



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 151 OF 2001

JUDITH NJUE MUKWANJERU.....PLIANTIFF

VERSUS

STANDARD CHARTERED BANK (K) LTD.....1ST DEFENDANT

PRIDE OF MERU HOTELS.....2ND DEFENDANT

JUDGMENT

1. The plaintiff **JUDITH NJUE** through a plaint dated 22nd August 2001 sued the Standard Chartered Bank Kenya Ltd and Pride of Meru Hotels Limited seeking several prayers as set out in the said plaint. M/s. Kiautha Ariithi & Co. Advocates appeared for the 2nd defendant and on 29.8.2001 filed defence and counterclaim. That on 31.8.2001 the firm of M/s. Mwarania & Co. Advocates filed Memorandum of Appearance and defence for the 1st defendant. The 2nd defendant subsequently filed an amended defence and counterclaim dated 10th September 2001.

2. The plaintiff meanwhile sought leave to file an amended plaint through an application dated 18th September 2002. That upon hearing of the application and on being allowed the plaintiff filed an amended plaintiff, provoking the 2nd defendant to file further amended defence and counterclaim dated 17th October 2002. The plaintiff proceeded to file reply to further amended defence and defence to counterclaim on 4.02.2003. The 1st defendant also filed amended defence dated 21st May 2003.

3. The suit herein was heard by several judges who included Justice W. Ouko, Lady Justice M. Kasango, and lastly myself.

4. The plaintiff gave evidence and called two witnesses where as the 2nd defendant gave evidence and called no witnesses. The 1st defendant called one witness.

5. PW1, Dr. Judith Mukwanjeru Njue, testified that she is a resident of Meru, and a professor of University and a consultant for University. That she was a client of Standard Chartered Bank in 1975 with an account with the bank. That she secured a credit facility in 1975 for Kshs.60,000/= as a personal loan which she fully paid. Later she took Kshs.80,000/= which she fully paid. She used her title deed No. Ntima/Igoki/3091 to guarantee an overdraft against Sawa Sawa Academy for Ksh.725,000. That the overdraft was subsequently increased to Ksh.900,000/= in 1993 and for it she charged plot numbers 3091 and 3421 for the said facility. She produced green card exhibit P1 for plot No. 3091 and exhibit P2 for plot No.3421.

6. That in 2004 PW1 went to USA and on return she found that the Bank had allowed the Sawa Sawa

Academy (school) to overdraw beyond the limit allowed to the sum of Sh.1.3 million as opposed to sum guaranteed of Ksh..900,000/=. That the exceeding of overdraft had been done without informing PW1. PW1 approached the manager and at the same time, the school began to experience problems. She testified the directors of the school to be comprised of Victor Njeru, Alloys Nganga and herself, adding it was only herself who had guaranteed the loan using her own property.

7. PW1 testified that she talked to the Bank Manager Dr. Chamugor, Meru Branch expressing her disappointment to him for exceeding the limit which she had guaranteed, which over withdrawal PW1 discovered from her Bank statements for the period running from 9th September 1997 to 3rd January 2002. The statement was produced as exhibit P3 including the forwarding letter of 9.9.97 – BF 1,235, 164/03, DR 17.10.01, Ksh.90,336 (at 5.4.2003) in which the balance was credit.

8. PW1 testified that she sought for her bank statements when she heard that her two (2) parcels of land had been sold and she wanted to verify how much she still owed the bank and also know how much the school had paid back. She discovered figures which she could not understand such as a deficit of 21.4.1999 of Ksh.100,846 and costs of Bank draft of Ksh 400/=. 12.5.1999 draft (00203962 – 01) of Ksh.33,345/= plus bank draft of Ksh.400 urging the figures were not drawn by the school. That on 14.7.99 a draft -00207376-01 for Ksh.1,350/=. 13.7.2000 draft 00271513- Ksh.15,500/=. 13.7.2000 cost and bank draft Ksh.600/, 2.8.2000 draft 00271892-1 Ksh. 1,353 plus costs of bank draft Ksh.600/=. 23.10.2000 draft 003921351 Ksh.58,361 plus cost of Sh.600, 13.6.2001 draft no. 004426539 – Ksh.113,312/=. 13.6.2001 draft 00426554 Ksh.60722, costs Ksh.650, 13.6.01 draft costs Ksh.650, 1.3.2001 draft 00420,765-01 – Ksh.62,416, plus costs Ksh.650, 17.10.2001 draft 00565753-01 Sh.70,000/= plus costs Sh.650/= 3.5.2002 draft 00592300-1 for Sh.75,000 plus costs 650/=. PW1 testified that she confirmed with Sawa Sawa Academy records, that the school never made any of the above-mentioned withdrawals totalling to Ksh.634,555/= PW1 approached the bank, headquarters over the issue who seemed to take figures as genuine.

9. PW1 testified that the sale of securities was carried out without any letter of notice (Statutory Notice) but averred that in 1995 she had been given 14 days notice by the firm of Advocates M/s. Mbae and Mwarania Advocates through a letter dated 21.11.1995 addressed to the three directors including PW1 through a registered post. The letter and certificate of postage produced as exhibit P5 and 5(a) respectively. PW1 in response to the said letter testified that she talked to the manager and wrote several letters seeking indulgence for more time to pay Ksh.1,032,631/10 which was outstanding at the time. PW1 and school were allowed to continue paying and due to difficulties in payment by the school PW1 was advised to arrest the overdraft into a loan and PW1 remain still guarantor/charger. That PW1 continued to make payments but in 1999 when she returned from Sweden she found notification of sale of her property from M/s. Dolphin Auctioneers dated 2.2.1999. That on 2.2.1999 at 3.45 p.m., PW1 stated she was in Sweden and the notice was received by her son. She produced Notification of Sale exhibit P6. She stated the time of the sale was not indicated. That the auction was to be on a Friday 16.4.1999 at 12 O'clock at old Marete Bus Stop – Meru Town. That the outstanding amount as per notification was Ksh.1,500,012/90. PW1 then proceeded to see one Sam, at Bank's headquarters Nairobi to find out why her property was being sold without her having been served with statutory Notice, who called their lawyers M/s. Mbae Mwarania in PW1's presence and asked them to fax the notice and it came through while PW1 was still at Sam's Office on 15.4.1999 at 9.56 a.m. The letter dated 21.11.1995 was similar to P Exhibit 5 as it was a duplicate except the fax copy did not have the letter head. Fax copy marked P Exhibit 7. PW1 testified she was given 14 days notice PW1 told Sam she was going to look for money to offset the loan, which PW1 testified she did referring to 10th June 1999 P Exhibit 4 cheque for Ksh.400,000 but was returned unpaid. PW1 testified she later on 23.6.1999 cleared the amount when she cleared paid on 25.6.1999 Kshs.150,000 on 12.8.1999 Ksh.205,060/90, on 22.2.2000 Ksh.15,000/=. on 15.3.2000 Ksh.15,000/= 3.4.2000 Ksh.12,600/=. 9.6.2000 Ksh.17,250/= and 19.9.2000 Ksh.130,000/=. That PW1 stopped paying on realizing that the bank continued making charges notwithstanding she was paying. PW1 stated the above-mentioned payments were personally made by herself. That as she was paying the intended sale did not take place, as the bank cancelled the notification of sale in one of the newspapers. That later on, another advertisement was put in the newspapers and the property sold. The Advertisement was on 21.5.2001 in the Daily Nation and date for sale was on 5.6.2001 outside KCB at 12 O'Clock, Daily Newspaper produced as P Exhibit 8. That the first advertisement was on 10.7.2000.

The Daily Nation of 10.7.2000 produced as P exhibit 9 and the sale was cancelled as per Daily Nation of 17.7.2000 produced as P exhibit 10. That on 9.7.2001 in the Daily Newspaper that PW1's property was advertised again for selling of property No. 3091 PW1 left for sale on 26.7.2001 as per P Exhibit II while PW1 was out of the country. PW1 just heard her home had been sold as she never saw the advertisement as she was out of the country. PW1 went to her advocates, and to the bank where she met a man who confirmed buying her property.

