



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 760 OF 2002**

**AGREY MAIYO.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD....1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS.....2<sup>ND</sup> DEFENDANT**

**BALWINDER SINGH LOCHAB.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

1. These Proceedings commenced at the High Court in Kakamega as **HCC No. 13 of 1997, Aggrey Maiyo vs. 1) Kenya Commercial Bank (k) Ltd 2) Garam Investments** will have taken some 21 years to be resolved. What a long time!

2. Although the evidence given by Aggrey Maiyo (**the Plaintiff or Maiyo**) was lengthy, the facts surrounding the dispute herein may not be involved. At all material times to this suit Maiyo traded under the name and style of Nyika Tours and Safaris (**Nyika**). Nyika was a customer to Kenya Commercial Bank (**the Defendant or KCB**), University Way Branch and was offered some facilities namely, a loan of Khs.200,000/=, and overdraft of Ksh. 300,000/= which was enhanced by Khs.270,000/= to make a sum of Ksh.570,000 upto 31<sup>st</sup> July 1991. Maiyo partly guaranteed the facilities and a Charge was taken over his property known and described as Eldoret Municipality block 14/738 (hereafter the suit property) pursuant to the Provisions of the now Repealed Registered Land Act (Chapter 300 Laws of Kenya). In addition a Charge was taken over Kericho/Cheptalal/1201 (**the Kericho property**).

3. From the totality of the evidence put forward by both Maiyo and KCB, the Borrower defaulted in the payment of the facilities. In consequence KCB sent out a demand Letter dated 17<sup>th</sup> January 1992 to Maiyo. Default persisted and a Statutory Notice dated 14<sup>th</sup> May 1992(D Exhibit pages 44 and 46) was sent to the Plaintiff by the 1<sup>st</sup> Defendants Advocates, Amolo & Gachoka Advocates. This letter which was also copied to the principal Borrower, was sent by way of Registered Post and in his testimony to Court, Maiyo conceded to its receipt.

4. As there was no positive reaction to the Statutory Notice, KCB attempted to sell the suit property by way of a Public Auction slated for 6<sup>th</sup> April, 1993. This was not to happen as the Bank was served with a Court Order in **Nrb Hcc.1618 of 1993, Aggrey Kimaru Arap Maiyo vs. Kenya Commercial Bank Ltd (D Exhibit page 46)**.

5. That there was default, at least at that time, may not be controversial because in the affidavit in support of the Application for Injunction in 1618 of 1993, Maiyo acknowledge that Nyika had fallen into difficult times. He then averred,

***“THAT in my endeavor to pay the outstanding amount I intend to sell some plots in Eldoret Town and all that piece of Land known as L.R No. Nandi/Kipkaren Salient/509”. (D Exhibit page 52).***

6. On 3<sup>rd</sup> May 1995 Maiyo wrote to KCB (D Exhibit page 60) seeking 60 days to enable him settle the account. In that letter he requested the Bank not to put up his property for Sale. The Bank granted the indulgence sought (D Exhibit page 63) in a letter of 12<sup>th</sup> May 1995 allowing Maiyo upto 31<sup>st</sup> July 1995 to pay. There was default yet again. Hear what Maiyo says under cross-examination,

***“I was given upto 31<sup>st</sup> July 1995. I did not pay KCB in full. I did not pay the debt nor pay the debt for Nyika in full”.***

Indeed at the end of his cross-examination carried out on 21<sup>st</sup> June 2017, Maiyo confirmed that the debt had not been repaid in full.

7. That status of default was the state of affairs when Maiyo received a Notification of Sale dated 2<sup>nd</sup> January 1997(P Exhibit page 21B) notifying him of an intended Sale of the Suit property on 5<sup>th</sup> February 1997. It is common ground that the Notification triggered the filing of this suit. Further it is not in contention that on 3<sup>rd</sup> February 1997, the High Court sitting at Kakamega (prior to the transfer of the file to Nairobi) granted Orders of Injunction restraining the Sale of both the Kericho property and the suit property.

8. It was the testimony of Maiyo that having obtained that Order, he visited KCB Eldoret Branch on the same day at 2.30pm in an attempt to serve the Order. The Manager declined and insisted that the Order be served upon the Branch Manager Kenyatta Avenue Nairobi. Unfazed Maiyo walked to Uchumi Supermarket Eldoret where he successfully sought to use their facilities to fax a copy of the Court Order to Fax Number 02-219844 which is alleged to be the Fax number for KCB Kenyatta Avenue (See P Exhibit 2 page 16).

