



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 407 OF 2012**

**JULIUS KIPKENY KOLIL ..... 1<sup>ST</sup> PLAINTIFF**

**RUTH JEMUTAI KAMAR ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> DEFENDANT**

**NANCY WAITHERA KIRURI ..... 2<sup>ND</sup> DEFENDANT**

**MUGANDA WASULWA**

**T/A KEYSIAN AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. The Plaintiffs have brought this Application before Court under Certificate of Urgency under **Order 40 Rule 1** of the *Civil Procedure Rules* and **section 3** of the *Civil Procedure Act*. The Notice of Motion dated 25 June 2012 seeks a temporary injunction against the second Defendant by herself or her agents from evicting or interfering with the quiet possession of the Plaintiffs' property being Maisonette No. B4 erected on L. R. No. 9042/685, Simba Villas, Embakasi, Nairobi (hereinafter "the suit property"), pending the hearing and determination of this suit. The Application also seeks a declaration that the purported sale by public auction carried out on the suit property be declared irregular and an illegality. The Application is brought upon 4 grounds namely that the second Defendant purportedly bought the suit property at a public auction following instructions given by the first Defendant to the third Defendant auctioneers. Secondly, the purported sale was irregular as the Plaintiffs were not in any arrears with their loan repayments. The sale was also irregular as there was no statutory notice issued to the Plaintiffs before the sale was carried out and lastly, the property was not advertised for sale by third Defendant.
2. The Application is supported by the Affidavit of the first Plaintiff on his own behalf and on behalf of the second Plaintiff, sworn on 25 June 2012. The deponent recorded that on or about 24 May 2007, the Plaintiffs secured a loan facility from the first Defendant in the sum of Shs. 3,910,000/- in order for the Plaintiffs to purchase the suit property. The Plaintiffs executed a Charge document in favour of the first Defendant which was known then as Savings and Loan Kenya Ltd. A Mortgage Account No. MGO 829115449 was opened with the first Defendant which the deponent stated had been dutifully, diligently and faithfully serviced by the Plaintiffs. The deponent attached to his said Affidavit, copies of the Plaintiffs' Bank Statements firstly for their Savings

Account and secondly for the said Mortgage Account. Such statements detailed that as between 20 December 2011 and 1 March 2012 individuals by the name of “Anthony “and “Kennedy” had deposited Shs. 6 million in the Savings Account. The deponent went on to say that the Plaintiffs had never had any dealings with these two individuals. Further, on or about 30 April 2012, the Plaintiffs’ tenant in the suit property had received a letter from a firm of advocates asking him to vacate the suit property on or before 31 May 2012. As a result of these activities, the Plaintiffs had instructed their advocates on record to carry out a search at the Lands Office to establish the status of the suit property. Unfortunately, the deponent failed to attach a copy of the said search to the Affidavit in support of the Application but, instead, attached a copy of the Lease of the suit property registered in their joint names as Lessees from the Kenya Commercial Bank Staff Pension Fund Registered Trustees for the unexpired term of 99 years from the first day of April 1988 (less the last seven days).

3. The Plaintiffs obtained interim orders on 25 June 2012 from this court, that a temporary injunction do issue pending the hearing of the Application before court. Those temporary orders have been extended from time to time and are still in place. The second Defendant swore a Replying Affidavit on 4 July 2012. She detailed that she had seen an advertisement in the Standard newspaper of the 13 December 2011 advertising the sale of the suit property by way of public auction. She obtained a catalogue for the auction and attended the same which was held on 14 December 2011. On that date, she tendered a banker’s cheques totalling Shs. 1,500,000/- representing 25% of the purchase price for the suit property. The deponent detailed that her advocates forwarded cheques totalling Shs. 2,000,000/- to the Relationship Manager, (Credit Support) of the first Defendant under cover of its letter dated 27 February 2012. In that letter, her advocates had requested of the first Defendant bank for more time (30 days) to be able to pay the outstanding balance of Shs. 2,500,000/-. Despite this, the deponent maintained that she had subsequently paid the balance of the purchase price to the first Defendant being Shs. 4,500,000/-. In this regard, she referred to a Certificate of Sale issued to her by the third Defendant auctioneers plainly declaring her to be the purchaser of the suit property. At paragraph 9 of her Affidavit in reply, the second Defendant exhibited letters to her advocates on record from the first Defendant dated 8<sup>th</sup> and 9<sup>th</sup> May 2012 enclosing the executed Transfer by Chargee (in triplicate) in her favour and the original Lease document. However, the court noted that she had not in fact exhibited to the Replying Affidavit, copies of the 2 documents. The second Defendant concluded her said Affidavit by detailing that she was the lawful owner of the suit property and consequently entitled to vacant possession and occupation of the same. She also noted that the *“copy of the title exhibited by the Plaintiffs clearly shows that the property was charged to the 1st Defendant who sold the same to me in exercise of their statutory power of sale after the Plaintiffs defaulted in payment of the loan.”*
4. On the 5th July 2012, the first Defendant filed its Replying Affidavit sworn on that day by its Relationship Manager one **Peter Weru**. In paragraph 4 thereof, the deponent stated that the first Defendant, by a letter of offer dated 24th May 2012 (which I presume is a typographical error and should read 24th May 2007), advanced to the Plaintiffs a mortgage facility of Shs. 3,910,000/- to enable them to complete the purchase of the suit property. He attached to his said Affidavit, a copy of the said letter of offer as well as the Charge document dated 13 July 2007. He noted that under clause 6 of the said Charge, it was expressly detailed that in case of default by the Purchasers in the payment of any single monthly instalment, the first Defendant would exercise its statutory powers of sale. Thereafter, the deponent detailed that the Plaintiffs had defaulted in their repayment obligations and as at 15 May 2008, were in arrears to the extent of Shs. 245,664/-. He attached a copy of a letter addressed by the first Defendant to the Purchasers dated 15 May 2008 to this end. He also attached a copy of what he maintained was a Statutory Notice addressed to the Purchasers dated 13 June 2008. There was also a further letter attached dated 20 May 2009 noting that the Plaintiffs’ account was in arrears to the extent of Kenyan shillings 144,392 .41.
5. The interesting point to note as regards these exhibits to the Affidavit of the said **Peter Weru** was that the letter of offer dated 24 May 2007 was addressed to the Plaintiffs at P. O. Box 48400 (00100), Nairobi which was the address detailed in the Charge document dated 13 July 2007. However the letters addressed to the Plaintiff’s giving warning of the arrears to their account, as well as the Statutory Notice, were addressed to the Plaintiffs at P. O. Box 4178, Eldoret. Similarly, the account statements attached to Mr. Weru’s said Affidavit in relation to the Mortgage Loan

