



**Samson (Suing as the legal representative of the Estate of Samson Kabiri Kabitu)
v Co-operative Bank of Kenya Ltd & 2 others (Environment & Land Case
40 of 2015) [2023] KEELC 21555 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 40 OF 2015
FM NJOROGE, J
NOVEMBER 15, 2023**

BETWEEN

**JULIA NJOKI SAMSON (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF SAMSON KABIRI KABITU) PLAINTIFF**

AND

CO-OPERATIVE BANK OF KENYA LTD 1ST DEFENDANT

LUKA MERIERI KABIRI 2ND DEFENDANT

CHARLES KIMANI WANGUI 3RD DEFENDANT

JUDGMENT

Pleadings

Plaint

1. By a further amended plaint filed on 23/06/2022, the plaintiff sought the following orders:
 - i. A declaration that a charge registered on parcel number Bahati Kabatini Block 1/2679 is illegal and void ab initio.
 - ii. A cancellation of the title deed of parcel number Bahati Kabatini Block 1/2679 in the name of Michael Kabutu Samson.
 - iii. A permanent injunction, restraining the Defendants whether by itself, agents and or representatives from, trespassing on, selling, alienating or in any other way disposing of or adversely dealing with the plaintiff's parcel of land known as Bahati Kabatini Block 1/2679.
 - iv. General Damages



2. The plaintiff averred that her deceased husband Samson Kabiri Kabitu was the registered owner of land parcel No. Bahati Kabatini Block 1/2679 (hereinafter “the suit property”; in 2009, the plaintiff discovered that the original title document of the suit property was missing; she reported the matter to Central Police Station, Nakuru; the plaintiff later learnt that the said title document was stolen by the her son Michael Kabutu Samson; she also learnt that the plaintiff’s son had transferred the suit property to his name before guaranteeing a loan facility to Charles Kimani Wangui. Michael Kabutu Samson was arrested, charged and convicted on his own plea of guilty in CMCR No. 63 of 2013 Republic vs Michael Kabutu Samson; he was serving a six year sentence in Nakuru Maximum Prison as at the commencement of the present suit. The plaintiff was served with a 45 days redemption notice; She later learnt that the suit property had been advertised for sale on 16/01/2015 which sale aborted. The plaintiff stated that she is in the process of losing the only home that she has ever known.

Defence of The 1st Defendant.

3. The 1st defendant filed its statement of defence dated 14/10/2015 on 15/10/2015. The 1st defendant denied the averments in the plaint and stated that sometime in the year 2011, one Charles Kimani Wangui took 2 loan facilities of Kshs. 500,000/= and Kshs. 1,500,000/= respectively from the 1st defendant guaranteed by the said Michael Kabutu who offered the title for Bahati/Kabatini/Block 1/2679 as security for the said amount. Before advancing the loan, the 1st defendant conducted due diligence and confirmed that the suit property was registered in the name of Michael Kabutu. After conducting a valuation of the suit property, Charles Kimani Wangui and Michael Kabutu Samson executed a charge and a further charge over the suitproperty. However, Charles Kimani Wangui defaulted in repaying the loan and the 1st defendant decided to exercise its statutory power of sale through the firm of Legacy Auctioneering Services. The 1st defendant sought that the suit against it be dismissed.

Defences of The 2nd And 3rd Defendants.

4. The 2nd and 3rd defendants neither entered appearance nor filed any statements of defence.

Evidence

Plaintiff’s Evidence.

5. Julia Njoki Samson testified as PW1. It was her evidence that the title to the suit property which was registered in the name of Samson Kabiru, her late husband got lost; she had a grant of letters of administration Ad Litem with respect to his estate which she produced as PExh.1. When she discovered that the title had disappeared, she reported the matter to the police where she was issued with a police abstract; she produced a copy of the lost title deed as PExh.2 and the police abstract as PExh.4. She paid Kshs.50 for the abstract and a copy of the receipt for the said amount of money was produced as PExh.4(a). She later discovered that it was her son Michael who had stolen the said title; her son was arrested, charged, pleaded guilty and was consequently jailed for six years. She had commenced the present proceedings because the 1st defendant asked her to vacate the suit property on the ground that it did not belong to her; she was served with two documents: the 45 days Redemption Notice dated 6/11/2014 and copy of the advertisement for sale by auction by Legacy Auctioneers; the said documents were produced as P.Exh. 6 and P. Exh. 7 respectively; she has lived on the land since 2008; she explained that she took possession of the suit property after the title got lost since her late husband’s aged parents were living thereon; she prayed that the suit property be reinstated to her for her peaceful stay thereon and that she be awarded costs of the suit.