10. PW1 testified that the Standard Chartered Bank Ltd never served her with the Statutory Notice upto to the date she was giving evidence on 24.11.2000 but she only received an a demand notice giving her 14 days to pay addressed to the three directors of Sawa Sawa Academy which PW1 had guaranteed for a loan which copy of demand PW1 received on 21.11.1995. She testified the letter was signed by M/s Mbaya Mwarania and Co. Advocates. Letter and receipts produced as P. Exhibit 5. The demand was for the sum to be paid within 14 days. She stated at the trial at Embu of this matter the court gave her a Statutory Notice given by Alias Muriithi Mungania Advocate dated the same date with her demand notice. P exhibit 5. addressed to Mrs. Judith M. Njue. She stated the purported notice was dated 21.11.1995 whereas the demand notice was filled on space written date and it was of 2 pages while the Demand Letter was one page. That the signature in both notice and purported Statutory Notice, she said were different. She stated Mwarania was her lawyer before and she knew his signature. The affidavit bearing signature of Mwarania signed by him produced as P exhibit 12. PW1 testified she proceeded to find out who Mr. Muriithi was since judgment had been entered against her based on what she felt was fraud. PW1 testified that she found out at the time one Alias Muriithi purported to give her Statutory Notice, which he prepared and signed he was still a pupil at Mbaya Mwarania Advocate. That she came to know when Mr. Muriithi was admitted as an Advocate of the High Court of Kenya when her lawyer wrote to LSK on 24.1.2006 when L.S.K. replied that Mr. Murithii was admitted as an Advocate on 7.8.1996 as per P exhibit No. 13. That is, when the notice was issued it confirmed he was not an Advocate. PW1 all the same denied having been served with the Statutory Notice by Mr. Muriithi, she further faulted the Notice of not bearing the names of other two directors. She stated the issue of Statutory Notice is of great importance as the ruling was re-entered against her based on a falsified notice. She testified that she was never served with a true Statutory Notice but a manufactured one for the purpose of this case. She stated that even if she had been served with a Statutory Notice, the bank was supposed to sell PW1's property bearing in mind the reserve price. She testified that the two parcels Ntima/Igoki/3421 and 3091 were valued. She stated plot 3091 has been her home for the last 35 years and it is a palacious house and the last valuation by the Standard Chartered Bank was 6.7 million however Dolphin Auctioneers put a forced sale value at Ksh.2.5 million as per their notification of 4.8.2000 but the property was sold for Ksh.1,050,000/= which PW1 testified was far way below half the reserve price. That the other parcel 3421 of 0.405 hectare about an acre had a reserve price of 2.1 million as per notification of sale by M/s. Dolphin Auctioneers but was sold at Ksh.200,000/=, PW1 produced notification of 2.2.1999 as P exhibit 14. PW1 testified that was grossly under valuation.

11. PW1 testified that by the time of sale of her properties the debt had been paid. She testified she noted that the statement had a lot of anomalies payments, withdrawals from the loan account which amounted to Ksh.640,000/= plus. On enquiry she was told a lot of payments were going to lawyers and auctioneers and costs of the bank in trying to sell PW1's property. PW1 testified as she had not been served with Statutory Notice the payments were all irregular. PW1 referred to P Exhibit 4, the statement on irregular deductions. PW1 consulted an accountant M/s. Naivasha and Associates, certified Public Accountants Kenya, who went through PW1's bank statements and accounts and furnished her with Auditor's Report on operation of her loan account No. 01198-62418 400, held at Standard Chartered Bank – Meru Branch. She testified the Report revealed that the claimable amount as from 24.10.98 to 3.5.2002 to be Ksh.634,455/= in respect of payments made. She testified the loan as overdraft was at Ksh.725,000/= then 900,000/= but PW1 was only a guarantor to the limit of Ksh.900,000/= but when she was away, it became Ksh.1,300,000/= in excess of the sum PW1 had guaranteed. She added on the date her property was to be sold there was no auction as she went there and found none between 9.00 a.m. and 5 p.m. She testified that she was not liable to the charge that went to the auctioneers who auctioned her property as there was no right to sell. She stated the 2nd defendant colluded to sell her property by private treaty and by undervaluing her property. adding that the 2nd defendant knew the reserved property. She testified that as regards plot No. 3091 the buyer obtained the certificate of registration in the name of PRESTIGE

MERU HOTEL whereas plot No. 3421 is registered in Kioga's name. PW1 testified that since 2001 she has been under a lot of stress as she was to be evicted from her home and her name as a professor was tarnished notwithstanding the fact that the bank never served her with Statutory Notice. She prayed that the court do find the sale null and void and that it be set aside. That the sell of parcel No. 3091 be set side and the registration be cancelled and be registered in the plaintiff's name. She also prayed for the discharge of the charge and a permanent injunction over plot No. 3091 plus damages occasioned by undervaluation and entire process, with costs and interest she further sought the money reflected in her audited accounts be declared as owed to her plus interest to be refunded to her. Then PW1 was recalled later and produced P exhibit 15 a letter dated 27.3.1996 by the Standard chartered Bank Limited on Standard Chartered Bank and Sawa Sawa Academy Limited liabilities Kshs.1,051,128, Debt interest Ksh. 32% charged on loot day of each month. It also had a handwritten note **“to Muriithi 30/3 to issue statutory notice”** annexed to sworn affidavit on 28.9.2001 of Elias Muriithi Mwongela marked annexure **“EMM2”**.

12. During cross-examination of PW1 by Mr. Mwanzia, learned Advocate, she testified she took loan and charged her two properties Ntima/Igoki/3091 and 3421, but plot No. 3091 was fraudulently sold in 2001 but plot No. 3421 had been sold earlier on without her being served with Statutory Notice. She testified the school had an overdraft of Ksh.900,000/= which they exceeded by Ksh.400,000/= but they paid the full overdraft and even exceeded by paying more than they were supposed to. PW1 testified she only saw an advertisement for sale of plot No. 3091 on 27.7.2000 but not for plot No. 3421. She testified the loan was supposed to be cleared by the end of 2000 and the whole amount was over by the end of 2000 and in excess referring to the affidavit of 22.8.2001 to which bank statement was annexed. That by them the account had a debit of Ksh.515,203 which amount included Ksh.634,000/= in dispute. PW1 stated that before 2000 she never received a Statutory Notice. PW1 specifically denied ever receiving a Statutory Notice dated 2.4.1996 and she pointed out the same was not even addressed to her but to Managing Director of Sawa Sawa Academy. PW1 testified the letter referred to her, was not inresponse to the Statutory Notice on P Exhibit 3. PW1 testified she had paid all the money due inrespect of plot No.3091 but there were added illegal charges such as those the auctioneers. On letter dated 4.6.1995 PW1 stated when she wrote the letter she was offering to pay what she legally owed the bank and on letter dated 23.5.1995 she stated it was to show she was to clear the loan in regard to Plot No.3091. PW1 pressed further stated that the bank never served her with a Statutory Notice but she got a normal demand notice of 14 days on 21.11.1995 from the bank. She stated the amount sought as per notice by Mr. Mbare Mwarania & Co. of 21.11.1995 was Ksh.1,032,631. She insisted she never saw the notice nor was she ever served with any Statutory Notice and as such her properties were wrongfully sold.

13. On being cross-examined by Mr. Mwirigi learned Advocate PW1 testified Sawa Sawa Academy never made payments but she did and that non-payment could attract penalties. She testified that by 16.7.98 there were many illegal entries, adding she wrote many letters to the bank. She testified that she saw the notice dated 21.11.1995 for the first time in Court. PW1 testified she sued the 2nd defendant because the 1st defendant sold her property wrongfully to the 2nd defendant. She added the 2nd defendant resides nearby, knew her plot as a palatial house and he knew its value. PW1 testified she was not aware of a letter dated 2.4.1996. On letter dated 21.11.1996, PW1 stated it was written to the three directors of the academy. PW1 testified on the day for intended auction she went to intended place of auction and found there was no auction at all.

