



Jacinta Njoki Wakaba (Suing As the Legal Representative of the Estate of the Late Daniel Wakaba Gachoki v Aberdare Farmers Sacco Limited & 3 others (Environment & Land Case 210 of 2018) [2022] KEELC 3543 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 210 OF 2018**

FM NJOROGE, J

MAY 26, 2022

BETWEEN

JACINTA NJOKI WAKABA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DANIEL WAKABA GACHOKI PLAINTIFF

AND

ABERDARE FARMERS SACCO LIMITED 1ST DEFENDANT

JAMES M. GITAU T/A GALLANT AUCTIONEERS 2ND DEFENDANT

JANE NJERI 3RD DEFENDANT

MILTON GITAU GICHARU 4TH DEFENDANT

JUDGMENT

1. This old piece of litigation has been presided over by five judicial officers who preceded me but a little surprise is that all the parties have through the many years retained the same legal representation! The dispute herein regards the alleged wrongful realization of security by way of exercise of a power of sale by the 1st defendant through the 2nd defendant while the owner was deceased and while no grant of letters of representation had been raised to his estate. The plaintiff, the deceased's widow, rose to spiritedly protect the estate hence this suit, which is the second, the first being a magistrate's court case at Naivasha which was dismissed for lack of locus, the plaintiff then also having risked suing the 1st defendant but without a grant of probate in her favour.

The plaint.

2. In the plaint dated 22/10/2008, the Plaintiff prays for judgment against the Defendants jointly and severally for the following orders:



- i. A permanent injunctions do issue restraining the defendants, their agents and/or servants from interfering with the suit land title No. Nyandarua/Tulaga/2949.
 - ii. A declaration that any purported notice issued on the suit land, sale or dealings with the suit land was unprocedural, null and void and/or voidable at the instance of the deceased Estate.
 - iii. A mandatory order nullifying all the dealings sale or notice issued on the suit land herein before a grant of representation was made and an order reconvening the suit land to the estate of the deceased. In the alternative an order that the sale herein was illegal, unprocedural and the Defendants do jointly and severally pay to the deceased Estate such an amount by way of damages for the illegal sale of the land to the assed by the honourable court based on the current value of the suit land.
 - iv. Costs of the suit
 - v. Any other and or further relief this honourable court may deem fit to grant.
3. The plaintiff's claim is as follows: that she is the 2nd wife to the late Daniel Wakaba Gachoki who owned title number Nyandarua/ Tulaga/ 2949 (the suit land). The deceased charged the land and substantially repaid the loan. However, on 30/11/2007 the 1st defendant, a cooperative society purportedly gave to the deceased's advocates notice of intention to exercise its statutory power of sale to recover the balance. The letter was transmitted to the plaintiff. She gave an indication of intention to clear the balance. However, a dispute as to who would be administrator to the deceased's estate arose between the plaintiff and her co-wife. In 2008 the 2nd defendant an auctioneer, purported to advertise the land for sale but the sale was halted by an order of the Naivasha Principal Magistrate's court. Later on, the plaintiff found that the sale had been conducted and the estate was given notice to vacate the land. The plaintiff claims that the sale was fraudulent and null and void for inter alia, lack of any grant of representation to the deceased's estate at the time of sale, non-service of statutory notice and want of notice of sale by the auctioneer. She claims that the estate of the deceased was never issued with a statement of account on the loan repayment and that the amount demanded was exaggerated and that it stands to suffer irreparable harm owing to the pending eviction. She avers that she and her family reside on the suit land. She also averred that the 1st defendant has refused to accept monies in liquidation of the debt.

The 1st and 2nd defendants' defence.

4. The 1st and 2nd defendants filed their joint defence on 3/2/2009, stating that contrary to the plaintiff's claims of part-repayment, the deceased never made any repayments in respect of the loan. They deny that the notification of sale and advertisement notice issued were illegal. While positing that the plaintiff had no locus standi to institute the subordinate court suit, they aver that once the orders in the subordinate court lapsed they were not extended and the land was properly and procedurally sold to the 3rd defendant without any element of fraud.
5. The 1st and 2nd defendants also amended their defence on 16/10/2020 to include a statement that no repayments were made to offset the loan and a counterclaim against the plaintiff, seeking the sum of Ksh 889.974.85 with interest at 17.00% on then capital and arrears from 31/7/2007 until payment in full, costs of the suit and counterclaim with interest thereon as the court may determine.