9. Maiyo's further testimony is that he travelled to Nairobi with a Process Server by the name Mr. Kogo and on 4<sup>th</sup> February 1997 at about 9.00am they visited the offices of Garam Auctioneers on 3<sup>rd</sup> Floor Muhu House but found the door to the offices closed. A person who was inside the offices told them that he could not receive the Court Order and that the Auctioneer had travelled to Sotik. The two then visited KCB, Kenyatta Avenue Branch at about 10.30 am and the Order was served upon the Assistant Manager Operations who received it at 11.25am on that very day.

10. The Bank through its witness Austine Ngundo Mwendo (DW1) denied that any Court Order had been properly served upon KCB or the Auctioneer prior to the Public Auction of 5<sup>th</sup> February 1997. This however is not consistent with the contents of the affidavit of Stephen Njogu Mburu sworn on 11<sup>th</sup> September 1997. Mr. Mburu was then the Branch Manager of KCB at its Kenyatta Avenue Branch. This is what he disposed,

***'THAT surprisingly on 5<sup>th</sup> February 1997, the Plaintiff served a Court Order dated 3<sup>rd</sup> February 1997 on the Bank (Kenyatta Avenue Branch Nairobi) at 11.25am or thereabout. A copy of the said Order is annexed hereto and marked SNM11'.***

The prospects of the Plaintiff's case substantially turns on the date and time the Court Order was served and is discussed in some detail later in this decision.

11. Anyhow, the evidence of both the Bank and Garam is that the auction proceeded as scheduled and at about 12.20 pm the hammer was lowered in favour of Balwinder Singh Lochab (the 3<sup>rd</sup> Defendant or Lochab) who was the highest bidder at Kshs.625,000/=. The property was subsequently transferred in favour of Lochab through a Transfer by Chargee in exercise of Power by Sale on 17<sup>th</sup> March 1998. In spite of the Transfer, Maiyo still occupies the house to date.

12. It is against these sketched out facts that the respective parties plead their cases.

13. In an Amended Plaint dated 18<sup>th</sup> March, 2014 and filed on the same day, Maiyo seeks the following Orders:-

**aa) A declaration that the Defendants had no colour or right to deal with LR known as Eldoret Municipality Block 14/738 since the injunction issued on 17<sup>th</sup> February 1997 was in force.**

**bb) A declaration that the purported sale and auction held on the 4<sup>th</sup> and 5<sup>th</sup> February 1997 be declared null and void.**

**cc) Damages for trespass to LR Eldoret Municipality/Block 14/738.**

14. In support of those prayers, Maiyo avers that the Auction of his property was unlawful as the Debt secured by the Suit Property was fully paid and settled. Secondly, it was illegal as it proceeded in spite of a lawful Court Injunction. Also, that in breach of the Provisions of the Registered Land Act, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to serve him with any competent Statutory Notices.

15. On another front, Maiyo claims that he was never issued with periodic Statement on the loan account whereas he has been making payments ever since drawdown of the loan.

16. On his claim for trespass the Plaintiff gives the following particulars:-

**a) Claiming ownership of the Plaintiff's property illegally.**

**b) Entering and trying to evict the Plaintiff from his peaceful enjoyment of his property.**

**c) Claiming payment for rent illegally from the Plaintiff.**

17. In their joint Defence of 10<sup>th</sup> March 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant deny the Plaintiff's Claim and defend the Sale of the Suit property to the 3<sup>rd</sup> Defendant. The Defendants aver that the Sale was legal as no restraining Orders were served on the Defendants prior to the Public Auction of 5<sup>th</sup> February 1997. The two Defendants further pleaded that they would crave the Leave of Court to consolidate this suit with Cases Nos. 1729 of 2001 and 1618 of 1993 which they stated are related. This did not happen as the two files could not be traced by the time the Hearing of this matter had concluded.

18. The 3<sup>rd</sup> Defendant's case is simply that he is a bona fide purchase for value without Notice and is entitled to enjoy quite possession of

the Suit property. He also makes the proposition that if the Plaintiff is aggrieved by the Sale, then his only redress is in damages against KCB.