14. PW2 Simon Gitobu Ithiria Manager of M/s. Naivasha and Associates, certified Public Accountant testified that he is licensed to practice accountancy. He testified that his duties in the firm included taking all responsibility of doing accounts to the final stage and give report to the client. He stated that he is professionally competent to prepare the accounts and that he had worked with the said firm for the last 3 years. He stated that he took instructions from the plaintiff in this case, prepared the statements of accounts, indicating the operations of the plaintiff's loan account with M/s. Standard Chartered Bank of Kenya Limited, Meru Branch A/C No. 00191B – 624184 – 000 in the name of M/s. Judith Njue for the period running from 14th December 1990 to the 31st January 2001. The plaintiff's complain was that since being granted loan facilities of Ksh.725,000/= she had cleared the whole loan by 19th September 2000. He stated that they were examining the Bank's calculation of the interest accruing on the facility payments/repayments that the plaintiff had made to the bank through the period. That the Bank was

calling for loan balance of Ksh.1,500,012/90 by 20.4.1998. That according to PW2's investigation the plaintiff had paid Ksh.1,579,803 between 8th April 1999 and 9th September 2000 as per PW2's annexed appendix 1. He relied on all original bank statements supplied by the plaintiff from the Standard Chartered Bank of Kenya, Meru Branch. They were for period running from September 1997 all the way to 30th April 2003. He produced the statements as per P exhibit 10. He came to a conclusion that the plaintiff had overpaid the loan facility by Ksh.102,424./30 by 9th September 2010 as per appendix 1 of PW2's Report.

15. On point No. 5 over bank rates applied he stated they realized the Bank had overcharged the plaintiff's to the tune of Ksh.22,634/20 over the period from 9th September 1997 through 30th April 1998 being the date when the Bank stopped charging interest on the facility. Under No. 6 on costs of the draft PW2 stated he applied the norms of accounting and Banking principles norms and found there were charges such as cost of draft and for draft issues to the tune of Ksh.634,455 between October 2nd 1998 and 3rd May 2002. He stated the terms of accounting and banking principles referred to by the bank were non-existing and should not have been charged as such services were not given to the plaintiff. He stated costs of draft would normally be charged whenever cheque is given. PW2 referred to Appendix 3 of his report. He stated that when plaintiff instructed them in A/C No.0119B – 634-184-000 she had a deposit of Ksh.165,986/= (credit) as of 17th November 2001. He stated that inspite of having a credit the plaintiff's attempt to withdraw the amount the bank could not allow her to do so inspite of having fully paid the loan. The bank was withholding the money inspite of the loan having been cleared in full.

16. PW2 summarized their findings as follows:-

a. The amount of loan outstanding as of 9th September 1997 as Ksh.1,235,164/05. That according to their calculation the acceptable interest charged amounted to Ksh.242214/65. That the amount that ought to have been owed by that time should have been Ksh.1,477,378/70 less the amount of repayment of Ksh.1,579,803. The plaintiff's therefore had overpaid by Kshs.102,424/30.

b. The principal deposits of Ksh.165,986 should have earned interest of Kshs.122,495/43 for the period from 17th November 2001 to 31 January 2003.

c. The disputed charges for the same period from 22.10.1998 to 3rd May 2002 was Ksh.634,455/=. PW3 testified that in summary under (a) (b) and (c) above the plaintiff should have been paid Ksh.1,025,360/75 as of 31st January, 2006. PW2 testified that he prepared and signed the Report on 1st February 2006 in accordance with the accounting standards.

He produced the Report as P exhibit 11.

17. During cross-examination of PW2 by Mr. D.J. Mbaya, learned Advocate PW2 testified that he is not a registered Certified Accountant nor is he licensed to practice accounts but he can certify any account as an employee as he is allowed by the firm. That he signed for the firm on behalf of the holder of the licence. He stated the rate of interest is based on contract and that he did not look at the letter of offer and charge document which are relevant documents. He stated he applied a figure of 14 per cent on interest being bank base rate for Standard Chartered Bank in 1997. He stated that 14 per cent is also court rate. He stated that he is not aware of different clause and penalty of 36 per cent. He stated according to Bank statement the plaintiff made last payment on 3rd May 2002 of Ksh.75,000/= and the loan balance after payment was Ksh.90,336/=. He said that the statement he was referring to was not the loan statement in respect of counsel question. He stated the actual position is that the plaintiff made last repayment to the loan on 8th August 2001 of Ksh.787,500/= and 2nd last payment was made on 5th August, 2001 of Kshs.262,500. He stated he was not aware whether the amounts were paid by the auctioneers or purchase of the property nor was he aware Ksh.165,000/= was money refunded to the plaintiff by the bank after realizing the security. He stated that in the preparation of his report he relied on documents given to him by the plaintiff. He stated as per statement Ksh.130,000/= was deposited into the plaintiff's loan account on 19.9.1999 and as of 26.7.2001 the amount owing to the to the bank was Ksh.749,498/= which amount was disputed. He stated he did not mislead his clients or cheat on the rate of interest.

18. On being cross-examined by Mr. Rimita Learned Advocate for the 2nd defendant, PW2 testified that the deposits as of 1.8.2001 and 8.8.2001 said to have been deposited by the bank were amongst the figures he used in his calculations. He corrected his position immediately and stated in his calculation on repayments he did not include deposits of 1.8.2001 and 8.8.2001. According to appendix 1 he testified that he referred to the period running from 31st December 1997 to 19th September 2001.

19. PW3, Harrison Musumia, Land Registrar, Imenti North, Imenti Central, Imenti South and Buuri sub-county testified that he deals with land registration, issuance of titles, certificate of leases and various land registration documents, that he hears and determines boundary disputes, objections to removal of cautions and attends members of public and advise them on land issues. He stated that he had record of parcel No. Ntima/Igoki/3091 which he stated is a resultant of subdivision of the original parcel No. Ntima/Igoki/578. That its size is 0.405 hectares on sheet map No. 4 and 8. That subdivision was done on 11.6.1976 and registered to Iringo Tharusha on 18.6.1976. It was transferred to M/s. Judith Njue and title issued on the same day. Entry No. 1 of 11.6.1976, subdivision by Iringo Tharusha. Entry No. 2 on 18.6.1976 transfer to Judith Njue, No. 3 18.6.1976 land certificate issue, Entry No. 4 of 9.7.1976 an agreement in terms of Section 70 of the Registered Land Act (Repealed) on count of charge to secure amount of Ksh.60,000/= in favour of Standard Chartered Bank. Entry No. 5 of 5.11.1976 an agreement in terms of Section 70 of the Registered of Land Act (Repealed). Entry No. 6 of 30.8.1984 an agreement in terms of Section 70 of the Registered Land Act (Cap 300). Entry No. 7 of 29.6.1978 compulsory acquisition by Government of Kenya 0.45 hectares vide gazetted Notice No. 1740 of 23.6.1978, Entry No.8 of 30.6.1987 charge No. 11 an agreement in terms of Section 70 of Cap 300, Entry No. 9 of 14.12.1990 charge, which information PW3 testified is contained in part "B" of the proprietorship, on part "C" on encumbrances Section the entry he stated were as follows:-

Entry No. 1 of 9.7.1976 charge for Ksh.60,000/= in favour of Standard Chartered Bank

Entry No. 2 charge

Entry No. 3 reserves right to tap and consolidation further advances.

Entry No. 4 of 5.1.1976 discharge of charge entry No. 1 and 3.

Entry No. 5 of 5.11.1976 charge to secure Ksh.80,000/=

Entry No. 6 charge in favour of Standard Chartered Bank.

Entry No. 7 of 5.11.1976 charge.

Entry No. 8 of 27.8.1981 discharge of charge of entry No. 6-8.

Entry No. 9 of 30.8.1984 charge to secure loan of Ksh.200,000/=.

Entry No. 10 of 30.8.1984 charge.

Entry No. 11 of 30.6.1987 charge.

Entry No. 12 of 30.6.1987 charge.

