



**Njaguti v Thagana (Environment & Land Case E008 of 2022)
[2022] KEELC 13833 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E008 OF 2022
JO MBOYA, J
SEPTEMBER 22, 2022**

BETWEEN

BEATRICE WANGARI NJAGUTI PLAINTIFF

AND

JOHN KARARU THAGANA DEFENDANT

JUDGMENT

Background

1. Vide the Originating Summons dated the February 21, 2022, the Plaintiff herein has approached the court seeking for the following Reliefs;
 - a. The Defendant herein, John Kararu Thagana, his agents, servants and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendants continued occupation of LR No 16217/87/27 IR No 9003 Nairobi is declared unlawful and constitute trespass.
 - b. The Defendant, his agents, servants and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendant's continued occupation of LR 1617/87/27 IR No 9003 Nairobi, give vacant possession to the Plaintiff within 14 days of the Plaintiff within 14 days of the Judgment being issued.
 - c. Failure to give vacant possession within the stipulated period, the Plaintiff through her appointed auctioneers, be at liberty to evict the Defendant, his agents, servants and/or representatives and any other party whatsoever from the suit premises known as LR 1617/87/27 IR No 9003 Nairobi from the suit premises.



- d. In the event of Eviction by the aforementioned auctioneers, the officer commanding Muthaiga Police Station (OCST) be and is hereby ordered to offer security to the auctioneers in carrying out the exercise and to maintain law and order.
 - e. The costs of the Suit be awarded to the Plaintiff.
2. The Originating Summons herein is premised and/or anchored on the grounds that have been enumerated on the face thereof and same is further supported by the affidavit of the Plaintiff sworn on the February 21, 2022 and to which the Plaintiff has attached six annexures.
 3. Upon being served with the originating summons and the supporting affidavit thereto, the Defendant herein responded vide a Replying affidavit sworn on the March 21, 2022 and to which the Respondent has attached a total of 11 annexures.
 4. Other than the affidavit by the Defendant, there is also a Replying affidavit sworn by one William Kirenge Mwangi and same is sworn on the March 23, 2022. For clarity, the said Replying affidavit has also been sworn in response to the originating summons herein.

Depositions by the parties:

a. Plaintiff's case:

5. The Plaintiff's case is captured vide the Supporting affidavit sworn on the February 21, 2022, and the various annexures attached thereto.
6. For the avoidance of doubt, the Plaintiff's case can be summarized as follows;
7. The Plaintiff vide the supporting affidavit has deponed that same read a daily Newspaper on the February 8, 2021 and same came across an advertisement pertaining to and/or concerning a Property known as LR No 12217/87/22, IR No 90035, which was scheduled for sale vide Public auction on the February 24, 2022.
8. Further, the Plaintiff has deponed that upon reading the details of the suit property in the daily newspaper, in terms of the preceding paragraph, same developed an interest in the suit property and therefore liaised with the nominated auctioneers, with a view to obtaining particulars and further details in respect of participating in the intended/scheduled auction.
9. On the other hand, the Plaintiff has averred that upon obtaining the requisite details, same proceeded to and generated a cheque in the sum of Kshs 500, 000/= only, drawn in favor of M/s Co-operative Bank Ltd. For clarity, the deponent has stated that the deposit of Kshs 500, 000/= was a pre-condition to participating in the scheduled auction.
10. Having deposited the sum of Kshs 500, 000/= only, the Plaintiff proceeded to and participated in the scheduled public auction, which was held on the February 24, 2021 and thereafter same emerged as the highest bidder, having placed a bid in the sum of Kshs 43, 700, 000/= only
11. Besides, the Plaintiff has averred that upon being declared as the highest bidder, same was called upon to deposit the sum of money equivalent to 25% of the purchase price. In this regard, the Plaintiff stated that same proceeded to and indeed paid a further sum of Kshs 10, 425, 000/= only, which added to the initial deposit of Kshs 500, 000/= only, constituted an aggregate of Kshs 10, 925, 000/= only.
12. For clarity, the Plaintiff further averred that after the payment of the aggregate sum of Kshs 10, 925, 000/= only, being 25% of the purchase price, same thereafter made arrangements and procured a banking facility in the sum of Kshs 35, 300, 000/= only from M/s Co-operative Bank K Ltd.



