



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**CIVIL CASE 116 OF 2001**

**MATHEW NJUGUNA NGANDA.....PLAINTIFF**

**VERSUS**

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

**The Registered Trustees CATHOLIC DIOCESE OF NAKURU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff, Matthew Njuguna Nganda, filed suit against the Defendants, Kenya Commercial Bank Limited and the Registered Trustees of the Catholic Diocese of Nakuru seeking declaratory orders of this Court that the sale and purchase of Land Reference No. L.R. 6221/1 Grant 1R7248 (*hereinafter referred to as the suit land*) in June 2000 by the Defendants was unlawful and fraudulent and should be set aside. The Plaintiff further prayed for perpetual injunction to issue to restrain the Defendants from taking possession of title No. L.R. No. 6221/1 Grant I.R. 7238 until a proper and lawful sale of the property is conducted. The Plaintiff has alternatively prayed that the 1<sup>st</sup> Defendant be ordered to pay damages to the Plaintiff for the wrongful exercise of its statutory power of sale. The basis of the Plaintiff suit against the Defendant is the allegation that the 1<sup>st</sup> Defendant sold the suit land to the 2<sup>nd</sup> Defendant fraudulently and purportedly in the exercise of its statutory power of sale. It was the Plaintiff's case that no such public auction took place and further that the sum of Kshs 7,000,000/= paid by the 2<sup>nd</sup> Defendant as the purchase consideration did not reflect the true market value of the suit land. The Defendants deny the Plaintiff's claim. Issues were agreed and the case proceeded to hearing before Lady Justice Sarah C. Ondeyo who heard a substantial part of the Plaintiff's case before she was transferred to Nairobi. The parties to this suit agreed by consent to have this suit proceed to hearing from the place that the hearing had been concluded by Lady Justice Sarah C. Ondeyo. This Court therefore heard part of the evidence of the Plaintiff and the evidence of both defendants. At the close of both the Defendants case, the parties to this suit agreed by consent to file written submissions in support of their respective case. This Court has considered the Plaintiff's case, according to the evidence that was taken by Lady Justice Ondeyo and part of the Plaintiff's and the entire Defendants case, according to the evidence that was taken by this Court.

The Plaintiff called two witnesses, himself and a Registered Valuer. According to the evidence of the Plaintiff (*hereinafter referred to as PW 1*), parcel number L.R. 6221/1 situate at Mawingo Salient Scheme used to belong to him. The said parcel of land measured about 306.5 acres. PW 1 testified that his property was sold in a public auction by the 1<sup>st</sup> Defendant. It was his evidence that the property was sold at a grossly undervalued price of Kshs 7,000,000/=. According to PW 1 the land was valued more than Kshs 2,7000,000/=. PW 1 testified that the price of an acre in the area was in the region of Kshs 130,000/= per acre. He further testified that he was not served with the statutory notice before the said

property was sold by public auction. The Plaintiff urged the Court to nullify the sale because the same was undertaken in a fraudulent manner. PW 1 admitted that he owed money to the 1<sup>st</sup> Defendant on account of a loan that was advanced to him. PW 1 testified that he had filed several suits to stop the said parcel of land being sold by the 1<sup>st</sup> Defendant. It was his evidence that he had paid Kshs 300,000/= out of the total amount of Kshs 750,000/= which was advanced to him.

It was further his testimony that he could not be able to service the said loan advanced to him as the access road to his farm had been blocked when the Ministry of Lands and Settlement created Mawingo Settlement Scheme. PW 1 testified that because of the lack of access to the said parcel of land the value of the property had been reduced. PW 1 further testified that he had secured a buyer for the said parcel of land but the bank refused to accept to be paid the purchase consideration thereto. PW 1 insisted that even though his parcel of land did not have an access road to it could not be valued at Kshs 7 million. The Plaintiff admitted that he had filed several suits to thwart the 1<sup>st</sup> Defendant from selling the suit property. He admitted that some of the suits had been filed by his wife to prevent the suit land from being sold.