19. The Plaintiff on the one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other formulated the following issues for this Court to determine:-

1. Whether or not the Plaintiff had repaid the amount borrowed from the 1<sup>st</sup> Defendant.
2. **Whether or not the 1<sup>st</sup> Defendant maintained a proper record of the amounts borrowed, charged, owing and as re-paid by the Plaintiff.**
3. **Whether it was justified to put up Notices of Intention to auction and sell Kericho/Cheptalal 1201 and Eldoret Municipality Block 14/738.**
4. **Whether there was a lawful order of injunction from Court restraining auctions and sales of the Plaintiff's properties in Kericho and Eldoret.**
5. **Whether the order of injunction restraining sales, auction and transfers of the Plaintiff's assets was brought to the notice of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.**
6. **Whether the third Defendant is culpable of trespass onto the Plaintiff's property by reason of its inter alia attempt to get onto the property and transfer of the property onto him.**
7. **Whether adequate and competent Statutory Notices in law were issued to warrant an attempt to exercise a Statutory Power of Sale as purported by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**
8. **Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants conspired jointly and severally to have the Suit property undervalued by purporting it to be undeveloped.**
9. **Whether or not the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are culpable for fraud jointly and severally.**
10. **Whether or not the Plaintiff is entitled to the Prayers asked for in the Plaint.**
11. **Who pays costs?**

20. Whilst those issues could, and will be condensed, they seem to capture the issues that emerges for resolution. I would however add, for purposes for the 3<sup>rd</sup> Defendant's case, the following two issues:-

- (i) **Whether the 3<sup>rd</sup> Defendant is a bonafide Purchaser for value without Notice?**
- (ii) **Whether the 3<sup>rd</sup> Defendant has an absolute and indefeasible Title to the Property?**

**Is the Plaintiff and Principal Borrower in default and whether or not KCB was entitled to issue a Statutory Notice.**

21. There can only be one simple answer to this. The evidence placed before Court is replete with various Letters in which Maiyo admitted that Nyika was in default of repayment of the facilities borrowed from KCB. In addition Maiyo made the admissions in his oral evidence in Court. His last word in cross-examination by KCB's Lawyer could not have been the clearer,

***"I have not paid the debt".***

As a corollary KCB who had taken up a charge over the Suit property was entitled to issue a Statutory Notice for its Demand.

22. That Notice would be issued under the aegis of Section 74 of The Repealed Registered Land Act (which was the applicable statute) which reads:-

**"74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.**

**(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -**

- (a) appoint a receiver of the income of the charged property; or**

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only -

(a) where the chargor is bound to repay the same;

(b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor; Provided that -

(i) in the case specified in paragraph (a) -

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

(ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge”.

**Were there proper and/Competent Statutory Notices issued?**

23. It is common ground that KCB, through its Lawyers, issued a Statutory Notice dated 14<sup>th</sup> May 1992. For good measure that Notice is reproduced in full;-

14<sup>th</sup> May, 1992

Aggrey Kimaru Arap Maiyo

P.O Box 56034

NAIROBI

NOTICE

CAP 300 SECTION 74 LAWS OF KENYA

Dear Sirs,

RE: KENYA COMMERCIAL BANK LIMITED

We act for Kenya Commercial Bank Ltd and hereby require you to pay to us on their behalf forthwith the principal moneys now owing under a charge made between yourself of the one part and our client of the other part (Registered in the lands Title Registry in the Encumbrances Section of Title No.L.R Loc Eldoret/Municipality/Block 14/738 registered in the name of Aggrey Kimaru Maiyo with interest owing in respect thereof on the date of payment, and currently standing at Khs.840,221.10 at 31<sup>st</sup> March, 1992 GIVE YOU NOTICE THAT if such principal moneys is not paid before the expiration of three (3) months from the date hereof our client shall sell the property comprised in the said charge.

Acceptance of part of the principal sum demanded herein does not constitute a waiver of this notice.

DATED at NAIROBI this .....day of .....1992.

Yours faithfully,

*Signed*

Amolo & Gachoka.

Maiyo conceded to receiving the Notice. It is also common ground that this was the only Notice issued under the Provisions of The Repealed Registered Land Act.