13. It was further stated that the banking facility in the sum of Kshs 35, 300, 000/= only, was procured through a company known as Interfresh Kenya Limited, which is a company wherein the Plaintiff and her husband are the directors.
14. Further, the Plaintiff averred that upon the procurement of the banking facility in the sum of Kshs 35, 300, 000/= only, same was paid to and or in respect of the balance of the purchase price.
15. Subsequently, the Plaintiff has averred that the suit property, which was purchased from the public auction on the February 24, 2021, was thereafter transferred and registered in her name, as the lawful and legitimate proprietor thereof.
16. Nevertheless, the Plaintiff proceeded to and deponed that the balance of the purchase price having been financed through a Banking facility, on the security of the suit property, same (suit property) was charged to and in favor of M/s Co-operative Bank Ltd.
17. Be that as it may, the Plaintiff has stated that the suit property having been purchased and/or acquired by her vide Public auction, duly carried out by the nominated auctioneers, her title to and in respect of the suit property is therefore indefeasible.
18. At any rate, the Plaintiff has further deponed that upon the purchase and acquisition of the suit property, same is therefore the legitimate owner and in this regard, same is entitled to absolute and exclusive rights to and in respect of the suit property.
19. However, it has been contended that despite being the lawful and legitimate owner of the suit property, the Defendant herein has remained in occupation and possession of the suit property, albeit without any lawful rights and/or interests whatsoever.
20. Premised on the foregoing, the Plaintiff has therefore sought that the Defendant herein ought to be declared as a trespasser and thereafter same to be evicted from the suit property.

b. Defendant's case:

21. The Defendant's case is primarily anchored on the replying affidavit sworn on the March 21, 2022, and in respect of which, the Defendant has averred that same was the lawful and legitimate owner of the suit property, which is the subject of the instant suit.
22. Further, the Defendant has averred that same proceeded to and applied for a banking facility from m/s Co-operative Bank K Ltd, whereupon same pledged the title of the suit property as security.
23. Having pledged the title of the suit property as security to M/s Co-operative Bank Ltd, the Plaintiff was granted the financial accommodation which was applied for and thereafter the Plaintiff have stated that same proceeded to and repaid a total of Kshs 10, 000,000 Only or thereabouts.
24. Be that as it may, the Defendant have further averred that despite the efforts made by himself towards liquidating the banking facility that was granted unto him, the bank commenced the process of realizing the security, namely, the suit property, which had hitherto been charged to the bank as security.
25. However, the Defendant has further stated that upon realizing that the Bank was keen to exercise her Statutory power of sale and to effectively sell and dispose of the suit property, same proceeded to and filed civil proceedings vide Nairobi HCC OM No E089 of 2021 against m/s Co-operative Bank Ltd, who were the chargees of the suit property.



26. Besides, the Defendant has also averred that contemporaneously with the filing of the suit, same filed an application for Temporary injunction, seeking to bar the bank from proceedings with the intended sale vide public auction.
27. Nevertheless, the Defendant has also averred that despite the urgency at the foot of the Application of the temporary injunction, the Honourable court, namely, the High court, commercial and admiralty division directed that the application be served and that same be heard inter-partes.
28. It has further been averred that pursuant to and in line with the direction of the Honourable court, issued vide Nairobi HCC OM No E021 of 2021, same proceeded to and served the suit pleadings, the Application and the hearing notice on the bank.
29. Notwithstanding the foregoing, the Defendant has stated that the bank proceeded to and purported to sell the suit property to and in favor of the current Plaintiff, even though no public auction was conducted.
30. According to the Defendant, the sale of the suit property to and in favor of the Plaintiff was stage managed , with a view to defeating his (Defendant's), rights and Equity of redemption.
31. In any event, the Defendant has further averred that by the time the bank proceeded to and disposed of the suit property, albeit fraudulently, same had procured and obtained an Interested buyer, who was keen to purchase the suit Property for the sum of Kshs 65, 000, 000/= only.
32. However, the Defendant has further stated that despite intimating to the bank that same had procured and obtained a purchaser, who was keen to purchase the suit property and thereby redeem same, the bank frustrated the efforts by the Defendant, and hence proceeding to defeat the Defendants equity of redemption.
33. Other than the foregoing, the Defendant has also averred that prior to and/or before instructing the nominated auctioneers to sell and dispose of the suit property by way of public auction, the bank had neither issued nor served the Defendant with the requisite Secondary notice as envisaged under Section 96(2) of the [Land Act, 2012](#).
34. In the absence of the Secondary statutory Notice, as required by or under the law, the Defendant contends that the Exercise of the Bank's statutory power of sale and the purported sale of the suit property was illegal, unlawful and void.
35. Further, the Defendant has averred that even though the bank purported to have sold the suit property by way of public auction, no such auction was conducted and/or undertaken at all. In this regard, the Defendant has alluded to the investigations that were carried out by one William Mwangi, who was engaged by the Defendant as a private investigator.
36. On the other hand, the Defendant has further averred that even though the Plaintiff has purported to have purchased and therefore acquired the suit property by public auction, there are material discrepancies as pertains to whether the Plaintiff indeed paid the 25% stakeholders sum on the date of the public auction and whether the entire transaction, if at all, was concluded within the prescribed timeline.
37. At any rate, the Defendant has further averred that though the nominated auctioneers had indicated that the balance of the purchase price, was due and payable within 90 days, it is apparent that same was not so paid because the charged document shows that same was prepared and dated on the July 14, 2021, which is stated to be well outside the 90-day period.



