



**Preps International Limited v Barclays Bank Of Kenya Ltd & 2 others (Environment and Land Case Civil Suit 169 of 2011) [2022] KEELC 2315 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2315 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 169 OF 2011**

**SO OKONG'O, J**

**APRIL 27, 2022**

**BETWEEN**

**PREPS INTERNATIONAL LIMITED ..... PLAINTIFF**

**AND**

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

**J.M GIKONYO T/A GARAM INVESTMENTS ..... 2<sup>ND</sup> DEFENDANT**

**FARIDUN SULEIMAN ABDALLA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought this suit through a plaint dated 13<sup>th</sup> April 2011. The plaint was amended several times. The latest plaint is the Further Amended Plaint dated 18<sup>th</sup> April 2017 in which the Plaintiff has sought the following reliefs;
  - a. A perpetual injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining them by themselves or through their agents from finalizing the sale, alienating, dealing or transferring all that land parcel known as L.R No.3734/940(I.R 24438) (hereinafter referred to as “the suit properties”).
  - b. A declaration that the public auction was illegal and unlawful and the same be set aside and the suit property reverted to the Plaintiff.
  - c. General damages
  - d. Refund of the balance of the auction sale price of Kshs.9, 032,932.19 unlawfully withheld with interest from the date of sale at commercial rates.
  - e. Further or any other relief as this honourable court may deem fit to grant.
  - f. Cost of the suit and interest at court rates.



### **The Plaintiff's case:**

2. The Plaintiff averred that through a letter of offer dated 25<sup>th</sup> August 2007, the 1<sup>st</sup> Defendant offered to the Plaintiff a business mortgage loan of Kshs.12, 500,000/- to purchase a house redeemable within 84 months. The Plaintiff averred that it accepted the 1<sup>st</sup> Defendant's offer and charged the suit property that was registered in its name as a security for the loan.
3. The Plaintiff averred that through a letter dated 11<sup>th</sup> December 2009, it requested the 1<sup>st</sup> Defendant for an extension of the redemption period to enable it clear the loan but the 1<sup>st</sup> Defendant declined the request. The Plaintiff averred that the 1<sup>st</sup> Defendant however agreed to enter into further negotiations with the Plaintiff. The Plaintiff averred that through its letter dated 30<sup>th</sup> March 2011, it proposed to settle the then outstanding loan amount of Kshs.14, 766,263.11 in full within 45 days from the date of approval of the proposal by the 1<sup>st</sup> Defendant.
4. The Plaintiff averred that its proposal was accepted by the 1<sup>st</sup> Defendant and pursuant thereto, the Plaintiff invited offers for the purchase of the suit property by private treaty in respect of which it received various offers ranging between Kshs.65 Million and Kshs.70 Million of which the 1<sup>st</sup> Defendant was notified.
5. The Plaintiff averred that negotiations with the interested purchasers took time due to a suit that was pending in court namely, Nairobi HCCC No. 580 of 2009 over the suit property which had since been finalized.
6. The Plaintiff averred that despite it getting the aforementioned offers for the purchase of the suit property, an advertisement was placed in the Daily Nation Newspaper of 11<sup>th</sup> April 2011 for sale of the suit property by public auction on 12<sup>th</sup> April 2011 and on contacting the 1<sup>st</sup> Defendant, the Plaintiff was given an appointment on the day of sale that was scheduled to take place at 11.00 am.
7. The Plaintiff averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not serve it with the requisite 45 days' notice of intention to exercise the statutory power of sale. The Plaintiff averred that the 3<sup>rd</sup> Defendant purchased the suit property at the purported public auction conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants at a consideration of Kshs.48, 500,000/= that was below the market value of the suit property.
8. The Plaintiff averred further that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants transferred the suit property to the 3<sup>rd</sup> Defendant and remitted to the Plaintiff a sum of Kshs. 24,700,797.70 only as the balance of the auction sale price and withheld part of the balance of the sale price that should have been released unconditionally thereby causing the Plaintiff to suffer loss and damage. The Plaintiff averred that the amount unlawfully withheld by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants amounted to Kshs. 9,032,939.19.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' case:**

