum of Ksh. 10,834,602.46/-, which demand Notices and the certificate of posting had been produced as Df Exhibit 8(a), (b) & (c) respectively. That failure to respond to the said Notice, the Plaintiffs had further been issued with a 90 days' Statutory Notice dated 2nd February, 2017 for a sum of 12,015,401.10/= addressed to both Plaintiffs, which Statutory Notices and certificates of posting had been produced as Df Exhibit 9(a) (b) and (c) respectively.

137. Section 90 of the Land Act, to which is of importance in the instance case, provides for remedies of a Charge to the effect that;

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

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

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

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

138. It is worth noting that a Statutory Notice issued under Section 90 of the Land Act, prompts a process, which leads to the Chargee ultimately exercising its remedies outlined under Section 90(3) of the Act. The Notice is issued where the Chargor is in default of any obligation under the Charge or has failed to pay interest or any other periodic payment and such default continues for one month.

139. As read together with Section 90(3), Section 90(2) of the Land Act obligates the Chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state



the amount required to be paid within three months for the purposes of making good the default or where the default is non-observance of a covenant in the Charge, then the Notice is to state what the Charger is to do or desist from doing so as to rectify the default. Thirdly, the Notice ought to state the fact that if the default is not rectified within the time stated in the Notice, then the Chargor would thereafter sue for money due and owing under the Charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the Notice is that the Notice needs to state that the Chargor has the right to apply to court and seek any relief or challenge the exercise by the Charge of any of the Statutory remedies. The Notice crystallizes after the expiry of ninety days from the date it is received by the Chargor.

140. The Statutory Notices stipulated under the Land Act are mandatory legal requirements. The right to exercise the Statutory remedies accrues only after full compliance with the legal framework on Statutory Notices. The Statutory Notice in the present case in my humble view was in accordance with Section 90(2) of the Land Act and therefore the acts of the Defendant in seeking to exercise its Chargee's Statutory Power of Sale are lawful.

141. Secondly, Section 96 of the land Act is explicit to the effect that after the borrower has failed to remedy the default in accordance with the Notice issued under the law, the Chargor, who is the guarantor is entitled to a Notice of not less than 40 days under Section 96(2) of the Land Act, before the Chargee can sell the Charged property. The Notice under Section 96(2) of the Land Act is mandatory, and is quite different from the Redemption Notice issued under Rule 15 of the Auctioneers Act.

142. Section 96(2) of the Land Act which provides as follows:-

“ Before exercising the Power to sell the Charged land, the Chargee shall serve on the Chargor a Notice to sell in the prescribed form and shall not proceed to complete any contract for Sale of the Charged land until at least forty days have elapsed from the date of the service of the Notice to sell”.

143. In this case, on 16th May 2017 a 40 days' Notice to sell had been served upon the Plaintiffs demanding a payment of a total sum of Ksh. 12,924,995.15/-, which Statutory Notices and certificates of posting had been produced as Df Exhibit 10(a) (b) and (c) respectively. The postal address was not disputed. These Notices I find, had given the Plaintiffs sufficient time for the full payment to be made failing which the 1st Defendant would realize the Charge on the suit lands. The Statutory Power of Sale had fully matured and thus was exercisable.

144. That failure by the Plaintiffs to respond to the said Notices had thus prompted the 1st Defendant to instruct Igaré Auctioneers to issue a 45-days' Redemption Notice together with the notification of Sale and schedule in respect to land parcel Nos. Kericho/Municipality Block 1/185 and Kericho/Municipality Block 1/186. The said Notices which had been produced as Df Exhibit 12 (a) (b) and (c) respectively had been served on the caretaker at the suit premises wherein the 2nd Plaintiff had been notified via a telephone call of the same. The said Redemption Notice had stipulated that the Plaintiffs owed the 1st Defendant a total of 12,924,995.15/=

145. As far as the contents of the 45 days Redemption Notice issued by the 2nd Defendant is concerned, the same is provided for under Rule 15 (d) of the Auctioneers Act as follows;

“ Upon receipt of a Court warrant of letter of instruction he Auctioneers shall in the case of immovable property.



- d) Give in writing to the owner of the property a Notice of not less than forty – five days within which the owner may redeem the property by payment of the amount set forth in the Court warrant or letter of instruction.”

146. Subsequently, when there had been no reaction, the Auction had been conducted on 26th September, 2017 whereby the 3rd Defendant had been declared the highest bidder and the two properties had been sold for Kshs. 22,000,000/= whereby the full amount that was outstanding at the time had been recovered. In the instance case, I find that the 1st Defendant herein had complied with the provisions of the law as herein above cited and therefore the Statutory Power of Sale was legally exercised.