The Plaintiff denied that he had sworn a false verifying affidavit when he filed this case by stating that no suit was pending before any Court. PW 1 admitted that he was aware that the property had been advertised twice before it was finally sold by public auction. The Plaintiff denied that he was aware that the suit land was to be sold by public auction on the 15<sup>th</sup> of June 2000. It was his testimony that he became aware of the sale after the said parcel of land had already taken place. He further testified that he requested PW 2 to do a valuation of the said property because he was of the view that the property had been sold at a gross under value. PW 1 instructed the Valuer to give him the current market value of the said parcel of land. PW 1 testified that by the time he instructed the Valuer, he has already filed the current suit. The Plaintiff testified that there was no other case pending before this Court challenging the sale by the 1<sup>st</sup> Defendant of the suit land by public auction.

PW 2 Wanjiku Ng'ang'a (*hereinafter referred to as PW 2*) testified that she was a registered and a licenced Valuer. She was also a member of the Institution of the Survey of Kenya. PW 2 testified that she prepared a valuation report in respect of *LR No 6221/1 Nyandarua* on instructions of the Plaintiff. The valuation report prepared is dated the 9<sup>th</sup> of February 2001. PW 2 testified that she visited the suit land on the 2<sup>nd</sup> of February 2001. It was her testimony that the entire parcel of land measured 306.5 acres less 2 acres road reserve. PW 2 gave a description of the suit land. She testified that there were two vested down cliffs on the farm. The topography of the land was a slope towards a stream. At the time of her visit the land was being utilized. The Plaintiff had planted maize, beans and vegetables. The Plaintiff also kept cattle. PW 2 testified that apart from the 20 acres which comprised of the cliff area, the rest of the land arable. PW 2 valued the property at Kshs 27,600,000/= this being the open market value. She testified that she had taken into account the fact that accessibility to the said parcel of land had been blocked and therefore there could be no outlet for the farm produce. She further testified that the fact that the land was not accessible had brought down the value of the land.

PW 2 produced the valuation report that she had prepared as Plaintiff's Exhibit No. 1. PW 2 disagreed with the valuation prepared on the instructions of the 1<sup>st</sup> Defendant by Ngotho Wathome valuers. She disagreed that the open market value of the property was Ksh 8,000,000/=. She testified that it was inconceivable that land in Central Province could cost less than Kshs 5000/= per acre. She however agreed that the bigger the land the less the value per acre. She disagreed with the estimation of the cliff area to be 60 acres. In her view the cliff area was about 20 acres. PW 2 testified that she had been instructed by the Plaintiff to value the property and was not aware of the price that the 1<sup>st</sup> Defendant had sold the said parcel of land to the 2<sup>nd</sup> Defendant. PW 2 testified that she only learned of the sale when she undertook a search of the said property at Nairobi. She learnt that the property had been sold to the 2<sup>nd</sup> Defendant. PW 2 admitted that the suit property did not have an access road as Mawingo Settlement Scheme had encroached on the said parcel of land therefore cutting off access. PW 2 testified that there was very little economic activity going on the suit land, and stated that the farming activity going on the suit land was basically for consumption by the Plaintiff and his family.

PW 2 testified that her valuation was influenced by the Agricultural activities that used to be done on the suit land and what was done in the neighbourhood. She admitted however that the full potential of the utilisation of the suit land was hampered by lack of road access. The value of the land was consequently diminished. PW 2 assessed the market value of the property to be Kshs 27,600,000/=. PW 2 testified that this value is assessed on the basis of a willing buyer – willing seller basis. It was PW 2's testimony that between 22 to 30 acres of the suit land could not be utilized because it comprised a cliff. PW 2 testified that the valuation report prepared by Samuel Kiragu of Kiragu & Mwangi Limited which stated the value of the property to be Kshs 10,500,000/= was an undervaluation. It was PW 2's evidence that the suit land was situated in Central Province where the demand for land was very high and the supply low. She further testified that she based her valuation on the comparative analysis and also considered the fact that values of land in Central Province were generally high.