24. Mr Katwa appearing for Maiyo faults the Notice as being inadequate and or improper for various reasons. First, that by using the words "if such principal monies is not paid before the expiration of 3 months from the date hereof out client shall sell the property comprised in the said charge", the Notice is not the one contemplated by Section 77(1) and (2) of the Act. In support of this proposition Counsel cited the Court of Appeal decision in Trust Bank Ltd vs. Eros Chemist Ltd & another (2000) eKLR in which the Judges held,

***"The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our Judgement, the notice is to guard the rights of the mortgagor because if the Statutory right of sale is exercised the Mortgagor's equity of redemption would extinguished. This would be a serious matter. The law clearly intended to protect the Mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period".***

25. How are the words used in the Notice to be construed? It seems to me that on a plain reading thereof that the Bank gave Notice to Maiyo to pay the principal monies before the expiration of 3 months from the date of the Notice failing which KCB would sell the charged property. The word expiration means:-

**"Expiration is a derivate of expire which means:-**

**(of a period of time) come to an end. (Concise Oxford English Dictionary 12<sup>th</sup> Edition".**

The Notice was to Maiyo to pay the defaulted sum before the end of 3 months of the Notice. This in my view is in consonance with the statutory requirement that the Chargor must comply with the Notice within the three months of the date of service. The Notice does not constrict on the time set out by Statute. Further it is clear that the Sale shall proceed after the expiration of three months if the principal monies shall not have been paid.

26. Further criticism was made of the fact that the Author of the Notice omitted to indicate the date of the Notice at the bottom of the Letter. Nothing much can turn of this as the letter is dated. It was dated 14<sup>th</sup> May 1992.

27. There was also an argument that the 1992 Notice was spent because the parties negotiated and compromised on it and so a renewed wish to auction should have warranted a fresh Notice in 1997. This argument is clearly without merit and this type of argument has been addressed by our Courts as follows:-

***"It is plain that section 74 did not impose on the charge, the giving of more than one notice and there is no sound policy reason why he should be obliged to give fresh notice to the charger any time a sale was suspended to accommodate him. If such were a legal requirement, no charge in his right mind would suspend a projected sale as a matter of favour or indulgence to a defaulting mortgagor" (Mbuthia vs. Jimba Credit Finance Corporation & another[1988]eKLR).***

I say no more!

28. What about the 45 days Notification of Sale required by the Provisions of Rule 15(d) of The Auctioneers Rules which makes the following requirement in respect to immovable property.

**"Upon receipt of a Court Warrant or letter of instruction the Auctioneer shall in case of immovable property:-**

**(a) Give in writing 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".**

29. Shown to these Court are two Notifications of Sale, one issued by Rosam Enterprises dated 27<sup>th</sup> April 1995 for an Auction on 9<sup>th</sup> June 1995 (D Exhibit page 62). This is a Notice of 43 days. The second is a Notification of Sale dated 2<sup>nd</sup> January 1997 for an Auction on 5<sup>th</sup> February 1997 (D Exhibit page 67). This is a Notice of 32 days or so. None of the two Notices complies with the requirements of Rule 15(d) of the Auctioneers Act and that is certainly a clog of the Chargor's equity of redemption. This Court shall return to the implications of non-compliance.

### **Bank Statements.**

30. On the issue of Bank statements for this account, Maiyo stated as follows in his written statement,

***"I asked for the Order of Injunction (and got the Order) because KCB***

***(a) had never given the Bank statements to my accounts since March 1996 and I did not and/don't know the balance in my account".***

But this assertion was not supported by his oral evidence in which he admitted receiving statements upto 11<sup>th</sup> June 1997. He then appears to have changed the position when he stated in re-examination,

***“I wrote to the Bank letter of 20<sup>th</sup> December 2010. Amount claimed was in excess of Khs.3.7 million. I requested for status of my debt. Following the letter, I have not received any statement”.***

I am unable to find that the evidence tendered by Maiyo proved what he alleged in his statement of Claim namely,

***“The Plaintiff further states that he has never been issued with the periodic statements on the loan account whereas he has been making payments ever since the loan drawdown”.***

Whether the Sale was in breach of a Lawful Court Order.

31. This may well turn out to be the crux of this matter. Through a Chamber Summons dated 3<sup>rd</sup> February 1997, Maiyo sought the following Orders:-

**b) THAT the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be and are hereby restrained by way of a temporary injunction from auctioning, selling, transferring, conveying, or in any other manner dealing or auctioning land parcel Number Eldoret Municipality/Block 14/738 and Kericho /Cheptalal/1201 pending the hearing and determination of this Application inter parties.**

**c) THAT the 1<sup>st</sup> Defendant be restrained from all acts in pursuance of the loan pending the taking of Accounts between Plaintiff and 1<sup>st</sup> Defendant and that all payments be accounted for and interest worked out.**

32. On the same day Hon. Tanui J (now retired) granted the Order of Injunction in terms of prayers (b) and (c) of that Summons pending interparties hearing on 17<sup>th</sup> February 1997. In effect the Auction of the Suit property scheduled for 5<sup>th</sup> February 1997 was stopped by the Order. Although it was the evidence of the Plaintiff that the Order was served on 4<sup>th</sup> February 1997, the Bank's position is that no lawful Order was served. But what emerges from the totality of the evidence?