Reply to defence to the 1st and 2nd defendant's counterclaim.

6. The plaintiff filed this pleading on 18/11/2020 and reiterated the particulars of fraud in the plaint.



The 3rd and 4th defendants' defence

7. The 3rd and 4th defendants filed their defence on 17/11/2009, stating that they purchased the land validly and that the only remedy that the plaintiff has is that of damages under section 77 of the Registered Land Act. In their amended defence filed on 15th March 2018, they included a counterclaim for orders of eviction of the plaintiff and for vacant possession.

Defence to counterclaim.

8. The plaintiff filed a defence to counterclaim on 2/5/2018, denying the 3rd and 4th defendant's claims. The 3rd and 4th defendant's notice of claim against the 1st and 2nd defendants.

9. The 3rd and 4th defendant stated in this notice that owing to the plaintiff's claim against them they are seeking full indemnity from the plaintiff and the rest of the defendants against the plaintiff's claim and costs of her action and any other adverse orders that may result, and that the question of the debt owed by the plaintiff to the 1st and 2nd defendants be properly determined between all the parties in the suit.

Hearing.

10. Hearing took place on 4/11/2021 when the plaintiff and two defence witnesses testified. By consent of the parties the bundle of documents filed by plaintiff and attached to the list of documents dated 26/10/2020 were produced as exhibits except PMFI 10.

The plaintiff's evidence.

11. The plaintiff's evidence closely followed the contents of the plaint. She produced the grant of letters of administration to her late husband's estate (P. Exh 2), a copy of the title to the suit land (P. Exh 10) and the charge (P. Exh 3.) and she stated as follows: that by about the year 2005 the balance outstanding on the credit facility to the deceased was about Ksh 230,000/=. The deceased also gave his cars to the Greenlands Dairy which was supposed to pay monies gained therefrom to the 1st defendant. By the time the 1st defendant served her with a notice (P. Exh 11) she was not the administrator to the deceased's estate. She later became an administrator in the year 2008. When a notice of advertisement was placed in the press she obtained the injunction in the magistrate's court and despite the fact that no other notice was issued thereafter, the 1st and 2nd defendants sold the land hence the sale was illegal. She alleged that the 4th defendant was absent at the auction. She stated that she has never been advised of the extent of indebtedness of the estate by the 1st defendant. She averred that her late husband was chairman of the 1st defendant and he fell ill in 2005 and died in 2006. He was also a director of Greenland Dairy.

12. Upon cross-examination by Mr Kibera and Mr Mboga, she stated that the loan sum was Ksh 400,000/= and that her late husband had repaid some of the principal. However, she knew that he had not paid the entire sum owing; she was given a notice by an employee of the 1st defendant on 30/11/2007 to which she responded. By then she was not the administrator to her late husband's estate. She does not know what duration the injunctive order against the defendants in the magistrate's court was to last; that she was brought a letter dated 11/8/2007 showing that the balance was about Ksh 880,000/=. That she served the auctioneers the injunctive order on 12/5/2008 and the land was not sold that day. She did not get to know when the defendants later disposed of the land. She admitted that her late husband worked with Greenland dairies. However, from 2005 her husband fell sick, ceased being a chairman in the 1st defendant Sacco, and later died in 2006. She did not know if any money was repaid after 29/10/2005; she stated that the 3rd and 4th defendants have not taken possession of the land.



The Defendant's Evidence.