9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a joint amended statement of defence dated 18<sup>th</sup> February 2015 on 23<sup>rd</sup> June 2015 in which they denied the Plaintiff's claim in its entirety. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that on the Plaintiff's request, the 1<sup>st</sup> Defendant extended the loan redemption period to 31<sup>st</sup> May 2011. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred further that they followed the laid down procedure while exercising the 1<sup>st</sup> Defendant's statutory power of sale. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that they sold the suit property below the market price.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the suit property was sold at a public auction to the highest bidder. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied that they withheld the balance of the purchase price due to the Plaintiff illegally. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants averred that the balance of the auction purchase price



was to be released to the Plaintiff once the parties entered into a final consent settling this suit or upon the determination of the suit by the court. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged the court to dismiss the Plaintiff's claim with costs.

11. The 3<sup>rd</sup> Defendant filed amended statement of defence dated 16<sup>th</sup> May 2017 on 17<sup>th</sup> May 2017. The 3<sup>rd</sup> Defendant averred that he bought the suit property at a public auction where his bid of Kshs. Kshs. 48,500,000.00 was the highest. The 3<sup>rd</sup> Defendant averred that upon being declared the purchaser of the suit property by the 2<sup>nd</sup> Defendant, he paid a deposit of Kshs. 12,500,000/- and the balance of the purchase price thereafter after which the suit property was transferred and registered in his name.
12. The 3<sup>rd</sup> Defendant averred that the public auction at which he purchased the suit property was lawful hence he acquired a good title to the suit property and that the Plaintiff's remedy if any was to claim damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
13. The 3<sup>rd</sup> Defendant averred further that the reliefs sought by the Plaintiff had been overtaken by events since the suit property had been transferred and registered in the name of the 3<sup>rd</sup> Defendant.

**The evidence tendered by the parties:**

14. In support of its case, the Plaintiff called as its witness, its Managing Director, Redempta Susan Chetambe (PW1). PW1 adopted her witness statement dated 23<sup>rd</sup> June 2014 as her evidence in chief and produced the Plaintiff's bundle of documents dated 17<sup>th</sup> October 2019 filed on 22<sup>nd</sup> October 2019 as Plaintiff's Exhibit 1.
15. PW1 testified that she was told by the 1<sup>st</sup> Defendant that the suit property was sold at Kshs. 48,500,000/- out of which she was paid Kshs. 24,700,797.70/-. PW1 stated that as at the time of sale of the suit property, the outstanding loan balance was Kshs. 14,766,263.11/-. PW1 stated that out of the purchase price, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants retained Kshs. 9,032,939.19/- on the ground that this suit was still pending determination.
16. PW1 stated that prior to the sale of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant through public auction, she had approached the 1<sup>st</sup> Defendant to allow her to sell the property by private treaty and towards that end the Plaintiff received several purchase offers. PW1 stated that the suit property was valued at about Kshs. 80,000,000/-. PW1 stated that the Plaintiff was not served with the redemption notice and that the person who was allegedly served with the said notice was not her.
17. PW1 stated that a suit was filed against the Plaintiff in the High Court namely, HCCC No. 580 of 2009 by other people who were claiming the suit property in which suit the Plaintiff spent a lot of money to defend itself before a ruling was given in its favour. PW1 stated that the Plaintiff pleaded with the 1<sup>st</sup> Defendant who was also a party to that suit to reschedule the loan repayment but the 1<sup>st</sup> Defendant declined to extend the indulgence.
18. PW1 stated that the market value of the suit property was assessed at Kshs.75, 000,000/- on 4<sup>th</sup> April 2011. PW1 stated that the Plaintiff shared with the 1<sup>st</sup> Defendant the letters of offer for purchase of the suit property that it had received from Karen South School and Ken Russ Medics Ltd. which had offered to purchase the suit property at Kshs. 65,000,000/- and Kshs. 68,000,000/- respectively. PW1 stated that in order to clear the outstanding loan, the Plaintiff entered into a memorandum of understanding in 2010 with one, Peng Hui which arrangement was also rejected by the 1<sup>st</sup> Defendant.
19. PW1 stated that on 12<sup>th</sup> April 2011, the Plaintiff entered into an agreement to sell the suit property to one, Charity Wambui Mwangi at Kshs. 65,000,000/- 10% of which was deposited with the Plaintiff's Advocates. PW1 stated that when she informed the 1<sup>st</sup> Defendant of this development, she was



