



No. 10

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 23 OF 2012

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
ARTICLES 22(1), 23(3) 40 AND 57 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
THE INDIVIDUAL (SUPERVISORY JURISDICTION) PRACTICE AND PROCEDURE RULES,
2006 AND PART 5, RULE 19 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948,
INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 1966,
INTERNATIONAL CONVENTION ON ECONOMIC, CULTURAL AND SOCIAL RIGHTS
AMERICAN CHARTER ON HUMAN RIGHTS, AFRICAN (BANJUL) CHARTER ON HUMAN
RIGHTS.**

AND

**IN THE MATTER OF: THE SALIENT PRINCIPLES OF FAIRNESS, REASONABLENESS
AND LEGITIMATE EXPECTATION**

BETWEEN

LEONARD JEFWA KALAMA.....1ST PETITIONER

SOPHIE KALAMA.....2ND PETITIONER

AND

CONSOLIDATED BANK OF KENYA.....1ST RESPONDENT

REGISTRAR OF LANDS.....2ND RESPONDENT

JUDGMENT

0. The Petitioners, respectively husband and wife, filed this petition dated 30th March 2012 suing in addition to the Land Registrar and the Attorney General who were the 2nd and 3rd respondents (the suit against the latter being subsequently withdrawn), a commercial bank, the 1st respondent, from which the 1st Petitioner, with the consent of the 2nd petitioner, had obtained a loan and executed a charge over his parcel of land and, as an Interested Party, the purchaser of the charged property upon public auction by the said bank in purported exercise of its power of sale.
0. The Petitioners contend that the creation of a new title to the land upon the transfer of the suit property to the Interested Party was an unconstitutional infringement of the petitioners' right to own property under Article 40 of the Constitution and sought relief as follows:
 - a. ***A Declaration that portion Number GEDE/DABASO/536 is therefore the property of the petitioners and the acts of the Respondents of creating absolute freehold interest or any form of alienation whatsoever was unconstitutional null and void ab initio and nullities in law.***
 - b. ***General Damages***
 - c. ***Any other form of redress that the court may deem just to grant***
 - d. ***Cost of the suit.***
0. The Petitioner's case is summarised in the Petition at paragraphs 6-13 as follows:
 6. *The 1st Petitioner was on the 10th day of July 1995 registered as absolute proprietor of ALL that parcel of land known as portion number GEDE/DABASO/536 containing by measurement 1.5 Hectares or thereabouts situate within Malindi Municipality.*
 7. *The 1st Petitioner and with the blessing of the 2nd Petitioner executed a charge with the 1st Respondent in the sum of Kshs.750,000/= dated 21st June 1996 and surrendered title to land to the 1st Respondent.*
 8. *The Petitioners, despite their servicing of the loan facility, were informed that the collateral deposited with the 1st Respondent had been disposed of by public auction for failure to offset the outstanding monies agreed mutually as Kshs.3,000,000/=.*
 9. *Your Petitioner was in the process of sourcing for funds to liquidate the loan with view to protecting the family home, property and the identified grave yard for his kindred having buried his mother and step mother thereon.*
 10. *The Petitioners who are enjoying their pent years upon superannuation have known the said land as home and their final resting home/place with his family.*
 11. *It is the Petitioners contention that*
 - a. *The Respondent's statutory power of sale, if at all, has [not] arisen, such adequate and proper notice ought to have issued.*
 - b. *Their right of redemption had not been extinguished.*
 - c. *The said sale was not in accordance with the law, practice and procedure hence a nullity.*
 - d. *Section 77 (1) of the Registered Land Act, Cap 300 of the Laws of Kenya has been flouted by the 1st Respondent.*
 - e. *The 1st and 2nd Respondent to this Petition are in breach of the provisions of article 40 and 57 of the Constitution of Kenya.*
 12. *In further blatant aggravation of the Petitioner's Constitutional Rights, the 1st and 2nd Respondent did alienate the aforementioned title unlawfully in favour of the Interested Party.*
 13. *This was done clandestinely and presumably over a short duration time without the Petitioner's knowledge, consent, connivance and/or acquiescence.*
0. On 17th April 2012, the said Interested Party filed a suit in the High Court at Malindi, HCCC No.