13. The 1st defendant called one Josphat Kaniaru Kireru as DW1. He stated as follows: that he is the manager of the 1st defendant; that the deceased was chairman of the 1st defendant and he ceased from that position in the year 2005; that Greenland dairy is an entity entirely different from the 1st defendant whose business was to buy and process milk; that the late Daniel Wakaba Gachoka was the registered owner of the suit land and had charged his title to the 1st defendant in a charge dated 25/2/2000 which was registered on 16/3/2000; that no payments were made to offset the loan; that on 14/8/2007 the advocates for the 1st defendant issued a statutory notice to the estate of the deceased and subsequently a notice of sale was issued but it failed to pay to the 1st defendant the sums owing or any proposal to pay or ask for an account; that that the plaintiff secured injunctive orders from a court of law which were not extended and consequently the suit land was sold by private treaty on 18/8/2008 and the title to the suit land was transferred to the 3rd and 4th defendants. He prayed that if the transfer of the suit land is cancelled the title documents deposited as security do remain with the 1st defendant to secure the payment of the outstanding amount and interest.
14. Upon cross-examination by Mr Mboga and Mr Kibera DW1 stated that the deceased was a chairman of the 1st defendant and director of Greenland dairies; that the sum owed was Ksh 889,974/- (inclusive of interest) as at August 2007; that the original sum advanced to the deceased was Ksh 400,000/=; that the deceased had never paid anything towards the loan account; that the 3rd defendant paid to the 1st defendant the whole of that sum of Ksh 889, 974/-; that after the sale and transfer of the suit land, the witness does not know who occupies the land at present. He maintained that the sale was regular and not fraudulent and the land was only sold after the injunction order period lapsed. He stated that the 3rd defendant would be refunded his money of the loan is repaid. He supported the 3rd defendant's claim for eviction.
15. Upon cross-examination by Mr Njiraini he stated that there are records of the deceased's indebtedness which could show the loan terms and conditions, the and the balance outstanding but he had produced none at the hearing; that P.Exh 9 is an attempt to recover the money in 2005 which was Ksh 478,532/=; that the amount indicated on P.Exh 8 was Ksh 235,530/= being balance as at November 2005; that by the time the 1st defendant sent the letter DExh 2(a) dated 11/8/2007 to the Estate of the deceased, he was already deceased; that the address on that letter belonged to the 1st defendant; that the certificate of posting produced as evidence does not indicate the name or postal address of the addressee; that there were instructions issued to the auctioneer but they were not produced in court as evidence; that though the letter states that the sale took place at Utalii house the offices of the 1st defendant at at Engineer Town in Kinangop; that the letter states that the 3rd defendant was the highest bidder for Ksh 1,023,964.30; that the abortive sale had Engineer Township playground as the venue but DW 1 did not know if any other notice issued after that advertisement; that he does not know who was the highest bidder or if a valuation before sale was conducted and he has never seen any during his tenure as a manager; that the money was paid to the 2nd defendant but he has no evidence of how the money was transmitted, if ever, to the 1st defendant and he has no evidence to prove that payment.
16. DW 2 Milton Gitau Gicharu, testified on 4/11/21 and adopted the contents of his sworn affidavit dated 14/11/2008 as his evidence in chief. He produced copies of the following: letter dated (2DExh 7), the consent of the land control board 2DExh 8 and the title deed (DExh 9). He testified that he learnt that the suit land was being sold and placed his bid; that the first bidder was son to the deceased landowner but he could not remember how much that first bid was; that he was informed that he should wait for the son to purchase the land but he was told that he was unable to raise the required



amount and so DW2 purchased the land; that he paid Ksh 1,023,964/30 to the 2nd defendant and was issued with a receipt; that he attended the land control board and he was issued with a consent and subsequently the title was transferred to his and his wife's names. However, he has never been able to take possession of the land and he now seeks vacant possession and in default the purchase price be reimbursed with interest by the 1st defendant. Upon cross-examination he stated that he does not have the receipts for the monies he paid to the 2nd defendant. He however admitted that the documents attached to his adopted affidavit bore information that differed from that on the certificate of sale from the auctioneer. He stated that he did not know that Daniel Wakaba was deceased.

17. At that point the case of the 3rd and 4th defendants was closed. The court ordered the parties to exchange submissions.