- informed that the suit property had already been sold. PW1 stated that the suit property had been valued by the 1<sup>st</sup> Defendant on 4<sup>th</sup> February 2011 at Kshs. 45,000,000/- being the open market value and Kshs. 32,000,000/- being forced sale value.
20. PW1 reiterated that the Plaintiff was neither served with a notification of sale neither was the same posted or left on the suit property that was under guard. PW1 testified that at the material time, she was not in Nairobi as she was attending to her daughter who was admitted to Loreto Convent Girls Secondary School, Matunda.
  21. PW1 stated that the Plaintiff was frustrated while following up on Kshs. 9,032,939.19 which was the balance of the auction purchase price that the 1<sup>st</sup> Defendant retained without any justification. PW1 stated that the Plaintiff had not been served or furnished with any official fee notes to warrant the retention of the said amount.
  22. The 1<sup>st</sup> Defendant's legal counsel in charge of debt collection and recoveries, Castro Mutai (DW1) gave evidence on its behalf. DW1 adopted his witness statement dated 23<sup>rd</sup> January 2020 as his evidence in chief and produced the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's amended consolidated Bundle of Documents filed on 23<sup>rd</sup> June 2015 as Defence Exhibit 1.
  23. In his statement, DW1 stated as follows: The Plaintiff obtained a loan from the 1<sup>st</sup> Defendant secured by a charge over the suit property. The Plaintiff defaulted in its loan repayment obligations. The 1<sup>st</sup> Defendant through its advocates served the Plaintiff with a statutory notice demanding payment of the outstanding amount in default of which 1<sup>st</sup> Defendant would put up the suit property for sale by public auction. Upon receipt of the statutory notice, the Plaintiff in several letters undertook to clear all the loan instalments that were in arrears together with the recovery expenses that had been incurred within 90 days. The Plaintiff did not honour its commitment.
  24. DW1 stated that before the 1<sup>st</sup> Defendant's advocates could revive the recovery process, the 1<sup>st</sup> Defendant discovered that there existed a suit involving the suit property namely HCCC No. 580 of 2009 which the 1<sup>st</sup> defendant and the Plaintiff joined. DW1 stated that the said suit was struck out on 17<sup>th</sup> January 2011. DW1 stated that nothing stopped the Plaintiff from redeeming the suit property or clearing the loan instalments that were in arrears during the pendency of the aforesaid suit.
  25. DW1 stated that due to the Plaintiff's failure to honour its contractual obligations and subsequent commitments, the 1<sup>st</sup> Defendant had no alternative but to exercise its statutory power of sale. DW1 stated that the Plaintiff was duly served with a notification of sale by the 2<sup>nd</sup> Defendant after the expiry of which the suit property was advertised for sale on 12<sup>th</sup> April 2011.
  26. DW1 stated that on 12<sup>th</sup> April 2011, the suit property was sold by public auction to the highest bidder whose bid was above the forced sale value of the suit property. DW1 stated that the 1<sup>st</sup> Defendant was not privy to the negotiations that the Plaintiff had with potential purchasers of the suit property. DW1 stated that any person who was interested in purchasing the suit property was at liberty to attend the public auction and bid for the property.
  27. In his oral testimony, DW1 stated that the 1<sup>st</sup> Defendant was not holding any balance of the purchase price as there were auctioneers and other related fees that were deducted from the auction purchase price before the balance was paid to the Plaintiff. On cross-examination, DW1 stated that the sum of Kshs.9, 032,939.19/- claimed by the Plaintiff was spent on costs whose breakdown was given to the Plaintiff.
  28. The 3<sup>rd</sup> Defendant, Faridun Suleiman Abdalla (DW2) was the next to give evidence. DW2 adopted his witness statement filed on 25<sup>th</sup> May 2016 as his evidence in chief and produced the 3<sup>rd</sup> Defendant's



bundle of documents filed on 28<sup>th</sup> March 2014 and supplementary bundle of documents filed on 17<sup>th</sup> January 2020 as Defence Exhibit 2 and Defence Exhibit 3 respectively.