- 55 of 2012, asserting its right as a purchaser and registered proprietor of the suit property upon the public auction held by the bank on 15th July 2011 and therefore sought vacant possession of the land from the defendant (the 1st petitioner herein). This suit was, by consent of the parties, stayed pending the hearing and determination of the Petition herein.
0. The interested Party's case is that he is a bona fide purchaser for value of the suit property at a public auction held on 15th July 2011 following due advertisement of the sale. In a Replying Affidavit sworn on 5th June 2012, one Tushar Shah, an authorized director of the Interested Party stated that information about the sale of the Charged Property was received from the advertisement for sale by public auction published on 16th May 2011 in the Star Newspaper. Knowing the registered owner, the 1st petitioner, through a previous purchase of the neighbouring plot from him, the said Mr. Shah unsuccessfully sought to buy the plot from the 1st petitioner to avoid the public auction. The said director said that the particular auction which had been scheduled for 31st May 2011 was said to have received very low bids, prompting a re-advertisement and subsequent auction on 15th July 2011 wherein the Interested Party placed a successful bid of Kshs.5.5Million. The Interested Party then complied with the conditions of the auction as to payment of the purchase price and it was subsequently registered the proprietor of the suit property.
 0. The 1st respondent's case is that it acted properly and within the law in exercising its power of sale of the security under the Charge following default in repayment of the loan advanced to the 1st petitioner. Mr. Julius Gikonyo, a Remedial Officer at the Bank swore on its behalf the Replying Affidavit of 30th August 2012, where the bank clarified that on 21st June 1996, the 1st petitioner had been advanced a facility of Kshs.1.5Million from the Bank, secured by a legal charge over the Charged Property. The charge, it was said, was a continuing security for advances made to the 1st petitioner by the Bank from time to time, together with interest, costs, charges and expenses. The 1st petitioner was in default as at 9th March 2004 with an outstanding balance of Kshs.6,760,240 and a three month statutory notice was issued to him. Thereafter, in accordance with the Auctioneers Rules 1997, a firm of Auctioneers conducted the sale after issuing the 45-day Redemption Notice on the 7th March 2011 and advertising the property for sale on the 11th July 2011. According to a memorandum of sale by the auctioneer attached to the replying affidavit, the property was eventually sold on the 15th July 2011 to the Interested Party as the highest bidder at Ks.5.5Million.
 0. The 2nd Respondent did not file any replying affidavits but the State Counsel made submissions in opposition to the Petition as shown below.
 0. Counsel for the parties filed written submissions which, with exception of the 1st respondent although duly served, they highlighted on 20th November 2013 and judgment was reserved. The counsel for the parties present - Mr. Gathuku for Dr. Khaminwa for the Petitioner, Miss Lutta for 2nd and 3rd Respondents and Miss Muyaa for Mr. Ole Kina for the interested party - made supplementary oral submissions and judgment was reserved [M/s Muturi Gakuo & Kibara for the 1st Respondent filed written submission but did not attend the court to make oral argument]. The submissions were as follows:

“Mr. Gathuku for Dr. Khaminwa for petitioners

The parties have filed their submissions save for the 2nd and 3rd respondents. Dr. Khaminwa has instructed me that he does not wish to make any oral argument in addition to the written submissions. I rely on the written submissions entirely.

Ms. Muyaa for Mr. Ole Kina for the Interested Party

I refer to the affidavit of service indicating service on the 1st Respondent.

In highlighting the submissions of the Interested Party, there is an admission that there was a charge and a default. There was consent to charge by the 2nd petitioner who is the

1st petitioner's wife. From the documents before the court, there is evidence that the petitioners were aware of the power of the chargee to sell. The property was sold by public auction. The interested party purchased the property by public auction. The 1st Respondent was the Petitioner's employer. The petitioners knew the purchaser because the property was adjacent to another property that the petitioners had sold to the Interested Party. The Interested Party paid the deposit at the fall of the hammer and the balance of the purchase price whereupon the property was registered in the name of the Interested Party. The declaration of the Interested Party as the highest bidder at the fall of the hammer. The interested party complied with all the requirements. When is the equity of redemption deemed to have been extinguished? It is at the fall of the hammer.

