



REPUBLIC OF KENYA



Muyundo v Musyimi & another (both Sued as the Administrators of the Estate of Stephen Musyimi Kimolo (deceased)) (Environment & Land Case 407 of 2014) [2025] KEELC 4966 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 4966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 407 OF 2014**

**OA ANGOTE, J
JULY 3, 2025**

BETWEEN

DONALD WEKESA MUYUNDO PLAINTIFF

AND

JUSTUS KIMAU MUSYIMI 1ST DEFENDANT

VERONICA NDINDI MUSYIMI 2ND DEFENDANT

**BOTH SUED AS THE ADMINISTRATORS OF THE ESTATE OF STEPHEN
MUSYIMI KIMOLO (DECEASED)**

JUDGMENT

Background

1. Vide a Plaint dated 1st April 2014, the Plaintiff prayed for judgment against the Defendants jointly and severally for:
 - a. Vacant possession.
 - b. An order of eviction directed against the Defendants and/or any other person in occupation of Title Number Nairobi/ Block 106/12 at the behest and with the acquiescence of the Defendants.
 - c. Mesne profits calculated at Kshs. 55,000/- per month from 1st October 2010 until the Plaintiff acquires vacant possession of Title Number Nairobi/Block 106/12.
 - d. Costs of this suit.
 - e. Interest on (c) and (d) above at court rates.



- f. Any other or further order that may further the course of justice.
2. The Plaintiff averred that he is the registered proprietor as lessee from the Government of Kenya of Title Number Nairobi/ Block 106/12 (the suit property) by virtue of a transfer in exercise of the chargee's power of sale. He asserted that the Defendants are in occupation of the suit property, which was previously registered in the deceased name, Stephen Musyimi Kimolo.
 3. It was averred by the Plaintiff that the late Mr. Kimolo had charged the suit property to NIC Bank, the chargee, to secure a loan facility granted to Utalii Transport Co. Ltd, the chargor; that Utalii Transport Co. Ltd defaulted in servicing the loan facility and that the bank commenced the process of realization of the charged security under Section 90 of the Land Act.
 4. According to the Plaintiff, the chargor sought to stop the sale and commenced legal proceedings in HCCC No. 97 of 2009 and that by virtue of a letter of consent filed in HCCC No. 97 of 2009 on 12th June 2009, the Plaintiffs in the latter suit allowed the chargee to sell the suit property by private treaty in the event there was a shortfall after realization of the other securities.
 5. It was contended in the Plaint that the conditions for the sale of the suit property crystallized and the property was duly sold to the Plaintiff, Donald Wekesa Muyundo, by virtue of a transfer and charge registered at the District Lands Registry on 29th November 2010.
 6. The Plaintiff stated that he paid the loan by monthly installments of Kshs. 78,000/- from September 2010 and Kshs. 123,290/= from January 2011 until completion. He maintained that he was entitled to vacant possession of the house soon after he signed the agreement and that he paid a deposit of the purchase price and started to service the monthly installments on the loan amount.
 7. According to the Plaintiff, despite having paid the full purchase of the suit property and the same being transferred to the Plaintiff, the Defendants have declined to yield vacant possession of the same. According to the Plaintiff, the Defendants are trespassing on his property of which he is the legally registered proprietor and is entitled to vacant possession of the same.
 8. The Plaintiff maintained that the Defendants have been enjoying possession of a house that belongs to him and that he has incurred losses estimated at Kshs. 55,000 per month, being the monthly rental value of the house. It is on this basis that the Plaintiff has sought for eviction orders against the Defendants.
 9. Vide a Statement of Defence and Counterclaim, the Defendants averred that the purported sale and transfer of the suit property did not give the Plaintiff a good title and was a nullity. They contended that Section 90 of the Land Act was not applicable at the time the Bank irregularly exercised its statutory power of sale and that it is the Registered Land Act (repealed) that was in force.
 10. The Defendants asserted that they instituted Milimani HCCC No. 97 of 2009 against the Bank and the firm of Westminster Commercial Traders to safeguard the interests of Utalii Transport Company Ltd because the Bank had unlawfully instructed the firm of Westminster Traders to repossess motor vehicles secured by the Hire Purchase facility. They stated that the conditions of the impugned consent in Milimani HCCC No. 97 of 2009 filed on 12th September 2009 were the subject of Milimani HCCC No. 32 of 2010.
 11. According to the Defendants, the purported sale of the suit property was irregular, unlawful and should be declared void and set aside for the following reasons: they did not authorize the irregular consent and the terms of the consent, particularly Clause 14, which was breached by NIC Bank; the charge instruments did not give NIC Bank the right to sale the land by private treaty as required under



Section 79 of the repealed Registered Land Act; and that the transfer by the chargee was defective and did not confer a valid title to the bank because it was not dated and the signatures of the Directors of NIC Bank are not witnessed as required by law.