147. The court finds it cannot uphold the alleged conduct of the Auction as having been being illegal as no cogent or tangible evidence was preferred in proof of fraud irregularity and/or illegality as stated in *Central Bank Ltd vs Trust Bank Ltd & Others* [1996] eKLR; -

“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.”

148. On the second issue in relation to the valuation of the suit properties herein, the Plaintiffs contention was that on plot No. Kericho/Municipality Block 1/186 there were 109 rooms where their valuer had valued the said plot at Kshs. 26,900,000/=. That Plot title No. Kericho/Municipality Block 1/185 had 78 rooms and had been valued at Kshs. 23,500,000/=. That the value given to the both parcels of land had been Kshs. 16,000,000/= yet his valuation showed that each plot had been valued at Kshs. 16,000,000/= and therefore the 1st Defendant had undervalued their property. The valuation reports of both the suit parcels of land had been produced as Pf Exhibit 2 and 11 respectively.

149. The 1st Defendant on the other hand had produced a valuation report from M/S Sedco Valuers Ltd as Df Exhibit 11 which had stated at paragraph 05.1 that both the premises had been inspected for valuation purposes on 24th May 2017 where the valuation report had given an amalgamated value for the two properties. That the open market value was Ksh 29,000,000/=: Mortgage value at Ksh 23,200,000/=: forced Sale value at 21,000,000/=: improved value at Ksh. 13,000,000/=: and land value at Ksh 16,000/000/=:.

150. The primary provision on forced valuation is found in Section 97(2) of the *Land Act* No. 6 of 2012 and applies where the charged land is to be sold in the exercise of Power of Sale or pursuant to an order of the court.

151. Section 97(2) of the *Land Act* provides as follows;-

- (2) A Chargee shall, before exercising the right of sale, ensure that a forced Salevaluation is undertaken by a Valuer.

152. The loan facility was granted in the year 2014, both the premises had been inspected for valuation purposes on 24th May 2017 and the Sale by Auction conducted on the 26th September 2017 by which time I do not think the property had not appreciated so much in its value for the purpose of a forced sale. The Valuation herein, I find had been done within reasonable time before the Sale by public Auction as provided for under Section 97 of the *Land Act*

153. It was thus upon the Plaintiffs herein to demonstrate that the 1st Defendants valuation did not result in the best price obtainable. The Plaintiffs did not give sufficient reason as to why the court should disregard the 1st Defendant’s valuation report and rely only on their report by merely producing



a counter-valuation report and claiming that the intended selling price was not the best price was insufficient. They ought to have satisfactorily demonstrated as to why the intended selling price was not the best price by for example discrediting the Defendant's valuer as not being qualified or competent to carry out the valuation, or that (s)he had done the valuation while considering irrelevant factors, or that the valuation had been carried out way before the time of the intended sale. (see the case of Zum Investment (*supra*))

154. On the third issue for determination to whether the 1st Defendant's right of Statutory Power of Sale had accrued. It is trite law that this right can only accrue after the mandatory statutory valuation stipulated under Section 97 of the Land Act had been satisfied. Having found as the court did in paragraph 146 herein above. I find the answer in the positive.
155. On the last issue for determination as to whether the 3rd Defendant's counterclaim should be allowed. The answer is in the negative. I say so because the 3rd Defendant's allegation and evidence herein submitted, that the suit premises had been demolished by the Plaintiffs was based purely on suspicion and hearsay. Indeed the 3rd Defendant's evidence was as follows:
- “... I then took over the property. Later my caretaker told me that my property had been destroyed....
- From the caretaker and the people around there, we had been informed that it had been the Plaintiffs who had destroyed the property.”
156. It is trite that suspicion alone cannot form the basis for conviction and further that circumstantial evidence however strong cannot form the basis for conviction unless corroborated with evidence that points irresistibly to the guilt of an accused. Indeed the provisions of Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In the instance case, no evidence had been led to point irresistibly to the guilt of the Plaintiffs as persons who had vandalized the buildings on the subject suit property. To this effect, I find the counterclaim against the plaintiffs herein fails.
157. In the end, I find that the Plaintiffs case has not been established to the required standards of probabilities and I herein proceed to dismiss it with costs.
158. However since there had been no evidence tendered that after the two properties had been sold for Kshs. 22,000,000/= to recover Ksh. 12,994,995.15/=-, the surplus amount of money therein had been paid into the Plaintiff's account(s), this court orders as follows.
159. That said surplus amount totaling to Ksh. 9,005,004.85/- shall either be deposited into the Plaintiff's account or be accounted for within the next 14 (fourteen) days of the delivery of this Judgment.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19TH DAY OF OCTOBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