The allegation that the property is matrimonial property. The moment the property is charged it ceases to become a matrimonial property. It is also an afterthought pleaded way after the sale. I refer to **HCC no. 385 of 2011 Wafabwa v. HFCK**. Action failed because the right of redemption was extinguished at the auction sale.

There is no suggestion that the exercise of the power of sale was flawed in any way or that it was conducted negligently or fraudulently. The charge or its validity is not challenged. There is no allegation of infringement of Registered Land Act which is still applicable. The remedy is in damages against the auctioneer who sold the property. There is no evidence that there were negotiations between the petitioner and the 1st respondent. If there was correspondence it means that the petitioners were aware that the Bank could sell the property. The sale was on a valid default. The Court of Appeal in **Jacob Ochieng v. HFCK No. 453 of 2001**. If there was irregularity in the conduct of auction the petitioner could recover damages from the auctioneer. The authorities by the petitioners **Msa. Pet. No, 107 of 2011 Nderu v. British American Insurance**. Courts should be wary of use of the constitutional applications to litigate normal disputes. Where private law offers sufficient redress the parties should use civil law not constitutional law. There is no constitutional matter before the court. I pray that the Petition be dismissed with costs. The Registered Land Act is not unconstitutional.

Ms. Lutta for the 2nd Respondent

I support the submissions of the Interested Party. The matter before the court is governed by contract between the parties. The 1st Respondent and the Petitioners entered into a contract knowing the consequences of default. The role of the 2nd respondent is merely procedural as it was her duty to effect the changes on the records in the lands registry upon presentation of the documents by the parties. The suit against the 2nd and 3rd Respondents should be dismissed with costs.

Mr. Gathuku in reply

I am able to respond to the submissions by the counsel for the respondents. The Petitioners in addition to the submissions rely on the grounds of the Petition, affidavits of the petitioners respectively sworn on 30th March 2012 as well as the replying affidavit of the interested Party sworn on the 5th June 2012.

The genesis of the Petition is that the 1st petitioner was a long standing employee of the 1st respondent. The petitioner got a loan from the 1st respondent with which he purchased the suit property. The petitioner continued to repay the loan. At one point, the 1st respondent made a demand for payment Annexure PES7 to the affidavit of the Interested Party's affidavit.

Jurisdiction of the Court. The petitioner states that his fundamental rights and freedoms

have been breached. I refer to **Rosa A. Munyoki & 17 Ors. V. Investment & Mortgages Bank & Anor. (2006) eKLR at p.8** private entities are subject to constitutional provisions on fundamental rights. The decision was applied in **Mombasa Petition No. 107 of 2011 Nderu v. British American Insurance Ltd.** Fundamental rights binds all persons and state organs.

The petitioner's claim is that his rights have been infringed by the 1st respondent and the interested party when they colluded fraudulently to deprive him of his property through a public auction.

The 1st respondent owed the petitioner a duty of care. I refer to the House of Lord's decision (1997) 3WLR 99. Implied obligation to employers not to conduct dishonest business. The details of the fraud are found at p.5 of the submissions and paragraph 11 of the Petition.

Whether the property was matrimonial property is dealt with at p.9 of the submissions. The question of the Interested Party's title is set out at p.10 of the submissions. The 1st petitioner's case is properly before the court, which may make orders whether they are popular or not. The Attorney general has not filed any replying affidavit in opposition to the application. That is all."