account No.MG 0829115449 detailed the name of the first Plaintiff but no address for him. However, the deponent stated that the first Defendant commissioned the services of the third Defendant to sell the suit property and recover the amount outstanding due from the Plaintiffs. The third Defendant had issued a 45 day notice of sale to the Plaintiffs which again bore the Eldoret address. The third Defendant advertised the sale in the Standard newspaper of 13th December 2011, the deponent attaching a copy of the said advertisement to his Affidavit marked “PW-10”. It was somewhat surprising to the court to note that the advertisement was carried in the Standard newspaper only one day before the date of the auction. Mr. Weru confirmed that the second Defendant was the highest bidder at the auction and he exhibited copies of the Bid, the Memorandum of Sale and the Certificate of Sale as exhibit “PW 11”. He then detailed that: *“the proceeds of the sale were credited to the Applicants’ loan account by the 1st Defendants officers to settle the Debt owed by the Applicants to the 1st Defendant as evident from the statement of account.”*

6. As if realising that the contents of his Replying Affidavit and the exhibits attached thereto were somewhat inadequate in explanation of the first Defendant’s side of the story, **Peter Weru** swore a Supplementary Affidavit dated 9 August 2012. Leave to this end had been granted by this Court on 26 July 2012. The deponent emphasised that the right to sell the suit property by public auction was detailed in the Letter of Offer dated 24 May 2007 (clause 16) as well as in the Charge document. He also noted that the Plaintiffs had agreed, by signing the Letter of Offer, to maintain a minimum balance of Shs. 65,000/- at all times in their Savings Account held by the first Defendant (clause 18(i)). The deponent went on to say that not only had the Plaintiffs defaulted in their repayment obligations but they also failed to maintain the said minimum balance of Shs. 65,000/-. He then went on to say that the statutory notice was issued and served upon the Plaintiffs by ordinary post and attached a copy of the mailing list of the first Defendant dated 18 June 2008. Bearing in mind the court’s observation, as above, as to the short notice of the auction sale by advertisement placed in the Standard newspaper of 13 December 2011, the deponent attached to his Supplementary Affidavit a copy of advertisements taken out by the third Defendant in the Standard newspaper of 28 November 2011 as well as 13 December 2011.
7. Mr. Weru also attached to his Supplementary Affidavit, a letter from the first Defendant dated 2 December 2011 addressed to a firm of valuers – Transcounty Valuers Ltd asking it to carry out a professional valuation of the suit property for forced sale purposes. I presume that the copy of the subsequent valuation prepared by the said Transcounty Valuers Ltd was exhibited to his Replying Affidavit as “PW-9”. However, it was interesting for the court to note that the said valuation was dated 13 December 2011 (the day before the auction sale) and the recommended forced sale value of the suit property was Shs. 6,500,000/-. It seems therefore that the suit property was sold at the alleged auction to the second Defendant at Shs. 500,000/- less than the forced sale value. The deponent also attached as exhibit “PW-14” copies of various correspondence passing between the first Defendant and the Plaintiffs. Such took the form of the first Purchaser’s letter to the Chief Executive Officer of the first Defendant dated 14 May 2012, received by the first Defendant bank on 17 May 2012. That letter emanated from the first Purchaser care of P. O. Box 13943 – 00100 Nairobi. It complained of what the first Purchaser detailed as an irregular sale of his property. This was after he had received notification from his tenant that the property had been sold. He noted therein that he had not received any letter, notice or otherwise indicating that the loan repayments had not been received by the first Defendant and he maintained that money had always been in the account for the purpose of loan repayments. He further stated that monies totalling Shs. 6 million had been deposited into his account without his consent in December 2011 which he now understood were the proceeds of what he termed the *“secret sale of my property”*. The first Defendant bank responded by its letter of 25 May 2012 which, predictably, detailed that the sale of the suit property had been carried out in accordance with proper procedures and was as a direct result of arrears on the Plaintiffs’ mortgage account not being cleared from time to time. Perhaps more interesting to the court, was the Brief dated 18 May 2012 to the Chief Executive Officer from the first Defendant’s Credit Support Department. At the back end of that report/brief the first Defendant’s Credit Support Department detailed as follows:

### **“Current Complaint**

**Mr. Kolil called on us in early May and expressed surprise that the property had been sold, indicating that he was not aware of the Bank's recovery action that culminated in the sale. He however did confirm that the address used in all our mails to him was correct.**

**We have now seen his letter dated 14<sup>th</sup> May 2012 to the CEO, and wish to clarify as follows:**

**(i) The arrears reflect and communicated to Mr. & Mrs. Kolil are genuine, and his assertion that funds were always available on account 015101403663 is not supported by entries on the statement. The credits to this account were at best, erratic and insufficient to cover loan repayments, leading to the arrears.**

**(ii) As evidence in the body of this brief, sufficient communication was sent to the debtors by way of telephone calls, demand letters [from the Branch, Credit Administration and Credit support Units], Statutory Demand Notice from Legal department, Auctioneers 45 days redemption notice and advertisement. It is evident that the bank over-indulged the debtor despite the fact that this gesture was not being reciprocated. Mr. Kolil has confirmed that the correct address was used in sending all these letters.**

**(iii) There was no 'stranger' operating Mr. Kolil's savings account. The credit amounts credited into his account are proceeds of the action sale, which were used to liquidate his loan.**

**(iv) The property was sold at Reserve Price value as per recent valuation report.**

**In light of the above, it is observed that the realization of our security followed due process and was in no way secretive as claimed."**

8. As agreed by counsel for the parties before court on 7 November 2012, the Plaintiffs' Application would be dealt with by way of written submissions. The Plaintiffs' submissions were filed on 21 of November 2012. They commenced by stating that the purported auction of the suit property on 14 December 2011 was null and void. The Plaintiffs maintained that the same was done in violation of the law and a void action cannot convey any title to a purchaser, in this case the second Defendant. As regards the law, the Plaintiffs referred the court to Article 40 of the Constitution from which they stated that it was clear that no arbitrary deprivation of property of any description can be tolerated. They maintained that the alleged auction was carried out arbitrarily and against the express provisions of the law. The Plaintiff then set out **section 69 (A)** of the *Transfer of Property Act* and submitted that no statutory notice was served on the Plaintiffs. They maintained that such statutory notice must be served by Registered Post, which was never done and to which the first Defendant admitted in the said Supplementary Affidavit that the same had been served by ordinary post. The Plaintiffs referred the court to the case of **Simiyu versus Housing Finance Company of Kenya Ltd (2001) EA 540**. The Plaintiffs noted that in that case there was no proper statutory notice or notification of sale served on the plaintiff because the Post Office Box used by the first and second defendants therein did not belong to the plaintiff. The Plaintiffs herein pointed to what it termed the "alleged Statutory Notice" which detailed therein the following:

**"For the purposes of this paragraph, the date of service shall be ten (10) days from the date of posting as evidenced by the certificate of posting a registered postal issued to s at the time of postage".**

The Plaintiffs maintained that the certificate of posting was very significant and as there is no certificate of registered post the Notice cannot be said to exist. The Plaintiff then referred to the requirements of

**section 74 (1)** of the *Registered Land Act* which had been highlighted by the Court Appeal in the case of **Ochieng & Anor. vs Ochieng & Ors** (no citation given) as well as the case of **Trust Bank Ltd versus Eros Chemist Ltd (2001) 2 EA 550** in which the Court had found:

**“..... In our judgement with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months’ notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid.”**

9. The Plaintiffs thereafter referred the court to **section 69A** of the *Transfer of Property Act* which provided that a mortgagee shall not exercise the statutory power of sale unless and until a notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in the repayment of mortgage money or part thereof for three months after such service. Further, the Plaintiffs maintained that the third Defendant auctioneers had never served them with the Notice of Sale as required by **rule 15 (C)** of the *Auctioneers Rules 1997* in that they had failed to locate the suit property and served the notification of sale of the same on the registered owner or on an adult member of his family residing or working with him. The Plaintiffs summed up their submissions thus:

**“(i) No 90 days Statutory Notice was served.**

**(ii) The advertisement on the Newspaper referred to a property owned by Kenya Commercial Bank Staff Pension Fund and not the Plaintiff. This was clearly meant to conceal the information about sale from the Plaintiff.**

**(iii) The property was advertised for sale before valuation was carried out. It was humanely impossible to release the valuation report on 13<sup>th</sup> December 2011 and publish Notice of Sale on the Newspaper the same day (13<sup>th</sup> December 2011).**

**(iv) The valuer at no time visited the suit property yet the report purports to mention the interior state of the property.**

**(v) The bid by the second Defendant was for Kshs.5,000,000/= (Read Kenya Shillings Five Million Only).**

**(vi) No deposit of Kshs.1,000,000/= (Read Kenya shillings One Million Only) was made to enable the Second Defendant to participate in the action.**

**(vii) No auction was concluded on 14<sup>th</sup> December 2011 as the Second Defendant was referred to the valuer.**

**(viii) The Second Defendant did not pay the entire purchase value within the time stipulated.**

**All these point at arbitrariness. The parties did not comply with the due process of the law. The bank is at all times obliged to protect the interests of its clients but in this particular case it went out of its way in ensuring that its clients’ property was arbitrary disposed. It even exposed its client’s bank details to a third party a total stranger”.**

10. The first Defendant’s submissions were filed herein on 7 December 2012. They commenced by detailing the background to the suit and interestingly at paragraph 1.3, the first Defendant detailed that on the 13<sup>th</sup> of June 2008, it had issued a three months statutory in Notice under **section 69A** of the *Transfer of Property Act* served upon the Plaintiffs by registered mail. (Underlining mine).

Thereafter the first Defendant having set out the facts relating to the Application before court noted that the facts in contention as between the Plaintiffs and the first Defendant were that the first Defendant maintained that the Plaintiffs were in breach of their repayment obligations that resulted in the sale and subsequent transfer of the suit property to the second Defendant in exercise of the Chargee's right of sale under the Charge and at law. The first Defendant also contended that a valid Statutory Notice under **section 69A** of the *Transfer of Property Act* was issued and that the public auction conducted on the 14 December 2012 was legal. The first Defendant also maintained that the notices and all demands and correspondence were addressed to the Plaintiffs at their last known postal address which they do not deny is theirs. It submitted that a look at the statement of the Plaintiffs mortgage account reveals that the Plaintiffs were in breach of their repayment obligations. In its turn, the first Defendant also referred this court to the **Simiyu** case (supra) as well as **Mbuthia v Jimba Credit Finance Corporation & Anor EALR 341** in which the court had held that a statutory notice ought to be issued only once. The first Defendant maintained that the Statutory Notice issued to the Plaintiff's gave them 3 months from the date of service to pay the amounts due. The first Defendant maintained that the Statutory Notice was therefore valid. As regards service of the Statutory Notice, it was the first Defendant's submissions that it was addressed to the Plaintiffs at their last known postal address which was P. O. Box 4178 (without saying whether this was Eldoret or otherwise). Again the first Defendants emphasised that the Plaintiffs had not denied the fact that this was their postal address. It maintained that all the previous demand letters had been sent to that same postal address. It concluded by saying:

**“The fact is they received it, cleared the outstanding instalments amount immediately but did not pay the amount demanded and thereafter again defaulted on their repayment.....The Plaintiffs/Applicants received a statutory notice, their conduct of paying the outstanding instalments amount shows that they did receive the statutory notice, the 1st Defendants obligation under section 69 A was therefore discharged.”**

11. In terms of whether the auction sale was legal, the first Defendant set out the provisions of **section 15** of the *Auctioneers Act*. It then referred to the various documents in relation to the auction sale including the advertisements taken out in the Standard newspaper of 28 of November and 13 December 2011. It pointed out that the advertisements noted that the leasehold title for 99 years from April 1988 was registered in the name of Kenya Commercial Bank Staff Pension Fund Registered Trustees. This the first Defendant noted was the mother title to the suit property and submitted that the Plaintiffs were in error when they stated that the owner of the suit property was disguised in those advertisements. Thereafter at paragraph 4.4.3.8 of its submissions, the first Defendant detailed as regards the valuation report produced by the Transcounty Valuers firm. It detailed that it had recommended a reserve price of Shs. 6 million. This court has already noted that the Valuation Report detailed a forced sale value of Shs. 6,500,000/-. That obviously begs the question as to why the said valuers should recommend a reserve price of Shs. 6 million only? The first Defendant then submitted that the Plaintiff's had no claim at law to the suit property. It pointed to the provisions of **section 60** of the *Transfer of Property Act* as well as the Court of Appeal case being **Habib Zurich Finance (K) Ltd versus Muthoga & Anor (2002) 1EA 81** in which the court had found that:

**“In 1985, section 60 of the Transfer of Property Act was amended so that the equity for redemption was lost on the fall of the hammer at an auction unless the chargee wished to set-aside the sale for non-payment of the purchase price....”**

The first Defendant maintained that the Plaintiffs had lost their right to redeem upon execution of the Memorandum of Sale at the auction. It also submitted that it had applied the proceeds of sale of the auction as provided by law in that they were utilised to clear the mortgage debt, the balance being credited to the Plaintiffs' accounts by its officers.