Entry No. 13 of 14.12.1990 further charge for Ksh.725,000/=

He testified that on entry No. 10 of part "B" on proprietorship that on 21.8.2001 the parcel was registered to Pride of Meru Hotel Limited of P.O. Box 155. Meru, for a consideration of Ksh.1,050,000/= and title deed as per entry No. 11 issued on 21.8.2001, thus Entry No. 12 of 22.8.2001. PW3 testified an inhibition was entered prohibiting dealings with the said parcel till Civil Case No. 151/2001 at Meru High Court is heard and finalized. That Entry No. 13 of 1.12.2009 is a caution by Judith Mukwanjeru claiming licences interest, Entry No. 14 of 1.9.2011 is a restriction that the property should not be registered

without the consent of the Chief Registrar vide his letter Ref. MRU/A23/Vol/VI/35 of 8th August 2011. He stated he does not know why entry No. 7 was registered after No. 6 which is dealing with compulsory acquisition as once land is compulsorily acquired it reverts to the government. He produced copy of Kenya Gazette as P exhibit 16 being Gazette Notice No. 1740 of 23.6.1978. He testified in spite of that, there continued to be further charges by the bank. PW3 testified he assumed the bank continued to hold the title. He testified that, showed that there was no due diligence on Lands Office as the government took out Ntima/Igoki/3091 and Proprietor of Land Parcel 3091 compensated. He testified he has leases showing the land after acquisition went to Meru County Council as lessor and Judith Mukwanjeru Njue became a lessee in respect of parcel Ntima/5395 of 0.0523 hectares and Ntima/Igoki/5396 of 0.047 hectares, Ntima/Igoki/5402 of 0.0355 hectares and Ntima/Igoki/5404 of 0.0474 hectares for a term of 99 years with effect from 1.6.1991.

20. PW3 testified that after compulsory acquisition of Ntima/Igoki/3091 by government as of 23.6.1978 there was no title that could be charged nor title that could be auctioned or transferred to any purchaser. He stated the purported charge and auction was due to lack of diligence on the part of the bank. He further testified a letter by the Standard Chartered Bank of Kenya Limited of 8.12.1990 to the chairman North Imenti Land Control Board, Kinoru that they had no objection to consent being granted as applied for, showed there was no due diligence on the part of the Bank as there was no title under Ntima/Igoki/3091 to which consent could be sought and be granted for facilitating to secure a loan. PW3 produced the letter as P. Exhibit 17. He testified after auction that there was no title that could be registered in form of M/s. Pride Meru Hotel Ltd. PW3 produced green card as P exhibit 18 in respect of land parcel Ntima/Igoki/3091, Ntima Igoki/5402 P exhibit 19, Ntima/Igoki/5404 P exhibit 20, Ntima/Igoki/5395 P exhibit 2 Ntima/Igoki/5396 P exhibit 22.

21. During cross-examination of PW3 by M/s Nelima, learned Advocate for the 1st defendant, PW3 testified that Ntima/Igoki/3091 was compulsory acquired on 29.6.1978 and as such it ceased to exist and converted to a lease hold with effect from 1.6.1991. He stated the bank did not act diligently by failing to carry out search. On certificate of search over Ntima/Igoki/3091 dated 30.8.1984 he stated it is showing proprietor as Judith Njue and encumbrance under entry No. 9, a charge in favour of the Standard Chartered Bank of Kenya Ltd. He admitted the document was from their office but it did not show the property had been compulsorily been acquired. He stated he did not stand to say there was no due diligence. On cross-examination of PW3 by Mr. Rimita, learned Advocate, for the 2nd defendant, PW3, testified that green card of Ntima/Igoki/3091 was not professionally handled, on entry No. 7 he testified it was registered on 23.6.1975 as per Kenya Gazette No. 1740 which was an intention to acquire the land. He stated entry No. 7 is wrong and should not have been entered. He stated charges were registered despite entry No. 7. That the land was sold and Meru Hotels issued with title. That inhibition was entered and thereafter Restriction by Chief Registrar entered. On re-examination of PW3 by M/s. Kiome, Learned Advocate, he testified that leases to the plaintiff were allocated on 1.6.1991 and the ownership started on 1.6.1991 and that the notice of acquisition of Ntima/Igoki/3091 was actualized.

22. DW1, Mohammed Igbal Karimi, the 2nd defendant, the Director of Pride of Meru Hotels Ltd, testified that on 25.7.2011 he saw Dolphin Auctioneers going round Meru Town advertising the sale of a property. He picked one of the papers. He produced copy of the advertisement as exhibit D.I. He got interested in the property, and upon discussion with his Co-directors they agreed to purchase the property. That on 26.7.2001 his partners attended the auction and at 1.30 p.m. his partners went to the office with the auctioneer. He was told they bid at 1,050,000/= and they paid 25% being Ksh.262,500/= by issuing a cheque in favour of the Standard Chartered Bank. That on 30.7.2001 they executed an agreement with the auctioneers and paid the balance of Kshs.785,000/= all in all being Ksh.1,050,000/=. Consent of the Land Control Board was subsequently obtained and the transfers was effected into the defendant's name. That title deed was issued. DW1 produced copy of the title deed in respect Ntima/Igoki/3091 as defence exhibit D2. That after getting the title they were served with Court's order dated 22.8.2001 restraining them from disposing the suit property. That they filed their defence and counterclaim over Ntima/Igoki/3091. He prayed that the plaintiff's claim be dismissed and their counterclaim be allowed with costs. During cross-examination of DW1 by M/s. Kiome, learned plaintiff's counsel, DW1 testified that he noted the condition of sale No. 5 and that he did check the details of the encumbrances before he bought the property. He also stated he did not check on 6 of the

condition of sale regarding the reserve price nor did they enquire on the same. He stated Pride Meru Hotels Ltd, is a limited liability company and that they made a resolution to purchase the property. He admitted that he did not produce the resolution to purchase the property to the court and that the other directors allowed them to purchase the property below the reserved price. He stated they did not utilize the property after purchase nor had they proceeded to the ground. He admitted that they did not do any due diligence in respect of the property before the purchase. On cross-examination by M/s. Nelima for the 2nd defendant, DW1 stated he could see the accused plaint dated 22.8.2001 that the property was sold by public auction. He stated that he did not attend the auction. On being re-examined by Mr. Rimita, learned Advocate, DW1 testified that his co-directors attended auction after they had agreed to purchase the property and returned to inform him they succeeded in the auction.

23. DW2, Boniface Machuki, an employee of the 1st defendant, a recovery Manager, testified that he knows the plaintiff as a guarantor to Sawa Sawa Academy and that the 2nd defendant bought a property in a public auction from the Bank. That the plaintiff had sued the 1st defendant for selling two of her properties being plot Nos.3091 and 3421 which plaintiff had offered to the 1st defendant as securities for facilitating the amounts that was taken by M/s. Sawa Sawa Academy in 1984 and 1990. That the properties were charged. DW2 referred to charge dated 8.6.1987 in respect of Ntima/Igoki/3091 for Ksh.200,000/= and search of 30.6.1987, charge of 19.3.1987 in respect of Ntima/Igoki/3421 for KSh50,000 and search of 5.9.1987 which showed the owner of property was Judith M. Njue. He further stated that he had a charge dated 8.8.1984 in respect of Ntima/Igoki/3091 for Ksh.200,000, a further charge dated 8.12.1990 in respect Ntima/Igoki/3091 for Ksh.725,000/-. He produced the documents as exhibits, charge dated 8.6.1987 defence exhibit D 3(a), search dated 30.6.1987 as defence exhibit D 4 (a), search dated 15.4.1987 defence exhibit D 4 (b), charge dated 8.8.1984 defence exhibit D 5 (a), charge dated 8th December 1990 defence exhibit D 6. He testified that the plaintiff started defaulting in payments and several demands were made. The first was through a letter dated 11.6.1992 to the directors of Sawa Sawa Academy.