6. Upon cross-examination, she confirmed that she was suing on behalf of the late Samson's estate. She reiterated that Michael stole the title document from her in the year 2009 and that she had reported the matter to the police; that before his death, Samson had placed a caution on the suit property and that her son Michael had since died. She further stated that when she went to the Lands Registry, she was referred to the bank, where she was told to find the "young man"; she also discovered at the bank that her son, whose picture was shown to her on a computer screen, was involved. The bank advised her to go back to the lands office. She testified that she only came to court after the bank expressed the intention to sell the suit property. Upon re-examination, she stated that the police also asked her to look for the "young man"; that when he was found, he was jailed on his own plea of guilt.
7. The plaintiff's case was then marked as closed.
8. Joseph Maeri testified as DW1. It was his evidence that he was a business banker with the 1st defendant bank. He adopted his witness statement dated 5/5/2023 as part of his evidence-in-chief. He then produced the documents in the list dated 16/12/2015 as DExh.1 – 11 and those in the supplementary list dated 18/1/2021 as D. Exh. No.12 – 25. It was his evidence that the 1st defendant bank had lent money to one Charles Wangui who had introduced the registered owner of the suit property to it; that the registered owner was Michael who offered the suit property as security; that before advancing the loan in June 2011 they conducted a search in November 2011 which confirmed that Michael was the owner of the suit property; the loan was not repaid and so they decided to exercise their statutory power of sale; all the notices were served "upon the interested party"; they did not find any encumbrances on the title to the property. He added that the bank followed the requisite procedure in registering the charge; the bank charged the land 2 years after the police abstract was issued; the 2nd defendant did not find any caution, restriction or prohibition registered and that the bank never committed any irregularities. In his witness statement, he indicated that upon the borrower defaulting in the repayment of his loan, the 1st defendant issued a 30 days' notice on 03/09/2012 followed by a 90 days' notice on 03/01/2014. At the time of the issuance of the said notices the accrued loan stood at Kshs. 1,924,262.25/= . Upon the borrower failing to repay the outstanding amount, the 1st defendant opted to exercise its statutory power of sale under Section 90(3) of the *Land Act*. The 1st defendant then issued a 40-day notification of sale of charged property and instructed legacy auctioneers to sell the property before the plaintiff instituted the present proceedings. The sale was scheduled for 16/01/2015 but was stayed as a result of a court order dated 15/01/2015 issued in Nakuru CMCC No. 14 of 2015 that was filed and later withdrawn by the plaintiff.
9. Upon re-examination, he confirmed that he had nothing to show that he worked for the 1st defendant bank but added that he worked at its Gilgil branch; that he was not personally involved in the matter; that the consent to charge was the key document which he did not have. He stated that the borrower was to secure the consent and that the property is still charged to the bank.
10. Upon examination by the court, DW1 stated that his colleague had attended the Land Control Board meeting but he did not have the minutes of the said meeting. He stated that there was no structure on the land.

Submissions

Plaintiff's submissions.

11. The plaintiff filed her submissions on 23/06/2023 while the 1st defendant filed its submissions on 06/06/2023.



12. The plaintiff in her submissions set out the prayers sought in the plaint and reiterated that Michael Kabutu Samson had stolen the original title deed and transferred it to his name. She also reiterated that when he was arrested, Michael Kabutu Samson was charged and pleaded guilty in CMCR No. 63 of 2013 Republic Vs Michael Kabutu Samson. It was the plaintiff's submissions that upon his release from prison, Michael Kabutu Samson died on 13/10/2020. It was also the plaintiff's submissions that Michael Kabutu Samson acquired the title fraudulently after the death of his father and therefore no valid charge could be registered as an illegal title is subject to revocation pursuant to the provisions of Section 26 of the [Land Registration Act](#). The plaintiff relied on the cases of Monica Achieng Akumu & 3 Others vs Dishon Omindi Nyamondo & 2 Others [2013] eKLR, Alice Wanjiru Thika & others vs Joseph Gichono Mwangi & Others Embu High Court Misc. Application No. 84 of 2007 among other cases in support of her arguments. It was the plaintiff's submissions that the suit property should revert back to the name of the deceased so that his estate could commence succession proceedings. The plaintiff relied on Section 26 of the [Land Registration Act](#) and submitted that a title can be revoked if it was procured through fraud or misrepresentation to which the person was a party. The plaintiff then relied on among other cases the cases of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR, Evanson Wambugu Gachugi vs Simon Wainaina Gatwiki & 2 Others [2014] eKLR. The plaintiff submitted that she is an innocent proprietor who is entitled to the protection of her property under Article 40 of [the Constitution](#) of Kenya. The plaintiff concluded her submissions by relying on the case of Alice Chemutai Too vs Nickson Kipkurui & 2 Others [2015] eKLR and sought inter alia that a permanent injunction be issued restraining the defendants from dealing with the land as the title was obtained illegally.