PW 2 denied that her valuation was exaggerated. PW 2 disagreed with the valuation undertaken by Moses Nyakwayi of Ngotho Wathome Company Limited dated the 14<sup>th</sup> of February 2000. According to her the valuation of Kshs 8,000,000/= was undervaluation. PW 2 however admitted that during an auction the price of the land would depend on the bidders. She further testified that even if there was a forced sale the value of the property would not go below half the market value of the property. PW 2 further testified that the value she gave to the said parcel of land was the market value. She testified that at the time she was instructed by PW 1 to value the suit land she was not aware that the suit land had been sold to the 2<sup>nd</sup> Defendant. PW 2 testified that in reaching the valuation of the suit land she considered the prevailing prices in the area even though she did not say so in the valuation report that she prepared. She further testified that it was not a requirement for the basis of the valuation to be stated in a valuation report.

She denied that the valuation report was prepared to give PW 1 the basis for filing the suit against the Defendants. She further denied that she gave the value of the suit land based on the instructions that she had been given by the Plaintiff. PW 2 testified that the valuation she gave was based on the market value and not the forced sale value. PW 2 testified that she did not overlook any material factor in arriving at the said stated valuation of the property. PW 2 further testified that in reaching the value that she gave to the suit property she considered the values of the land within the vicinity of the suit land although she did not specifically state so in her report. She confirmed that she put into consideration the fact that the suit land did not have a road access when giving the value to the suit land. It was PW 2's testimony that she was instructed by the Plaintiff to give the market value of the suit land and not its forced sale value.

The 1<sup>st</sup> Defendant called two witnesses in their defence. DW 1 Geoffrey W. Mureithi (*hereinafter referred to as DW 1*) testified that he was incharge of Advances at the 1<sup>st</sup> Defendant's Naivasha Branch. He testified that the Plaintiff had borrowed the money from the 1<sup>st</sup> Defendant in 1990 but had defaulted in paying the same. He further testified that the suit land was sold to recover the amount owed to it by the Plaintiff. DW 1 testified that when the Plaintiff defaulted in paying the loan, the 1<sup>st</sup> Defendant instructed its Advocates who issued the requisite statutory notices to the Plaintiff. The statutory notice sent to the Plaintiff dated the 8<sup>th</sup> of December 1992 was produced as 1<sup>st</sup> Defendant's Exhibit No. 1. DW 1 testified that the property was subsequently advertised for sale to recover the amount which the Plaintiff had defaulted in paying. DW 1 testified that the 1<sup>st</sup> Defendant had unsuccessfully advertised the said property for sale on the 5<sup>th</sup> of October 1993 (*produced as 1<sup>st</sup> Defendant's Exhibit No. 2*) and on 11<sup>th</sup> September 1996 (*produced as 1<sup>st</sup> Defendant's Exhibit No. 3*). He further testified that it is when said property was advertised for sale for the third time on the 15<sup>th</sup> of June 2000 that they were able to sell the said property to the 2<sup>nd</sup> Defendant who was the highest bidder (*Advertisement for sale on 15<sup>th</sup> June 2000 produced as 1<sup>st</sup> Defendant's Exhibit No. 4*).

DW 1 testified that the said property was sold at Kshs 7,000,000/= to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant executed the transfer in favour of the 2<sup>nd</sup> Defendant. DW 1 testified that after the sale of the said property, the debt owed by the Plaintiff still remained at Kshs 819,000/=. DW 1 testified that the sale of the said suit land was proper and legal. He testified that the 1<sup>st</sup> Defendant did not have any contact

or dealings with the 2<sup>nd</sup> Defendant and further that the said property was sold after a valuation had been done. DW 1 further testified that the valuation report prepared prior to the public auction by Ngogho Wathome & Company on the 14<sup>th</sup> of February 2000 gave the market value of the said property to be Kshs 8 million whilst the forced sale value was put at Kshs. 5 million. He denied that the property was sold at a throw away price. DW 1 admitted that all the advertisements prior to the one of 9<sup>th</sup> June 2000 were in the Daily Nation Newspaper. He further testified that in the three advertisements prior to the last advertisement, at least one month notice was given before the date of the auction. He testified that the last advertisement when the property was actually auctioned was in the People Daily Newspaper. The last advertisement was made six days prior to the auction date.