24. DW2, testified that the Bank issued Statutory Notice through its lawyers dated 2.4.1996 which was received by Judith Njue and she signed at the back of the notice. He sought to produce a photocopy of the letter marked as MFI-7 urging there is a writing at the back of the letter promising to clear the loan. He stated that there is a further letter dated 21.11.1995 from the advocates M/s Mbae & Mwararia Advocates addressed to Judith M. Njue, Victor W. Njue, and Allan Nyaga Kamotho demanding payment of Ksh.1,032,621/01 within 14 days. Letter produced as defence exhibit D8. Then plaintiff did a letter to manager, Mr. Molonza promising to pay. letter produced as defence exhibit D9. That prior to that there was a letter dated 23.11.1995 signed by the plaintiff making promise to settle the balance. Letter produced as defence exhibit D 10. That on 3.5.1997 the plaintiff also wrote letters to the bank under letter head of Sawa Sawa Academy attaching copy of sale Agreement of one of her properties. She also wrote a letter dated 22.10.1996 requesting for more time to pay. Letter produced as defence exhibit 11. That the plaintiff made some payments but it was not enough to relief the account. That the bank proceeded thereafter and issued notification of sale through Dolphin Auctioneers. The notification showed sum owed as Ksh.1,500,02/90. That the same was send as per affidavit of service dated 1.2.1999. Document produced as defence exhibit D 12. That the properties were advertised in the Daily Nation of 31.3.1999. Daily Nation marked as defence exhibit D 13. That the auction was not conducted. That one of the property was auctioned thus plot No. Ntima/Igoki/3421 for Ksh.200,000 but the bid for the other property was low. That further notification of sell was issued for Ntima/Igoki/3091 that notification of sale dated 10.7.2000 and 4.,8.2000 was issued to Judith M. Njue of Sawa Sawa Academy. There was advertisement in Daily Newspaper of 16.10.2000. He produced advertisement as defence exhibit D 14. He testified that the property was told to M/s. Pride of Meru Hotels Ltd at Ksh.1,050,000/=. He stated that they had a memorandum dated 30.7.2001, which he produced as defence exhibit D 15. He stated that before selling of the properties valuation was carried out. That in respect of L.R. Ntima/Igoki/3091 valuation was done by M/s. Coreria & Company and was valued at 2,100,000/= as force sale value, mean if ing it the property was to be sold adversely it would not go below Ksh.2,100,000/=. The market value of the property was Ksh.350,000/=. He stated the valuation is dated 23.9.1998. Valuation produced as defence exhibit D 16. That the other property Ntima/Igoki/342 1 its market value was given as Ksh.350,000/=. The force sale value was that 200,000. It was sold at Ksh.200,000/=. DW2 produced valuation report as defence exhibit D17. That after auction the 1st

defendant received a letter from M/s Sawa Sawa Academy requesting transfer of Ksh.165,000 from their loan A/C 011362415400 to Judith M. Njue saying account No.015016081100 both accounts held in 2nd defendant's bank. Letter produced as defence exhibit D 18. DW2 referred to an advertisement of 9.7.2001 in Daily Nation over Ntima/Igoki/3091 which he produced as defence exhibit D 19. He testified that before the property was sold the plaintiff was in default and had accrued in balance of Ksh.1,535,612/90. That in 2001 balance as of 13.6.2001 was Ksh.749,498/= and that is why the security was sold.

25. On cross-examination of DW2 by M/s. Kiome, learned Advocate, DW2 testified that he had been with Standard Chartered Bank for 3 months and when the matters relating to this case were happening he was not working with the bank and his evidence is based on documents that he found on record. That the plaintiff had taken an overdraft with limit of Ksh.900,000/= and the account was operated by Sawa Sawa Academy and signatures to the accounts were the directors. That when default accrued the sum owed was over Ksh.1 million, That the money withdrawn was over Ksh.900,000/=. That the bank allowed the account to be overdrawn over Ksh.900,000 but the DW2 did not have consent of the directors. That security for overdraft was charged for Ksh.900,000/=. On P. exhibit 18, green card under entry 9 of 30.5.1984 shows a charge of Ksh.200,000/= in respect of Ntima/Igoki/3091 and entry No. 11 of 30.6.1987 Ksh.200,000, entry No. 13 of 14.12.1990 shows a charge of 725,000/=. DW2 stated from the green card there is no entry for a charge of Ksh.900,000/=. DW2 testified that he had not been aware that Ntima/Igoki/3091 had been compulsorily been acquired when the bank charged the same. On entry No.7 in the green card of 29.6.1978 shows compulsorily acquisition of the property by Government of Kenya. He admitted that from his understanding that it is not possible to charge a property that has compulsorily been acquired by government stating in such a situation a charge has no legal force. He insisted the bank did due diligence. He admitted that bank did not get a copy of the green card or Abstract of the title saying he saw the green card in the court for the first time in respect of this matter. He stated that the sale was void, as the sale was over a non-existing property. He testified that the value of the land was Ksh.3,000,000/=, with sale value of Ksh.2,100,000/= but was sold at Ksh.1,050,000/= thus 50% of the minimum it would have fetched. He further stated the reserve price was Ksh.2,100,000/=. That there were conditions of sale with a reserve price. He stated when the property was sold the amount in default was KSh687,000/=. He testified that the other property had been sold earlier on. That the balance as of 13.6.2001 was Ksh.749,498/= and property was sold at Ksh.1,050,000/= leaving a balance of Ksh.165,986/= (cr). That a draft was issued for Ksh.75,000/= leaving a credit of Ksh.90,336/= to credit the account. He stated after the first sale the balance came to Ksh.1,305,719/90, that the cheque for Ksh.400,000/= was dishonoured and balance went to Ksh.1,040,710/90 which was reduced by cheque of Ksh.150,000/= to Ksh.890,710/90, the balance before forced sale. On cross-examination, of DW2 by Mr. Rimita Advocate, for the 2nd defendant, DW2 testified that the charge was signed by the customer and, was registered at the Land's Office. He stated the customer failed to pay the money advanced and was given notice of intention to sale the property. That after the sale of the property the money was released to the customer. He stated the property was sold by the auctioneer and was subsequently transferred. On re-examination by M/s. Nelima, learned Advocate, for the 1st defendant, DW2 testified that search was carried out before the charge and the bank was not aware of the encumbrances.

26. DW2, was recalled subsequently and testified, that he knew of the original Statutory Notice dated 2.4.1996 addressed to the Managing Director of Sawa Sawa Academy which was issued by M/s. Mbae Mwarania and Company & Advocates. He produced the same as defence exhibit D7. On cross-examination DW2 stated defence exhibit D7 was issued to the Managing Director of Sawa Sawa Academy and stated Managing Director was the plaintiff. He stated the letter was not addressed to Judith Njue. He stated there was nothing to show Judith Njue was the Managing Director. He stated on personal level there was no Statutory Notice to Judith Njue.

27. After close of the defence case plaintiff was given 14 days to put in written submissions and serve upon defendants who were given 14 days to file and serve their submission but before submissions could be put on record the trial court was transferred. The plaintiff's submissions were filed on 20th August 2015, the submissions by 1st defendant were filed on 17th February 2016 and that of the 2nd defendant on 30th September 2015. That the Deputy Registrar Meru Law Courts through a letter dated 19th February 2016 forwarded the court file to Siaya High Court, but I did not receive the same till I returned

from leave on 1st March 2016, hence the cause for delay in preparing the judgment since hearing was closed on 1.7.2015. My apologies to the parties though the delay could not solely be attributed to the court as such, as we all know our constitutions demand that justice be dispensed with without undue delay.