33. Austine Ngundo Mwendo (DW1) who testified on behalf of the Bank did not have firsthand knowledge of what had transpired on 4<sup>th</sup> or 5<sup>th</sup> February 1997. He gave his testimony on the basis of the file and records of the Bank in his custody by virtue of the position he held at the Bank. For that reason he could not give a firsthand account of what may or may not have been served in respect hereof on 4<sup>th</sup> or 5<sup>th</sup> February 1997. For that reason the position of the Bank is better told by one Stephen Njogu Mburu who was at the material time the Manager of the Bank at its branch at Kenyatta Avenue. On 14<sup>th</sup> September 1997 he swore an affidavit in which he said as follows:-

***“That surprisingly on 5<sup>th</sup> February, 1997 the Plaintiff served a Court Order dated 3<sup>rd</sup> February, 1997 on the Bank (Kenyatta Avenue Branch Nairobi) at 11.25 am or thereabout. A copy of the said Order is annexed hereto and marked ‘SNM 11’ ”.***

34. Even if, arguendo, it is accepted that the Order was served on 5<sup>th</sup> February 1997 at 11.25 am, it would still be 35 minutes before the time the Auction was to commence being 12.00 noon on the same day (5<sup>th</sup> February 1997).

35. Even then the Bank takes a second and third positions. Counsel for the Bank submits,

***“17. The Order was served on the 1<sup>st</sup> Defendant without being accompanied by the Chamber Summons dated 3<sup>rd</sup> February 1997 and there is no evidence of such service. Further no service was effected on the 2<sup>nd</sup> Defendant.***

***18. The Order as extracted did not stop the 1<sup>st</sup> Defendant from exercising its statutory Power of Sale and therefore the Auction scheduled on 5<sup>th</sup> February 1997 proceeded and a Sale was concluded by the 2<sup>nd</sup> Defendant in favour of the 3<sup>rd</sup> Defendant”.***

36. To understand these arguments, I reproduce the Order as extracted,

**“3.2.97**

**Coram ; Tanui, J**

**Applicant in person**

**N/A for Respondent**

**Chesang C/Clerk**

**Applicant: This is an application for temporary Injunction to restrain the Respondent from selling by a Public Auction the properties named in paragraph (b) of Chamber Summons dated 3.2.97 pending the inter-parte hearing of the said application. As shown in the annexed and supportive affidavit we had entered into arrangements with the Respondent for**

payment of the sum advanced to me. I need more time. I pray that service of this application be dispensed with.

**Order: 1. Let Service of this application be dispensed with in the first place.**

**2. Let there be an injunction to restrain the Respondent in terms of Prayers (b) and (c) of the Chamber Summons dated 3.2.97 pending the inter-parte hearing of the application on 17.2.97.**

**3. Costs in the cause”.**

On the face of it, the events sought to be enjoined cannot be known without looking at the Chamber Summons of 3.2.1997. The Order would therefore be meaningless unless served together with the said Summons.

37. The evidence of Maiyo was that he was with Mr. Kogo (the Process Server) when process was effected. Whilst the Process Server did not testify, his affidavit of Service sworn on 7<sup>th</sup> February 1997 was admitted into evidence (Plaintiff's Exhibit 1A page). In paragraph 3 of that Affidavit he states,

***“THAT on 4<sup>th</sup> February, 1997 I travelled from Eldoret to Nairobi City then I proceeded to K.C.B Kenyatta Avenue, Hughes Building through my inquiry I met one Assistant Manager Operations whom I introduced myself briefly to him. Thereafter I caused service of Order under Certificate or Urgency, Chamber Summons, Affidavit and annexures upon him. He accepted the said service under protest by signing and stamping in the presence of the Plaintiff Aggrey Maiyo. I now return the principal copies duly served”.***

The Process Server is saying that he served both the Order and the Chamber Summons. There is therefore an argument by Maiyo that the Bank would be aware that one of the Auctions sought to be enjoined was of the Eldoret property (the suit property). Is there independent evidence that supports this assertion?