DW 1 testified that the purpose of the advertisement in the Newspapers was so that the property would be marketed to get the best possible price. DW 1 further testified that posters were also placed in Nakuru town and its environs before the said public action date. He testified that the Plaintiff had been given the statutory three months notice by registered post on the 8<sup>th</sup> of December 1992. He however admitted that prior to the public auction in the year 2000, no notice was sent to the Plaintiff. He further stated that the Plaintiff had not corresponded with the 1<sup>st</sup> Defendant four months prior to the sale of the said property by public auction. DW 1 further testified that ordinarily the bank did not give specific instructions to the auctioneer which newspaper to advertise the sale of the property. He stated that the 2<sup>nd</sup> Defendant had paid the sum of Kshs 7,000,000/= in full after they had successfully bid for the property. DW 1 testified that prior to the sale in the year 2000, the public auction then held did not attract any bidders.

The 1<sup>st</sup> Defendant's DW 2 Moses Nyakwaye (*hereinafter referred to as DW 2*) stated that he was a registered Valuer. He testified that on the 11<sup>th</sup> of February 2000 he visited the suit property L.R. 6221/1 and did a valuation of the property. He further testified that the property in question was about 18 kilometres North of Gilgil town. He found that there was a water tank which had been converted into a house. Part of the land was used for subsistence farming while the rest remained fallow. According to his valuation the said property was valued at Kshs 8,000,000/= while the forced sale value was Kshs 5,500,000/=. DW 2 testified that the factors he put into consideration in arriving at the said valuation were the productivity of the land, the fact that the land was traversed by a perennial river and the fact that the said parcel of land was large.

He testified that a big parcel of land had its own quantum disadvantages. The bigger the land the less the value per acre. He testified that this was due to the fact that there was a higher demand for smaller parcels of land than larger ones. It was his testimony that it was difficult to sell a larger parcel of land as the pool of potential purchasers was small. He stated that if the land was subdivided, it would attract a better price per acre but the owner would have to contend with the fact that he would lose a substantial portion of it in roads and public utilities created. The costs of the subdivision will also have to be factored in. He testified that another factor he took into consideration was the fact that there was no road access to the said parcel of land which access had been blocked when the Mawingo Settlement Scheme was created. He testified that the lack of access to the property affected its productivity.

DW 2 testified that the valuation prepared by PW 2 was exaggerated. It was his testimony that PW 2's valuation did not consider the fact that a big portion of the land consisted of a steep area. DW 2 produced the report that he had prepared as 1<sup>st</sup> Defendant's Exhibit No. 5. DW 2 admitted that the valuation that he undertook was for the purposes of determining the forced sale value of the property. He further admitted that the suit land was relatively fertile and suitable for agricultural purposes. He further testified that there was an electric line passing through the property. He further confirmed that the property in question was not accessible. It was his testimony that open market value presupposed that there would be a reasonable period of proper marketing and further that the purchaser and the vendor were knowledgeable people. He further testified that market value was determined in a situation where there was a willing buyer and a willing seller. Forced sale price was based on a willing buyer but an unwilling seller.

It was his testimony that in a forced sale, the vendor may not have the best price possible because he did not have an opportunity of selling the property. He further testified that in a sale by public auction, the fact that the purchaser is required to pay the purchase consideration within a short period also impacts

negatively on the purchase consideration. DW 2 further testified the fact that the power line crossed the land reduced the value of the land as no economic activity would be carried under the power lines. He further testified that the land value is determined by the potential of the land to generate income. DW 2 testified that the best test to determine the value of the property was the market price. He further testified that a difference of valuation of 25% was acceptable. A higher difference in valuation would be very unusual.