0. Briefly, by his written submissions the 1st petitioner urged five grounds as follows. First, it was argued that the 1st Respondent and the Interested Parties being bodies corporate, were capable of being found to have committed breaches to the fundamental rights and freedoms of the Petitioners. This argument was made in anticipation of a defence by the Respondents and Interested Party. Secondly, the 1st petitioner's right under Article 40 (1) of the Constitution was cited as having been breached by the Respondents. It was submitted that the 1st respondent owed a duty to the 1st petitioner first as a customer and as an employee. The 1st petitioner in pre-emption also submitted that Article 27 of the Constitution could not protect the 1st respondent and the Interested Party since their actions had been fraudulent. Third, suspicion was cast in the conduct of the Interested Party, leading up to a bid that was coincidentally the exact figure as the forced sale value. The sale was further said to have been illegal as it was based on the alleged debt of Kshs.12,851,484.35 which sum was denied. The court was urged to refer to the Guideline on Licensing of New Institutions/CBK Regulations 3.3 (b) and 3.6 (a) as per Section 33 (4) of the Banking Act which provides that, "All interest on non-performing loans and advances will be suspended in accordance with the criteria set out in this guideline and should not be treated as income. Interest in suspense shall be taken into account in the computation of provisions for non-performing accounts." The court was urged to find that as the auction was based on an illegality, the same ought to be declared null and void. The cases of **Shaw vs Shaw (1965) 1 All ER 638** and **Bank of India vs. Mayu Madhvani, HCCC No. 544 of 1989 (UR)** were cited on the proposition that the illegality of a transaction rendered any claim made on it null and void. Of further contention was the value obtained in the sale vis a vis the amount alleged to be owing. The case of **Kenya Commercial Bank Ltd vs. James Osebe (1982) 1 KAR 48** was cited on the proposition that the 1st respondent owed a duty of care to the 1st petitioner to obtain the best possible price to reduce the balance owing. Fifthly, it was submitted that the suit property had been intended to be the Petitioners' matrimonial home, adding that per **M'Mukanya vs. M'Mbijiwe (1984) KLR 761**, possession need not be physical. Lastly, the court was urged that under Article 68 (c) (v) of the Constitution, it had authority to investigate and query the mode and acquisition of the Interested Party's title to the Charged Property, and if found to have been obtained illegally, to declare it null and void.
0. The 2nd petitioner's submissions were that as the 1st petitioner's wife, she had an overriding interest under Section 28 (a) of the Land Registration Act 2012 as the Charged Property was matrimonial property. This right, she submitted, emanated from the fact that the property was acquired during the course of her marriage and her interest is protected under Article 68 (c) (iii) and (iv) of the Constitution. The court was urged to disregard the fact that the property was solely

- registered in the name of the 1st respondent but rather to look at the spirit and intention of the framers, noting that under Section 79 (3) of the Land Act 2012, this interest was given such prominence as to require that a spouse give her written consent before a matrimonial home can be charged. The 2nd Petitioner claiming locus as the spouse, also submitted [she did not file any affidavit save for the 4-paragraph verifying affidavit averring to the truth of the facts set out in the petition] that she utilized the Charged Property. The court was asked to consider the case of *Njuguna vs. Njuguna (1982) LLR 823* where it was held that if a wife contributes to the development of property which is registered in her husband's name, she acquires an interest in the property. She urged the court to find that her Constitutional Rights had been infringed in the auction sale and transfer of the property and urged the court to declare it null and void, and order a correction of the Register accordingly.
0. The 1st respondent submitted that no allegations had been made by the Petitioners touching on any fraud, illegality or mistake attributable to the Respondent. The allegation regarding revised terms of the loan, it was submitted, were unsubstantiated and an afterthought. The court was urged to uphold the doctrine of freedom to contract, in view of the Letter of Offer and Charge to which the 1st petitioner had voluntarily made himself a party. The case of *National Bank of Kenya Limited vs. Pipeplastic Samkolit (K) Ltd & Anor (2001) KLR 112* was cited where the Court of Appeal cautions that parties are bound by the terms of their contract and a court of law cannot re-write a contract unless coercion, fraud and undue influence are pleaded and proved. The Bank maintained that it had followed due process and procedure in the statutory sale. It was argued that the 1st petitioner lost his equity of redemption as soon as the Charged Property was sold by public auction, as also held in the cases of *Shadrack Chepkwony vs AFC, Nakuru HCCC 1998 of 1992* and *Solid Hold Limited vs. Trans National Bank, HCCC 149 of 2004*. The Court of Appeal authorities in *Savings and Loan Kenya Limited vs Mayfair Holdings Limited (2012) eKLR* and *Mbuthia vs. Jimba Credit Finance Corporation & Anor, Civil Appeal No. 111 of 1986* where it was held that the equity of redemption was lost at the fall of the hammer at auction sale were also cited. Lastly, it was submitted that the 1st petitioner having admitted his indebtedness, and thereafter failing to challenge the legality of the power or process of sale, the 1st petitioner now sought the court to shield him from compliance with his contractual obligation.
 0. The Interested Party's submissions reiterated the facts of the case noting that the evidence of meetings between the Interested Party's Director and the 1st petitioner and his brother discussing the impending sale by auction had been uncontroverted. It was also noted that the allegations of fraud had not been proved to the standard of *Central Bank Limited vs. Trust Bank Limited and Others (1995 – 1998) 2 EA 57 (CAK)* which is much higher than in an ordinary civil case. The court was urged to find that the Respondents and Interested Party had followed the law as laid down in the Registered Land Act, and that this act was not unconstitutional, nor were any of the actions leading up to the sale of the charged Property.
 0. Taking into account the pleadings and affidavits in this petition and the respective written and oral submissions of the counsel for the parties, I consider that the issues for determination by the court are as follows:
 - a. Whether the exercise by the 1st respondent of the chargee's power of sale was lawful;
 - b. Whether the 1st petitioner/chargor's fundamental right to property was violated; and
 - c. Whether the petitioners are entitled to the relief sought.