12. It is the Defendants' case that further, there is no agreement for sale or memorandum of sale by NIC Bank or Garam Auctioneers respectively with the Plaintiff; that the Plaintiff did not pay the balance of the purchase price within ninety days stipulated in his offer to purchase dated 25th March 2010 and that the Late Stephen Musyimi Kimolo passed away on 26th February 2006 yet NIC Bank, through the firm of K. Mwaura & Company Advocates, had by letters dated 2nd February 2009 addressed to the deceased demanded the immediate payment of Kshs. 18,585,234.78, being the amount due and outstanding on the Company's current accounts held at NIC Bank.
13. It was averred by the Defendants that the two letters purporting to be statutory notices but addressed to the late Stephen Musyimi Kimolo were invalid, defective and of no effect in law because the Bank did not have any right under the Registered Land Act to exercise its statutory power of sale.
14. The Defendants contended that the Bank repossessed motor vehicles valued at Kshs. 18,700,000 and have not given any account of the proceeds of the sale to the Defendants despite several requests; that they are not trespassers and have always been in possession of the suit property and that they are joint administrators of the estate of the late Stephen Musyimi Kimolo pursuant to a grant of letters of administration issued on 21st March 2007 in Succession Cause Number 1348 of 2006.
15. It was averred in the Counterclaim that the late Stephen Musyimi Kimolo was one of the directors of Utalii Transport Company Limited and he maintained a current account number CA2 1-200-000469 at the Bank's Mombasa Road Branch for the purposes of and in connection with its transport business.
16. It was affirmed by the Defendants that by a letter dated 1st September 2003, and executed by the Directors of Utalii Transport Company, NIC Bank offered, and the Company accepted an overdraft facility for the sum of Kshs. 1,500,000 subject to the terms and conditions stipulated in the letter, and that one of the express terms of the letter of offer was that the overdraft facility would be secured by a legal charge over parcel of land known as Nairobi/ Block 106/12 (the suit property) together with the Director's guarantees.
17. According to the Defendants, the charge dated 10th September 2003 was duly registered over the property to secure the overdraft facility in the sum of Kshs. 1,500,000; that through a letter of offer dated 28th February 2005 and executed by the Company on 14th March 2005, the NIC Bank offered and the Company accepted the additional Banking facilities, which included an overdraft facility for Kshs. 4,000,000 being working capital, hire purchase facility of Kshs. 48,000,000, Guarantee for Kshs. 7,500,000 and Insurance Premium Finance Loan of Kshs. 1,500,000.
18. The Defendants stated in their Counterclaim that under Clause 8.2 of the letter of offer dated 28th February 2005, it was an express term that the security, being a legal charge over NAIROBI/BLOCK 106/12, would be a continuing security for payment of all sums payable to the bank under the referenced schedule.
19. It was further asserted that by a charge dated 12th April 2005, the late Stephen Musyimi Kimolo created a charge in favour of the 2nd Defendant to secure the facilities granted to Utalii Transport Company pursuant to the letter of offer dated 28th February 2005 for an aggregate sum of Kshs. 14,000,000 and that by a letter dated 13th April 2007 and executed by Utalii Transport Company on 10th May 2007, the Bank offered, and the Company accepted the following Bank facilities:
 - i. Overdraft- Kshs. 6,000,000 (the overdraft facility).



- ii. Kshs. 4,000,000 (the excess facility).
 - iii. Hire purchase- Kshs. 42,000,000.
 - iv. Insurance Premiums Facility- Kshs. 4,500,000.
 - v. Guarantee- KShs. 9,000,000.
20. The Defendants averred that the company duly complied with the terms of the offer of the said facilities but no further charges were created over LR No. 12661/66 and LR No. NBI/ BLOCK 106/12 as provided for in the letter of offer or by law, and that the facilities advanced to the company by the letter of offer dated 13th April 2007 were not secured by valid legal charges over the two properties.
 21. It is the Defendants' case that they applied for a term loan facility by a letter dated 21st January 2008 for a sum of Kshs. 17,000,000 to enable the Company to pay the overdraft facility on the current account maintained by NIC Bank and to refinance the hire purchase facility.
 22. It was affirmed that by a letter of offer dated 19th February 2008, the 2nd Defendant granted, and the Company accepted the term loan facility upon the terms and conditions stipulated in the letter of offer; that it was a term of the letter of offer under the Schedule that they would sign Guarantees for Kshs. 65,500,000/- and that Further Legal Charges would be registered under the properties L.R. No. 12661/66 and L.R. No. NAIROBI/BLOCK 106/12 to secure sums equivalent to the respective market prices for the two properties.
 23. The Defendants maintained that no further charges were ever registered to secure the Term Loan Facility over the properties L.R. No. 12661/66 and NAIROBI/BLOCK 106/12 and therefore the term loan facility for Kshs. 17,000,000 advanced pursuant to the letter of offer dated 19th February 2008 was not secured by the two properties already charged.
 24. The Defendants stated that they did not execute fresh guarantees as required under the schedule to the letter of offer and their consent as Guarantors to the Company was not obtained prior to the restructuring of the facilities granted to the Company. On this basis, they averred, the purported sale of the property known as NAIROBI/BLOCK 106/12 was void and a nullity in law, and should be set aside.
 25. In the Counterclaim, the Defendants have sought that the Plaintiff's suit be dismissed and prayed for the following reliefs against the Plaintiffs:
 - a. A declaration that the compromise by way of a Consent Order filed in court in Milimani HCCC No. 97 of 2009 on 12th June 2009 is null and void and that all steps taken to enforce the said compromise are unlawful and void ab initio.
 - b. A declaration that the purported sale, transfer and registration of the property known as L.R. No. NAIROBI/ BLOCK 106/12 to the 1st Defendant is null and void for illegality and should be set aside.
 - c. An order directing the Chief Land Registrar to cancel and revoke the Certificate of Lease issued to the 1st Defendant for the property known as L.R. No. NAIROBI/BLOCK 106/12 and issue a Certificate of Lease in the names of the Plaintiffs.
 - d. A permanent injunction restraining the 1st Defendant whether by himself, his agents, servants and/or employees or whosoever from trespassing into, interfering with the Plaintiffs quiet possession, selling, transferring, charging, mortgaging, leasing, alienating, dealing or in any way interfering with the property known as L.R. No. NAIROBI/ BLOCK 106/12.



- e. Costs of the suit.
 - f. Such further or other relief as this Honourable Court may deem just and convenient to grant.
26. The Plaintiff filed a Reply to Defence and Defence to Counterclaim in which they denied the allegations in the said pleadings. As to the issues raised in the counterclaim, the Plaintiff pledged ignorance.