Submissions of the plaintiff

18. The plaintiff filed submissions on 30/11/2021 and reiterated the contents of the pleadings and the evidence. According to the plaintiff the issues for determination in the instant suit are as follows: whether the sale of the suit land was in compliance with the law; whether the sale and transfer of the suit land ought to be cancelled, whether the plaintiff ought to be evicted, whether the 1st defendants has proved the claim for Ksh 889,974.85; and what should be the orders as to costs.
19. Citing the case of *Livingstone Mwangi Gichora V Family Finance Building Society* [2002] eKLR, the plaintiff submitted that the sale was in contravention of the law as the chargor was deceased and no grant had been taken out for his estate and there was therefore no compliance with the Registered *Land Act* in that the statutory power of sale had not accrued by the time of the sale. Further the notice issued was of shorter duration than the requisite statutory 3 months in that having been served on 30/11/2007, the statutory power of sale would have accrued in March 2008, yet the instructions to sell were issued as per the notification of sale on 21/2/2008 and this contravened Section 74 of the Act and the notice itself and the sale was null and void ab initio. The plaintiff cited *Nyangilo Ochieng & Another Vs Fanuel B Ochieng & 2 others* [1996] eKLR for that proposition, his argument being that there was no service on the charger who was already deceased and there was no evidence of postage. The plaintiff also stated that evidence showed that the sale was by private treaty to the second highest bidder while no explanation was given as to why the sale was to the second highest and not the first highest bidder and no evidence of payment was produced. The inclusion of the 4th defendant was said to be suspect and no evidence was produced that she is wife to the 3rd defendant. In the plaintiff's eyes this is evidence of fraud.
20. The further submission of the plaintiff is that the auctioneer failed to serve a redemption notice under rule 15 (d) of the *Auctioneers Act* cap 526. He also failed to observe Rule 11 of the same rules and that no valuation or any reserve price was set. For these reasons the plaintiff avers that the claim against her by the 3rd and 4th defendants should fail.
21. Regarding the claim for Ksh 889,974 by the 1st defendant the plaintiff submitted that the same was not specifically pleaded nor proved. Citing the case of *Nyangilo Ochieng & Another*, the plaintiff submitted that it is the 1st defendant who ought to refund the 3rd defendant his money if any.

Submissions of The 3rd and 4th Defendants.

22. The 3rd and 4th defendants filed their submissions on 24/1/2022. They state as follows: that the issues arising were whether the deceased owed the 1st defendant; whether the sale of the suit land was legal; whether the 3rd defendant paid the 1st defendant for the suit property; whether the registration of the



- 3rd and 4th defendants is valid and legal; and whether their claim against the 1st and 2nd defendants has been proved.
23. It is submitted that it is not in dispute that the deceased charged the suit land for Ksh 400,000/= to the 1st defendant and so owed the 1st defendant; that the interest rate was 17%; that the plaintiff admitted that some of the money is still outstanding in her evidence; that the 3rd defendant, being a bona fide purchaser without notice of defect in title, had no role in issuing the statutory and the redemption notices and he is the registered owner now and that as per the decision in *Commercial Interior Ltd and Another Vs Equity Bank Ltd & 2 Others*, [2015] eKLR and *Jose Estates Ltd Vs Mutumbu Farm Ltd & 2 others* 2019 eKLR where the charged property has been sold the equity of redemption of the chargor is extinguished. It was further submitted that the 3rd defendant was an innocent purchaser; that section 98 of the *Land Act* empowers the chargee to sell the charged land at market value in a private treaty or by public auction with reserve price; that as per *Kazungu Fondo Shutu & Another Vs Japhet Noti Charo & Another* [2021] eKLR and *Lawrence Mukiri Vs The Attorney General & 4 Others* [2013] eKLR, a bona fide purchaser of a legal estate without notice has absolute unqualified and unanswerable defence against the claim of any prior equitable owner. Citing the case of *Eunice Grace Njambi Kamall & another Vs the Attorney General & 5 others* Civil Suit 976 of 2012, the defendants urge that if faulty notices were issued, the property would revert to the initial registered owner and remain as security until the outstanding loan is paid, and in that event the 1st defendant ought to be ordered to refund the 3rd defendant the sums paid for the land, with interest at court rates from 18/8/2008 to date. Indemnity for costs of the suit is also sought from the 1st and 2nd defendants in the event the plaintiff's claim succeeds.
24. I have perused through the court record and I have found no submissions on the part of the 1st and 2nd defendants.

Determination.