1st Defendant's Submissions.

13. The 1st defendant in its submissions identified the following issues:
- a. Whether the defendant bank complied with the requisite statutory provisions with respect to registration of a charge on the subject property.
 - b. Whether the alleged fraud and illegality attributed to the defendant bank has been proved.
14. On the first issue, the 1st defendant submitted that it complied with the requisite statutory provisions before registering the two charges on land parcel No. Bahati/Kabatini Block 1/2679. It was also its submissions that it advanced a loan of Kshs. 2,000,000/= to Charles Kimani Wangui and charged the suit property with the consent of the owner Michael Kabutu Samson. It stated that it conducted a search at the lands registry and upon confirming that the property was registered in Michael's name, it registered the charge against the suit title. The 1st defendant submitted that it first advanced Kshs. 500,000/= to Charles Kimani Wangui before registering a further charge of Kshs. 1,500,000/= . In addition to executing the further charge, Michael Kabutu Samson further executed a guarantee and indemnity against Charles Kimani Wangui for the total loan facility of Kshs. 2,000,000/=. The 1st defendant reiterated that before registering the charge over the suit property, it conducted due diligence. The 1st defendant relied inter alia on the cases of Charles Karathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR, David Peterson Kiengo & others vs Kariuki Thuo [2012] eKLR in support of its arguments. The 1st defendant submitted that the charges over the suit property were registered on 29/06/2011 and 14/11/2011 respectively and that the plaintiff moved court on 15/01/2015 four years after the registration of the said charges, alleging that the suit property belonged to her late husband which is an attempt to derail the process of realization of security by the defendant bank. It was the 1st defendant's submission that from the police abstract produced by the plaintiff, it was clear that the plaintiff was aware of the transfer of the suit land but did not do anything to protect the title from being dealt with adverse to



her interests. It was also the 1st defendant's submission that the plaintiff did not explain the reason for the delay. The plaintiff relied on inter alia the cases of Utalii Transport Company Limited & 3 Others v NIC Bank Limited & another [2014] eKLR, Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited [2014] eKLR, Andrew Shimbiro v Sammy Talam [2021] eKLR in support of its argument.

15. It was further the 1st defendant's submission that the claims of fraud and illegality attributed to the 1st defendant by the plaintiff in registering the charges lack an evidential basis. It reiterated that it conducted a search before registering the charges. The 1st defendant relied on Section 107 of the Evidence Act and, inter alia, the decision in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Appeal No. 342 of 2010 [2013] eKLR in support of its arguments. The 1st defendant submitted that the plaintiff did not adduce any evidence to show that the title deed of the suit property was stolen and maintained that it was not privy or party to the alleged fraud. The 1st defendant then added that before it registered the charges, it obtained the consent from the owner Michael Kabutu Samson. The 1st defendant concluded its submissions by seeking that the plaintiff's suit be dismissed with costs.