Hearing and Evidence

27. The Plaintiff, PW1, informed the court that he is an Advocate of the High Court. He adopted his statement dated 1st April 2014 as his evidence in chief. He produced ten (10) documents in his bundle as PEXB1 -10. He also produced a second list of documents dated 20th June 2022. The valuation report was marked as MFI 11 and the three documents were produced as PEXB 12, 13 and 14.
28. The PW1 stated that he purchased the suit property from the Bank in November 2010 and took possession of the house in September 2021. He was, however, unable to get immediate vacant possession because the Defendants were in the house and they refused to vacate the property.
29. PW1 stated that the late Stephen Musyimi Kimolo, the previously registered proprietor of Nairobi/ Block 106/12, had charged the property to NIC Bank to secure a Bank facility granted to Utalii Transport Co. Ltd and that the borrower defaulted on its obligations to the Bank and the property was put up for sale.
30. He asserted that the Bank became entitled to sell the house after the borrower failed to fully pay the loan in terms of the letter of consent filed in HCCC No. 97/2007 on 12th June 2009 which allowed the Bank/chargee to sell title Number Nairobi/ Block106/12 by private treaty in the event there was a shortfall after realization of the other securities listed in the consent. According to PW1, the conditions for the sale crystallized and the property was put on sale.
31. It was the evidence of PW1 that he became aware that the suit property was for sale and wrote to the auctioneers, Messrs Garam Investments Limited, indicating that he wanted to buy the house; that he paid the deposit of Kshs. 850,000/- and that borrowed the balance of the purchase price from the Bank.
32. It was the evidence of PW1 that the Bank thereby sold the suit property to him by virtue of a transfer and charge registered at the District Lands Registry on 29th November 2010. He stated that he paid the loan and he was in possession of the original title; that he was kept away from the house for 11 years from 2011 and got possession in September 2021 and that he was therefore no longer seeking prayers (a) and (b) of the Plaint.
33. According to PW1, the going rates for rental in the area is Kshs. 55,000/- per month, which sum he lost each month he was not in possession. It was his prayer that he should be awarded mesne profits from the time he started paying loan in installments in September 2010 until the date that the Defendants gave him vacant possession.
34. In cross-examination, PW1 stated that he bought the land after the Defendants had failed to honour the consent in HCCC No. 97 of 2007; that he inspected the house before he purchased it; that the 1st Defendant was in occupation of the house when he bought it and that the letter of offer comprises the terms of the sale.
35. It was the evidence of PW1 that the Bank was to finance the purchase as shown in the letter of 19th May 2010 and he was to repay the loan of Kshs. 7,225,000/- by instalments; that he charged the property to NIC Bank and that the charge was registered on 20th November 2010.



36. With respect to the counterclaim, PW1 averred that he was neither a party to HCCC No. 97 of 2009 nor any dispute between NIC Bank and the Defendant; that he was aware that HCCC No. 32 of 2010 which was with respect of the alleged consent, was dismissed and that the counterclaim should be dismissed with costs.
37. The 1st Defendant, Justus Kimau Musyimi, relied on his witness statements dated 14th November 2016 and 1st November 2022. He also produced two bundles of documents dated 11th November 2016 and 1st November 2022 as DEXB1 and DEXB2.
38. DW1 testified that the suit property was registered in the name of his father and was charged to NIC Bank; that at the time he filed the statement, his family was living in the house; that he was thrown out of the house in September 2021, when the Plaintiff came with auctioneers and that the loan secured by the land was an overdraft of Kshs. 1.5 million which was paid off.
39. DW1 averred that his late father died in February 2006; that the letters of administration were issued in 2007 and were confirmed in 2011; that between 2007 and 2010, the administrators did not take any other facility other than the hire purchase facility, for which the bank did not ask for any other security and that between 2007- 2011, no valuation was undertaken in respect of the land.
40. DW1 confirmed that he saw the draft of the consent in HCCC 97 of 2009 and he was aware of the terms of the consent; that HCCC No. 32 of 2010 was between the bank and himself, in which he challenged the terms of the consent because was not agreeable with the terms and that the court however ruled against them.
41. According to DW1, they have since filed an appeal which has not been determined. He indicated that the only valuation he was aware of was done in 2003.
42. It was his evidence that the company applied for a Term Loan Facility by a letter dated 21st January 2008 for a sum of Kshs. 17 million to enable the company to pay for the overdraft facility on the current account maintained by NIC Bank and to refinance the hire purchase facility and that by a letter of offer dated 19th February 2008, NIC Bank granted and the company accepted the Term Loan Facility upon the terms and conditions stipulated in the letter of offer.
43. He asserted that no further charges were ever registered to secure the Term Loan Facility over the two properties and that the Term Loan Facility for Kshs. 17 million advanced pursuant to the letter of offer dated 19th February 2008 was not secured by the two properties already charged.
44. He maintained that they did not execute fresh guarantees as required under the schedule to the Letter of Offer and that his consent as a guarantor to the company was not obtained prior to the facilities that were granted to Utalii Transport Company.
45. The witness averred that on 5th February 2009, NIC Bank, in breach of the terms of the banking facilities, unlawfully instructed the firm of Westminster Commercial Traders to repossess Utalii Transporter Company Limited's eleven motor vehicles, and that Utalii Transport Co. Ltd filed a suit in Milimani HCCC No. 97 of 2009.
46. According to DW1, the Company did not agree with the terms of the consent and that they instructed their advocates, through a letter dated 6th April 2009, to have LR No. 12661/66 sold and the proceeds utilized to offset the correct outstanding amount on the account held by Utalii Transport Company Limited and that NIC Bank was at no time allowed to sell the suit property by private treaty in exercise of its statutory power of sale.



