REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 797 OF 2012

(CIVIL CASE NO. 741 OF 2012)

SIMON NJOROGE MBURU ………………………………….. PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LTD. ……………… DEFENDANT

R U L I N G

1. Before this Court for consideration is the Notice of Motion brought by the Plaintiff dated 5th November 2012. The same is brought under **sections 78 (1), 96, 97 (2) and 98 (2)** of the *Land Act, 2012* as well as Articles 14 and 159 of the Constitution. The Application seeks an order for temporary injunction pending the hearing and determination of this suit barring the Defendant, its agents, employees, associates, servants or any other persons from selling, leasing, renting, occupying, transferring, sub-leasing, subletting, using, misusing, wasting or in any other manner dealing with the property title number KIAMBU/GATUANYAGA/2949 (hereinafter "the suit property"). The Application is brought upon the following grounds:

"1. THAT the Plaintiff is the owner of property title number KIAMBU/GATUANYAGA/2949.

2. THAT the Defendant has issued the Plaintiff with a notification of sale dated 6th September, 2012 through Dikemwa Auctioneers.

3. THAT the intended sale of the property title number KIAMBU/GATUANYAGA/2949 has not been advertised as required by the Land Act No. 6 of 2012.

4. THAT there has been no valuation of title number KIAMBU/GATUANYAGA/2949 to ascertain the forced sale valuation before the intended sale.

5. THAT the Plaintiff/Applicant will suffer irreparable harm if an injunction barring the sale of title number KIAMBU/GATUANYAGA/2949 is not granted since this is matrimonial property and he has started construction on it to build the matrimonial home.

6. THAT it is in the interests of justice that this Honourable Court stops the

intended sale of the property title number KIAMBU/GATUANYAGA/ 2949.

7. **THAT it is in the interests of justice that this application be allowed.**

8. **THAT this application has been brought without undue delay.**

9. **THAT the Defendant will suffer no prejudice if this application is allowed".**

2. Although it does not say so, the Application is supported by the Affidavit of the Plaintiff again dated 5th November 2012. Such details that the Plaintiff is the registered owner of the suit property and also a director of a company known as Jomar Limited. That company applied for a loan facility in the amount of Shs. 1 million from the Defendant in 2001. The deponent set out the securities required by the Defendants as regards the loan which included a Charge over the suit property. The deponent noted that the loan had been taken for the purposes of servicing various contracts that the company had been awarded by the Yatta Constituency Development Fund Committee. He noted that due to the failure by the said Committee to pay the company on time, the latter had defaulted in payment of the loan. The deponent then recounted how he had been notified by the Defendant by letter dated 28th May 2012 received on 30th May 2012 that it was calling in the loan together with accrued interest. He recounted that he had also received a notice from Dikemwa Auctioneers that they would be selling the suit property on 6th November 2012. The deponent then maintained that the Defendant had not carried out a proper valuation in relation to the sale of the suit property, the last one having been done in 2011. Such had placed a value of the suit property at Shs. 1.5 million. He maintained that the suit property was worth more than that and it was a matter of common knowledge that the value of the land in Kenya had been going upwards of late. He had been advised by his advocates on record that there had been no advertisement of the sale of the suit property as required under the Land Act 2012. The suit property was matrimonial property which the deponent had acquired 20 years ago and he was in the process of building his matrimonial home thereon. He had already bought building materials which were on site and annexed photographs of the same. The Plaintiff maintained that he would suffer irreparable harm and loss should the sale of the suit property proceed, he having invested 20 years of his blood and sweat in order to be able to provide shelter for his family.
3. On 6th November 2012, Lady Justice Mwilu, as she then was, granted interim Orders of injunction preventing the disposition of the suit property and by directions given on 19th November 2012, this suit was transferred from the Environmental and Land Division of this Court to the Commercial and Admiralty Division. Thereafter, one **Julius Gikonyo**, the Remedial Officer of the Defendant bank swore a Replying Affidavit on 17th December 2012. For one reason or another, the Application did not come before this Court for hearing until 18th June 2013. In the said Replying Affidavit, the deponent detailed the borrowing of Shs. 1 million by the said company Jomar Ltd from the Defendant bank as per the letter of offer dated 16th June 2011. By accepting the same, the said company committed to repay the loan within 3 months. The title of the suit property was put up for bank security purposes at an interest rate of 18.75% per annum. Should there be default in the payment of the loan within 90 days, the Defendant bank imposed a penal rate of interest at 18% per annum on amounts in excess of the authorised borrowing limit of Shs. 1 million. The deponent noted, that as at 28th May 2012, the said Company had failed to service the facility and the outstanding debt had risen to Shs. 1,252,756.65 by that date. As a result, the Defendant served upon the Plaintiff, a Statutory Notice dated 28th May 2012 requiring him to settle the outstanding debts within 3 months, otherwise the Defendant bank would exercise its statutory power of sale. The said Mr. Gikonyo pointed to paragraphs 9 and 10 of the Supporting Affidavit in which the Plaintiff admitted that he had been served with the Statutory Notice on the 30th May 2012. Thereafter, the Defendant bank had instructed Messrs. Dikemwa Auctioneers to sell the suit property and the latter served the Plaintiff with Notification of Sale on 10th September 2012. Neither the borrower company nor the Plaintiff had made any effort to settle the outstanding arrears as required in the Statutory Notice and/or the Notification of Sale.
4. Mr. Gikonyo went on to say that a valuation of the suit property had been carried out by Metrocosmo Ltd in June 2011 detailing a forced sale value for the suit property of Shs. 1 million. He annexed a copy of the valuation to his said Replying Affidavit. He further noted that he had