The 2<sup>nd</sup> Defendant called one witness to testify on its behalf. Ernest Kamau Murimi (*hereinafter referred to as DDWI*) testified that he worked for the 2<sup>nd</sup> Defendant as the Secretary to the Justice and Peace Commission. He testified that in the year 2000 there was an advertisement for the sale of land in the Newspaper. DDWI testified that he saw the advertisement. The 2<sup>nd</sup> Defendant was interested in purchasing land because it wanted to resettle land clash victims. DDWI testified that he saw the advertisement on the 9<sup>th</sup> of June 2000 (*Advertisement was produced as 1<sup>st</sup> Defendant's Exhibit No. 4*). He also saw hand bills being circulated in Nakuru town. DDWI went to the public auction personally and bid for the property. He offered Kshs 7 million. He was the highest bidder. The offer was accepted. An agreement was signed between the 2<sup>nd</sup> Defendant and the Auctioneer (*Agreement produced as 2<sup>nd</sup> Defendant's Exhibit No. 2*). An Application was made to procure the consent of the Land Control Board. Consent was duly granted (*produced as 2<sup>nd</sup> Defendant's Exhibit No. 3*). Transfer was obtained from the 1<sup>st</sup> Defendant (*produced as 2<sup>nd</sup> Defendant's Exhibit No. 5*). The land was transferred to the 2<sup>nd</sup> Defendant and an entry of the said transfer made (*title deed produced as 2<sup>nd</sup> Defendant's Exhibit No. 6*).

DDWI testified that after the transfer they took possession of the land but were prevented from undertaking any developments thereto by the orders of the Court. It was his testimony that the Plaintiff had not vacated the land. DDWI confirmed that there was no access to the land. It was his further testimony that they purchased the suit land in a public auction without any unprocedural dealings with the 1<sup>st</sup> Defendant. DDWI testified that the 2<sup>nd</sup> Defendant did not hold any account with the 1<sup>st</sup> Defendant. DDWI further testified that after he had seen the advertisement in the Newspaper, he visited the land. He testified that several meetings were held by the 2<sup>nd</sup> Defendant when a decision was made to purchase the property. DDWI testified that he saw handbills in Nakuru town. After the auction, 2<sup>nd</sup> Defendant immediately paid 25% of the purchase consideration and thereafter paid the full balance of the purchase consideration.

DDWI admitted that the 2<sup>nd</sup> Defendant had advertised the said parcel of land for sale at Kshs 50,000/= per acre. He testified that the price of Kshs 50,000/= per acre was not the commercial value of the property. He denied that he knew the Manager of the 1<sup>st</sup> Defendant bank prior to the sale of the said property. He further denied that the 2<sup>nd</sup> Defendant had colluded with the 1<sup>st</sup> Defendant to purchase the said property. He testified that there were other bidders at the public auction but the 2<sup>nd</sup> Defendant had emerged as the successful bidder. DDWI testified that the 2<sup>nd</sup> Defendant had an ongoing project where it settled the landless. It was his testimony that the 2<sup>nd</sup> Defendant did not sell the said parcels of land purchased for profit but used the same to resettle the landless. He testified that the 2<sup>nd</sup> Defendant had purchased several parcels of land which it has used to resettle either the land clash victims or the landless. DDWI denied that there was a conspiracy between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to have the said property sold to the 2<sup>nd</sup> Defendant. He testified that the 2<sup>nd</sup> Defendant intended to sub-divide the property and settle the landless and the homeless. Part of the land would be utilised to build a school and a dispensary. He testified that the plans had been prepared but could not be implemented until the conclusion of the case.