47. The witness argued that without the consent of the Defendants or of Utalii Transport Company, their advocates on record at the time, in collusion with the Bank's Advocates, filed a purported consent letter dated 10th June 2009 which was filed in court on 12th June 2009, compromising the suit in favour of NIC Bank.
48. He contended that the purported consent was null and void because it was fraudulent, illegal and premised on misrepresentations by NIC Bank Limited; that the consent was vitiated by fraud and mistakes and the terms of the same cannot bind the Defendant and that the purported sale of the suit property to the Plaintiff herein was irregular, unlawful and should be set aside.
49. In cross-examination, the Defendant stated that he filed HCCC No. 97 of 2009 and HCCC No. 32 of 2010 complaining about the sale in both suits; that in HCCC No. 32 of 2010, he was complaining about the consent which he never signed and never approved, and that he was informed about the signing of the consent by his advocate, Nelson Havi, when he went to collect the file from him.
50. DW1 stated that the consent formed the basis of the sale; that the consent is the main issue in the Court of Appeal; that the Plaintiff was not a party to the Appeal and that although this suit was filed in 2014, he came to know about the sale of the suit property property in 2021.

Submissions

51. The Plaintiff's counsel submitted that the Plaintiff has good a title to the suit property and that the transaction between the Plaintiff and the chargee, NIC Bank, took place in 2010, as evidenced in the letter of offer, the transfer document and the charge documents dated 28th September 2010.
52. Counsel referred to Section 77 of the Registered *Land Act*, which gave the chargee the right to exercise its statutory power of sale in the case where a chargor defaulted in payment. It was submitted by counsel that the said provision also provided that upon the registration of the transfer, the interest of the chargor in that property shall cease and pass to the transferee free from all liabilities on account of the charge.
53. It was submitted that the transaction was carried out via private treaty on account of the letter of consent dated 10th June 2009 as adopted in HCCC No. 97 of 2009; that the sale was concluded and the Plaintiff became the registered owner of the suit property and that the Defendants denied the Plaintiff vacant possession claiming that he had acquired the title illegally and irregularly.
54. Counsel relied on Section 87 of the Registered *Land Act* and argued that as of the date of the registration of the transfer, the Plaintiff was officially regarded as the owner of the suit property and that the Defendants hindered the Plaintiff from enjoying his rights to own property as per Article 40 of *the Constitution*.
55. It was submitted that the Plaintiff is a bona fide purchaser of the suit property because he was not aware of any dealings between the Defendants and the bank, and his title cannot therefore be vitiated for such. Counsel relied on the definition of a bona fide purchaser in the Black's Law Dictionary and by the Court of Appeal in Uganda in the case of *Katende vs Haridar & Company Limited* [2008] 2 EA 173.
56. On the basis that the Plaintiff is the registered owner of the suit property, and that although he purchased the property in 2010, and only got possession in 2021, counsel submitted that the Plaintiff is entitled to mesne profits from the Defendants for the period beginning when he started making installments to the period he was finally granted vacant possession



57. The Plaintiff's counsel relied on the case of *Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah* [2016] KEHC 1880 (KLR) where the court referenced the definition of mesne profits. Counsel also quoted the case of *Samow Edin Osman vs Peter Mwangi Mbutia & Another* (HCCC No. 600 of 2003) and the Court of Appeal case of *Peter Mwangi Mbutia & Another vs Samow Edin Osman* [2014] KECA 279 (KLR). In the latter case, the Court of Appeal held that an amount claimed as mesne profits should be substantiated and evidenced before a court can grant the same.
58. It was the Plaintiff's counsel's submission that in the Plaintiff, they have asked the court to issue an order for mesne profits at the rate of Kshs. 55,000/- monthly from the date the Plaintiff acquired ownership to the time he was granted vacant possession. Counsel urged the court to consider a valuation report dated 17th December 2024 which proposed that the market rental value of the property ranges between Kshs. 60,000/- to Kshs. 65,000/-.
59. The Plaintiff's counsel submitted that this suit has been under litigation for about 15 years and that the figure prayed in the Plaintiff was applicable then; that the property has since then appreciated in value, and it would be unfair, impractical and a punishment to the Plaintiff for this court to ignore the effluxion of time and its effect on the value of the property.
60. It was submitted that this court ought to dismiss the counterclaim against the Plaintiff because it lacks legal merit. With regards to costs, counsel submitted that under Section 27 (1) of the *Civil Procedure Act*, costs of any act follow the event, unless the court shall, for good reasons otherwise order. Counsel urged this court to award the Plaintiff the costs of the suit as per scale and interest at the prevailing court rates.
61. The Defendants' counsel submitted that the sale of the suit property to the Plaintiff was illegal and void ab initio; that the facilities advanced to the company through the letter of offer dated 13th April 2007 were to be secured by, among others, a charge over the suit property which was to be stamped and registered to cover Kshs. 4 million, the existing overdraft facility as advanced in the letter of offer of 28th February 2005; that a fresh valuation was to be carried out on the property and that the charge was not stamped and no fresh valuation was carried out on the suit property.
62. Similarly, it was submitted, the facilities, including a Term Loan Facility of Kshs. 17 million advanced to the company through the letter of offer dated 19th February 2008 was to be secured by a stamped charge over the suit property and a fresh valuation was to be carried out and that the charge over the suit property was neither stamped, nor was not up to the current market value and that there was no fresh valuation carried out on the suit property.
63. Counsel argued that the facilities advanced to the company through the letters of offer dated 13th April 2007 and 19th February 2008 were not secured by the suit property through the registration of the requisite charge documents as per the terms of the letters of offer.
64. It was the Defendant's counsel submission that the Bank advanced the facilities to the Company despite the suit property not being charged to secure the same because following the death of the late Stephen Musyimi Kimolo and the issue of Letters of Administration to his estate on 21st March 2007 to the Defendants, as the grant had not been confirmed, under Section 45 (1) of the *Law of Succession Act*, the Defendants could not make any dispositions or charge the suit property to secure the additional facilities to the Company.
65. Counsel relied on Section 2 of the Registered *Land Act* which defined disposition of a deceased person's property to mean any act where a deceased's person's right in or over land, a lease or a charge are affected. Counsel also relied on the case of *Martevé Guest House Limited vs Daniel Muirui Njenga*