12. The first Defendant then turned its attention to the principles as to the granting of injunctions as expounded in the classic authority of **Giella versus Cassman Brown (1973) EA 358**. It maintained that the applicant had not shown a prima facie case with a probability of success. It

was evident in the first Defendant's opinion that the Plaintiffs having breached their obligations under the Charge had been served with a valid Statutory Notice and thereafter the first Defendant had exercised its right of sale. The first Defendant had demonstrated that the auction had been conducted lawfully and in good faith. It had also established that it was not in breach of any of its obligations to the Plaintiffs. As regards the suit property, the same had already been sold and transferred to the second Defendant. It maintained that the Plaintiffs had no legal right to the suit property to warrant an injunction and their remedy, if any, lay in damages. Finally, the first Defendant concluded its submissions as follows:

**“The 1st Defendant submits on a balance of probability, that a valid statutory notice was sent out and received by the Plaintiffs/Applicants. The fact that they receive the same can be deduced from their conduct of clearing the outstanding instalments. What could have prompted this if not the receipt of the statutory notice? The 1st Plaintiff being a banker was well aware of the procedure. He knew that clearing the outstanding instalments would give him some reprieve. He however did not consider the full effects of the statutory notice that called for the payment of the whole outstanding amount which immediately become due and payable. The Applicants chose to ignore all notices from the bank and the auctioneers, they filed this suit 5 months after the auction! Equity does not aid the indolent.”**

13. The submissions of the second Defendant were brief and to the point. As regards the legal position, it maintained that all the Plaintiffs' previous rights of proprietorship of the suit property, either legal or equitable, were extinguished at the fall of the hammer at the auction. It maintained that legal ownership and proprietorship of the suit property now vested in the second Defendant. The manner in which and time at which the second Defendant paid the purchase price could not nullify the sale in favour of the Plaintiffs. It was only the first Defendant that can rescind in the sale in the event of the breach of the terms of a sale by a purchaser. The second Defendant maintained that she being the lawful owner of the suit property, was now entitled to the vacant possession thereof. The second Defendant submitted that the Plaintiffs herein had not established a *prima facie* case with a probability of success as required by the first rule in the **Giella** case and in this regard emphasised that there was no requirement for the service of the Statutory Notice by registered post under the Indian Transfer of Property Act (now repealed). The second Defendant maintained that the Plaintiffs were seeking to rely on technicalities in order to defeat the first Defendant's right to realise its security through the statutory power of sale. The second Defendant also emphasised that even if the Plaintiffs were successful in the suit, they can easily be compensated by way of damages. In my view, the most telling submission made by the second Defendant was as regards **section 69B** of the *Transfer of Property Act* which had now been repealed but was still applicable pursuant to the transitional provisions of the *Land Registration Act, 2012*. That section provided that the Plaintiffs' remedy lies in damages in the event that the Court finds that the first Defendant did not follow the laid down procedure in realising the suit (charged) property. The section also gave protection to the second Defendant who was the purchaser of the suit property at a public auction in that she could only lose that protection if it was proved before court, that there was an improper or irregular exercise of the statutory power of sale of which the second Defendant had notice. The second Defendant also drew the Court's attention to **section 26** of the *Auctioneers Act* which provides that any irregularity on the part of the auctioneer cannot invalidate a sale so that the remedy of the Purchasers in this suit would be by way of damages against the auctioneer, the third Defendant. In this regard, the second Defendant referred the Court to the Ruling of my learned brother **Azangalala J.** in the case of **John Mwenja Ngumba versus Kenya Commercial Bank Ltd & 7 Ors (2006) eKLR.**

14. I have extensively reviewed the annexures to both the Affidavit in support of the Application as well as the first Defendant's Replying Affidavit and Supplementary Affidavit. There are a number of anomalies therein which I have found to be disturbing. For example, the matter of the address of the Plaintiffs. The Letter of Offer addressed by the first Defendant to the Plaintiffs and dated 24 May 2007 details the Plaintiffs' postal address as P. O. Box 48400 (00100), Nairobi. However, all of the correspondence exhibited as "PW-3", "PW-4" (the Statutory Notice), and "PW-5" to the Replying Affidavit of **Peter Weru** detail the Plaintiff's postal address as P. O. Box 4178, Eldoret.