29. DW2 testified that he purchased the suit property at a public auction that was held at the offices of the 2<sup>nd</sup> Defendant. DW2 stated that he attended the auction personally and made a bid of Kshs. 48,500,000/- for the suit property which was the highest. DW2 stated that he paid the full purchase price after which the suit property was transferred and registered in his name.
30. The 2<sup>nd</sup> Defendant (DW3) was the last to give evidence. DW3 told the court that he was an auctioneer and had practiced for 27 years. DW3 adopted his witness statement dated 20<sup>th</sup> May 2015 as his evidence in chief. On cross-examination, DW3 clarified that he received instructions to put up the suit property for sale by public auction on 28<sup>th</sup> January 2011 and not on 8<sup>th</sup> February 2011 as indicated in the certificate at page 66 of Defence Exhibit 1.
31. DW3 stated that he personally served the Plaintiff's director who identified herself as Susan with the notification of sale on 4<sup>th</sup> February 2011 at the Plaintiff's offices and also affixed a copy of the same in a prominent place on the suit property.
32. DW3 stated that he also served another copy of the notification of sale upon the Plaintiff through registered post. He stated that he followed due process in conducting the auction sale of the suit property.

#### **Submissions by the parties:**

33. The Plaintiff filed submissions dated 29<sup>th</sup> March 2021 and supplementary submissions dated 17<sup>th</sup> September 2021.
34. The Plaintiff submitted that the contradictions in the Auctioneer's Certificate at page 66 of Defence Exhibit 1 cannot be justified as mere typographical errors. The Plaintiff submitted that DW3 in his oral testimony had stated that he was instructed on 28<sup>th</sup> January 2011 and not on 8<sup>th</sup> February 2011 as indicated in the said certificate. The Plaintiff submitted that in the notification of sale, the 2<sup>nd</sup> Defendant indicated that he received instruction on 1<sup>st</sup> February 2011.
35. The Plaintiff submitted further that the photographs produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to prove service should be disregarded as no certificate was filed in court to confirm their authenticity as required under section 106B of the *Evidence Act*, Chapter 80 Laws of Kenya. The Plaintiff submitted further that in the notification of sale, the loan due was given as Kshs.14, 805,900.90 and not Kshs. 14,766,263.11 which is the amount that was deducted by the 1<sup>st</sup> Defendant from the purchase price of the suit property. The Plaintiff submitted that the uncertainty as to the amount that was due contradicts the requirement of Rule 15 (d) of the *Auctioneers Rules* 1997.
36. The Plaintiff submitted that parties are bound by their pleadings hence DW1's testimony that the balance of the purchase price of Kshs.9, 032,939.19/- claimed by the Plaintiff was paid out by the 1<sup>st</sup> Defendant in settlement of the auctioneers and legal costs should be disregarded.
37. The Plaintiff submitted that the sale and transfer of the suit property to the 3<sup>rd</sup> Defendant should be set aside due to the unlawful conduct of the Defendants. In support this submission, the Plaintiff relied on *Maina Wanjigi & Another v Bank of Africa Kenya Ltd & 2 Others* [2015] eKLR where the sale was set aside due to the unlawful conduct of the auctioneer. The Plaintiff submitted that the 3<sup>rd</sup> Defendant did not acquire a valid title to the suit property since he was aware of the irregularities that were committed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants during the auction. In support of this submission, the Plaintiff cited *Joseph Kamau Mwangi v Kenya Commercial Bank Limited* [2004] eKLR.