- & 3 Others [2022] KECA 539 (KLR) where the Court of Appeal held that charged property forms part of a deceased person's free property, as well as Section 82(b) (ii) of the Law of Succession Act, which sets out the powers of the Defendants, as personal representatives of the deceased with respect to the deceased's immovable property.
66. The Defendant's Counsel further submitted that the statutory notice issued to the deceased was invalid as the deceased had died before the same had been issued and any valid statutory notice ought to have been issued to his personal representatives. Further, that pursuant to Section 71 of the Registered Land Act, a variation on the amount secured by a charge could only take effect if the chargor had consented to the variation in writing.
 67. Counsel submitted that variations of the charge on the suit property to secure the amounts advanced in the letters of offer of 13th April 2007 and 28th February 2008 could only have been valid if the chargor's personal representatives had consented to the same in writing, which consent they were precluded from giving pursuant to Section 45(1) and 82(b)(ii) of the Law of Succession Act.
 68. Further still, it was submitted that in the absence of default arising from the secured overdraft facilities in the sum of Kshs. 1,500,000 advanced through the letters of offer of 1st September 2003 and 28th February 2005, the Bank could not exercise its statutory power of sale in regard to the charge over the suit property because the same was no longer available to it, and that the Bank could not anchor its statutory power of sale on the facilities of 13th April 2007 and 28th February 2008.
 69. On the issue of whether the Plaintiff was a bona fide purchaser, the Defendant's Counsel submitted that the sale of the suit property to the Plaintiff was irregular and unlawful and ought to be declared null and void and set aside. Counsel relied on the definition of a bona fide purchaser in Black's Law Dictionary 8th Edition and the test for a bona fide purchaser as captured by the Court of Appeal in the case of Samuel Kamere vs Lands Registrar, Kajiado [2015] KECA 644 (KLR).
 70. It was the Defendant's counsel's submission that the Plaintiff was not a diligent purchaser because the presence of occupants on the suit property when he inspected the same should have called upon him to undertake further and proper due diligence before proceeding with the purchase. Counsel relied on the case of Torino Enterprises Limited vs Hon. Attorney General [2023] KESC 79 (KLR) where the court opined that occupation of the land ought to have sounded as a "buyer be aware" to the appellant.
 71. The Defendant's counsel submitted that there was no evidence of meaningful due diligence by the Plaintiff and the Plaintiff was therefore not an innocent purchaser for value for this reason.
 72. It was further submitted that the Defendants did not authorize the irregular consent in HCCC No. 97 of 2009; that the Defendants challenged the impugned consent and sought to have it set aside in HCCC No. 32 of 2010; that the suit was dismissed in a judgment delivered on 15th March 2015 and that the said decision is subject of Civil Appeal No. E404 of 2021 at the Court of Appeal which is pending hearing and determination.
 73. It was further submitted that the sale of the suit property was in contravention of the doctrine of lis pendens. Counsel stated that as at 25th March 2010, the date when the Plaintiff communicated an offer to purchase the suit property to the Bank and on 29th November 2020, when the transfer of the suit property to the Plaintiff was registered, the said Bank was well aware of the suit.
 74. It was submitted that the Bank was bound by the doctrine of lis pendens which prohibits the alienation of the suit property during the pendency of the suit. Counsel relied on the definition of lis pendens as provided in Black's Law Dictionary 8th Edition, Section 3(1) of the Judicature Act, Section 52 of the Indian Transfer Property Act (repealed), Section 107(1) of the Land Registration Act and the Court



- of Appeal Cases of Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015] eKLR and Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others [2017] KECA 79 (KLR).
75. Additionally, counsel submitted that pursuant to Section 77(1) of the Registered *Land Act*, the sale of the suit property by the chargee in exercise of statutory power could only have been way of public auction and that under Section 79 of the RLA, the mode of exercise of statutory power of sale for a sale by private treaty by the chargee could only be varied or added to the charge with the sanction of the court.
 76. Defendant's counsel relied on the decision of this court in Lydia Nyambura Maina vs Diamond Trust Bank Kenya Limited & Another [2019] KEELC 3854 (KLR) where the court held that a sale by chargee by private treaty without the express consent by the chargor was contrary to the provisions of Section 77(1) of the Registered *Land Act*. Counsel also relied on the case of Marteve Guest House Limited vs Daniel Muirui Njenga & 3 others [2022] KECA 539 (KLR).
 77. It was additionally submitted that there was no valid agreement for sale or a memorandum of sale between the chargee and the Plaintiff, as none was presented in evidence by the Plaintiff.
 78. It was submitted that the documents adduced by the Plaintiff do not satisfy the requirements of Section 3(3) of the *Law of Contract Act*. Counsel relied on the case of Joseph Siro Mosioma vs Housing Finance Co of Kenya Limited & 3 others [2021] KEHC 72 (KLR) and Elizabeth Ndulu Mathuva vs Joseph Mbiu Muthiani [2018] KEELC 3368 (KLR).
 79. Counsel further submitted that the transfer by the chargee was invalid because the signatures of the chargee's directors were not witnessed as required and that the transfer document was not dated. Counsel urged this court to conclude that the sale by the chargee was manifestly illegal and ought to be cancelled. They relied on the English Court of Appeal case of Birkett vs Acord Business Machines Limited [1999] EWCA Civ 1866.
 80. It was pleaded that any subsequent dealings flowing from the illegal sale were therefore flawed and the only suitable remedy is for cancellation and revocation of the title issued to the Plaintiff. Counsel relied Mahendrakumar Chandulal Shah & Another vs Fidelity Commercial Bank Limited & 2 Others (2022) KEHC 10743 (KLR) and Board of Trustees Meru Diocese Kirimara Parish vs Dores Wanja Bore [2020] KEHC (KLR).
 81. Defendant's Counsel also submitted that the Plaintiff is not entitled to mesne profits, because he has not demonstrated how the sum of Kshs. 55,000/- per month was arrived at. Additionally, that although the Plaintiff produced a valuation report dated 30th August 2018 which was marked for identification, the valuer did not testify. Counsel submitted that the valuation reports dated 30th August 2018 and the Market Rental Survey dated 17th December 2024 are devoid of probative value and are of no legal effect.