been advised by the advocates on record for the Defendant that as regards paragraphs 11, 12, 13, 14, 15 and 16 of the Supporting Affidavit, the provisions of the Land Act 2012 were inapplicable as the same had not come into effect at the time that the Statutory Notice and Notification of Sale had been issued to the Plaintiff. The suit property had been registered solely in the Plaintiff's name as clearly indicated in the Title document annexed to the Affidavit in support of the Application. On 6th November 2012, the property had been sold by public auction to the highest bidder at the fall of the hammer being one Rachael Wanja Mungai who had offered Shs. 1.2 million for the suit property. The said Ms. Mungai had paid the 25% deposit required being Shs. 300,000/-. As a result, the interim orders granted by Lady Justice Mwilu on 6th November 2012 had already been overtaken by events as the suit property had been sold at 11. 45 am that morning, while the Court Order was only served on the Auctioneers at 4.30 pm that afternoon. The deponent had been advised by the advocates on record for the Defendant that the Plaintiff's equity of redemption had been extinguished upon the sale of the suit property by way of public auction. The prayer for injunction pending the hearing and determination of this suit should not be granted, as it would affect the rights of the purchaser of the suit property who was not privy to this suit.

5. The Plaintiff's submissions were filed herein on 19th July 2013. They consisted mainly of the Plaintiff underlining that the Defendant had failed to comply with the provisions of the *Land Act 2012* in relation to the exercise of its Statutory Power of Sale. He put forward the submission that the *Land Act 2012* applied to the suit property whereas the Defendant, as per paragraph 13 of its Replying Affidavit, averred that the provisions of that Act were inapplicable and irrelevant. The Plaintiff pointed to **section 78** of the *Land Act 2012* which provided that the part in relation to Charges applied to all charges on land including any charge made before the coming into effect of the Act. As the Act had come into effect in May 2012, the Statutory Notice was affected by it. The Plaintiff maintained that the Defendant had not complied with the provisions of the Land Act in so far as it had failed to ensure that a forced sale valuation was undertaken by a valuer. Further, the valuation report by the said Metrocosmo Ltd was dated 13th June 2011 even before the Charge had been put in place and registered.
6. In the Plaintiff's opinion, once the Defendant had issued a statutory notice detailing its intention to sell the suit property, it was duty bound by the provisions of **section 96 (2)** of the *Land Act* to undertake a forced sale valuation. As per **section 97 (1)** of the *Land Act*, the Defendant bank was under a duty of care to the Plaintiff to obtain the best price reasonably obtainable at the time of the sale of the suit property. It was the opinion of the Plaintiff that the price received of Shs. 1,200,000/- was not the best price reasonably obtainable for the suit property. The Plaintiff then pointed at the provisions of **section 97 (3)** of the *Land Act 2012* which details that where charge land is sold at 25% below the market value there would be a rebuttable presumption that the Defendant bank was in breach of the duty imposed under **section 97 (1)** above referred to. Under **section 97 (3) (b)** of the *Land Act 2012*, a chargor whose charged land is being sold for a price 25% or more below the market value could apply to the court for an Order that the sale be declared void. The Plaintiff maintained that this was the case here.