38. This Court again falls back to Affidavit of Mr. Mburu sworn on behalf of the Bank. After stating that the Order of 3<sup>rd</sup> February 1997 was served on 5<sup>th</sup> February 1997 at 11.25 am, he goes on to depone,

***“That since the Auction was scheduled for 12 noon at Eldoret Town we tried to get in touch with the Auctioneers and KCB Eldoret Branch but all in vain due to the short Notice despite the Plaintiff having obtained the Court Order to (2) days before the date of Auction”.***

This is an express acknowledgement by the Bank that it was well aware that the Order served upon it on 5<sup>th</sup> February 1997 at 11.25am was to restrain the Sale of the Suit property scheduled for 12.00 noon on the same day. Perhaps an affirmation that both the Order and the Chamber Summons were duly served! There is therefore succinct evidence that the Order was duly served and the Bank was well aware that it enjoined the Sale of Eldoret Municipality/Block 14/738 due for 12.00 noon on 5<sup>th</sup> February 1997.

39. It is now common cause that the Auction proceeded inspite of the Court Order. What explanation does the Bank give for this happening? In Defence the Bank pleads,

***“7. Further the Defendants avers that the aforesaid Sale was legal and no Restraining Orders were served on the Defendants prior to the Public Auction of 5<sup>th</sup> February 1997.***

***9. In answer to paragraph 9A, the Defendants avers that they were not aware of the Injunction Order over the Suit property prior to the Public Auction on 5<sup>th</sup> February 1997”.***

But the evidence as evaluated by this Court points to a contrary position. The evidence is that Court Order restraining the Auction of the Suit property was duly served on the Bank 35 minutes prior to the Auction and that the Bank was well aware of this.

40. At any rate that pleaded position is not consistent with the explanation given by Mr. Mburu that the Auction proceeded because the time was too short for him (sitting in Nairobi) to communicate with the Auctioneer who was in Eldoret or the Branch at Eldoret. On this latter explanation the Court observes that no evidence was led by the Bank as to the effort it made to reach the Auctioneer and that it became completely impossible to stop the Auction. It is not lost to Court that the Order was served at 11.25am and on the evidence of the Auctioneer and the 3<sup>rd</sup> Defendant the hammer was lowered (signifying a successful bid) at about 12.20pm. The Officers at Nairobi had at least 55 minutes to communicate the contents of the Order to the Auctioneer. No evidence has been placed before the Court that all effort was made but in vain. Instead the Bank has shifted its explanation!

#### **Court's Rendition.**

41. This Court finds that the Bank was in willful disregard of a Court Order when it proceeded with the Sale of the suit property. It was enough that only the Bank was served because it was the principal. An argument that the Auctioneer should have also been served is unhelpful because for purposes of the sale, the Auctioneer was merely an agent of the Bank. The Bank bore the responsibility of informing the Agent about the Order and its effect.

42. The Court finds that the Auction and Sale of 5<sup>th</sup> February 1997 infringed the law on at least two aspects. There was breach of the 45 day

Notice required by Rule 15(d) of the Auctioneers and significantly it proceeded in disobedience of a Court Order. What would be the Legal implication of these infractions on the validity of the Sale to the 3<sup>rd</sup> Defendant?

43. The 3<sup>rd</sup> Defendant argues forcefully that he is an innocent Purchaser for value without Notice and his purchase of the property cannot be defeated by any irregularity in the sale. This Court is unable to find that the 3<sup>rd</sup> Party colluded, connived or was complacent in the irregularities or breaches of the law and accepts that he is an innocent Purchaser for value without Notice.

44. In support of the proposition that the Sale should not be defeated, the provisions of Section 24(a) and 25 of the Registered Land Act are cited by the 3<sup>rd</sup> Defendant. These read,

**“24. Subject to this Act**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.**

45. While the provisions of Section 24(a) are a restatement of the extent of Rights and Privileges that vests in a person registered as a Proprietor of Land, Section 25(1) is certainly irrelevant. The provisions of this latter section would not insulate proprietorship (at least in respect to subsequent registrations) acquired in breach of the Law.