28. I have very carefully perused the evidence and reproduced the same as much as I could to make it easy for everyone to follow and understand the proceedings in this matter, I have carefully perused the pleadings, the respective rival submissions by the plaintiff and the defendants and from my understanding of the pleadings and the evidence by all parties a number of issues came out and doing the best I can, the issues for consideration can be summarized as follows:-

- a. Whether the 1st defendant's statutory right of sale had accrued to effect sale of the charged properties?*
- b. Whether the plaintiff was validly or sufficiently served with any statutory notice of sale by the 1st defendant before the sale?*
- c. Whether the plaintiff was validly or sufficiently served with notification of sale prior to the sale of the properties?*
- d. Whether the purported sale and subsequent transfer of land Ntima/Igoki/3091 and 3421 by the 1st defendant to the 2nd defendant and a third party respectively was legal and whether good title passed thereof?*
- e. Whether the plaintiff's property was sold by privately or public auction and whether the particulars of fraud were proved against the 1st and 2nd defendant?*
- f. What relief if any is the plaintiff, the 1st defendant and the 2nd defendant entitled to?*

29. The first issue for consideration is **whether the 1st defendant's statutory right of sale had accrued to effect sale of the charged properties?** The chargee's statutory right of sale accrues once the chargor defaults in payment of principal sums or any interest or any other periodical payments or any part thereof or in the performance or observance of any agreement expressed or implied in any charge and continues for more than one month, which obligates the chargee to serve the chargor notice in writing to pay the money owing or to perform and observe the agreement and only if the chargor does not comply within three months of the date of service, of the notice served under **S. 74 (1)** of the **Registered Land Act (Repealed)** the chargee therefore must serve statutory notice upon the chargor before he can validly proceed to exercise the statutory right of sale. Under **Section 90 (1) and 90 (2) (b) of the Land Act 2012** it is the duty of the chargee to issue and serve the Statutory Notice. The burden of proving issuance and service of the statutory notice always lies with the bank (**chargee**) and it is not of the chargor to prove that he or she was not served with the notice of sale. In the case of **Nyangilo Ochieng and Another V. Kenya Commercial Bank, Court of Appeal at Kisumu Civil Appeal No. 148 of 1995, (1996) eKLR** The Court of Appeal stated as follows:-

“It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”

30. Under **Section 90 (1) of the Land Act 2012**, the requirements for valid statutory notice are set out as follows:-

“If the 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 performance or observation of any covenant, express or implied, in any charge, and continues to be in default of one month, the chargee may serve the chargor a notice, in writing, to pay the money owing or to perform and observe the

agreement as the case may be.”

31. According to **Section 90 (2) of The Land Act 2012** the notice to be served is required to adequately advise the chargor of:-

- 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 (3) months, by the end of which the payment is default must have been completed.*
- c. (-----)*
- d. The consequence that 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.*

32. Further to the above under **section 90 (3) of the Land Act 2012** if the chargor does not comply within two (2) months after the date of service of the notices under **Section (1)**, the chargee may do the following.

- a. Sue the chargor for any money due under the charge,*
- b. appoint a receiver of the income of the charged land,*
- c. lease the charged land, or if the charge is of a lease, sublease the land*
- d. enter into possession of the charged land; or*
- e. Sell the charged land*

33. In the instant suit the plaintiff categorically denied having been served with any **Statutory Notice** by the 1st defendant. She stated at no time had the 1st defendant served her with any statutory notice before the sale but that she was only received demand notice from M/s. Mbae Mwarania & Co. Advocates dated 21.11.1995 which was addressed to three directors of Sawa Sawa Academy through P exhibit P5. That when plaintiff went to the 1st defendant's headquarters and confronted one Sam and sought why her property was being sold without her being served with Statutory Notice is when he called M/s Mbae Mwirania Advocates in her presence, and a letter was faxed on 15.4.1999. The letter was dated 21.11.1995 exhibit P.7. The plaintiff produced P exhibit 12 in which under paragraph 4 of affidavit of **Elias Muriithi Mungania, an Advocate of the High Court of Kenya dated 28.9.2001** under Paragraph 4 stated:-

“That I personally drafted the statutory notice which was specific to the plaintiff as a chargor to accompany the notice to the director's of the borrower institution since the statutory notice was to warn him of the consequences of failure to comply to urge her to liase with the other directors to repay the loan and I signed the notice myself which I would usually do in the absence to the late Mwarania”

The plaintiff produced P exhibit 13 a letter from Law Society of Kenya which stated:-

“Dear Sir

ELIAS MURITHI MUNGIIRA ADVOCATE (DECEASED)

Thank you for your letter dated 19th January 2006.

Mr. Elias Muriithi Mung'ira, advocate, (deceased) was admitted to the Roll of

Advocates on 7th March 1996.

Yours faithfully

G. MAINGI-KIMANI

AG. SECRETARY

It is further stated under paragraph 13 of P exhibit 12 as follows:-

“That the statutory notice to the applicant dated 21.11.1995 was in no uncertain terms that no reminders would be sent.”

The 1st defendant's witness DW2 did not in his evidence talk of any Statutory Notice dated 21.11.1995 but of 2.4.1996 which he produced as defence exhibit D7, the said notice was addressed to the Managing Director, Sawa Sawa Academy and signed by M/s. Mbae Mwarania & Co. Advocates. This is not the notice Mr. Elias Muriithi Mung'ira, Advocate, drafted and signed as it is dated 2nd April 1996 and not 21.11.1995. The 1st defendant did not adduce evidence to demonstrate that other than the Statutory Notice which Mr. Elias Muriithi Mung'ira deponed he issued dated 21.11.1995 any other Statutory Notice was issued. In the 1st defendant's amended defence dated 21.5.2003 under paragraph 3 the 1st defendant categorically pleaded that the Statutory Notice was issued on 21.11.1995. It follows therefore the only Statutory Notice issued was the one of 21.11.1995 which was signed by unqualified person. The 1st defendant did not produce the said Statutory Notice dated 21.11.1995 as exhibit but produced a different Statutory Notice dated 2.4.1996 which contradicts the affidavit of Elias Muriithi Mung'ira and their pleadings. The plaintiff in her evidence denied being served with statutory notice dated 21.11.1995 or any but stated that she only received demand letter dated 21.11.1995 addressed to the three directors of Sawa Sawa Academy. Plaintiff stated she saw a copy of the statutory notice for the first time at court when Hon. Late Justice Tuiyot, gave her a copy of the notice given by Elias Muriithi Mung'ira Advocate dated 21.11.1995. That notice has to date not been produced by the 1st defendant who instead, now relies on exhibit D7 dated 2.4.1996. There is no evidence of service of the notice dated 21.11.1995 or that of 2.4.1996 by way of affidavit of service or otherwise. The 1st defendant exhibit D 7 indicated there was “**personal service**” of the Statutory Notice and in spite of that the same was not personally served as there is no affidavit of service on record. The 1st defendant had the burden of proof that the plaintiff was personally or otherwise served with the statutory notice dated 21.11.1995 as pleaded or with any other but have failed to discharge that burden. I therefore find and hold that the plaintiff was not validly or sufficiently or at all served with any statutory notice of sale by the 1st defendant before the sale of her properties.

34. I would further proceed with the issue of **whether the 1st defendant statutory right of sale had accrued to effect sale of the charged properties?** The plaintiff in the amended plaint averred that between 8.4.1999 and 19.9.2000 the borrower had paid to the 1st defendant a total sum of Ksh.1,579,803 which amount was owing to and demanded by the 1st defendant as at 31.7.2001. The plaintiff further averred the 1st defendant's power of sale as a chargee had not accrued because the plaintiff's liability as a guarantor had, by the time of purported exercise of power of sale been fully discharged. The plaintiff in her evidence testified how she paid the sum due and owing to the 1st defendant through various payments upto 19.9.2000 when she stopped payments upon noticing the bank continued to make charges which she disputed. PW1 sought services of auditors to give her an audited report on the operations of her loan A/C No. 119B-624184-00 held at Standard Chartered Bank Kenya Ltd, Meru Branch. PW3 gave evidence and produced plaintiff's P exhibit 11. being Auditors Report. In his summary of Report he stated as follows:-

Kshs.

a. Amount of Loan outstanding at 09.09.1997	1,235,164.05
Add: Acceptable Interest accrued from 09.09.1997 – 30.04.1998 Appendix 1	<u>242,214.65</u>
	<u>1,477,378.70</u>
Less: Cash Repayments from 08.04.1999 - 19.09.2000 Appendix 1	1,579,803.00
Amount Refundable by the Bank	(102,424.30)

Kshs.