Analysis and Determination

82. Upon consideration of the Plaintiff's claim, the Defendants' Defence and Counterclaim, the responses filed thereto and the parties' submissions, the issues for this court's consideration are as follows:
 - a. Whether the Plaintiff obtained good title over property title number Nairobi/ Block 106/12 from NIC Bank;
 - b. Whether the Plaintiff is entitled to mesne profits for the period between 2010 - 2021.



83. The uncontested facts underlying this suit are that the suit property, Title Number Nairobi/ Block 106/12 (hereinafter the suit property), was at all material times registered in the name of the late Stephen Musyimi Kimolo, who was one of the directors of Utalii Transport Company Limited.
84. It is not disputed by the parties that vide a letter of offer dated 1st September 2003, the Directors of Utalii Transport Company Limited accepted an overdraft facility for the sum of Kshs. 1,500,000, and a charge dated 10th September 2003 was duly registered over the suit property.
85. Thereafter, through a second letter of offer dated 28th February 2005, NIC Bank offered additional banking facilities to the borrower, which included an overdraft facility for Kshs. 4,000,000 for Working Capital, Hire Purchase Facility of Kshs. 48,000,000, Guarantee for Kshs. 7,500,000 and Insurance Premium Finance Loan for Kshs. 1,500,000. The Company accepted the additional facilities by executing the letter of offer on 14th March 2005.
86. The evidence before this court shows that on 12th April 2005, a charge was created in favour of NIC Bank with respect to L.R. Number 12661/66, to secure the facilities granted to Utalii Transport Company pursuant to the letter of offer dated 28th February 2005 for an aggregate sum of Kshs. 14,000,000/-.
87. The Defendants assert that following the demise of Stephen Musyimi Kimolo on 26th February 2006, NIC Bank offered further additional loan facilities to Utalii Transport Company Limited through letters of offer dated 13th April 2007 and 19th February 2008.
88. They contended that while it was a term of the letters of offer that the Directors would sign Guarantees for Kshs. 65,500,000/- and that Further Legal Charges would be registered against L.R. No. 12661/66 and L.R. No. NAIROBI/BLOCK 106/12, no such guarantees were ever signed and no further charges were registered to secure these sums.
89. The evidence before this court shows that following default by the chargor, Utalii Transport Company, NIC Bank instructed the firm of Westminster Traders to repossess motor vehicles secured by the Hire Purchase facility.
90. The Defendants contested the said repossession and filed suit vide Milimani HCCC No. 97 of 2009. In this suit, a letter of consent was filed on 12th June 2009, in which Utalii Transport Company and its directors, which included the Defendants, allowed the chargee to sell the suit property by private treaty in the event there was a shortfall after realization of the attached securities.
91. The Plaintiff averred that the conditions in the consent crystallized and the chargee, NIC Bank, exercised its statutory power of sale through sale of the suit property by private treaty to the said Plaintiff. The Plaintiff's case is that the Bank lawfully exercised its statutory power of sale and that he is a bona fide purchaser of the suit property, having acquired it without any notice of defects.
92. The Plaintiff stated that he entered possession of the suit property in September 2021. He therefore abandoned his initial prayers for vacant possession and for orders of eviction against the Defendants. His sole prayer is for mesne profits for the period between September 2010, when he averred he began paying for the suit property to the Bank, and September 2021, when he took possession of the house, to be calculated at the monthly rate of Kshs. 55,000/-.
93. The Defendants have challenged the Bank's exercise of its power of sale. They have asserted that the consent was unlawful; that the charge instruments did not give NIC Bank the right to sale the suit property by private treaty; that the sale of the suit property to the Plaintiff was defective for lack of a memorandum of sale; that the transfer was not dated and the signatures of the Directors of NIC Bank



are not witnessed as required by law; and that the two letters purporting to be statutory notices were addressed to the late Stephen Musyimi Kimolo are invalid, defective and of no effect in law.

94. The Defendants have averred that they challenged the legality of the consent entered into in HCCC No. 97 of 2009 in HCCC No. 32 of 2010. This suit was however dismissed. The Defendants have since filed an appeal challenging this judgment at the Court of Appeal in Civil Appeal No. E404 of 2021. As this question is pending before the Court of Appeal, the issue of the validity of the consent in HCCC No. 97 of 2009 is sub judice.
95. The doctrine of sub judice is prescribed under Section 6 of the *Civil Procedure Act*:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
96. The Defendants have produced the Memorandum of Appeal with respect to Civil Appeal No. E404 of 2021. The Appellants in this suit are Utalii Transport Company Limited, Veronica, Ndindi Musyimi and Justus Kimau Musyimi as administrators of the Estate of Stephen Musyimi Kimolo, Veronica Ndindi Musyimi and Justus Kimau Musyimi, while the Respondents are NIC Bank Limited and Kanini Haraka Enterprises Limited.
97. The Plaintiff is not a party to the appeal. However, the legal issues raised by the Defendants in this matter are identical to those pending in Civil Appeal E404 of 2021, which is a court of competent jurisdiction. This court is therefore precluded from delving into that issue. Moreso the High Court having dealt with the legality of the consent in HCCC No. 97 of 2009.
98. The issue of whether the Plaintiff acquired good title to the suit property lies at the heart of both the Plaintiff’s claim and the Defendants’ counterclaim. While the Plaintiff seeks to affirm his title, the Defendants contend that the sale to the Plaintiff was irregular and should be declared null and void.
99. It is not disputed that in March 2010, NIC Bank purported to exercise its power of sale by private treaty in favour of the Plaintiff. By a letter dated 25th March 2010 addressed to Garam Investments, the Plaintiff offered Kshs. 8,500,000 for the suit property and enclosed a 10% deposit of Kshs. 850,000 via cheque no. 181499.
100. To finance the balance of Kshs. 7,225,000, the Plaintiff obtained a mortgage loan from NIC Bank. The Bank issued a letter of offer dated 19th May 2010, which the Plaintiff accepted on 26th May 2010. A charge was subsequently registered on 28th September 2010 against Title No. Nairobi/Block 106/12.
101. The Defendants correctly noted that the Bank’s power of sale was exercised under the Registered *Land Act*, as the sale occurred in 2010 when the suit property was still governed by that regime.
102. Section 74(1) of the Registered *Land Act* provides the chargee’s remedies in the instance of default by a chargor, which remedy should be preceded by the issuance of a three-month notice. It provides:

“74

- (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee



may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

- (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -
- (a) appoint a receiver of the income of the charged property; or
 - (b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.”

103. Section 77 of the Registered Land Act (repealed) prescribed that a chargee shall exercise their power of sale through selling the charged land by public auction through a licensed auctioneer. Section 79 of the Act all the same provided that the application of this section may be varied or added to the Act. Such variation or addition to a charge however requires the court’s approval, unless the chargee is the Agricultural Finance Corporation or the Settlement Fund Trustees.

104. In the Court of Appeal case of Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro & Another [2014] KECA 775 (KLR), Okwengu JA relied on a ruling by Ringera J (as he then was) delivered on 9th December 1996, where, in granting an interlocutory injunction, the Judge considered the necessity to vary a charge to allow for a sale by private treaty under the Registered Land Act:

“Section 77 of the Act is clear that the power of sale is to be exercised by public auction. In this case, there is no pretense that the power is being exercised in that manner. In fact it is being exercised by private treaty. The justification is a variation of charge dated 8th March 1995. Such a variation could only be justified under section 79 of the Act. That section permits the variations of section 77 in their application to a charge provided that any such variation (except where the chargee is the Agricultural Finance Corporation or the Settlement Fund Trustees) cannot be acted on unless the court so orders. Now assuming that the provision of sale by a public auction is a provision which applies to a charge within the intendment of section 79 and can as such be varied in a charge – I asked counsel for authority to such effect and none was provided – the second respondent was then obliged to show that the variation relied upon had been sanctioned by the court. No such sanction was proved or even alluded to in the otherwise detailed affidavit of the chargee in opposition to the application.”

105. In this suit, four loan agreements were executed between NIC Bank and Utalii Transport Company Limited, evidenced by the letters of offer dated 1st September 2003, 28th February 2005, 13th April 2007, and 19th February 2008, all signed by the company’s directors. None of these agreements were varied to authorize the chargee to exercise its power of sale by private treaty.

106. However, the circumstances in this matter are different. The sale of the suit property by private treaty was pursuant to the letter of consent dated 10th June 2009 which was adopted by the court in HCCC



- No. 97 of 2009. As already stated, the legality of this consent is a question pending before the Court of Appeal. Nevertheless, as at the time this suit was instituted, the consent had not been stayed or set aside. The said consent therefore constituted an unequivocal agreement between NIC Bank and Utalii Transport Company Limited to sell the suit property by private treaty.
107. The consent between the parties in HCCC No. 97 of 2009, which included the Defendants in their personal capacity as well as administrators of the Estate of Stephen Musyimi Kimolo, restructured the facilities that were issued to Utalii Transport Company and included the following term:
- “... that in the event that the parties fail to reach an agreement on the payment of the shortfall of the debt after the expiry of the thirty days, NIC Bank shall exercise its contractual and/or statutory power of sale in the following order of priority:
- a. Dispose of the various motor vehicles set out above.
 - b. In the event of any further shortfall from the sale of the motor vehicles, proceed to sale by private treaty LR No. Nairobi/ Block 106/12.”
108. This consent was adopted as an order of the court in HCCC No. 97 of 2009, satisfying the requirement under Section 79 of the Registered *Land Act* for the court’s approval of the variation of a charge. The said consent was executed by the legal representative of the Plaintiffs in HCCC No. 97 of 2009, who had an implied general authority to compromise and settle the suit.
109. The Court of Appeal in Board of Trustees, National Social Security Fund vs Micheal Mwalo [2015] KECA 782 (KLR) quoted with approval the case of Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485, where Harris J held, inter alia, that –
- “A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
- A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”
110. This court is satisfied that the sale of the suit property by private treaty was pursuant to the consent in HCCC No. 97 of 2009. The Defendants do not refute that statutory notices were issued to the late Stephen Musyimi Kimolo post humously by NIC Bank on 2nd February 2009 under Section 74 of the Registered *Land Act*.
111. The said notice indicated that at the expiry of three months from the date of service of the notice, their client would exercise its statutory power of sale and sell the suit property to recover the outstanding loan amount of KShs. 18, 585, 234.78 together with interest, costs and other expenses incidental thereto.
112. The Defendants have stated that the service of the statutory notice was un procedural because the Bank ought to have served Stephen Musyimi Kimolo’s legal representatives, to whom letters of administration had already been issued on 21st March 2007.
113. The Defendants have also alleged that no sale agreement or memorandum of sale was executed between the Plaintiff and NIC Bank and that the transfer was neither dated nor witnessed.