25. It is common ground that the suit land was owned by the deceased Daniel Wakaba and that by the time of the issuance of the statutory notice, he was already deceased and no representation had been raised to his estate. It is also not in doubt that the plaintiff is now the administrator of his estate and has brought the current suit in her capacity as such.
26. The issues that arise in this case for determination are therefore as follows:
- a. Was the sale of the suit land proper and in accordance with the law and if not, should the title in the names of the 3rd and 4th defendants be cancelled?
 - b. Should the 1st and 2nd defendant's counterclaim against the plaintiff be upheld?
 - c. Do the 3rd and 4th defendants have any remedy against the plaintiff and/or the 1st and 2nd defendants in this case?
 - d. Who ought to bear the costs of the instant suit?
27. A chargee's exercise of statutory power of sale, whether by way of public auction or private treaty, is bound to certain legal strictures. The most important of these is the statutory notice. In this case a three-month notice by chargee to the chargor under section 74 of the Registered *Land Act* applied. The notice herein was issued on 30/11/2007. I agree with the plaintiff that the notice would run up to the early days of March 2008. However, the notification of sale dated 21/2/2008 shows that that period had not expired by the time the chargee decided to have the property sold. Besides by 30/11/2007, the chargee was deceased, having died way back in 2006 and representation not having been raised to his



estate, there was legally no one to be served with the statutory notice. I am of the view that the plaintiff has established fraud against the 1st and 2nd defendants. The statutory notice can not be deemed to have been served under the circumstances, for the pertinent question that would arise is who would be required by that notice to exercise the equity of redemption. In the circumstances I am agreeable to the position espoused in the case of *Livingstone Mwangi Gichora V Family Finance Building Society* [2002] eKLR as follows:

“It is trite law that account of a deceased person cannot be drawn upon or the money transferred until probate or letters of administration have been granted and registered with the Banker. See Halsbury Laws of England 4th Edition vol 3.”

28. Also, the 1st and 2nd defendants failed to demonstrate actual service at all. It was admitted in evidence by DW1 that the address in the statutory notice belonged to the 1st defendant. How could the notice be expected to reach the chargor or the administrator of his estate even if one existed? Lastly, the postage slip that was produced by the DW1 bore no postal address or name of addressee. Such a postage slip does not prove that any dispatch of the statutory notice was done. In this regard this court also agrees with the court in *Nyangilo Ochieng & another Vs Fanuel B Ochieng & 2 others* [1996] eKLR which stated as follows regarding such service:

“It is quite possible that such notices were sent but that fact, in the face of denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was, as the learned judge has pointed out, in the judgment, “the villain in the matter”.

In the absence of proof of such posting we are constrained to hold that the sale by auction was void. We think that the learned judge, with respect, fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P.O. Box 120, SARE.”

29. I agree with the plaintiff’s counsel that a redemption notice under the Rule 15 of the Auctioneers’ Rules was a necessity and the 1st and 2nd defendants failed to demonstrate that any such notice was issued. Consequently, this court holds that the sale by the 1st and 2nd defendants was null and void ab initio.
30. The next question that arises is whether in the circumstances stated above the title in the names of the 3rd and 4th defendants be cancelled. The cases cited by the 3rd and 4th defendants lean towards the proposition that once a statutory power of sale is exercised then the chargor’s equity of redemption is extinguished and the sale should be upheld. Section 98 of the *Land Act* is cited to this effect. In the case of *Commercial Interior Ltd and Another Vs Equity Bank Ltd & 2 Others*, [2015] eKLR cited by the 3rd and 4th defendants, the chargor was alive and disputed the validity of the statutory notice.
31. In the case of *Jose Estates Ltd Vs Mutumbu Farm Ltd & 2 Others* [2019] eKLR it was stated as follows:
- “The issue of statutory notice, even if it had been raised before the trial court, would have been a non-issue in view of the conduct of the said respondents before, during and after the conclusion of the transaction. They were kept in the know all along. They were even allowed to bring on board other bidders.”
32. The decisions cited by the 3rd and 4th defendants are distinguishable because the courts in the cited cases appear to have considered that the chargors had the opportunity to exercise their equity of redemption in respect of their properties in contrast to the present case where the chargor was deceased and there



was no administrator to his estate. It is a fundamental rule that the equity of redemption shall not be clogged. What the 1st and 2nd respondents did was offensive to that rule. The defence of the 3rd and 4th defendants that they are innocent purchasers of the land does not therefore hold merit in the circumstances and must be rejected as the sale and transfer of the land to them is void ab initio. As observed in *Nyangilo Ochieng & Another Vs Fanuel B. Ochieng & 2 Others* 1996 eKLR it can not entitle the purchaser to obtain the proprietorship of the land so sold. In this court's view therefore, the title in the names of the 3rd and 4th defendants is liable to cancellation by this court.