In the Affidavit in support of the Application the first Plaintiff details that his address is P. O. Box 3900, Eldoret. At paragraph 14 of the Affidavit in support, the first Plaintiff makes the statement that the first Defendant bank did not furnish the Plaintiffs with the mandatory Statutory Notice of sale. This may be as a direct result of the first Defendant not using the correct postal address as above. Not contained in the Replying and Supplementary Affidavits of the first Defendant but in the first Defendant's submissions, it went to considerable trouble, in more than one paragraph thereof, to detail that the notices and all demands and correspondence were addressed to the Plaintiff's at their last known postal address which they did not deny was theirs. The first Defendant's submissions were that the Plaintiffs had, in fact, received the Statutory Notice as they cleared the outstanding instalment amount immediately thereafter but not the amount demanded in the Statutory Notice. To this end, the first Defendant referred to annexure "PW 16" to the Supplementary Affidavit which was the letter from the first Defendant to the Plaintiffs dated 25 May 2012 in response to the first Plaintiff's letter of complaint dated 14 May 2012. I see no reference in the first Defendant's said letter to the Plaintiffs clearing the outstanding instalments. Indeed, in exhibit "PW-6" annexed to the first Defendant's Replying Affidavit the copies of the Account Statements for the Plaintiffs' Mortgage account No. MG 0829115449 commence as at 18 October 2008 and for the Plaintiffs' Savings account No. 1100096027 as at 17 October 2008 – four months after the date of the Statutory Notice. Again, I find the first Defendant's explanation in this regard puzzling. So much so, that I am inclined to accept the Plaintiffs' version of events that they never received the Statutory Notice dated 13 June 2008.

15. In that regard, much has been made by the Submissions of the first and second Defendants as to the posting requirements in respect of Statutory Notices. In the first Defendant's submissions at paragraph 1.3 the statement is made that the statutory Notice was served upon the Plaintiffs by registered mail. Later in those submissions, at paragraph 4.3.4, the first Defendant details that the Statutory Notice was sent by post and that to prove this, the first Defendant annexed to its Replying Affidavit (at page 94) a copy of the mailing list dated 18 June 2008. Such seems quite clear to me and I accept that the Statutory Notice was served by ordinary not registered post. In the second Defendant's submissions at paragraph 4.3.4, the second Defendant made the point that there was no requirement of the service of such notice by registered post under the provisions of the Indian Transfer of Property Act. **Section 69A (1)** of the *Transfer of Property Act* reads:

**“(1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-**

- a. **notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service;”**

The Act does not specify the mode of service of the statutory notice. However, the Charge as between the Purchasers and the first Defendant dated 13 July 2007 does so and reads at clause 15:

**“Any notice or demand for payment by the Lender shall be deemed to have been properly served on the Chargor if delivery by hand to the Chargor or left at the Chargor's last known place of abode in Kenya or if sent by registered post at the last known postal address of the Chargor Kenya or if it is displayed on the Charged Property. In the absence of evidence of earlier receipt any notice or demand shall be deemed to have been received if delivered by hand at the time of delivery or if sent by post seven days after posting (notwithstanding that it be undelivered or returned undelivered) where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted.”** (Underlining mine).

The point has to be made and as referred to above, that the first Defendant has only produced before this court the statements relating to the Plaintiffs' Mortgage and Savings accounts as from the 18 October 2008. There is nothing to show this court that once the Statutory Notice was sent out by the first Defendant on 18 June 2008 as per the first Defendant's mail book, that the Plaintiffs failed to regularise

their loan repayments within the period of 3 months as from the date of service of the Statutory Notice. It seems therefore that the Statutory Notice was not properly served upon the Plaintiffs and I so find. I also find that there was no proof that the Plaintiffs had regularised their Mortgage account or otherwise.

16. The next point made by the Plaintiffs in their submissions was that the advertisement carried in the Standard newspaper of 28 November and 13 December 2011 had not detailed that the suit property was owned by the Plaintiffs. I have perused the same and the advertisement quite clearly reads:

**“All that property known as L. R. No.NBI 9042/65 – MAISONETTE NO. B-4 (SIMBA VILLAS, NRB). It is a lease hold title for 99years from April 1988 registered in the name of KENYA COMMERCIAL BANK STAFF PENSION FUND REGISTERED TRUSTEES.”**

There is no mention anywhere in the advertisement of the names of the Plaintiffs. I tend to agree with the Plaintiffs’ submissions that the advertisement was misleading and perhaps designed to conceal the information about the sale of the suit property from the Plaintiffs. However, I cannot agree with the further submission of the Plaintiffs that the sale was not properly advertised for they do not seem to have taken into account the advertisement published in the Standard newspaper on 28 November 2011 as well as the second advertisement on the 13 December 2011. There is also no evidence as regards the Plaintiffs’ submission that the valuer at no time visited the suit property. However, there is an element of truth in the Plaintiffs’ further submission that the suit property was advertised for sale before the valuation report had been published for the same is dated 13 December 2011. I have already commented on the fact that the valuer – Transcountry Valuers Ltd had noted at page 7 of the report that the forced sale value of the suit property were Shs. 6,500,000/-and that I found it surprising that the suit property had been sold for Shs. 6,000,000/-only, to the second Defendant. Further, the Bidding Register exhibited at page 96 to the first Defendant’s documents noted that the second Defendant’s bid was only Shs. 5 million, a fact that was commented upon in the third Defendant Auctioneers’ letter to the first Defendant dated 15 December 2011.