38. In short, the Defendant has averred that the sale and disposal of the suit property by the bank, to and in favor of the current Plaintiff, was carried out and/or undertaken in a manner contrary to and in contravention with the established procedures and provisions of the law.
39. Essentially, the Defendant has further averred that the sale of the suit property by and or on behalf of the bank was fraught with illegality and fraud and in this regard, it is averred that the Defendant has a legitimate claim as against the bank and by extension the current Plaintiff herein, who was privy to the fraudulent alienation and sale of the suit property.
40. Consequently, the Defendant has contended that it is therefore appropriate that the subject suit be stayed to await the hearing and determination of Nairobi HCC OM No E089 of 2021, wherein the Defendant challenges the powers of the Bank to alienate and sell the suit property as well as the process attendant to the sale.
41. In the alternative, the Defendant has also stated that the suit herein is indeed misconceived and does not disclose any reasonable cause of action. Consequently, the Defendant has sought to have the suit dismissed with costs.

Submissions by the parties :

a Submissions by the plaintiff:

42. The Plaintiff herein filed written submissions dated the May 11, 2022, and in respect of which same raised four pertinent issues, for consideration by the Honourable Court.
43. First and foremost, the Plaintiff submitted that the replying affidavit sworn by one William Kirenge Mwangi, who is stated to have been the Private Investigator appointed by the Defendant, raises scandalous allegations, albeit without any evidentiary basis.
44. To the extent that the said affidavit contains and/or alludes to scandalous allegations, which are devoid of any factual basis, the counsel for the Plaintiff has sought to have specific paragraphs, namely, paragraphs 10 to 15 thereof struck out and expunged from the said affidavit.
45. In the alternative, counsel for the Plaintiff has submitted that the Honourable court should be pleased to strike out the entire affidavit for being contrary to and in contravention of the provisions of Order 19 rule 6 of the Civil Procedure Rules 2010.
46. Secondly, counsel for the Plaintiff has submitted that having bought and/or purchased the suit property vide a public auction carried out and/or conducted on the February 24, 2021, same acquired lawful and legitimate title to the suit property, to the exclusion of all and sundry, the Defendant not excepted.
47. At any rate, the Plaintiff has further submitted that having purchased the suit property and same having been transferred and registered in her name, same is therefore entitled to absolute and exclusive rights thereto in line with the provisions of Sections 24, 25 and 25 of the [Land Registration Act, 2012](#).
48. Thirdly, counsel for the Plaintiff has submitted that to the extent that the suit property was sold and disposed off by the chargee in exercise of her statutory power of sale, the resultant sale of the suit property cannot be defeated and/or impeached at the instant of the Defendant herein.
49. Further, counsel for the Plaintiff has submitted that the Defendant's claim, if any, arising from the sale and disposal of the suit property by the chargee, is only a claim to Damages as against the chargee and not otherwise.