7. The Plaintiff maintained that the allegation by the Defendant in the Replying Affidavit, that the suit property had already been sold by the time that this Court's Order was served upon the auctioneer did not hold water. It was the Plaintiff's submission that the payment of a deposit by a purchasing party does not amount to the sale of the suit property. As long as the purchaser had not paid the balance of the purchase price, the transaction remained incomplete. The terms and conditions of sale had required that the purchaser of the suit property was to pay the balance of the purchase price on or before the 5th December 2012. There was no evidence before this Court that such balance had been paid. However, whether the purchaser had paid the balance of the purchase price or otherwise was immaterial as the Interim Order of injunction of this Court was in force with effect from 6th November 2012. As a result, the Plaintiff's Application had not been overtaken by events, since it barred the Defendant or its agents from receiving the balance of the purchase price. Finally, the Plaintiff detailed the principles as to the granting of injunctions as laid down in the well-known case of **Giella v Cassman Brown (1973) EA 358**. The Plaintiff maintained that in view of its submissions as above, it was clear and that he had a *prima facie* case with a probability of success. He had raised substantive issues with regard to the exercise of the Defendant's right to statutory sale, such needing rebuttal from the Defendant. There was also no doubt, that the Plaintiff would suffer irreparable injury if the injunction was not granted as he had

owned the suit property for over 20 years and he was making efforts to construct his family home thereof as could be seen from the photographs contained in the Valuation Report prepared by the said Metrocosmo Ltd dated 13th June 2011.

8. The Defendant's submissions were filed herein on 24th July 2013. It set out the details of the Application before Court as well as the background contained and set out in the Supporting and Replying Affidavits to the Application. The Defendant's principle submission was that the suit property was charged under the provisions of the Registered Land Act, now repealed and not the Land Act 2012. It pointed to **section 162 (1)** of the *Land Act* which read that any right, interest, title, power, or obligation acquired, accrued, established which was coming into force or exercisable before the commencement of the Act should continue to be governed by the law applicable to it immediately prior to the commencement of the Act. It referred this Court to the finding in the case of **Maithya v Housing Finance Company of Kenya & Anor. (2003) 1 EA 133**. The Defendant maintained that the Plaintiff had been duly served with a valid Statutory Notice dated 28th May 2012, on 30th May 2012. Similarly, the Plaintiff had been served with a valid Notification of Sale dated 6th September 2012. The Plaintiff had acknowledged being served with such documentation. The Defendant submitted that it had obtained a valuation carried out in June 2011 by Metrocosmo Ltd giving the forced sale value of the property set at Shs. 1,000,000/-. The same had thereafter been sold on 6th November 2012 for Shs. 1,200,000/-. Although this Court had granted ex parte injunctive Orders 6th November 2012, they were served upon the auctioneers at 4.30 p.m. in the afternoon of that day when the suit property had already been sold. As a result, those Orders were rendered academic and had been overtaken by events as the Defendant bank had validly exercised its statutory power of sale at the public auction held on 6th November 2012. The Plaintiff's equity of redemption had been extinguished at the fall of the hammer.