DW 3 Samuel Mwangi testified that he was a registered Valuer working with Kiragu and Mwangi Ltd. DW 3 testified that he carried a valuation of the suit property on the instructions of the Court. He testified that he travelled to the suit land and valued the same. It was his testimony that he found the suit land to be about 250 acres arable, 27 acres marshy and 30 acres waste land – i.e. the land was steep and rocky. DW 3 valued the entire parcel of land at Kshs 10,500,000/=. DW 3 testified that he use a comparable of land of similar sizes within the region to determine the value of the suit land. He found the

said parcels of land sold cost between Kshs 34,000/= and Kshs 37,000/= per acre. In determining the value of the suit land, DW 3 divided the land into several portions. He found that the suit land measured 306 acres less two acres road reserve. He found that 125 acres to be of the value of Kshs 40,000/= per acre. This portion was however land locked. It was inaccessible by car. 124 acres was valued at Kshs 34,000/= per acre. 55.5 acres was valued at Kshs 19,000/= per acre as it was wasteland. The developments were valued at Kshs 400,000/=.

DW 3 testified that if the land was subdivided, the price per acre of the arable land would be Kshs 80,000/= but 20% of the land would be lost when road access and public utilities are put into account. If the land was subdivided the property would be worth about 12.6 million. The 20% increase in value would constitute the costs of the sub-division and the developers profit. DW 3 prepared a valuation report which he produced as Defence Exhibit No. 7. DW 3 testified that the forced sale value of a property is about 70% of the market value. In the case of the suit land the forced sale value would be Kshs 7.35 million. DW 3 testified that PW 2 seemed to have valued the land on the premise that the said parcel of land was already subdivided. He testified that the value given of Kshs 90,000/= per acre was speculative. He further testified that the margin of error of more than 20% between two valuation was not acceptable and it showed that there was something wrong with one of the two Valuations. DW 3 further testified that he give a value of Kshs 19,000/= for the rocky and steep area and not a zero value. He testified that for a good price to be secured there must be a reasonable period where proper marketing has to be undertaken. DW 3 testified that the only extraneous factor considered by PW 2 in her report was the fact that she assumed that the property in question was already sub-divided. DW 3 testified that with aggressive marketing the sub-divided portions of land would be sold within a year but such aggressive advertisement would be costly. In his opinion the price paid for the suit land of Kshs 7 million in a public auction was fair. DW 3 was of the view that the valuation figure given by PW 2 was still very excessive.

I have considered the evidence adduced by the Plaintiff and the Defendants in this case. I have also read the pleadings filed by the parties to this case and the submissions made after the conclusion of this case. The issue for determination by this Court is whether the said suit land was sold by the 1<sup>st</sup> Defendant after it had issued a valid statutory notice to the Plaintiff. The other issue for determination is whether indeed a public auction was held on the material day that the suit property was sold to the 2<sup>nd</sup> Defendant. The other issue for determination is whether the price that the said property was sold to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant was fair. And the last issue for determination is what orders should issue in respect of the suit filed by the Plaintiff. It was the Plaintiff's case that the 1<sup>st</sup> Defendant sold the suit land without issuing him with the requisite statutory notice. The Plaintiff testified that he did not receive notice from the 1<sup>st</sup> Defendant prior to the sale of the property on the 15<sup>th</sup> of June 2000. The 1<sup>st</sup> Defendant, through its Officer in charge of Advances at Naivasha Branch, Geoffrey Mureithi testified that it gave the Plaintiff the requisite to the Plaintiff. The said officer testified that the Plaintiff was given the requisite statutory notice on the 8<sup>th</sup> of December 1992. The said statutory notice was sent to the Plaintiff by registered post. The postal address stated in the said letter is P. O. Box 93 Gilgil. The Plaintiff has not denied that the said postal address is his.