Analysis And Determination

16. After considering the pleadings, the evidence and the submissions the issues that arise for determination are:
- a. whether a declaration ought to issue declaring that the charge registered against the suit title is illegal and void ab initio;
 - b. whether the title deed in the name of Michael kabuto Samson ought to be cancelled;
 - c. whether the defendants ought to be enjoined from interfering with the suit land; and
 - d. whether general damages ought to be awarded to the plaintiff; and
 - e. who should meet the costs of the present suit.
17. It is the plaintiff's case that land parcel no. Bahati Kabatini Block 1/2679 was registered in the name of her late husband Samson Kabiru Kabitu. The plaintiff produced a copy of the title to the suit property. It bore the name "Samson Kabiri Kabutu". It was apparently issued on 10/9/1997. The defendants never challenged that title at the proceedings and it must therefore be deemed prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the matters set out under Section 26 of the Land Registration Act to which this court shall revert shortly in this judgment.
18. It is also the plaintiff's case that in the year 2009, she discovered that the title deed had been stolen and that she reported the matter to Central Police Station, Nakuru where she was issued with a police abstract. These facts have also not been controverted by the defendants. The plaintiff does not also deny that she was served with a 45 days' redemption notice and a copy of advertisement for sale by auction. It is also not denied that the plaintiffs' son, Michael Kabutu Samson, had given the suit property as security for a loan advanced to Charles Kimani Wangui and that the plaintiff's son was later arrested, charged and pleaded guilty to stealing the title deed in CMCR No. 63 of 2013. He was sentenced to six years in prison. He had been named as the 2nd defendant in these proceedings but upon demise he was substituted.
19. The plaintiff produced a copy of the Limited Grant ad Litem for the estate of Samson Kabiru Kabitu issued to herself on 20/01/2015 by the High Court of Kenya at Nakuru and I am convinced that she



has locus standi to bring this action. As earlier stated, a copy of the title deed for the suit property, registered in the name of Samson Kabiri Kabutu, was produced. From that document it is evident that Samson Kabiri Kabutu was registered as the owner on 10/09/1997 and issued with a title deed on the same day. A police abstract had also been issued on 01/10/2009 under OB No. 14/7/10/09 and it was produced. It demonstrated that Samson Kabiri had lost his title deed for land parcel No. Bahati/Kabatini Block 1/2679. A 45 days' redemption notice dated 6/11/2014 was equally issued. It was issued by Legacy Auctioneering Services to Charles Kimani Wangui and Michael Kabutu Samson requiring payment of Kshs. 3,159,237.54 within 45 days, failure to which the suit property would be sold at a public auction. A notification of sale was produced indicating that M/s Legacy Auctioneering Services was to conduct a public auction on 16/01/2015 at 11 a.m. in their offices at Nacha Plaza.

20. It is also not disputed that by a charge and a further charge which were registered as required by law, the 1st defendant had cumulatively advanced loans totalling to Kshs. 2,000,000/= to Charles Kimani Wangui or that Michael Kabutu Samson was the guarantor to Charles Kimani Wangui and had offered the suit property as security for the loan. It is also evident from the notices served on the plaintiff that the 1st defendant sought to exercise its statutory power of sale with regard to the suit property by the time the plaintiff herein filed the present suit. By the production of the certificate of official search for land parcel No. Bahati/Kabatini Block 1/2679 dated 18/11/11 the 1st defendant established that the suit property was registered in the name of Michael Kabutu Samson on 31/3/2011 under entry No. 5 therein, and that there was no encumbrance on the title. A charge in the 1st defendant's favour was the first encumbrance registered as entry No. 1 dated 30/06/2011. It was followed by a further charge in its favour registered as Entry No. 3 which is dated 16/11/2011. A copy of the title deed in the name of Michael Kabutu Samson issued on 31/03/2011 for land parcel No. Bahati/Kabatini Block 1/2679 was produced. A Charge dated 29/06/2011 for the principal amount of Kshs. 500,000/= entered into between Michael Kabutu Samson as the Chargor, Charles Kimani Wangui as the borrower and the Co-operative Bank of Kenya was also produced in evidence, as was guarantee and indemnity dated 19/11/2011 which indicated that Michael Kabutu Samson was the guarantor to Charles Kimani Wangui for the principal sum of Kshs. 2,000,000/=. A loan agreement dated 19/11/2011 between Co-operative Bank Limited and Charles Kimani Wangui for Kshs. 2,000,000/= at an interest of 1.75% for a credit period of 36 months with monthly installments of Kshs. 55,556/= was also produced. A report and valuation done by Adn Advisory Valuers on land parcel No. Bahati/Kabatini Block 1/2679 dated 14/10/2011 and a letter dated 28/10/2011 from the 1st defendant to Charles Kimani Wangui over bank facilities of Kshs.2,000,000/= was produced as was a Notification of Sale dated 22/07/2014 issued to Michael Kabutu Samson. A letter dated 3/07/2014 addressed to Michael Kabutu Samson informing him that the loan issued to Charles Kimani Wangui was outstanding to the tune of Kshs.2,557,383.77, and informing him to repay the said sum within 3 months was also tabled in evidence; a public auction notice issued by Legacy Auctioneering Services indicating that the suit property was to be sold on 16/01/2015 at Nacha Plaza was produced, as was a further charge dated 14/11/2011 entered between Michael Kabutu Samson, Charles Kimani Wangui and the 1st defendant. The pleadings in Nakuru CMCC No. 14 of 2015 earlier filed and withdrawn by the plaintiff herein were put before the court in evidence.
21. From the evidence before court therefore, it is neither disputed that the suit property is currently registered in the name of Michael Kabutu Samson nor that Michael Kabutu Samson guaranteed Charles Kimani Wangui a loan that he had taken from Co-operative bank Limited. Further, it is neither disputed that the suit property was offered as security for the loan that had been given to Charles Kimani Wangui nor that Charles Kimani Wangui defaulted in repaying the loan and the 1st defendant was in the process of exercising its statutory power of sale when the plaintiff commenced the present proceedings.