50. It was the Plaintiff's further submissions that the Defendant's remedy, where same is damnified by the exercise of the statutory power of sale by the chargee, as statutorily prescribed and/or circumscribed.
51. Finally, counsel for the Plaintiff submitted that the Plaintiff having bought and acquired title to and in respect of the suit property, same was obliged to enter upon and take possession thereof.
52. Nevertheless, counsel for the Plaintiff has submitted that despite the fact that same is the lawful and legitimate proprietor of the suit property, the Defendant has remained in occupation thereof, albeit without lawful claim, interests and or right.
53. In the premises, counsel for the Plaintiff has contended that the actions and/or activities by the Defendant constitute and/or amounts to trespass.
54. As a result of the foregoing, counsel for the Plaintiff has therefore submitted that the Plaintiff is thus entitled to compensation on account of General damages for loss of use of the suit premises.
55. To this extent, counsel for the Plaintiff has proceeded to and contended that the Plaintiff is therefore entitled to nominal damages assessed at kes.100, 000/= only, per month from the date of registration of the suit property in the name of the Plaintiff until date of Judgment.
56. Premised on the foregoing submissions, counsel for the Plaintiff has therefore contended that the Plaintiff has proved and/or established her claim as against the Defendant herein.
57. In support of the foregoing submissions, the counsel for the Plaintiff has relied on various decisions, *inter-alia*, *Muskari Nazi Kombo v Moses Masika Wetangula & 2 Others* (2013)eKLR, *Makatial Limited versus Liquidation Agent Trade Bank Ltd (IL)* (2018)eKLR, *Mursal Haji Ali & Another versus Stanley Maina Macharia* (2012)eKLR, *Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd & 4 Others*, *Nanak Hospital Management Services versus Prisca Wanjiku Kabarengo* (2015)eKLR, *Joseph Kipchirchir Koech versus Philip Cheruyot Sang* (2018)eKLR and *Ochoko Obinchi versus Zachary Oyoti Nyamogo* (2018)eKLR.

b. Defendants submissions

58. The directions pertaining to and concerning the filing and exchange of written submissions in respect to the subject matter were issued on the March 24, 2022.
59. Pursuant to the said directions, it was incumbent upon the Plaintiff to file and serve written submissions within 14 days from the date of filing of the last further affidavit, if any.
60. On the other hand, the Defendant herein was directed to file and serve his written submissions within 14 days from the date of service by the Plaintiff.
61. Thereafter, the court ordered and/or directed that the matter herein be mentioned on the 2nd of June 2022 to ascertain and/or authenticate the filing and exchange of the written submissions, before giving a date for Judgment.
62. Be that as it may, on the scheduled mention date counsel for the Plaintiff confirmed having filed and served written submissions, but the Defendant had neither filed nor served his written submissions.
63. Premised on the foregoing, counsel for the Defendant sought for and obtained liberty to file and serve written submissions within an extended duration of 14 days and the matter was thereafter scheduled for mention on the 21st of July 2022.



64. Suffice to point out that on the return date, namely, the 21st July 2022, counsel for the Defendant had neither filed nor served the written submissions or at all
65. At any rate, counsel for the Defendant also failed to attend court on the return date and therefore no explanation was given as to why the written submissions has neither been filed nor served.
66. Based on the foregoing and there being no reason forthcoming from the Defendant, the court proceeded to and set down the matter for Judgment. For clarity, no submissions were filed by and/or on behalf of the Defendant.

Issues of determination

67. Having reviewed the Originating Summons dated the February 21, 2022, the Supporting affidavit thereto and the Replying affidavits filed in Opposition thereto and similarly, having considered the written submissions filed by the Plaintiff, the following issues do arise and are thus germane for determination;
 - I. Whether the Defendant herein has any lawful claim, interests and/or rights to and in respect of the suit Property.
 - II. Whether the continued occupation, possession and use of the suit Property by the Defendant constitutes Trespass.
 - III. Whether the Plaintiff herein acquired lawful rights and interests over the suit Property and if so, whether the Plaintiff is entitled to the Reliefs sought at the foot of the Originating Summons.

Analysis and determination

Issue number 1 - whether the defendant herein has any lawful claim, interests and/or rights to and in respect of the suit property.