38. The Plaintiff cited the cases of *Martha Khayanga Simiyu v Housing Finance Co. of Kenya & 2 Others*, HCCC No.937 of 2001[2001] EA 540, *Elizabeth Wambui Njuguna v Housing Finance Company of Kenya Limited* [2006] eKLR, *Albert Mario Cordeiro & Another v Vishram Shamji* [2015] eKLR, *Trust Bank Ltd v Eros Chemicals Ltd*[2000] 2 EA 550 (CAK) to emphasize the mandatory nature of the requirement for service of statutory notice and notification of sale.
39. The Plaintiff submitted relying on section 26 of the *Auctioneers Act* 1996 that without prejudice to the order sought for the cancellation of sale, due to the irregularities committed during the auction sale, the court should consider awarding damages which the Plaintiff assessed at Kshs. 65,000,000/- which it claimed to be the average value of the suit property based on the valuation reports produced in evidence. The Plaintiff argued that the 2<sup>nd</sup> Defendant sold the suit property below the market value. In support of this submission, the Plaintiff cited *Standard Chartered Bank v Walker* [1982] 3 All ER 938 and *Kenya Commercial Bank Ltd v James Osebe* [1982-88] 1KAR 48.
40. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions dated 17<sup>th</sup> April 2021. They submitted that the 1<sup>st</sup> Defendant had a right to exercise its statutory power of sale. In support of this submission, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited HCCC No. 3125 of 1995, *John P.O. Mutere & Another v Kenya Commercial Bank Ltd*.
41. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted further that the 2<sup>nd</sup> Defendant issued and served the relevant statutory notices in accordance with the Auctioneers Rules 1997 after which the suit property was advertised for sale by public auction at which the 3<sup>rd</sup> Defendant was declared the highest bidder at the fall of the hammer. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the Plaintiff's right of redemption was extinguished at the fall of the hammer. In support of this submission, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited *Kamulu Academy Limited & another v British American Insurance (K) Limited & 2 Others* [2018]eKLR and *Mbutia v Jimba Credit Finance Corporation and another* [1986-1989] 1 EA 340 (CAK).
42. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the suit property was valued on 4<sup>th</sup> February 2011; six months before the auction at which the open market value was assessed at Kshs.45, 000,000/- and forced sale value at Kshs.32, 000,000/-. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the 3<sup>rd</sup> Defendant purchased the suit property at Kshs.48, 500,000/- above its open market value.
43. The 3<sup>rd</sup> Defendant filed his submissions on 1<sup>st</sup> July 2021. In summary, the 3<sup>rd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant conducted the sale of the suit property in accordance with the law and that he acquired a good title to the property.

#### **Issues for determination:**

From the pleadings, the following are the issues arising for determination in this suit;

- a. Whether the sale of the suit property that was conducted by the 2<sup>nd</sup> Defendant through a public auction on 12<sup>th</sup> April 2011 was lawful.
- b. Whether the Plaintiff is entitled to the reliefs sought in the Further Further Amended plaint.
- c. Who is liable for the costs of the suit?



**Whether the sale of the suit property that was conducted by the 2<sup>nd</sup> Defendant through a public auction on 12<sup>th</sup> April 2011 was lawful.**

44. It is common ground that the Plaintiff obtained a loan from the 1<sup>st</sup> Defendant secured by a charge over the suit property that was registered in the name of the Plaintiff and that the Plaintiff defaulted in its loan repayment obligations to the 1<sup>st</sup> Defendant.
45. It is also common ground that the 1<sup>st</sup> Defendant had a right under the law and the said charge that was executed by the Plaintiff in its favour to sell the suit property to recover the outstanding loan. The 1<sup>st</sup> Defendant's said right is normally referred to as the statutory power of sale. It is also common ground that before exercising its statutory power of sale, the 1<sup>st</sup> Defendant was required under the law to serve the Plaintiff with a three months' notice normally referred to as the statutory notice requiring the Plaintiff to pay the outstanding amount in default of which the suit property would be sold by public auction. In the event that the Plaintiff failed to comply with the demand, the 1<sup>st</sup> Defendant was at liberty to instruct a licensed auctioneer to sell the suit property by public auction after advertisement. It is common ground that before advertising the suit property for sale, the auctioneer was required under Rule 15 of the *Auctioneers Rules* 1997 to serve the Plaintiff with 45 days' notice normally referred to as the redemption notice and a notification of sale calling upon the Plaintiff to pay the outstanding loan in default of which the suit property would be sold by public auction. Under Rule 11 (1)(b) (x) of the *Auctioneers Rules*, the auctioneer was also supposed to fix a reserve price for the suit property based on a valuation carried out not more than 12 months as at the date of the auction.
46. It is not disputed that after the Plaintiff defaulted in its loan repayment obligations, the 1<sup>st</sup> Defendant served it with a statutory notice. It is also not disputed that the Plaintiff did not comply with the said notice as a result of which the 1<sup>st</sup> Defendant instructed an auctioneer; the 2<sup>nd</sup> Defendant to put up the suit property for sale by public auction. What is disputed is whether the 2<sup>nd</sup> Defendant complied with the provisions of the *Auctioneers Rules* 1997 while putting up for sale and selling the suit property. At the center of the dispute is whether the 2<sup>nd</sup> Defendant served the Plaintiff with a notification of sale before advertising and selling the suit property. The other issue is whether the property was sold at undervalue.
47. Rule 49 of *Auctioneers Rules* 1997 provides that:
- “Service of notice or document may be effected under these Rules by any method authorized by law or by registered post, addressed to the last known postal address or abode in Kenya of the person to be served, and such service shall be deemed to have been effected seven days after posting.”
48. In *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR the Court of Appeal stated that:
- “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....
- It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices.”