9. The Defendant maintained that the Plaintiff was not entitled to any injunctive relief as he had admitted that the said borrower company had defaulted in the payment of its loan facility. The Defendant referred this Court to the cases of **Labelle International Ltd & Anor. v Fidelity Commercial Bank & Anor. (2003) 2EA 541** as well as **Habib Bank AG Zero v Pop in Kenya Ltd (1989) LLR 3069** where it had been held:

> **"It is now established law that when part of the amount claimed is admitted or proved to be due a chargee cannot be restrained by an injunction."**

Further in the **Maithya** case (supra), **Nyamu J.** had quoted with approval the finding in the case of **Alghussein Establishment v Eton College (1988) 1 WLR 587** as follows:

> **"….. a party would not be allowed to ground his action on his own wrong as against the other party".**

The Defendant then pointed to the position as regards the purchaser's right in relation to her purchase of the suit property at the public auction. The Defendant maintained that it was trite law that an agreement for sale entered into by a third party as a result of the exercise of a chargee's power of sale is valid. It referred to the cases of **Ze Yu Yang v Nova Industrial Products Ltd (2003) 1 EA 362** as well as the case of **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Ors (2005) eKLR**. In the latter case it had been found:

> **"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages."** (Emphasis the Defendant's).

10. The Defendant then turned its attention to the principles as set out in the **Giella v Cassman Brown** case (supra). The Plaintiff must, in the first instance, prove that he had *a prima facie* case with a probability of success and the Defendant outlined how a *prima facie* case had been defined

in the case of **Mrao Ltd v First American Bank Ltd** **(2003) KLR 125** being:

> **"So what is a *prima facie* case? I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

The Defendant went on to say that in order for the Plaintiff to establish a *prima facie case*, he had to prove that he had an interest in the suit property. It was the Defendant's position that the Plaintiff had no interest in the suit property as the Defendant had validly exercised its statutory power of sale on 6th November 2012. As a result, the Plaintiff's equity of redemption had been extinguished. The Defendant submitted that an order for injunction should not be granted as it would affect the rights of the Purchaser of the suit property, who is not a party to the suit. As far as irreparable damage to the Plaintiff is concerned, the Defendant submitted that as per its letter of offer dated 16th June 2011, the Plaintiff as a director of the borrower company knew that it had committed to pay back the Shs. 1 million facility within a period of 3 months. The Plaintiff was aware of the risk of the failure to honour the terms of that undertaking and, in the Defendant's view, could not now claim that he would suffer irreparable loss if the suit property was sold. It pointed to the finding of my learned sister **Kasango J.** in the case of **Christopher Muroki v Housing Finance Company of Kenya Ltd & Anor.** **(2006) eKLR** in which the Judge had stated:

> **"The Plaintiff's arguments that the suit property is a matrimonial home where he resides with his family, and that its sale would result in irreparable loss, cannot stand since the Plaintiff in offering the suit property as security for loan accepted that in default of repayment the property would be sold."**

Finally, in relation to the balance of convenience as between the parties, the Defendant pointed the Court to the finding of my learned brother **Kimaru J.** in the case of **Bomet Beer Distributors** (supra) in which he held that:

> **"….. The balance of convenience tilts in favour of the 5th Defendant who purchased the property at the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th Defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction."** (Emphasis the Defendant's).

The Defendant maintained that as the suit property was sold to a third party who was not a party to the suit, her rights to the same stand to be prejudiced if the injunction is granted. In that regard, the Defendant submitted that the balance of convenience tilts towards disallowing the Plaintiff's Application before Court.