22. What is in contention is the process by which the suit property came to be registered in the name of the 2nd defendant Michael Kabitu Samson's and whether the 1st defendant is entitled to sell the suit land in exercise of its statutory power of sale. In particular, the allegations against the 2nd defendant are as follows: that he without knowledge or consent of the plaintiff took the suit title and forged signatures on the land transfer form, had the forms attested to by an advocate in her absence and caused the title to be illegally transferred to himself. The particulars of fraud against the 3rd defendant are that he used forged documents to obtain the loan and failed or neglected to repay the loan advanced by the 1st defendant.
23. The plaintiff alleged that her son Michael Kabutu Samson was arrested, charged and plead guilty to stealing the title deed of the suit property in CMCR No. 63 of 2013 Republic vs Michael Kabutu Samson and was sentenced to six years but the proceedings in the said matter were not produced. The 2nd and 3rd defendants failed to file their defences to the suit and they are assumed to have admitted the claims against them. The proper conclusion is therefore that the 2nd and 3rd defendants are culpable for the fraud that is alleged in the plaint. From the totality of the evidence produced by the plaintiff this court is convinced that the suit title was indeed stolen and the thief, the plaintiff's son, paid for that deviance by serving a jail term. The plaintiff proved her claim that the loss of title was reported to the police long before the title was charged in favour of the defendant.
24. What then is the position of the 1st defendant? It is to be observed that Section 26 of the [Land Registration Act](#) (LRA) provides as follows:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

25. If a title is obtained by fraud or misrepresentation, it may be nullified by the court. That is not the only situation that may lead to nullification, for Section 26(2) of the LRA provides that where a certificate of title has also been obtained illegally, unprocedurally or through a corrupt scheme the same may also be nullified. Has the plaintiff succeeded in proving fraud against the 1st defendant? The plaintiff in her amended plaint claimed that the 1st defendant relied on a forged document to register a charge on her land and that it failed to follow the lawful procedures to register the charge against the title. The 1st defendant was also alleged to have failed to obtain a land control board consent to the purported transaction, to have failed to conduct due diligence on the property as expected of a prudent chargee before registering the charge and having the title charged to secure sums disbursed to a third party, that is, the 3rd defendant.



26. Do these allegations hold any truth? The answer lies in the evidence of both parties. The plaintiff has established that the title to the suit land was stolen and there is no dispute that the title was illegally charged to the 1st defendant. She has also stated that she and her late husband's parents lived on the suit property. The loan agreements entered into between the 1st defendant and the 2nd and 3rd defendants were executed on 11/8/2011 and 19/11/2011 respectively. The valuation report that the 1st defendant included in its evidence is dated 14/10/2011. It would appear that there was a physical visit to the suit property to verify the details provided by the purported owner or to value it. The valuation report produced by the 1st defendant at the hearing actually detected the dwellings that the plaintiff testified about in which the plaintiff and her late husband's parents presumably lived. It is stated in the valuation report that there were "two dwellings houses (sic) constructed of stabilized mud walls beneath a mono pitched gci sheets roof". No photographs of the said houses are included in the report. In respect of occupation, the report simply stated that the property was occupied by the registered owner. No interview with any occupant was recorded. The witness statement adopted by DW1 went as follows:

"Prior to the execution of the charge the defendant carried out its due diligence by verifying the authenticity of the title document via its advocates on record at the Nakuru lands registry; results of which were in the affirmative. The defendant consequently released the requested Kenya Shillings Five Hundred Thousand (Kshs 500,000/=) to Charles Kimani Wangui after having the charge executed and registered towards security (sic) the said loan..."