Whether the exercise by the 1st respondent of the chargee's power of sale was lawful;

0. In determining whether the chargee's power of sale was lawfully exercised in the circumstances of this case, the court must consider the questions: whether the right to exercise the power of sale had arisen including whether the statutory notice had been given to the petitioner; whether the sale was conducted in accordance with the Auctioneers' Act 1997; and whether the petitioner/chargor's equity of redemption was extinguished.
0. Default on loan repayment: The petitioner admitted the default in loan repayment in his affidavit in support of the chamber summons application 30th March 2012 and filed in the Petition at paragraphs 3 – 8 as follows:

3. *That I charged the [suit] property with the 1st Respondent on the 21st day of June 1996 (shown and marked LJK 2 is evidence of the same).*
 4. *THAT I did the same with the blessing of my family members in furtherance of our interests.*
 5. *THAT as at that period I was in the employment of the 1st Respondent and was duly servicing the loan.*
 6. *THAT there have been and were deliberations as to rescheduling the terms of the facility between the 1st Respondent and myself.*
 7. *THAT I was under the honest impression that I shall be allowed to liquidate the sum due and owing having agreed at Kshs.3,000,000/-.*
 8. *THAT I have since been in the process of sourcing for funds in a bid to clear the outstanding monies with the 1st Respondent.”*
0. Statutory Notices: The petitioner did not contest that statutory notices were given upon default of repayment of the loan and the Redemption Notices (notification of sale) and advertisement of the public auction as set out in the replying affidavits filed for the 1st Respondent and the Interested Party. Neither was there any denial of the meetings between the director of the Interested Party with the 1st petitioner and his brother regarding the former’s offer to buy the property and avoid the scheduled public auction. No leave was sought to file a further affidavit to respond to the defence that the statutory notices had been served on the 1st petitioner. Indeed, in his written submissions, the 1st petitioner does not query the giving of statutory notice but only raises an alleged illegality with respect to contravention of Central Bank Guidelines on classification of the loan as a bad loan. It was submitted:

“The 1st Respondent vide a letter dated 9th March 2004 from Riunga Raiji & Co. Advocates (annexture JG3 of the affidavit of the 1st Respondent) the 1st Respondent demanded from the 1st petitioner the sum of Ksh.6,760,240.30. The 1st Respondent despite its threat to commence recovery proceeding in default of payment of monies demanded took no action and again issued another demand dated 21st October 2010 where the amount demanded was Ksh.12,851,484.35 (annexture PEX-6 of the affidavit of the Interested Party). It is on the strength of that demand that the 1st Respondent saw the need to exercise its statutory power of sale against the 1st petitioner. The 1st petitioner submits that the 1st Respondent’s actions were illegal for the amount claimed by the 1st Respondent was in contravention of Regulation 3.6 (a) for the 1st petitioner’s loan, as exhibited by the demand letter of 1st December 2004 was already classified as a bad loan under the provisions of Regulation 3.3 (b) of the Guidelines On Licensing of New Institutions Cbk/pg/01. It is the submissions of the 1st petitioner that the action of 1st Respondent to proceed and auction the 1st petitioner’s property is based on a[n] illegality and as such should be declared null and void.”