11. First of all let me say that I have no doubt that the provisions of the *Land Act 2012* did apply to the transactions as between Plaintiff and Defendant. That Act came into effect from May 2012. In any event, the Charge in favour of the Defendant executed by the Plaintiff in respect of the suit property is caught by **section 78 (1)** of the *Land Act, 2012* which reads as follows as regards Part VII thereof:

> **"This Part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically referred to in any section in this Part."**

As a result, **section 90** of the *Land Act, 2012* as regards the issue of statutory notices applied to the Defendant. **Section 90(1) and (2)** of the *Land Act, 2012* reads:

> **"(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or**

observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

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

(a) the nature and extent of the default by the chargor;

(b)if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c)if the default consists of a failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(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 for the court for relief against those remedies."

12. I have perused the letter dated 28th May 2012 addressed to the Plaintiff by the Company Secretary of the Defendant bank which is headed "Statutory Notice". I have no doubt that the Plaintiff has admitted that he received the same (see paragraph 9 of the Supporting Affidavit). Unfortunately for the Defendant, that so-called Statutory Notice does not fully comply with the above provisions of **section 90 (2)** of the *Land Act, 2012*. Under the financial accommodation made to the Plaintiff's company Jomar Ltd., the Defendant advanced Shs. 1 million repayable within a period of 3 months. That full amount has not been paid and as a result the Statutory Notice correctly demands that the whole amount be repaid rather than the amount that must be paid to rectify the default. The default of the said company did amount to the non-repayment of the total sum. However, the Statutory Notice does not detail the rights of the Chargor/Plaintiff to apply to the court for relief against certain remedies. The Notice is also given under the provisions of **section 74** of the *Registered Land Act* which, by that time, had been repealed. Accordingly, I find that the Statutory Notice issued by the Defendant to the Plaintiff to have been defective. There is however no doubt that the Plaintiff remained in default of that notice for the said period as stipulated therein of 3 months.

13. At that stage the provisions of **section 96 (2)** of the *Land Act, 2012* would have come into play. That section reads:

> **"(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least 40 days have elapsed from the date of the service of that notice to sell."**

Section 96 (3) makes provision for copies of the notice to sell the land upon various parties including a spouse of the chargor who had given consent. In this case, I am satisfied that the Plaintiff's spouse had not given consent to the charging of the suit property to the Defendant bank. I am further satisfied that none of the persons detailed in **section 96 (3)** of the *Land Act, 2012* needed to be served with the sale notice. I am also satisfied that the Notification of Sale issued by Dikemwa Auctioneers on behalf of the Defendant bank pursuant to **Rule 15 (B)** of the

Auctioneers Rules was more or less in the prescribed form and was certainly issued more than 40 days before the auction sale, which took place on 6th November 2012.

13. As I understood the Plaintiff's submissions, his main complaint was that the Defendant had breached the provisions of **section 97 (2)** of the *Land Act, 2012*. That sub-section reads:

> **"A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by valuer."**

I tend to agree with the Plaintiff that the valuation of the suit property carried out by Messrs. Metrocosmo Ltd dated 13th June 2011 does not comply with that sub-section. Indeed, the Plaintiff pointed out that the valuation had been commissioned and authored before the lending to the Plaintiff's company Jomar Ltd and presumably before the Charge had been executed although neither of the parties hereto had seen fit to attach a copy of the Charge document to the Supporting or the Replying Affidavits. In my view, before the Defendant could sell the suit property at auction, it was incumbent upon it to have a valuation undertaken by a recognised valuer.