33. Having found as above, should the 1st and 2nd defendant's counterclaim against the plaintiff or the 1st and 2nd defendants be upheld? Though their defence was brief and did not specifically set out any claim against other parties, attempted to do so in their notice of claim against the plaintiff and the 1st and 2nd defendants.
34. The 3rd and 4th defendant stated in their notice of claim that owing to the plaintiff's claim against them they are seeking full indemnity from the plaintiff and the rest of the defendants against the plaintiff's claim and costs of her action and any other adverse orders that may result, and that the question of the debt owed by the plaintiff to the 1st and 2nd defendants be properly determined between all the parties in the suit.
35. The grounds relied on in the notice as against the plaintiff are that the amount paid to the 1st and 2nd defendants offset the deceased's loan, which the plaintiff, now as administrator ought to pay to the 1st and 2nd defendants with interest. They state that once the notices from the 1st and 2nd defendants are faulted as has already happened now, then the suit property would still revert to the initial registered owner and remain security until the outstanding loan is paid; in that case the 1st defendant should refund the consideration sum the 3rd defendant paid to it.
36. It is true that in the first instance the property would revert back to the name of the deceased by virtue of the sale process and transfer being declared void. This court however should not prematurely engage into the issue of whether it will remain a security as it depends on the success of the 1st and 2nd defendant's counterclaim against the plaintiff.
37. To revert to the plaintiff's liability for indemnity however, it is not possible by any stretch of imagination to see how the plaintiff can be condemned to indemnify the 3rd and 4th defendants in this case; from the previous analysis contained in this judgment, the plaintiff and the 3rd and 4th defendants were victims to the nefarious schemes and omissions of the 1st and 2nd defendants.
38. This court having found the sale to them null and void ab initio for the reasons given, nothing would be as illogical and improper or unjust as upholding their claim of indemnity against the innocent plaintiff. Rather, the persons to be blamed for the fiasco that so adversely affected them are the 1st and 2nd defendants. It is safe to conclude that the statutory power of sale having failed to accrue, the 1st and 2nd defendant had no interest in the land to transfer to the 3rd and 4th defendant; hence, leaving them to benefit from the sale would amount to unjust enrichment in contrast to the double jeopardy suffered by the 3rd defendant who paid them and failed to get any valid interest in the land.
39. Nevertheless, the 3rd and 4th defendant's claim against the 1st and 2nd defendants must be proved. It has been submitted that the sale was by private treaty and that the total sum paid to the 2nd defendant was evidenced by the auctioneer's undated letter (2D Exh 7). That letter was produced by the 3rd defendant without prompting demur from the 1st and 2nd defendants. A letter bearing the same contents but dated 18/8/2008 (DExh 5) was produced by DW1 testifying on behalf of the 1st defendant. Both letters concur that the sum paid to the 2nd defendant was Ksh 1,023,964.30; both of them are under the hand



of the same person Jesse M. Gitau on behalf of Gallant Auctioneers. In the light of the foregoing I find that the sum received from the 3rd defendant by the 1st and by extension 2nd defendant was Ksh 1,023,964.30. I also find that the 3rd and 4th defendant's claim of indemnity for that sum ought to succeed.