46. The more relevant and helpful provisions that could be called into the aid of the 3<sup>rd</sup> Defendant are the provisions of Section 77(3) of the Registered Land Act which reads,

**“77(3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power”.**

The proposition that the Title of a Purchaser is immune from any irregularity in the exercise of the Statutory Power of Sale and that the Chargers remedy is in damages only against the person exercising such Power finds support in the following Court decisions:-

- [Civil Appeal No.34 of 2015 - Edward Charles Nginyo v. Hans Jurgen Zahlten & 4 others \[2015\] eKLR](#)
- [Civil Case No. 147 of 2004 - Bomet Beer Distributors Ltd & another v. Kenya Commercial Bank Ltd & 4 others \[2005\] eKLR](#)

47. But there is a view that where the irregularities lead to a void sale then the provisions of Section 77(3) cannot afford any protection or comfort to the Purchaser. See for example in [Ochieng & another vs. Ochieng & others \[1995-98\]2 EA](#) where the Court of Appeal held,

**“In our view, a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land so sold. It is therefore clear that the second Respondent did not acquire proper titles to the suit properties. Her remedy is, against the Bank, primarily to obtain a refund of the consideration paid”.**

48. This matter has received my anxious consideration. The rationale for protecting the Rights of a Purchaser who has acquired Title from a Sale which is later found to have been carried out by an irregular exercise of the Power of Sale is that Purchasers should not be required to inquire as to whether a Chargee is exercising the Power of Sale properly and in accordance with the law. If Sales were to be set aside routinely because of any irregularity in the process of Sale, then participation in a Public Auction would always be an uneasy exercise where a successful bidder would never be sure that his Purchase would be upheld in the event of a challenge. Such a state of affairs may diminish the efficacy of a Public Auction as a Chargee’s Remedy in the event of default and may have implications on the entire securitization regime. It is for the reason that this Court would be reluctant to set aside the Sale if the only irregularity in the exercise of the Power of Sale was the giving of a shorter Notice that infringed the provisions of Rule 15(d) of the Auctioneers Rules.

49. But the Sale was a bold disregard of a Court Order! Disobedience of a Court Order is to be derided. An Act done in disregard to a Court Order is more than a mere irregularity, it is void and therefore a nullity. The 3<sup>rd</sup> Defendant could therefore not acquire good Title from a void Sale. For purposes of striking a blow for the dignity of Court Orders, the Sale and subsequent Transfer should and shall be set aside. On this



occasion it is the inconvenienced Purchaser who should seek a remedy in damages against the Bank. To fail to do so would be to encourage routine and cynical disobedience of Court Orders restraining the exercise of a Chargee's Power of Sale on a sardonic stance that the sufferer could in any event sue for damages!

50. I reach this result notwithstanding that the transfer was achieved after the Order of Injunction had been subsequently lifted. The fact remains that the Sale happened when a Court order barring it was subsisting. The lifting of the Order could not possibly sanitize an already void and unlawful Sale.

51. Given the conclusion I have reached, I do not find it necessary to consider whether the property was sold at an undervalue.

52. As to Trespass, the Plaintiff has always been in possession of the Suit property. He has not been evicted and was unable to prove an act of Trespass. This claim is therefore unmeritorious.

53. Trespass is actionable per se and does not require the Plaintiff to prove that he/she has sustained actual damage. Damage for Trespass is therefore at large. So had the Plaintiff proved trespass, which he did not, I would not feel obliged to make more than an Award of Nominal Damages. The Plaintiff did not make any submissions in respect to quantum on the alleged trespass and did not prove any actual loss or damage. A nominal Award of Khs.10,000/= would suffice.

54. The upshot is that this Court declares that the purported Sale and Auction held on 5<sup>th</sup> February 1997 in respect to L.R Eldoret Municipality Block 14/738 is null and void. Although no such prayer was made, the natural consequence of that declaration is that registration and entries in the Register of Eldoret Municipality Block 14/738 shall be restored to the pre-auction position, that is, the Plaintiff as owner but with the charge of the Bank duly registered. The cost of restoration shall be borne by the Bank. On costs of this Suit the Bank shall meet both the Plaintiff's and 3<sup>rd</sup> Defendant's costs. I make this Order of costs in favour of the 3<sup>rd</sup> Defendant as he was blameless for the infractions that aggrieved the Plaintiff.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> day of September, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Cheptanui h/b for Katwa for Plaintiff

Chege for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Chege h/b for 3<sup>rd</sup> Defendant

Nixon - Court Assistant