14. However, are all these defaults on the part of the Defendant's fatal to it having sold the suit property through the said Dikemwa Auctioneers at auction on 6th November 2012? I have already noted that the Plaintiff acknowledge the receipt of the Statutory Notice being served upon him on 30th May 2012. Further, at paragraph 10 of the Affidavit in support of the Plaintiff's Application, he admits that he received the notification of sale issued by the said Auctioneers on 10th September 2012. The Plaintiff did nothing about those notices and waited until the last minute before the sale was due to take place to file the Application before Court on 5th November 2012. Because of the late filing, the Plaintiff was also late in obtaining the injunctive Orders issued by Lady Justice Mwilu on 6th November 2012. In my opinion, the Plaintiff has not come to court with clean hands. Further, there has been no attempt by the Plaintiff, nor his said company Jomar Ltd, to repay the monies borrowed from the Defendant bank. As was stated by Nyamu J. (as he then was) in the **Maithya** case (supra):

> **"Those who come to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the court's jurisdiction."**

15. The Plaintiff's further complaint was that although the injunctive Orders "missed" the auction sale, the purchaser of the suit property had only paid a 25% deposit towards the full purchase price as required under the conditions of sale when the injunctive Orders were served. It was the Plaintiff's submission that on such service, the sale to the purchaser was incomplete and it was unknown as to whether the purchaser had in fact paid the full purchase price in accordance with the conditions of sale. In response, the Defendant submitted that the Plaintiff had lost his right of redemption upon the fall of the hammer at the auction sale. This principle was clarified by my learned brother **Kimaru J.**in the aforementioned case of **Bomet Beer Distributors Ltd** (supra) in which he detailed:

> **"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for a chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages."**

The learned judge then proceeded to consider the position with regard to the granting of injunctive Orders as per **Giella v Cassman Brown** (supra) when he detailed:

> **"….. it was held that an injunction would be granted where an applicant establishes a prima facie case. The applicant is further required to establish that he would suffer irreparable loss which may not be compensated by an award of damages. If the court fails to decide the case on the two principles stated above, then it will decide whether**

or not to grant the injunction based on a balance of convenience.

In the present application, the plaintiffs have not established a prima facie case. The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they were/are entitled to the orders of injunction sought. Statutory provision in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages. The plaintiffs cannot therefore say that they would suffer irreparable loss which cannot be compensated by damages if the order of injunction is not granted. Damages will be adequate compensation to them. Further, the balance of convenience tilts in favour of the 5th defendant who purchased the property in the public auction. He has invested his financial resources but has been unable to enjoy the use of the said property. It would be inequitable to keep the 5th defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction."

In my opinion, the situation in this case falls very much along the lines and facts of the **Bomet Beer Distributors** case as above. The Plaintiff in this matter has claimed, rightly, that the statutory notice issued by the Defendant was invalid. He also complains that the Defendant did not have a valuation of the suit property carried out before sale. That is as may be but I do not consider that the Plaintiff has made out a *prima facie* case entitling him to an injunction and, I am of the view that he would well be compensated in damages. Despite his argument that the suit property has been sold at an under-valuation, the Plaintiff has not put in evidence before this Court, any alternative valuation to prove his point in that regard.

15. As I have detailed above, the Plaintiff lost his right of redemption in relation to the suit property at the fall of the hammer at the public auction held on 6th November 2012. **Section 99** of the *Land Act, 2012* details the protection to which the purchaser of the suit property at auction is entitled. It reads as follows:

"99. Protection of purchaser

1. **This section applies to –**

a. **a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or**

b. **a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the charge if the charge and the person so claiming obtained the charged land in good faith and for value.**

2. **A person to whom this section applies –**

a. **is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;**

b. **is not obliged to see to the application of the purchase price;**

c. **is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.**

3. **A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or**

irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

4. **A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power".**

That section now statutorily encompasses the right of the chargor prejudiced by unauthorised, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the Plaintiff's remedy lies in this case. In this regard, the Plaintiff would do well to note the powers of the Court in respect of remedies and relief as set out under **section 104** of the *Land Act, 2012*.

16. As a result, I dismiss the Plaintiff's Notice of Motion dated 5th November 2012 and lift the Orders made by Lady Justice Mwilu on 6th November 2012. The Defendant will have the costs of the Application.

DATED and delivered at Nairobi this 28th day of January, 2014.

J. B. HAVELOCK

JUDGE