40. I will at this juncture return to the issue of whether the suit land should remain a security upon the cancellation of the transfer. I had stated earlier that the determination of this question depends on the success of the 1st and 2nd defendant's counterclaim against the plaintiff. Their counterclaim is for the sum of Ksh 889,974.85 with interest at 17.00% on the capital and arrears from 31/7/2007 until payment in full, costs of the suit and counterclaim with interest thereon. But have they proved that level of indebtedness?
41. Proof is by evidence and it is a trite rule of evidence that he who alleges proves.
42. The transaction between the deceased and the 1st defendant was not a simple transaction. It can not be compared to the mere transfer by the 1st defendant to the 3rd and 4th defendants. It is of the nature that requires much documentation and records and accountability. It is solely by the production of the proof of records and updated computations of the amount due, especially when it has been expressed as a liquidated claim, that could have been instrumental in persuading the court to grant the orders sought in the counterclaim.
43. What militates against the full success 1st and 2nd defendants' counterclaim is lack of evidence; the charge document was produced as were the statutory notice and notification of sale and the auctioneer's report on the sale (DExh 5.) DW1 however carried nothing to court in terms of the documents showing the loan terms and conditions and the monthly payment records that would show the balance outstanding yet he admitted that those documents are within the custody of the 1st defendant; DW1 also had no evidence to demonstrate that the monies paid by the 3rd defendant were ever remitted to the 1st defendant. This is surprising since the 1st defendant had a counterclaim and it knew it needed to produce such evidence to secure orders sought in the counterclaim.
44. The upshot of the foregoing is that the 1st defendant has not established the counterclaim against the plaintiff and he would have received nothing from this judgment were it not for admissions made by the plaintiff.
45. Exh 8, the plaintiff's own evidence, was not denied by the 1st and 2nd defendants. That exhibit is the deceased's acknowledgment of a debt of Ksh 235,530/= that he owed to the 1st defendant. I must presume this to be the indebtedness owing by the deceased to the 1st defendant on the loan subject matter of the instant suit as no other liability against has been claimed to exist. Interest in the charge document produced as evidence is set at 17%.
46. I see no need to punish the plaintiff by backdating the interest computation on the principal sum proved to have been owing as at November 2005, partly because she was never accorded a chance or facilitated with information in the form of an account to enable her pay the loan, and partly because the title has not been in her name all along since transfer to the 3rd and 4th defendants. In the circumstances, I decline to apply simple interest at the rate of the 17% stipulated in the charge document (P. Exh 3 and also D. Exh 1) on that sum over the period of 17 years that that balance has remained unpaid. I would award the 1st defendant only Ksh 235,530/= as the balance sum due from the deceased's estate to it on its loan to the deceased without any contractual interest being applied thereon. In addition, I would give the plaintiff a grace period of 3 (three) months to pay that sum before the it begins accruing interest at court rates.



47. The outcome of the nullification of the sale would lead, as correctly prognosticated by the 3rd and 4th defendants' submissions, lead to cancellation of the title in their name and reversion of title back to the deceased's name. That would mean that the 1st defendant's security is still in place and it deserves to remain in place until the plaintiff pays the sum of Ksh 235,530/= found due herein above.
48. One thing that struck this court as odd is that none of the parties addressed the issue as to whether the deceased's loan with the 1st defendant was insured as is normally the case with such loans and whether indeed such loan was recovered by way of a claim to the insurance once the deceased died. The failure by the 1st defendant to produce much relevant evidence as to the indebtedness of the deceased to it may have as an unintended effect also had the effect of non-disclosure of the said insurance information. However, this court must decide the suit only on the basis of the available evidence and admissions.
49. In the final analysis, all the parties' respective cases have been found to be partially successful. Consequently, I issue the following final orders:
- i. A declaration that both the purported statutory notice dated 14/8/2007 and the notification of sale dated 22/2/2008 issued in respect of LR NO Nyandarua/Tulaga/2949 are null and void and they are hereby cancelled;
 - ii. That the sale and transfer of LR NO Nyandarua / Tulaga / 2949 by Aberdare Farmers Sacco Limited to Milton Gitau Gichuru and Jane Njeri was unprocedural, null and void and is hereby cancelled;
 - iii. The Land Registrar in the concerned land registry where the land is registered shall reinstate the Estate of Daniel Wakaba Gachoki (deceased) through its administrator as the legal proprietor of LR NO Nyandarua / Tulaga / 2949;
 - iv. The plaintiff shall within 90 days of this judgment pay to the 1st defendant the sum of Ksh 235,530/= in full and final settlement of the loan owed by the deceased Daniel Wakaba Gachoki in default of which that sum will continue to earn interest in favour of the 1st defendant at court rates till paid in full;
 - v. Within 30 days of the payment in full of the sum of Ksh 235,530/= or such other sum as may be due under order no (iv) above, the 1st defendant shall prepare at its cost a discharge of charge and release it to the plaintiff together with the original title document for LR NO Nyandarua / Tulaga / 2949 for registration at the plaintiff's own cost;
 - vi. Save that the 1st and 2nd defendants shall jointly and severally bear the costs of this suit of the plaintiff and the 3rd and 4th defendants, every other party shall bear their own costs of the suit.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 26TH DAY OF MAY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