17. The Plaintiffs’ submissions also brought up the validity of the 45 day notice given by the third Defendant Auctioneers dated 30 September 2011. That notice was served by registered post as per the Certificate of Posting dated (I think) 4 October 2011. Of course it was sent to P. O. Box 4178 Eldoret as that would have been the address given to the third Defendant Auctioneers by the first Defendant when issuing instructions for the sale of the suit property. The Plaintiffs brought to the Court’s attention that under **Rule 15 (C)** of the *Auctioneers Rules 1997* that the Notification of Sale should have been served by the third Defendant by locating the suit property and serving the same on the registered owner or an adult member of his family residing or working with him. No evidence was put before this court to the effect that such Notification of Sale had been so served. However I would find that the third Defendant Auctioneers did comply with **Rule 15 (d)** of the *Auctioneers Rules, 1977* by sending a notice of not less than 45 days in writing to the owner of the property, even though to the wrong address!

18. As indicated above, the Plaintiffs referred me to the **Simiyu** case and the Ruling of **Ringera J** as he then was. I would adopt the finding of the learned judge at p.456 of the authority as follows:

**“It appears to me that the first question to answer in this application is whether or not the Plaintiff was served with either the statutory notice required by law or with a due notification of sale and the effect, if any, of any want of service of the same on the contract of sale entered into between the chargee and the auction purchaser for the sale of the charged property. In answering that question the court is to remember that it is not required – indeed it is forbidden – to make a definitive finding of fact or law at the interlocutory stage particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here.”**

I believe that the case before court is on all fours with the **Simiyu** decision and as I have commented above, it is very likely that the wrong address has been used for the Plaintiffs in respect of both the

Statutory Notice and the Notification of Sale. Accordingly, it must follow and I do find that the Plaintiffs were probably not served either with the Statutory Notice relied upon by the first Defendant for the exercise of its statutory power of sale or the Notification of Sale required by the Auctioneers' Rules. What is the effect of that finding?

19. In that regard, I am supported by the decision in **Peter Kuria Munyuiru v Housing Finance Company of Kenya Limited & anor.**, HCCC No. 457 of 2006 (unreported) as per my learned brother **Warsame J.** I am sure that I will be forgiven for quoting extensively from the Ruling of my learned brother Judge as follows:

**"The central issue is whether the Plaintiff was properly and sufficiently served with the statutory notice. The notice is a mandatory legal requirement and the burden of proving proper and valued service is always on the shoulders of the chargee. The purpose of the notice is to alert or give notice to the chargor that his redemption of the suit property is about to come to an end due to his default. It is meant to be a shield and attack for both parties.**

**Section 74 of Cap 300 requires the chargee to give a statutory notice, which requires the chargor to pay all outstanding money within three months of the date of service of the said notice. A notice sent through registered post takes effect after the collection of the registered mail of the chargor from the Postal Corporation of Kenya. It is therefore incumbent upon the chargee to ensure the registered mail sent through any process is received and there must be evidence of receipt and the date it was collected or received by the addressee.**

**In the case before court, there is no evidence to show that the statutory notice allegedly sent through the Postal Corporation of Kenya reached the address of the plaintiff and was actually collected by the plaintiff to persuade me to say that a statutory notice had been properly issued and delivered to the chargor. In my understanding the law requires the process leading to the hanging or divesting of the devil must be legal and proper. The notice is meant to give the chargor an opportunity or at least a chance to redeem his property. And in my view a party who has not been given an opportunity or notice that his property is about to be auctioned can be rightly said to be aggrieved. In law, service of a valid statutory notice of sale on the chargor is a condition precedent to the exercise of statutory power of sale.**

**Without being definitive, it is my humble view that any sale transaction engaged or conducted prior to service of a valid statutory notice on the chargor is a nullity in law and is incapable of vesting any or any proper or valid interest over the property of the chargor held as a security by the chargee."**

20. Thereafter, the learned judge quoted from the Ruling of **Ringera J** (as he then was) who held in **HCCC No. 1678 of 2001 Samuel Kiarie Muigai v Housing Finance Company of Kenya Limited** (unreported) as follows:

**"The omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute which delegates from the chargor's equity of redemption. Without service of a valid statutory notice, the power of sale does not crystallise and any subsequent service of the notification of sale and the actual auction are merely acts pursuant to the pretended power of sale. As such they are nullity in law. In the matter at hand, the chargor had a specific statutory right to be served with a valid statutory notice under the provisions of Section 74 of the Registered Land Act. This court will not tolerate the trampling down of that right by the chargee on the basis that he can compensate the chargor for his loss in damages. Such toleration would be an improper exercise of discretion which would render the statute a dead letter law".**