27. Later on the defendant states as follows in regard to the second loan:

"The defendant prior to releasing the said amount of Kenya Shillings One Million Five Hundred Thousand Kshs 1,500,000/= carried out its due diligence as done in the previous loan facility and proceeded to execute and register a further charge over the suit parcel of land following consent from the registered owner one Michael Kabuto Samson."

28. There is no evidence that the 1st defendant ever conducted any due diligence beyond a search at the land registry even though it is a matter of notoriety that financial institutions usually visit the property intended to be charged and secure a valuation report prior to having the same charged. In this court's view, had the 1st defendant conducted due diligence by interview of the occupants while visiting the suit land for valuation or viewing, it may have arrived at a conclusion that the 2nd defendant's title was irregularly obtained or secured through a corrupt scheme and therefore not available for charging. I find that the 1st defendant has not come with clean hands.

29. Regarding failure to obtain a land control board consent for the purported transaction it is noted that the defence of the 1st defendant merely denies the plaintiff's allegation without asserting that the 1st defendant indeed obtained the requisite consent. Further, it is noteworthy that the 1st defendant filed a list of documents dated 16/12/2015 and a supplementary list dated 18/1/2021. I have perused those two bundles and found no land control board consent attached. Besides, the witness testifying at the hearing in the defendant's case never alluded to the securing of a consent for the purported transaction with the 2nd and 3rd defendants save in admission on cross-examination, which was that he did not have such a document with him. Upon examination by the court suo motu, DW1 also admitted that he did not have any minutes of the land control board meeting that approved the transaction.

30. Section 109 of the [Evidence Act](#) provides as follows:

"Proof of particular fact.



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

31. Failure to secure a land control board consent for a transaction in agricultural land being such a fatal omission in law, it was incumbent upon the 1st defendant, upon the claim being raised by the plaintiff that no such consent was obtained, to show that it indeed procured that consent. Under Section 6 of the Land Control Act (LCA), transactions affecting agricultural land are void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act. I find that no consent was obtained for any of the purported transactions between the 1st defendant and the rest of the defendants.
32. Lastly, this court has noted from the evidence of the 1st defendant that no statements of account were provided to show that the borrowed sums were never repaid. Besides, even perchance that the said sums were never repaid, there was also no evidence that the 1st defendant ever followed the principal borrower who was advanced the credit under the description of “working capital”. The borrower appears to have been traced and he appears to have been traced to sign against the 45 days’ redemption notice and in any event he appears to have declined to sign it. Having learnt that the 2nd defendant is deceased, the 1st defendant failed to demonstrate that any measures had been taken against that principal borrower prior to initiating the realization of the purported security in the suit title.
33. Lastly, while it is manifest that the real registered owner of the suit land is deceased and the impostor who purported to charge the land as owner lacked any confirmed grant of letters of administration or any documentation that showed that he had otherwise legally acquired the title in his name, the provisions of Section 45 of the Law of Succession Act kick in and the 2nd defendant must be deemed as an intermeddler. It would be against the interests of justice to uphold the claim to right of statutory power of sale by the 1st defendant while there is evidence that the charge in its favour was executed by an intermeddler and on the basis of a title in his name obtained illegally.
34. Consequently, it is my view that the plaintiff has proved her claim on a balance of probabilities and it therefore succeeds. I therefore enter judgment in the plaintiff’s favour against the defendants jointly and severally and I issue the following orders:
 - i. A declaration is hereby issued declaring that the charge and further charge dated 29/6/2011 and 14/11/2011 respectively registered against title no. Bahati Kabatini Block 1/2679 as entries nos 1 and 3 on the land register for the suit property namely Bahati Kabatini Block 1/2679 are illegal and void *ab initio*;
 - ii. The title deed for parcel number Bahati Kabatini Block 1/2679 in the name of Michael Kabutu Samson issued on 31/3/2011 is hereby cancelled;
 - iii. The Land Registrar Nakuru shall reinstate the title to parcel number Bahati Kabatini Block 1/2679 into the name of Samson Kabiri Kabitu;
 - iv. A permanent injunction is hereby issued, restraining the defendants jointly and severally whether by themselves, their agents and or representatives from, trespassing on, selling, alienating or in any other way disposing of or adversely dealing with the suit property known as Bahati Kabatini Block 1/2679.
 - v. General Damages are declined as none were proved by the plaintiff.
 - vi. The defendants shall jointly and severally bear the costs of the present suit.



**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 15TH
DAY OF NOVEMBER 2023.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