49. This was the same approach taken in *Jane Wairimu Ngure (Suing as administratrix of the Estate of Peter Tharao Ngure (Deceased) v National Bank of Kenya Limited & 2 others* [2019]eKLR:

“ 50. In the case of Obel Omuom –Vs- Kenya Commercial Bank Ltd, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996)eKLR the Court of Appeal held that in instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the Court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargor, and that in the ordinary course of events, the notice must have reached the chargor.”

50. From the evidence on record, I am satisfied that the Plaintiff was served with the necessary notification of sale. DW3 testified that he prepared the notification of sale went to the Plaintiff's office premises and served the same upon a lady who introduced herself as Susan. DW3 testified further that after serving a copy of the said notice at the Plaintiff's office, he affixed another copy at a conspicuous place on the suit property. If that was not enough, DW3 also served another copy of the said notice upon the Plaintiff by way of registered post.
51. PW1 who was the Plaintiff's Managing Director and whose name is Susan Chetambe denied that she was the Susan who was allegedly served with a notification of sale at the Plaintiff's office on 4<sup>th</sup> February 2011. PW1 claimed that on that day, she was out of Nairobi. PW1 did not however place any evidence before the court showing that she was not in Nairobi on 4<sup>th</sup> February 2011. The school admission letter for her daughter indicated that the daughter was to report to school on 7<sup>th</sup> February 2011. PW1 did not also tell the court whether the Plaintiff's office was open on the material day and if it was, who was in the office. There is a possibility that PW1 may not have been served but this does not rule out the fact that the notification of sale was served upon someone at the Plaintiff's office who introduced herself as Susan. Even if it is assumed that the notice was not served at the Plaintiff's office, the Plaintiff has not rebutted the evidence placed before the court by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the effect that the notice was also affixed on the suit property and served upon the Plaintiff by Registered Post.
52. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants produced in court as evidence photographs showing that the said notice was affixed on the suit property. The photographs were produced in evidence without any objection by the Plaintiff. The Plaintiff took issue with the said photographs in its submissions. I am of the view that that objection came too late. If the Plaintiff had any objection to the production of the said photographs in evidence, the objection should have been raised at the trial. I am satisfied from the said photographs that the 2<sup>nd</sup> Defendant affixed a copy of the notification of sale on the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also produced a certificate of posting showing that the 2<sup>nd</sup> Defendant served the notification of sale upon the Plaintiff by way of registered post through its postal address. The Plaintiff denied receiving the notice through post. The Plaintiff did not however dispute the fact that the postal address used was that of the Plaintiff. From the totality of the evidence before the court, I am satisfied that the 2<sup>nd</sup> Defendant served the Plaintiff with the notification of sale as required under the *Auctioneers Rules* 1997.
53. On the issue of the suit property having been sold at undervalue, I have noted from the evidence on record that when the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to sell the suit property, it forwarded



to the 2<sup>nd</sup> Defendant a valuation report on the suit property prepared by Landmark Realtors Limited dated 4<sup>th</sup> February 2011. In the said report, the open market value of the suit property was assessed at Kshs. 45,000,000/- while the forced sale value that was recommended to be the reserve price was assessed at Kshs. 32,000,000/-. It is common ground that the suit property was sold to the 3<sup>rd</sup> Defendant at Kshs. 48,500,000/- at a public auction and that was the highest bid. The property was in the circumstances sold above the open market value.