68. It is common ground that the Defendant herein was the registered proprietor and or owner of the suit property up to and including the February 23, 2021, same being the date preceding the scheduled public auction, which was held on the February 24, 2021.
69. On the other hand, there is also no dispute that by virtue of being the registered owner of the suit property, the Defendant proceeded to and pledged same as security in favor of a banking facility offered by M/s Co-operative Bank Ltd.
70. Be that as it may, it appears that after appropriating the banking facility and the attendant financial accommodation, the Defendant failed to liquidate the facility granted in his favor and hence the bank, namely the chargee, commenced the process of foreclosure via exercise of statutory power of sale.
71. On the other hand, it is also evident that when the bank commenced the process of realizing the security, namely the suit property, the Defendant herein proceeded to and filed a civil suit vide Milimani HCCOM No E089 of 2021, whereby the Defendant challenged the exercise of the banks statutory power of sale.
72. Despite the filing and/or lodgment of the said suit, details in terms of the preceding paragraphs, it is evident that the honourable court declined to grant any interim or temporary injunctive orders to the Defendant.



73. It is also apparent that after the honourable court declined to grant any interim or temporary injunctive orders, which were sought by the Defendant, the bank proceeded to and sold the suit property vide public auction on the February 24, 2021.
74. Nevertheless, even though the Defendant has contested and/or challenged the fact that a public auction was carried out and/or undertaken on the February 24, 2021, it must be pointed out that the issues pertaining to whether the public auction was lawfully carried out or otherwise can only be addressed or ventilated in the suit against the bank and not otherwise.
75. In any event, I am also alive to the fact that there is a pending suit, namely, Milimani HCCOM No E089 of 2021, between the Defendant herein, (who is the Plaintiff in the said suit) versus Co-operative Bank Kenya Limited & 2 Others. Consequently, the issue pertaining to the validity or propriety of the public auction can only be gone into and ventilated therein.
76. Be that as it may, what concerns this Honourable court is that the suit property was indeed sold vide public auction and thereafter same was transferred to and registered in favor of the Plaintiff.
77. The question that begs the answer is whether upon the sale of the suit property vide public auction and the incidental transfer thereof to the Plaintiff, the Defendant herein, would still be possessed of any lawful rights and or interests thereto.
78. To my mind, the Plaintiff's rights to and or in respect of the suit property, which are underscored by the Equity of redemption, stood extinguished and terminated upon, the successful sale of the suit property vide public auction.
79. To use the common parlance, the Defendant's Equity of redemption was extinguished at the fall of the harmer. Consequently, immediately upon the fall of the harmer the Defendant's rights to the suit property abated and became extinct, in the eyes of the law.
80. To fortify the foregoing observation, it would also be worthy to adopt and rely on the decision in the case of *Ze Yu v Yang Nova Industrial Produce Ltd* [2003] 1 EA 362 (CCK), Justice Nyamu (as he then was) held as follows: -
- “The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power.”
81. Recently, the legal position pertaining to the extinction of the Equity of redemption was amplified, if not clarified vide decision in the case of *Kamulu Academy Limited & Another v British American Insurance (K) Ltd & 2 Others* [2018]Eklr.
82. For coherence, the Honourable Court stated and observed as hereunder:
- “The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not...in the case of *Mbuthia v Jimba Credit Finance Corporation and another* [1986-1989]1EA 340(CAK) considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second Respondent. The Court of Appeal held:- A sale destroys the equity of redemption in the mortgaged property...The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property...The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved



that the mortgagee entered into the contract in bad faith... This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act.

83. In view of the foregoing, I come to the conclusion that the Defendant herein ceased to have any legitimate and/or lawful rights to and in respect of the suit property, immediately same was sold vide the public auction and which sale was vindicated by the issuance and execution of the memorandum of sale, which constitutes lawful contract between the chargee and the purchaser of the suit property.

Issue number 2- whether the continued occupation, possession and use of the suit property by the defendant constitutes trespass.