It is therefore the finding of this Court that the Plaintiff was given the requisite three months statutory notice before the said property was put on sale by public auction by the 1<sup>st</sup> Defendant. This Court finds that testimony by the Plaintiff that he was not served with the statutory notice to be without foundation. Evidence was adduced by the Plaintiff and also corroborated by the evidence of the 1<sup>st</sup> Defendant that the said property was advertised more than two time for sale by public auction but, in the two instances the said auctions did not attract any bids. The Plaintiff stated in his plaint that the alleged public auction when the suit land was sold did not take place. It was his evidence that no public auction was held as alleged by the Defendants. When the Plaintiff testified in Court he admitted that he only heard after the 15<sup>th</sup> of June 2000 that the property had been sold. The Plaintiff admitted that he was not aware that the public auction had been scheduled for the 15<sup>th</sup> of June 2000. The Plaintiff further admitted that he did not attend the public auction neither did he sent a representative to the said public auction.

Mr Ernest Kamau Murimi who testified on behalf of the 2<sup>nd</sup> Defendant testified that he attended the

public auction at Gilgil town on the material day. He found people at the place scheduled for the public auction. It was his evidence that the auction took place. Mr Ernest Kamau Murimi bid on behalf of the 2<sup>nd</sup> Defendant and was successful in his bid. An agreement was executed between the 2<sup>nd</sup> Defendant and the Auctioneers. The agreement was produced as 2<sup>nd</sup> Defendant's Exhibit No. 2. It is clear from the above evidence that a public auction did indeed take place. The Plaintiff admitted in his evidence that he was not aware that the public auction had been scheduled for the 15<sup>th</sup> of June 2000. Mr Ernest Kamau Murimi testified that he attended the public auction at Gilgil. This Court finds that the contention by the Plaintiff that the public auction was not held is obviously not true. The 2<sup>nd</sup> Defendant's representative confirmed that he attended the public auction, bid in the said public auction and upon being successful in his bid, executed the agreement with the auctioneer. This Court finds that indeed the public auction took place.

The Plaintiff testified that the suit land was sold at a throw away price. It was his evidence that the suit land was sold at Kshs 7 million while its true valuation was Kshs 27,600,000/=. The Plaintiff instructed PW 2 Wanjiku Nganga who prepared a valuation report putting the value of the said parcel of land at Kshs 27,600,000/=. The Plaintiff testified that the land in the area cost at least Kshs 130,000/= per acre. The Plaintiff testified that he has procured a buyer for the said parcel of land but the 1<sup>st</sup> Defendant had refused to indorse the sale. The Plaintiff admitted that his parcel of land could not be accessed by road as the only access to the land was taken over by the Ministry of Lands and Settlement when Mawingo Settlement Scheme was created. The Plaintiff admitted that the lack of access to the suit land reduced its value. He testified that the value of the land would be reduced from Kshs 30 million to Kshs 27 million because of the lack of a road access. The Plaintiff was adamant that the suit property could not fetch the price of Kshs 7 million.

PW 2 Wanjiku Nganga supported the evidence adduced by the Plaintiff. It was her evidence that the values of land in Central Province were generally high. According to her evidence, apart from the fact that the suit land was not accessible, the suit land was otherwise fertile and arable. It was her testimony that the valuation given by DW 2 Moses Nyakwaye was an undervaluation. PW 2 testified that the value given by DW 2 of Kshs 8 million was not the true reflection of the value of the suit land. PW 2 also testified that the valuation report prepared by DW 3 Samuel Mwangi putting the value of the suit land at Kshs 10,500,000/= was also an undervaluation.