54. I find no basis for the Plaintiff's claim that the suit property was sold at under value. The evidence on record shows that the Plaintiff requested for an opportunity that was granted by the 1<sup>st</sup> Defendant to sell the suit property by private treaty which the Plaintiff did not utilize. I am in agreement with the 1<sup>st</sup> Defendant that if the Plaintiff had potential purchasers who could purchase the suit property at a higher price, nothing stopped them from attending the auction and placing a bid.

55. In *Zum Zum Investment Limited v Habib Bank Limited* [2014] eKLR, the court stated that:

“ ....  
16. The question that this court must therefore address is whether the Plaintiff has satisfactorily demonstrated that the value of Kshs. 312,000,000.00 is not the best price reasonably obtainable for the suit property.....

....  
21.. The Defendant carried out valuation of the suit property and availed the report by Tysons Limited dated 24<sup>th</sup> April 2013. That report contains both the open market value of the property being Kshs. 390,000,000/- and the forced sale value of Kshs. 312,000,000/-. The Defendant, in my view, complied with Section 97 (2) of the *Land Act* by undertaking the forced sale valuation of the suit property. Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time.....

....27. In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds.”

56. The Plaintiff has not satisfied me that the suit property was sold at an undervalue to warrant the setting aside of the sale on that ground.

57. From the foregoing, it is my finding that the auction sale that was conducted on 12<sup>th</sup> February 2011 was lawfully carried out and that the 3<sup>rd</sup> Defendant who was the auction purchaser of the suit property acquired a valid title.



### **Whether the Plaintiff is entitled to the reliefs sought in the Further Further Amended plead.**

58. I have set out earlier in this judgment the reliefs sought by the Plaintiff. The Plaintiff is not entitled to the injunction sought to restrain the sale and transfer of the suit property. That relief has been overtaken by events since the suit property has been transferred to the 3<sup>rd</sup> Defendant. In any event, having found that the sale of the suit property was lawful, there is no basis for granting the order. The Plaintiff is also not entitled to a declaration that the public auction at which the suit property was sold to the 3<sup>rd</sup> defendant was illegal. I have found that there was nothing illegal in the said public auction. General damages was claimed on the basis that the auction was illegal. The relief is also not available in view of the earlier findings by the court. The Plaintiff has sought payment of Kshs. 9,032,939.19 which the Plaintiff has claimed to be the balance of the auction purchase price that the 1<sup>st</sup> Defendant has illegally withheld. The Plaintiff contended that out of the auction purchase price of Kshs. 48,500,000/- the 1<sup>st</sup> Defendant released to it a sum of Kshs. 24,700,797.70 only as the balance due to it. The Plaintiff has contended that the outstanding loan was Kshs. 14,766, 263.11 and as such it was entitled to payment of Kshs. 33,733,736.89 after deduction of the said amount. The Plaintiff has contended that after payment of the said sum of Kshs. 24,700,797.70, the 1<sup>st</sup> Defendant owes it Kshs. 9,032,939.19.
59. In its response to this claim, the 1<sup>st</sup> Defendant averred that the balance of the purchase price was to be released to the Plaintiff upon the parties entering into a consent settling this suit or upon the determination of this suit by the court. The 1<sup>st</sup> Defendant undertook to justify the withholding of the said amount of Kshs. 9,032,939.19 at the trial. At the trial, the 1<sup>st</sup> Defendant's witness(DW1) told the court in cross examination that the loan amount that was outstanding from the Plaintiff as at 3<sup>rd</sup> August 2009 was Kshs. 14,805,900.90. He conceded that the Plaintiff was paid a sum of Kshs. 24,700,797.70 only. He stated that that was the amount due to the Plaintiff after deduction of the outstanding loan, auctioneers' fees and other costs from the purchase price. He stated that the sum of Kshs. 9,032,939.19 claimed by the Plaintiff was spent on costs in respect of which a breakdown had been supplied to the Plaintiff. DW1 did not furnish the court with the alleged breakdown.
60. In re-examination, DW1 stated that the outstanding loan of Kshs. 14,805,990/- as at 3<sup>rd</sup> August 2009 continued to attract interest until 2011 when the 1<sup>st</sup> Defendant's security was realized. DW1 did not however tell the court the loan amount that was outstanding on the Plaintiff's account when the suit property was sold and the sale proceeds credited to the loan account.
61. For the Plaintiff, I did not get clearly where it obtained the sum of Kshs. 14, 766, 263.11 which it claimed to be the outstanding loan amount. I am unable to see how that could have been the outstanding loan amount as at the time of the sale of the suit property when both in the statutory notice and notification of sale, the outstanding loan was given as Kshs. 14, 805, 900.90 as at 3<sup>rd</sup> August 2009. The Plaintiff had referred to the bank statement at pages 55 and 56 of Plaintiff's Exhibit 1 as the basis of the said sum of Kshs. 14, 766, 263.11. I have perused the said statement. The statement is for the period 17<sup>th</sup> July 2010 and 14<sup>th</sup> June 2011. It is not possible that as at 14<sup>th</sup> June 2011, the Plaintiff still owed Kshs. 14, 766, 263.11. As at this date, the suit property had been sold and the purchase price paid.
62. The evidence before the court on this issue by both parties is not clear. I am keen on bringing this long standing dispute to a close. I have seen on record an affidavit sworn by Castro K. Mutai (DW1) on 14<sup>th</sup> November 2012 in support of the 1<sup>st</sup> Defendant's application of the same date in which the balance of the auction purchase price that was due to the Plaintiff was in issue. In paragraph 6 of the said affidavit, DW1 gave an account of how the sum of Kshs. 48,500,000/- that was received from the purchaser of the suit property was disbursed. From that account, Kshs. 16, 993,000/- was used to settle the outstanding loan, Kshs. 142,100.90 was incurred on valuation fees, Kshs. 1,293, 289.40 was paid