84. Having found and held that the Defendants rights and/or interests to and in respect of the suit property extinguished and/or abated at the fall of the harmer, the question that now remains is; whether the Defendant can lawfully retained occupation and possession of the suit property.
85. To my mind, having lost all the legal rights and/or interests to and in respect of the suit property, the Defendant cannot contend that the same remains the owner of the suit property, whatsoever and howsoever.
86. On the other hand, given that the Defendant's rights and/or interests over and in respect of the suit property were extinguished at the fall of the harmer, it then means that the Defendant's continued occupation and activities on the suit property are unlawful and illegal.
87. Contrarily, it is safe to state and reiterate that the actions by and/or on behalf of the Defendant are actually calculated to deny and/or deprive the registered proprietor, of his/her rights and privileges to the suit property.
88. Consequently, it is my finding and holding that the actions and/or activities by and/or at the instance of the Defendant, indeed constitutes and/or amount to trespass.
89. To buttress the foregoing finding, it is sufficient to take cognizance of the holding in the case of *David Ogutu Onda v Walter Ndede Owino* [2014] eKLR, where the court stated as hereunder;

“Trespass has been defined as any unjustified intrusion by one person upon the land in the possession of another. See, *Zacharia Onsongo Momanyi v Evans Omurwa Onchagwa* [2014] eKLR. To be able to establish the tort of trespass the plaintiff had to establish his ownership of the suit property and the fact that the defendant's occupation of the property is unjustified. The plaintiff has proved that he is registered as the proprietor of the suit property.

90. Other than the definition supplied vide the foregoing decision, it is also appropriate to take cognizance of the Provisions of Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya.
91. For coherence, the provision of Section 3(supra) are reproduced as hereunder;

Trespass upon private land

- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on,



private land without the consent of the occupier thereof shall be guilty of an offence.

- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

92. Premised on the foregoing, there is no gainsaying that immediately upon the Defendant's rights to the suit property being extinguished, vide public auction, the Defendant ceased to have rights and Interests in the suit property.
93. In a nutshell, even though the Defendant is still pursuing his claim, whatever the nature thereof as against the chargee in the suit before the high court, the pursuit of such claims, which is yet to yield any precipitate results, does not vest in the Defendant any legal rights and/or interests to and in respect of the suit property.
94. The Defendant may or may not wish to acknowledge the cessation of his title over the suit property and may perhaps be nursing hopes of retrieval of the suit property, but the hard fact is that for now the Defendant is a trespassers onto the suit property.
95. Period.

Issue number 3 -whether the plaintiff herein acquired lawful rights and interests over the suit property and if so whether the plaintiff is entitled to the reliefs sought at the foot of the originating summons.

96. Following the conclusion of the public auction that was carried out and/or undertaken on the February 24, 2021, the Plaintiff herein was declared as the highest and successful bidder, by the nominated auctioneers.
97. Pursuant to and upon being declared as the highest bidder, the Plaintiff proceeded to and complied with the requisite terms of the public auction, inter-alia payment of the stakeholder sum, being the 25% deposit.
98. Thereafter, it has been shown that the Plaintiff proceeded to and paid the balance of the purchase price, culminating into the transfer and registration of the suit property in favor of the Plaintiff.
99. Effectively, upon the transfer and registration of the suit property in favor of the Plaintiff, the Plaintiff became the lawful and legitimate proprietor of the suit property and thus same acquired legal rights and privileges attendant to such registration.
100. To my mind, immediately the Plaintiff became the registered proprietor to the suit property, his right thereof attracted legal protection in the manner prescribed vide Section 24, 25, and 26 of the [Land Registration Act 2012](#).
101. Perhaps to be able to understand the legal import and tenor of the foregoing Sections of the law, it is appropriate to reproduce same, for ease of reference.
102. For convenience, the foregoing provisions are reproduced as hereunder;
24. Interest conferred by registration Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

103. Notwithstanding the foregoing, the Defendant herein has contended that the transfer and ultimate registration of the suit property in favor of the Plaintiff, was procured and/or obtained illegally, owing to the fact that the chargee's statutory powers of sale had not been properly exercised.
104. Based on the contention that the public auction carried out and/or undertaken by and/or on behalf of the chargee was fraught with illegalities, the Defendant has therefore maintained that the Plaintiff's title is vitiated.
105. Be that as it may, it is appropriate to draw the Defendant's attention to the express provision of Section 99 (4) of the [Land Act, 2012](#), which provide as hereunder;

Protection of purchaser 99.



- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

106. At any rate, the import and tenor of the provision of Section 99(4) of the *Land Act* has since received judicial interpretation and/or construction, in numerous decisions.
107. To this end, it is imperative to make reference to two such decisions, whose import is explicit, apt and succinct.
108. First is the decision in the case of *Simon Njoroge Mburu v Consolidated Bank of Kenya* [2015]eKLR, where Hon Justice Havelock (as he then was) in interpreting Section 99 stated and observed as hereunder:

“That Section (99) now statutorily encompasses the right of the chargor prejudiced by unauthorized improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff’s remedy lies in this case. In this regard, the plaintiff would do well to note the powers of the Court in respect of remedies and reliefs sought out in under Section 104 of the *Land Act*, 2012

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

109. Additionally, there is the case of *Joyce Wairimu Karanja v James Mburu Ngure & 3 Others* [2018]eKLR, where the Honourable Court stated and held as hereunder:

“... there is little reason to be labour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under Section 99 of the *Land Act*. Thirdly, a mortgagor’s equity of redemption is extinguished upon the fall of the hammer in a public auction.”

110. In view of the foregoing Jurisprudential position, the Defendant’s remedy only lies against the chargee, namely, the bank who carried out and/or conducted the impugned public auction, subject of course to proof of the Impugned allegations.
111. To the contrary, the Defendant herein has no legal claim and/or remedy as against the Plaintiff herein. Consequently, despite the contestation by the Defendant, the Plaintiff herein acquired lawful rights to the suit property.
112. In short, my answer to issue number three is that the Plaintiff is the lawful and legitimate owner of the suit property and same is entitled to exclusive use, occupation and possession.

Final disposition

113. Having evaluated and/or analyzed the issues that were set out for determination, it is now appropriate to surmise the subject Judgment by rendering the dispositive orders.



114. However, before making the final orders, there is one outstanding issue that may require a short mention. For clarity, this relates to the claim by the Plaintiff for compensation on account of General damages in the sum of kes 100, 000/= per month from the date of registration of the suit property in favor of the Plaintiff to date of Judgment.
115. As pertains to the said claim, my answer is twofold. Firstly, there was no claim for payment of General damages, or mesne profit, at the foot of the originating summons. In this regard, the Plaintiff is bound by the pleadings and the reliefs sought thereunder. See *Independent Electoral & Boundaries Commission v Stephen Mutinda Mule & Others* (2014)eKLR.
116. Secondly, it is common knowledge that a claim for General Damages and/or Mesne Profits cannot be sought for and/or be granted on the basis of an originating summons. See *Kenya Commercial Bank v Osebe* (1982)eKLR.
117. Having addressed the foregoing issues, it is now appropriate to make the final orders. Consequently, I make the following orders;
- a. Declaration be and is hereby issued that the Defendant herein, John Kararu Thagana, his agents, servants and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendants continued occupation of LR No 16217/87/27 IR No 9003, is unlawful, illegal and constitutes trespass.
 - b. The Defendant, together with his agents, servants and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendant's continued occupation of LR 1617/87/27 IR No 9003 be and are hereby ordered to vacate and grant vacant possession of the suit property within 30 days from the date of this judgment.
 - c. In default of the Defendant and/or his agents, servants and/or employees, to vacate and hand over vacant possession within 30 days from the date of this judgment, the Plaintiff shall be at liberty to levy eviction against the Defendant herein.
 - d. Subject to clause (c) hereof an eviction order shall issue to and against the Defendant, without further reference and/or application to the court.
 - e. In the event that the Defendant fails to comply with clause (b) hereof and the Plaintiff is constrained to levy the eviction, the costs of the eviction shall be certified by the taxing officer of this court and same shall be borne by the Defendant.
 - f. Should it become necessary to levy the Eviction against the Defendant herein, the nominated auctioneers, shall be at liberty to apply for appropriate order for provision of security, if necessary, in line with Rule 9 of the Auctioneers Rules 1997.
 - g. Costs of the Suit be and are hereby awarded to the Plaintiff and same to be taxed and certified by the taxing officer of the Honourable court.

118. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND ____ DAY OF SEPTEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant



Mr. Kagicha for the Plaintiff.

No appearance for the Defendant