0. The issue of classification of the 1st petitioner’s debt as a bad loan under the Central Bank Guidelines on Licensing of New Institutions was not pleaded. It is not surprising that the 1st respondent did not specifically respond to it, other than by the assertion by the Remedial Officer of the bank at paragraph 11 of his affidavit of 30th August 2012 that:

“11. That all the grounds on which the petitioners’ constitutional petition is brought are untenable and/or materially incorrect in as much as:-

(a)The amount being claimed by the Bank was lawfully due and owing at the time of sale and the petitioner has never challenged the same previously as has been shown;

(b) The Petitioner was informed when the account became classified and has always been aware of what was happening and at no time has the petitioner

requested information and been denied the same, particularly a statement of account;

(c) *The Petitioner's account has been dealt with professionally in accordance with established principles of the Bank.*"

0. In this regard, the general principle that cases must be decided on issues placed on the record by pleading as upheld in the Court of Appeal decision in ***Chalicha F C S Ltd. v. Odhiambo and 9 Ors. (1987) KLR 182*** must apply. In any event, it is doubtful whether the Guidelines relied upon are of legal force affecting the loan contract between the 1st respondent bank and the 1st petitioner borrower. Indeed, the Guidelines, which are attached to the 1st petitioner's written submissions appear to be policy instructions for the accounting standards to be required of banks in the preparation and maintenance of their books rather than as affecting the contractual relationships between the banks and their customers. The guideline entitled 'Guideline on Risk Classification of Assets and Provisioning CBK/PG/04' provide as its purpose the following:

"Part II: STATEMENT OF POLICY

2.1 Purpose

This guideline is intended to ensure that all assets are regularly evaluated using an objective internal grading system which is consistent with this guideline; and that timely and appropriate provisions and write-offs are made to the provisions account in order to accurately reflect the true condition and operating results of institutions. It is also intended to encourage institutions to develop effective work plans for problematic assets in accordance with this guideline."

0. I do not find that the Guideline supports the 1st petitioner's contention that his loan had become a bad debt and unrecoverable by exercise of the chargee's power of sale as happened in this case. I find that the 1st Respondent bank exercised its power of sale under the charge following default by the 1st petitioner in repayment of the loan and after issuing all the necessary statutory notices before the sale by public auction to the Interested party. Upon the fall of the hammer at the public auction, the sale to the Interested Party as the highest bidder at the auction was concluded and in accordance with the Court of Appeal decision in ***Mbuthia v. Jimba Credit Finance Corporation Ltd 1988) KLR 1*** the 1st petitioner's equity of redemption was extinguished.
0. In addition, it is trite law that the dispute as to the exact indebtedness of the 1st petitioner to the 1st respondent is no ground for interfering with the chargee's power of sale. See the ***Kenya Commercial Bank Ltd. v. Harunani (2002) 2 KLR 691***. The 1st petitioner acknowledged the debt which whose amount he said without supporting evidence that had been agreed at Ksh.3,000,000/-. There was no payment even of this debt as perceived by the 1st petitioner. The dispute as to the amount of debt could only support a claim in damages upon reconciliation of the accounts. Section 77 (3) of the Registered Land Act provides as follows:

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

0. No illegality or corrupt business having been proved against the 1st Respondent the good faith principle in the House of Lords decision in ***Bank of Credit and Commerce International S.A. v. Mahmud and Anor (1997) 3 WLR 95*** cited by the petitioners does not apply, and in any event its relevance is in damages for loss of prospects of future employment for employees arising out of dishonest business by the employer, which was not in issue in this suit.
0. While accepting the principle of the chargee's duty of care to the chargor upheld in ***Cuckmere Brick Co Ltd v. Mutual Finance Ltd (1971) 2 All ER 633*** referred to in ***KCB v Osebe***, supra, on

obtaining the true market value price for the charged property, it has not been shown that the sale at the auction price was at a gross under-value being a forced sale in exercise of the power of sale.