out as auctioneer's fees, Kshs. 2, 576, 227.00 as Debt Recovery legal fees, Kshs. 1,083,730/- as legal fees in HCCC No. 580 of 2009 and Kshs. 1,710,855.00 as legal fees in ELC No. 169 of 2011. The total amount spent amounted to Kshs. 23,799,202.30 leaving Kshs. 24,700,797.70 as the balance due to the Plaintiff. DW1 had attached to the said affidavit documents in support of the various charges.

63. From that breakdown, I find the amount that was deducted as the outstanding debt reasonable since the outstanding debt that was given as Kshs. 14,805, 900.90 as at 3<sup>rd</sup> August 2009 must have increased due to application of interest. I also find the valuation fees, auctioneers charges and debt recovery legal fees justified. I am however not convinced that the 1<sup>st</sup> Defendant was entitled to recover the costs of HCCC No. 580 of 2009 and the costs of this suit (ELC No. 169 of 2011) from the proceeds of sale of the suit property.
64. Costs of a suit is at the discretion of the court. The 1<sup>st</sup> Defendant did not tender any evidence showing that it had been awarded the costs of HCCC No. 580 of 2009 and the costs of this suit (ELC No. 169 of 2011) as against the Plaintiff. In the circumstances, there was no justification for recovering the costs of the two suits from the proceeds of sale of the suit property. It is my finding therefore that the Plaintiff is entitled to a sum of Kshs. 2,794, 585/- comprising of the alleged costs incurred in HCCC No. 580 of 2009 and ELC No. 169 of 2011(this suit) that was unlawfully deducted by the 1<sup>st</sup> Defendant from the proceeds of sale of the suit property together with interest.

#### **Who is liable for the costs of the suit?**

65. As I have stated earlier, costs is at the discretion of the court. In this suit, the Plaintiff has succeeded only in respect of a part of its claim. Substantial part of the Plaintiff's claim has been successfully defended by the Defendants. I would order that each party bears its costs of the suit.

#### **Conclusion:**

66. In the final analysis and for the foregoing reasons, I hereby enter judgment for the Plaintiff against the 1<sup>st</sup> Defendant in the sum of Kshs. 2, 794, 585/- together with interest at court rates with effect from 19<sup>th</sup> April 2017 until payment in full. The Plaintiff's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is dismissed. Each of the party shall bear its own costs of the suit.

**DELIVERED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL 2022**

**S. OKONG'O**

**JUDGE**

**Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Mwangi for the Plaintiff

Mr. Mugo h/b for Mr.Chege for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. C.K.Chege for the 3<sup>rd</sup> Defendant

Ms. C.Nyokabi-Court Assistant