21. Similarly, in the **Simiyu** case (supra) it was held as follows:

**"The service of both an adequate statutory notice and a notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the Registered Land Act. Without compliance with those statutory commands there can be no valid exercise of the power of sale and accordingly it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereon. Neither can it properly be contended that the chargor's remedy if any such sale has taken place is in damages as provided in section 77 (3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor."**

I am further supported by the Court of Appeal decision, by which I am bound, in the **Trust Bank Limited v Eros Chemists Limited & Anor** case (supra) when the five-man bench deliberated as follows:

**"In our judgement, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice."**

Having found that the statutory notice was not properly served on the Plaintiff, I am in agreement with this submission in that such is not a mere irregularity which can be remedied in damages. I concur that where there is a clear contravention of the express statute (in this case the Transfer of Property Act) which detailed the power of sale to the chargee in the first instance, it cannot be correct to allow the chargee to assert a right contrary to law.

22. Taking into account the principles of the **Giella** case, I would here repeat what my learned brother **Warsame J** summed up in the **Peter Kuria** case in relation to the granting of an injunction as follows:

**"My understanding is always that where damages may be an appropriate remedy, an order of injunction would not be granted. My take is that a flagrant contravention of the law cannot be rewarded with the happening of a future event. The court must resolve the present illegality before it pleases the chargor with the possibility of a future award in damages against the chargee..... I therefore do not think damages would be an adequate remedy. It means the plaintiff has satisfied the first two tests in the grant of injunction. And by any means I am not in doubt to consider the last limb in Giella's case."**

23. In contrast to the above authorities, the first Defendant, apart from referring this court to **Paget's Law of Banking** as well as the **Giella** case, also drew the Court's attention to **Eccon Construction and Engineering Ltd versus Giro Commercial Bank Ltd & Anor**. EALR (2003) 2 EA 426. That was a case that involved the validity of the Charge for being not properly witnessed and I found it of little relevance to the matter before court. Further I was referred to the **Mbuthia** case (supra) which involved a finding as to when a sale by auction was considered complete and consequently as to when the mortgagee's equity of redemption was extinguished. One of the propositions put forward therein was a quote from **Halsbury's Laws of England (4th Edition) Volume 32 Para 276** as follows:

**"If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the prices so low as to be in itself evidence of fraud, but not on the grounds of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale."**

In this case, I find that the Plaintiffs never sanctioned the sale as the first Plaintiff has detailed in his said Affidavit in support of the Application. They first came to know of the sale when so informed by the tenant of the suit property, some 4 1/2 months after the sale had taken place. However, I do believe that there may have been some fraud in relation to the sale when one bears in mind that the Valuation is dated only the day before the actual day of the sale. I have also queried, as above, as to just why the suit property was allowed to be sold for Shs. 6 million when the said valuation had placed a figure of Shs. 6.5 million as the forced sale value. However, my own conclusions as regards the circumstances of the sale do not entirely depend upon an apparent undervaluation of the suit property as that will all come out at the hearing of this matter in due course. In any event, as I have already found that the statutory notice was not properly served upon the Plaintiffs, the sale and the subsequent transfer of the suit property to the second Defendant would necessarily not be confirmed – another matter that will come out at the hearing of the suit in due course.

24. Before I leave this matter, it would be remiss of me not to refer to the case of **John Mwenja Ngumba** (supra). My learned brother **Azangalala J** and learned sister **Kasango J.** after setting out the provisions of **section 69B** of the *Transfer of Property Act* went on to detail as follows:

**“In my view, even if there was non-compliance that alone would not be fatal as I agree with Ringera J as he then was in Jacob Ochieng Muganda –vs- House Finance Company of Kenya Ltd (supra) and Mulwa J in Kiran Rmaji Kotedia and Trust Bank Limited (supra) that such non compliance is a mere irregularity which would not invalidate the sale herein”.**

However, the conclusion arrived at by the learned Judges in that case can be distinguished from this matter before me when one takes into account the allegations of fraud made by the Plaintiffs herein against the first and third Defendants.

25. In the premises, I am satisfied that the Plaintiffs herein are deserving of an interim injunction pending the hearing and final determination of this suit. To my mind, the Plaintiffs have established a *prima facie* case with a probability of success and as per the **Simiyu** finding as above, I do not consider that damages may necessarily be an adequate remedy for the Plaintiffs. In the circumstances, I need make no finding as to the balance of convenience as per the **Giella** principles. Accordingly, I grant prayers 2 and 3 of the Notice of Motion dated 25 June 2012 with costs against the Defendants.

**DATED and delivered at Nairobi this 28<sup>th</sup> day of March, 2013**

**J. B. HAVELOCK**

**JUDGE**