114. Although the Plaintiff did not adduce a sale agreement in this suit, he presented to this court a letter dated 25th March 2010 in which he offered to purchase the suit property at the sum of Kshs. 8,500,000 and forwarded a cheque of Kshs. 850,000, being a 10% deposit. The Plaintiff annexed the copy of the cheque dated 25th March 2010.
115. The Plaintiff also adduced in evidence a letter dated 19th May 2010 in which NIC Bank offered him a mortgage loan of Kshs. 7,225,000 being the balance of the purchase price of the suit property. The Plaintiff signed the letter in acceptance of the terms therein. The Plaintiff also produced in evidence the charge dated 28th September 2010 which was registered in favour of NIC Bank with respect to the suit property.
116. The Plaintiff additionally presented bank statements evidencing transactions from 28th December 2010 to 29th August 2012 which shows that he was granted the loan on 28th December 2010 which he used to pay for the land, and commenced paying off the loan on 28th January 2011, and continued to pay the same.
117. From the said documents, it is apparent that there was a contractual agreement between NIC Bank and the Plaintiff, for the bank to sell the suit property to the Plaintiff at a consideration of Kshs. 8,500,000. Further, the Plaintiff has established, on a balance of probabilities, that he fully paid the purchase price of the suit property, which he raised vide a mortgage loan from the same bank.
118. As to the transfer, the same is indeed not dated. While there is no legal prescription for indicating a date on a transfer, the date serves a significant purpose because it contributes to the legal certainty of the instrument. In any case, the provision of the date is in-built into the prescribed form stipulated in the Repealed Act.
119. The impugned transfer is executed as prescribed under Section 109 of the repealed Registered Land Act, required every instrument evidencing a disposition to be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument.
120. Section 109(2)(b)(ii) of the repealed Act required that an instrument is deemed executed by a body corporate where such instrument was sealed with the common seal of the body corporate affixed thereto in the presence of and attested by its clerk, secretary or other officer and by at least one member of the board of directors or other governing body of the body corporate.
121. In this case, the instrument was signed by the Plaintiff and a Director and Secretary of NIC Bank, in compliance with Section 109 of the Registered Land Act. The signatures of the Plaintiff and those of the Directors of NIC Bank are however not attested by witnesses. Considering that the said copy of the transfer is the one that the Plaintiff retained, it is unlikely that the copy of the transfer that was presented at lands offices was not witnessed.
122. Despite these procedural irregularities appearing on the copy of the transfer held by the Plaintiff, this court is not persuaded that they are sufficient to vitiate the sale of the land to the Plaintiff, especially considering that the bank has not denied that it sold the property as a chargee. This court is guided by the Court of Appeal's treatise in Euro Bank Limited (In Liquidation) vs Twictor Investments Limited & 2 others [2020] eKLR where it held that:

“In our view, there was nothing sinister therefore with the Bank proceeding by way of private treaty. The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the Amadiva case (supra), if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay



in damages and not in cancellation of the Title Deed. In any event, even if the Court was minded to cancel the 3rd respondent's Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st respondent who had not cleared the loan with the Bank.”

123. In conclusion, this court finds that the chargee lawfully exercised its power of sale and that the Plaintiff lawfully purchased and obtained title to the suit property from the Bank.
124. The Defendants' counterclaim is found to be unmerited and is hereby dismissed.
125. The last issue for determination is whether the Plaintiff is entitled to mesne profits for the period between 2010-2021. Mesne profits refer to damages recoverable from a person in wrongful possession of immovable property. In the case of Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah [2016] eKLR, the Court defined mesne profits thus:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits. Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.”

126. It is trite that a claim for mesne profits being in the nature of a claim of special damages, must be specifically pleaded and proved. The legal and evidentiary burden of proof is on the party who is making the claim. This position was affirmed by the Court of Appeal in the case of Peter Mwangi Mbuthia & another vs Samow Edin Osman [2014] eKLR where the court posited as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

127. This court has found that the Plaintiff lawfully bought the suit property from NIC Bank in 2010, when he paid a deposit in the sum of Kshs. 850,000 and procured a mortgage loan from the same bank for the payment of the balance of the purchase price.
128. While the Plaintiff initially stated that he began making payments for the house in September 2010, the bank statements adduced in evidence shows that the loan was deposited in his account on 28th December 2010, whereafter he began repaying the loan.
129. The Certificate of Lease shows that the Plaintiff was registered as the owner of the suit property on 29th November, 2010. His claim for mesne profits should therefore only arise from 29th November, 2010 when he became the registered proprietor.
130. The Plaintiff stated that he took possession of the suit property in September 2021, a fact which the Defendant confirmed in court when he said that he was evicted from the suit property in September



2021. The Plaintiff's claim for mesne profits is therefore for the period between 29th November, 2010 to September 2021, which accounts for 10 years and 10 months, the period which the Defendants were in unlawful occupation of the suit property.

131. In his Plaintiff, the Plaintiff has sought that mesne profits be paid at the rate of Kshs. 55,000 per month, which he pleaded as the monthly rental value of the house. By consent of the parties, the Plaintiff produced a Market Rental Survey report dated 17th December 2024. According to the 2024 report, the rent for similar houses in the area ranged between Kshs. 60,000 and Kshs. 65,000.
132. Considering that the amount pleaded is Kshs. 55,000 per month, that is the amount the Plaintiff is entitled to. For the identified period of 10 years and 10 months (130 months), this court awards the sum of Kshs. 7,150,000 as mesne profits.
133. For those reasons, the court allows the Plaintiff's suit and dismisses the Defendants' counterclaim. The following final orders are hereby issued:
 - a. The Defendants shall pay the Plaintiff mesne profits of Kshs. 7,150,000
 - b. The Defendants shall pay interest at court rates on the above amount from the date of judgment until payment in full at court.
 - c. The Defendants shall pay the costs of the suit and the counter-claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF JULY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Khayega for Plaintiff

Ms Ahomo for Defendants

Court Assistant: Tracy