The 1st respondent Bank had in accordance with the Auctioneers' Rules 1997 commissioned valuation in June 2011 and established that the Charged Property could fetch Kshs.9 Million in the open market at the time, with a reserve/ forced sale value of Kshs.5.5Million. Indeed, there was evidence that the sale was put off on 31st May 2011 when the bids received were too low and re-advertised on the 8th July 2011 for public auction on the 15th July 2011. See also *Mbuthia v. Jimba Credit Finance Corporation Ltd (1988) KLR 1*.

0. The fact of the Interested Party's bid of Ksh.5.5Milion being the same as the reserve price in the valuation commissioned by the 1st Respondent bank is not conclusive proof of fraudulent collusion on the part of the 1st respondent and the Interested Party. It is a mere suspicion and the court cannot be asked to act on a suspicion of fraud. It is trite law that allegations of fraud must be proved to a standard higher than that of balance of probabilities applicable in civil cases but lower than the standard of beyond reasonable doubt of criminal cases. Neither was there any evidence to show that the property could have fetched more than the amount for which it was sold, in the circumstances of forced sale in a public auction.

Whether the 1st petitioner/chargor's fundamental right to property was violated

Unless it can be shown that the law itself is against the constitution, the sale of charged property in accordance with the due process of that law cannot be held to be an unconstitutional deprivation of property within Article 40 of the Constitution. This is because the constitution has as one of its principles of governance and national values under Article 10 the doctrine of the rule of law. In my view, for a person who claims that his fundamental right to property has been infringed as a consequence of exercise of statutory right of the power of sale and the consequential performance by the Land Registrar of the ministerial duty to register the parcel of land in the name of the transferee in accordance with the provisions of statutory provisions on land registration, he must demonstrate that the statutory provisions permitting the exercise of the power of sale and the subsequent change in the registration particulars of ownership of the parcel are unconstitutional. In the alternative, the petitioner must demonstrate that the statutory procedure for the exercise of the power of sale was not followed or that there was fraud or collusion in its exercise resulting in his being unlawfully and unconstitutionally deprived of his right to property. It would appear that the petitioners' case lay in this alternative.

0. No attempt was made to show that the Registered Land Act (now replaced by the Land Registration Act 2012 and the Land Act 2012) or its provisions for the exercise of the chargee's power of sale were unconstitutional. As a matter of fact, no new title was created; it is only the registration of the title to the suit property in the name of the transferee upon public auction. In their petition, the petitioners do not allege the unconstitutionality of the Registered Land Act; it is non-compliance with the section 77 of the Act that is alleged. At paragraph 11 of the Petition it is pleaded thus:

"11. It is the Petitioners' contention that

- a. *The Respondent's statutory power of sale, if at all, has [not] arisen, such adequate and proper notice ought to have issued.*
- b. *Their right of redemption had not been extinguished.*
- c. *The said sale was not in accordance with the law, practice and procedure hence a nullity.*
- d. *Section 77 (1) of the Registered Land Act, Cap 300 of the Laws of Kenya has been flouted by the 1st Respondent.*
- e. *The 1st and 2nd Respondent to this Petition are in breach of the provisions of Article 40 and 57 of the Constitution of Kenya."*

0. As I have held above, the exercise of the power of sale by the 1st respondent was done pursuant to the provisions of the Registered Land Act after default in repayment of the loan and after giving the 1st petitioner due statutory notice and, in accordance with the Auctioneer's Act 1997, the

requisite 45-day notification of sale. The charged property was then sold in a public auction with the Interested Party complying with the terms of the auction sale, and the property was subsequently registered in the name of the purchaser as the registered proprietor. In accordance with the Act (s.77 (2) of the Registered Land Act) and case law authorities referred to above, the equity of redemption was extinguished at the fall of the hammer, and in the circumstances of a lawful exercise of the power of sale of charged property, the chargor cannot maintain a claim for violation of his fundamental right to property under Article 40 of the Constitution.