PW 2 admitted that she used a comparative analysis of the prices of the properties in the area. She further admitted that she did not state in her report the comparative prices that she considered before reaching at the said valuation of Kshs 27.6 million. On his part DW 2 Moses Nyakwaye testified that the value that was given to the suit land by PW 2 was an exaggeration. It was DW 2's evidence that it was not possible for two valuers to give a valuation that would differ and be at variance by more than 20%. DW 3 Samuel Mwangi, a Valuer appointed by the Court gave the value to the suit land at Kshs 10,050,000/=. DW 3 before valuing the said property divided up the suit land according to its suitability to generate an income. According to him, he valued 125 acres at Kshs 40,000/=: 124 acres at Kshs 34,000/= and 55.5 acres at Kshs 19,000/=. The 55.5 acres was given a low value because the land was either steep, rocky or marshy. DW 3 testified that PW 2's value of Kshs 27.6 million was premised on the fact that the said parcel of land which measured 306.5 acres had been subdivided into smaller parcels. DW 3 disagreed with the value given by PW 2. He testified that the said value given was speculative. All the three Valuers who gave evidence in this case agreed that an ideal open market value could only be secured when there was proper marketing coupled with the fact that there would be knowledgeable vendors and purchasers. The three valuers agreed that in a situation where there is a forced sale, in a public auction, the best possible market value may not be obtained. PW 2 testified that in event of a forced sale the market value of the property may be reduced by upto 50%. DW 3 testified that in such an eventuality, the price would come down by about 30%. PW 2 testified that the sale of the suit land at Kshs 7 million was a case of gross undervaluation. DW 2 testified that he had put the reserve price for the suit land in the event of a forced sale at Kshs 5 million. DW 3 testified that a forced sale value would be Kshs. 7.35 million. According to DW 3 the price of Kshs 7 million which the property was sold was a fair price.

I have considered the conflicting evidence given by the three Valuers. It is obvious that the valuation given by PW 2 was exaggerated. Both DW 2 and DW 3 testified that it was not possible for two valuers to disagree on a price of a property to the margin of error of more than 20% or 25%. DW 3 testified that apart from the fact that PW 2 had not properly shown the land which was wasteland and further had assumed that the suit land was already subdivided, he agreed with the basis of her analysis. After assessing the evidence adduced by the three valuers it is the finding of this Court, that the valuation given by DW 3 Samuel Mwangi, an independent Valuer appointed by the Court is the valuation that shall be used as a basis to determining the value of the suit property. The valuation given by PW 2 was coloured by the sympathy that PW 2 may have felt for the Plaintiff. The valuation was therefore exaggerated. It was made on the basis that the suit land was already sub-divided into smaller portions. PW 2 did not consider the fact that the suit land had to be valued as one unit of land. PW 2 further erred in being carried away by the belief that she held that land in Central Province generally attracted high prices.

This myth was exploded by the evidence adduced by DW 3 who testified that he had been unable to sell a parcel of land measuring two acres near the suit land for Kshs 80,000/= due to lack of purchasers. PW 2 did not properly inspect the land to determine how many acres were suitable for agricultural purposes. According to her estimate about 20 acres of the suit land was wasteland. DW 3 confirmed on the ground that 55.5 acres was wasteland. It is the finding of this Court that the valuation undertaken by DW 3 was more professional and realistic. DW 2's valuation though on the lower side, was within the margin of error of between 20 and 25% acceptable within the property valuation profession. It is therefore the finding of this Court that the open market value of the said parcel of land is Kshs 10,050,000/= and its forced sale value is Kshs 7.35 million. The suit land was sold to the 2<sup>nd</sup> Defendant for the sum of Kshs 7 million. It is the opinion of this Court that the price that the suit land was sold to the 2<sup>nd</sup> Defendant was fair and within the forced sale value of the property.

In the premises it is the finding of this Court that the Plaintiff has not established his case that the suit property was sold fraudulently by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant has established that it issued the requisite statutory notice to the Plaintiff before the said property was sold. This Court cannot therefore grant the declaratory orders sought by the Plaintiff. The Plaintiff has not established a case on a balance of probabilities that the 1<sup>st</sup> Defendant breached the law when it sold the said property by public auction to the 2<sup>nd</sup> Defendant. The Plaintiff has not therefore proved that he is entitled to be paid damages.

The Plaintiff's suit therefore lacks merit. The same is dismissed with costs to the Defendants.

**DATED at NAKURU this 10<sup>th</sup> day of November 2004.**

**L. KIMARU**

**AG. JUDGE**