b. Amount of Principal Deposit at 17.11.2001 Appendix II	122,495.45
Amount Payable by the Bank	288,481.45
c. Disputed Charges claimable from the Bank (From 22.10.1998 – 03.05.2002)	634,455.00

According to PW2 the plaintiff had overpaid the 1st defendant the amount of loan by Ksh.102,424/30, paid disputed charges of Ksh.634,455 and her principal deposit of Kshs 165,986/= should have earned interest of Ksh.122,493/41 for the period way from 17th November 2001 to 31st January 2003. He stated the plaintiff should have been paid Ksh.1,025,360/75 as of 3rd January 2006. The plaintiff in her plaint did not raise the issue of the principal deposit nor call evidence on the same but dwelt on the loan account in which she claimed there were illegal charges and if it was not for them her loan account would not have reflected any outstanding amounts. The 1st defendant did not submit evidence or audited accounts to show how they had arrived at the amounts they claimed. The 1st defendant did not submit evidence on the amounts they were claiming nor did they controvert the evidence of PW1 on illegal charges and even unauthorised overdrafts to Sawa Sawa Academy in which the plaintiff was a guarantor. That PW2 Auditor's Report has not been challenged in anyway by the first defendant. DW2 other than producing several documents he did not respond to the issue of the plaintiff having cleared the loan and on overpayment a summarized by PW2. That DW2 stated that the plaintiff paid some amount that was not enough to relief her account. In view of the above then I find that the 1st defendant did not sufficiently rebutt the Auditors Report, Exhibit P. 11. The 1st Defendant should have filed an audited Report to show the amount of loan outstanding, accrued interest, cash repayment and respond on all disputed charges. I take the failure to respond, as an indication that the plaintiff's claim, that she had paid in excess of the sum due to the 1st defendant as unopposed and proved. The 1st defendant did not respond to show that notice on increment of interest or unagreed charges was done with approval of the plaintiff and was in accordance with loan agreement terms. The Bank cannot be allowed to charge interest or charges as it deems fit and without the that knowledge of the chargor, as such charges in my view are illegal and bank cannot be allowed to profit from an illegal charge. In view of the above I am satisfied that the plaintiff has proved that she had overpaid her loan by Ksh. 102,424/30 hence the 1st defendant's statutory right of sale had not accrued to effect a sale of the charged properties.

35. The second issue is **whether plaintiff was validly or sufficiently served with notification of sale**

prior to the sale of her properties? The document produced on notification of sale by the 1st defendant exhibit D 12 dated 2.2.1999 was served on 2.2.1999 upon the son of the plaintiff 43 days to the date of sale being on 16.4.1999 for both plots No. 3091 and 3421. There is an affidavit of service by auctioneers dated 1.2.1999, one day before service. In view of the date of commissioning before service the affidavit cannot be acceptable. There is a further notification of sale dated 10.7.2000 showing the date of auction as 26.7.2000. It is not clear how it was served as it is indicated **“Registered and normal.”** It was issued 16 days to the date of sale. That there is yet another notification of sale which was served on 7.8.2000 upon plaintiff's daughter. The auction was due on 18th October 2000. **Under Rule 15 of the Auctioneers Rules** the notification of sale must be served prior to the sell of immovable property. The chargor should be given 45 days upon which to redeem the property. It should be served upon the registered owner of the property or an adult member of his/her family residing or working with the proprietor and where upon service the person served refuses to sign the notification, the auctioneer has to sign a certificate to that effect.

35. In the instant case the public auction according to DW1, who did not attend the auction, but his co-directors, took place on 26th July 2001. The notification of sale allegedly served does not indicate as to when and to whom it was served. There is no evidence of any one having been served nor is there certificate from the auctioneer to the effect that the registered owner refused to sign the notification. The Auctioneer has not signed affidavit of service to that effect. The 1st defendant has failed to demonstrate compliance with **Rule 15 of the Auctioneers Rules**. The entire process in my view was flawed due to non-compliance with clearly spelt out procedures on service of notification of sale. It is all tainted with illegalities. It is unlawful and that failure goes to the root of the substance that violates the due process of administration of justice and find and hold that wrong doer should not be allowed to benefit from his own mistakes. I therefore find and hold that the plaintiff was not validly and/or sufficiently served with notification of sale prior to the sale of the properties in question.

36. Whether the purported sale and subsequent transfer of land Ntima/Igoki/3091 and 3421 by the first defendant to the 2nd defendant and third party respectively was legal and whether good title passed thereof? There is no dispute that the plaintiff charged her two properties with the 1st defendant to secure a loan. She was therefore a chargor and the 1st defendant a chargee. I have already found that the chargee failed to demonstrate that it served the chargor with statutory notice of sale and as such it could not exercise its power of sale or statutory right of sale and further that chargor had demonstrated that she had cleared the loan. PW3, the Land Registrar in his evidence, testified that on 18.6.1976 Land parcel Ntima/Igoki/3091 was registered in the name of Judith Njue, the plaintiff. He produced the green card as P exhibit 18 and testified that under Entry No. 7 of 29/6 1978 the land was compulsorily acquired by the Government of Kenya measuring 0.45 hectares vide Gazette Notice No. 1740 of 23.6.1978. That the 1st defendant caused the property to be charged thereafter. He further stated under entry No. 10 of 21.8.2001 the parcel was registered to M/s. Pride of Meru Hotels Ltd after the 1st defendant purportedly exercised its power of sale. That under entry No. 14 of 1.9.2011 a restriction was entered to the effect that no dealing should be registered without the consent of the Chief Land Registrar vide his letter Ref. MRU/A/23/Vol/V1/ 35 of 8th August 2011. That by virtue of entry No. 7 of compulsory acquisition, Land Ntima/Igoki/3091 reverted to Kenya Government with effect from 23.6.1978 (*see Kenya Gazette P. exhibit 16*). The subsequent registration of charges in favour of the 1st defendant were wrongful, unlawful and null and void after the acquisition of plot No. Ntima/Igoki/3091. The said land ceased to exist after its compulsory acquisition and subdivision creating new leases. There was no title that the 1st defendant could charge nor any of land that could be auctioned by the 1st defendant. That had the Land Registry been serious in their work they should not have misled the 1st defendant and the plaintiff to believe there was land that could be charge. The Lands Registry issued a false official certificate of search that Ntima/Igoki/3091 existed and could be charged in favour of the 1st defendant and auctioned. This is not only sad state of affairs but gross misrepresentation by Meru Lands Office to the 1st defendant and the plaintiff as well as the 2nd defendant, that there was a parcel of land existing known as Ntima/Igoki/3091 that could be charged and be purchased in a public auction. DW2 in his evidence and on being confronted with facts of the compulsory acquisition of Ntima/Igoki/3091 stated it was not possible to charge a compulsorily acquired property and in case of any purported charge he stated the same is of no legal consequence. He also agreed the sale was void as there was nothing that the bank could sell. In view of the above I find by virtue of compulsory acquisition of parcel Ntima/Igoki/3091 on

23/6/1976 and subsequent subdivision of the said title creating new leases the purported sale of Ntima/Igoki/3091 to the 2nd defendant was illegal and unlawful and the 1st defendant could not pass good title thereof for the reasons I have stated hereinabove.

37. As regards Ntima/Igoki/3421, the same was as I have found sold in exercise of power of sale and without notification of sale having been validly issued to the plaintiff. The valuation report P exhibit D 17 of 23.9.1998 show that the value of the property free from all encumbrances could fetch the sum of Ksh.350,000/= but the same was sold at a forced sale value of Ksh.200,000/=. The 1st defendant did not call evidence to demonstrate that the sale could not attract market value or sum above the reserve value. The chargee should have endeavoured to obtain the best price reasonably obtainable at the time of sale. The chargee should also have sought the chargor's valuers report. The proper however was transferred to a third party who was not joined in these proceedings and it would be against the constitutional provisions to deprive a third party of the property without being heard. That though the property was sold below the market price, in bad faith and at a gross undervalue the plaintiff's remedy I find is that of damages. The plaintiff sought damages in her plaint over the said property at Ksh.1,000,000/=. D 17 show that the property is a few metres from Madaraka-Gitoto Marram Road within Meru Town. Its value by 1998 was given at 350,000/=. It is now 17 years since the report was made. Its value today must have gone beyond a figure given by the valuer. I think the figure of Ksh.1,000,000 would be reasonable value for the plot today but it could even be more than the said figure.