0. The 1st petitioner's loan transaction with the 1st Respondent Bank is said to have had the blessing of his family presumably including the 2nd petitioner wife of the registered proprietor. However, this is not material given the state of the law at the time. The position of the law then was as held by the Court of Appeal in ***Kamau v. Mungai and Anor. (2006) 1 KLR 150*** where it approved the rejection by the High Court of a claim that the consent of the wife to a registered proprietor of land was necessary before he could dispose of the land.
0. The Constitution of Kenya 2010 at Article 68 (c) (iii) relied on by the 2nd petitioner empowers Parliament to make laws 'to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.' In turn, Parliament enacted the Land Act No.6 of 2012 which introduced under section 79 (3) thereof the requirement of spousal consent to a charge on matrimonial home as follows:

“(3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”

0. The principle of interpretation that laws do not have retrospective effect unless the expressly provided is well known. See section 23 (3) of the Interpretation and General Provisions Act and ***Panafrica Builders and Contractors Ltd. v. Singh (1984) KLR 121***. Needless to state, the provisions of the Constitution of Kenya 2010 and Land Act, 2012, which came into force on 2nd May 2012, have no retrospective application to the charge transaction the subject of these proceedings which took place in 1996. For the same reason the provision of section 28 (1) (a) of the Land Registration Act No. 4 of 2012 that unless the contrary is expressed in the register, all registered land shall be subject to spousal rights over matrimonial property as overriding interest without being noted on the register, is inapplicable to the suit property which had already been registered in the name of the Interested Party even before the Act came into effect on the 2nd May 2012. In addition, the assertion by the petitioners that the charged property was matrimonial property was not supported by evidence to support this claim.
0. Accordingly, I hold that in the absence of proof to the required standard of any fraud, the 1st Respondent's exercise of the chargee's power of sale in accordance with the provisions of the Registered Land Act which was then in force cannot be deemed to be unconstitutional as having deprived the petitioners of their fundamental right to property under Article 40 of the Constitution or as having violated the 2nd petitioner's spousal rights under Article 68 of the Constitution of Kenya 2010 as enacted, in terms of the Constitution, in sections 28 of the Land Registration Act 2012 and SECTION 79 (3) of the Land Act 2012 both which came into force subsequent to the valid exercise of the power of sale.
0. No evidence was adduced to support the vague claim of violation of the petitioners' right under Article 57 of the Constitution 2010, which provides that 'the State shall take measures to ensure the rights of older persons—(a) to fully participate in the affairs of society; (b) to pursue their personal development; (c) to live in dignity and respect and be free from abuse; and (d) to receive reasonable care and assistance from their family and the State.' I, therefore, do not find that the right was violated in any way.
0. Although anticipated by the petitioner's submissions, the issue as to whether a private person may become liable for infringement of fundamental human rights in the Bill of Rights, the respondents and the interested party did not take it up in their submissions and it therefore did not mature into a dispute to be resolved. Moreover, having held that the Petitioners' fundamental rights were not violated, the enquiry as to whether the 1st Respondent and or the interested party, as private

persons or non state actors, are liable or not does not arise. I, therefore, do not propose to pronounce on it.

Whether the petitioners are entitled to the relief sought.

0. For the reasons set out above, the petitioners are not entitled to the reliefs sought in the Petition and, accordingly, the Petition will be dismissed.

Order

0. The Petitioners' petition dated the 30th March 2012 is dismissed with costs to the Respondents and the Interested Party to be agreed or taxed by the taxing officer of the court in default. The conservatory order granted herein and the order of stay of the proceedings in **Malindi HCCC NO. 55 of 2012, Ocean Blue Limited v. Leonard Jefwa Kalama** pending the hearing and determination of the Petition are hereby discharged.

Dated, signed and delivered on the 31st January 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Wandera for Dr. Khaminwa for the Petitioners

Miss Langat for Mr. Kibara for the 1st Respondent

No appearance for the 2nd Respondent

Miss Muyaa for Mr. Ole Kina for the Interested Party

Mr. Ibrahim - Court Assistant