38. Whether plaintiff's property was sold by private treaty or public auction and whether the particulars of fraud were proved against the 1st and 2nd defendants? The plaintiff, in her evidence stated on the date of auction, thus 26.7.2001, there was no public auction outside the KCB Meru as she went to the scene at 9.00 a.m. and stayed there upto 5 pm. She stated there was no sign of sale. She stated the 1st defendant colluded with the 2nd defendant to deprive her of her property by selling it by private treaty and undervaluing her property. That the 1st defendant new the reserve price and the property. PW1 testified she underwent a lot of stress as she was at one time to be evicted and her name as a professor was damaged. DW1 Mohammed Iqbal Karimi in his evidence, he stated he did not attend the auction but he stated that on 26.7.2001 at 1.30 p.m. the auctioneer and his co-director, went to where he was and told him they bid for 1,050,000/=. He did not state where the auction was or whether it was in public or by private treaty or that it was outside KCB building or where. The plaintiff was at KCB site where auction was supposed to take place all the day and did not witness any auctioneering of her property. The auctioneer and the bank did not give evidence to show that the auction was held outside the place advertised and not by private treaty. I am convinced from the evidence of the plaintiff. That the auction was not held in public place as advertised but it was a private treaty and this is why the auctioneer went with DW1's co-directors at the purchaser 's offices to discuss on the price. The purchaser herein are said to be a limited liability company, DW1 did not produce any minutes of directors resolutions to purchase the property. The property in absence of directors resolutions to purchase the property in an auction herein vitiates the entire process and as such no good title could pass to the 2nd defendant even if the sold property existed as at the time of the auction.

39. The Plaintiff pleaded fraud and gave particulars against the 1st and 2nd defendants in her plaint The plaintiff is not only bound to plead but proof the particulars of the fraud. PW1 testified that the 1st defendant without her express authority and knowledge allowed the Directors of Sawa Sawa Academy when she was away to exceed the overdraft limit by Ksh.500,000 thus, from Ksh.900,000/= to Ksh.1,300,000/= which DW2 admitted was done without PW1's authority and knowledge. That the 1st defendant sold PW1's properties without serving her with statutory notice of sale. The 1st defendant failed to demonstrate any service of statutory notice of sale to the plaintiff. PW1 adduced evidence showing that she was not served with any statutory notice of sale. The sale was before the statutory right of sale had accrued. Further defence exhibit D 16 and 17 confirm the plaintiff's properties were sold below the market value and even below the reserve price. The market value of Ntima/Igoki/3421 was 350,000/= but sold at Ksh.200,000/= whereas Ntima/Igoki/3091 was 3,000,000/= but sold at 1,050,000/= when the forced price was Ksh.200,000/= and 2,100,000 respectively. The 1st defendant sold charged properties despite the principal debt having been fully paid and liability to the the 1st defendant discharged. PW2 evidence clearly showed that PW1 had not only paid the principal sum with interest but had overpaid. That PW1's guaranteed Sawa Sawa Academy loaned sum by the time of sale had fully

been discharged, however the properties were sold through private treaty instead of public auction. The plaintiff further proved the properties had been sold in bad faith and without due regard to the plaintiff's interest.

40. As regard particulars attributed to the 2nd defendant, the plaintiff proved that on the material date of auction she was at the site of intended public auction from 9.00 a.m. to 5 p.m. and no public auction took place. DW1 did not mention of any public auction of but his co-director going to his office with the auctioneer where he was told they had a deal and a successful bidder. The sale of Ntima/Igoki/3091 was therefore by a private treaty instead of public auction and buying the property at a price far below forced price or reserve price which was clearly stated in terms and conditions of sale as 2,100,000/= was wrongful. PW1 testified that DW1 was her neighbour and knew about her property its market value yet he colluded to buy it below what he knew or ought to have known was so low to amount to fraud. In view of the evidence tendered before court and upon its evaluation I am satisfied that the plaintiff pleaded and proved the particulars of fraud against the 1st and 2nd defendants and by reasons whereof the plaintiff suffered loss and damage. The plaintiff lost value of her parcel No. Ntima/Igoki/3421 valued at Ksh. 1 million. As regards Ntima/Igoki/3091 and the same having been acquired by Government of Kenya as early as 23/6/1978 the plaintiff cannot claim damages as after acquisition and subdivision of the said land she was adequately compensated and even if the compensation was not adequate her claim for compensation cannot lie in this case.

41. What **relief if any is the plaintiff, the 1st defendant and the 2nd defendant entitled (if any) in this case?** The plaintiff in her amended plaint sought several orders, whereas the 1st defendant sought in his further amended defence and counterclaim several orders. I have dealt with all issues I found relevant in this matter and I now proceed to make my final orders as follows:-

a. I declare and hold that the 1st defendant is not and was not and has never been entitled to exercise the statutory power of sale in respect of the charged properties being land No. Ntima/Igoki/3091 and Ntima/Igoki/3421 at the purported time of exercising statutory power Sale.

b. That as regards Ntima/Igoki/3421 though sold below the market value and in bad faith and as the purchaser was not made a party in this case and cannot be condemned unheard, I would not interfere with the sale and transfer of the property to the third party and the only remedy the plaintiff is entitled to, is one of damages and I shall in lieu of ordering the re-transfer of the property back to the plaintiff, award the plaintiff damages assessment at Kshs.1,000,000/= in respect of the loss of the said property.

c. I declare that the purported sale and transfer of Land title No. Ntima/Igoki/3091 by the 1st defendant to the 2nd defendant null and void and of no legal effect as the land was compulsorily acquired by Kenya Government on 23.6.1978. and could not be charged or auctioned and title now held by the 2nd defendant be returned to Meru Land Registrar's Office for further and necessary action as the same is of no legal effect. The 2nd defendant's remedy (if any) shall be addressed with the 1st defendant in a different suit or forum.

d. I order that and direct the Land Registrar, Meru to forthwith remove and/or cancel the names of the 2nd defendant from the title Ntima/Igoki/3091 and register the same if it is still in existence in the name of the lawful/and/or legal owner thus the Government of Kenya or to whoever might have been allocated the same by the Government of Kenya immediately following its acquisition and any portion that may be in existence and has not been used for designated purpose for which the land was compulsorily acquired do revert back to the plaintiff as the original owner in default of execution of the necessary document the Registrar of this court to do so.

e. I order and declare that the plaintiff is entitled to the discharge of a charge over the Ntima/Igoki/3091 and that the 1st defendant do effect such discharge of the charge forthwith.

f. An order of permanent injunction do issue restraining the defendant jointly and severally from taking possession, evicting, or otherwise interfering with the plaintiff's possession of any such portion or any title arising out of subdivision of No. Ntima/Igoki/3091.

g. The plaintiff is awarded further damages for suffering and stress caused by the 1st defendant's unlawful acts assessed at Ksh.2,500,000/= against the 1st defendant.

h. The 1st defendant's defence is dismissed.

i. The 2nd defendant's defence and counterclaim under prayers 14(a), (b), (c), (d) and (e) is dismissed.

j. The plaintiff is awarded costs of the suit against the 1st defendant with interest from the time of filing suit in respect of prayer No. (b) above but the rest from the date of this judgment.

k. The 2nd defendant is awarded costs with interest against the 1st defendant.

DATED AND SIGNED THIS 26TH DAY OF JULY 2016

J.A. MAKAU

JUDGE

DELIVERED AT MERU THIS 27TH DAY OF JULY 2016

In the presence of:

..... for Plaintiff

..... for 1st Defendant

..... for 2nd Defendant

C.C.

.....

.....

By FRANCIS GIKONYO

JUDGE

JUDGE

On Behalf of:

J. A. MAKAU

JUDGE