



Gitau v Agricultural Finance Corporation & 4 others (Environment & Land Case E002 of 2023) [2024] KEELC 6511 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6511 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E002 OF 2023
LN GACHERU, J
OCTOBER 3, 2024**

BETWEEN

DANSON MURIGI GITAU PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

HEZRON MBUGUA 2ND DEFENDANT

DIGIT AUCTIONEERS 3RD DEFENDANT

MICHAEL KIGAYA NORU 4TH DEFENDANT

LAND REGISTRAR MURANG'A 5TH DEFENDANT

JUDGMENT

1. The suit herein was commenced by way of a Plaint dated 27th January, 2023, and filed on 8th February 2023, by the Plaintiff herein Danson Murigi Gitau, who sought for judgment against the Defendants herein jointly and severally for orders;
 - a. That a declaration do issue that the Plaintiff is the bonafide and legally registered owner of the suit property namely LOC.2/Gacharage/3215, and that the same was fraudulently and irregularly sold to the 4th Defendant on 7th December, 2022.
 - b. That this Court do find that the actions of the 3rd Defendant of purporting to proceed with the auction of title number LOC.2/Gacharage/3215, in absence of a valid Valuation Report was illegal and fraudulent.
 - c. That the sale by way of public auction conducted on 7th December 2022, be declared null and void ab initio.



- d. That this honorable Court do find that there was collusion and fraud between the 1st, 2nd, 3rd and 4th Defendants to preserve and circumvent the sale of the suit property in favour of the 4th Defendant.
- e. That the 3rd Defendant's license be cancelled and/or revoked for illegally conducting themselves in a manner that colluded to preserve and reserve the suit property for auction in favor of the 4th Defendant.
- f. That this Court do find that price at which the suit property was sold was below the market value compared to the value that can be fetched by other parcels of land within the vicinity of the suit property.
- g. That in the alternative to prayer (f) above, the Court to order for an independent valuation to be conducted on the suit property to ascertain the proper and approximate market value of the property within 60 days hereof.
- h. That the Plaintiff be given a grace period of not less than 6 months either to repay the loan and/or get a buyer for the suit property in order to offset the loan that had accrued together with interests to the 1st Defendant as at 7th December, 2022.
- i. That a declaration do issue ordering the cancellation of any entries made in the register of the title of the suit property by the 5th Defendants depriving the Plaintiff of his proprietary rights in the land as a result of the auction held on 7th December, 2022.
- j. That this Court do find that the notice of sale dated 5th September 2022, was not properly served upon the Plaintiff.
- k. That this Court do find that no formal notice was served upon the spouse of the Plaintiff in accordance with Section 96 (3) (c) of the *Land Act*, 2012.
- l. That this Court do find that the service of the notice to sell the suit property upon the plaintiff was highly irregular and circumvented towards favouring the sale of the suit property in favour of the 4th Defendant.
- m. That the 4th Defendant be made to refund all monies collected by him in respect to the tea he has picked and delivered to the Gacharage Tea Factory since December 2022.
- n. That the 4th Defendant be condemned to pay special damages for all the fixtures, structures, crops, tools and equipment including all items he has destroyed, altered and/or utilized since he took possession of the suit property.
- o. That the 1st to 4th Defendants be condemned to pay general damages for the pain and suffering they have inflicted to the health and life of the Plaintiff as a result of their actions of fraud and collusion to sell the suit property in an irregular and illegal manner to the detriment of the Plaintiff.
- p. That the 1st to 4th Defendants be made to jointly and severally bear the costs of this suit together with interest rates from the date of filing this suit.
- q. That the 1st to 4th Defendants jointly and severally be compelled to pay the specific damage enumerated by the Plaintiff and general damages for the pain and suffering they have subjected upon the Plaintiff.
- r. Any other order this court may deem just and befitting.”



2. In his claim, the Plaintiff averred that he became the registered proprietor of the suit land, No LOC.2/Gacharage/3215, on 24th April, 2007, when he was issued with the title deed thereof in his name, and which parcel of land measures approximately 6.1 Acres. The Plaintiff contended that the suit land was still registered in his name according to a Certificate of Official Search dated 26th January, 2023.
3. The Plaintiff admitted to procuring a loan of Kshs.1,200,000/=, from the 1st Defendant on 12th July, 2018, which loan was secured by the title to the suit land. That he has been in continuous occupation of the suit land from 24th July 2007, up and until 7th December 2023, when the suit land was allegedly sold by public auction to the 4th Defendant.
4. He further averred that he paid off the monthly instalments ranging between Kshs.37,000/- and Kshs.40,000/=, due on the said loan faithfully, with the last payment being made by himself in October 2022, for the amount of Kshs.150,000/=. That he started experiencing difficulties in paying off the loan, and sought the 1st Defendant with a proposal to dispose of a separate parcel of land in order to pay off the loan, which proposal was declined by the 1st Defendant.
5. The genesis of the dispute herein relates to the conduct of the public auction carried out by the 3rd Respondent on 7th December, 2022, wherein, the suit property was sold and conveyed to the 4th Defendant at the forced market value of Kshs.5,250,000/=.
6. The Plaintiff contended that the Notice of Sale of the suit land dated 16th September 2022, was not properly served upon him, and the said Notice only came to his knowledge on 24th January 2023, upon visiting the Postal address of his friend through whom he used to receive mail.
7. He further averred that the said Notice of Sale which was purportedly served upon one Milka Wangari, was unprocedurally served because the said Milka Wangari, was neither an employee of the Plaintiff nor, any one of the persons contemplated to receive such a Notice under Section 96 (3) of the [Land Act](#), 2012.
8. The Plaintiff further contended that he was in communication with the one Peter Waititu Waruingi, an employee of the 3rd Defendant in the period leading up to the auction of the suit land, and they exchanged text messages on 6th December 2022, wherein, the 4th Defendant herein was named by the said Peter Waititu Waruingi, as the pre-selected beneficiary of the public auction scheduled for the following day, that is 7th December, 2022.
9. The Plaintiff described the public auction which took place on 7th December, 2022, as “stage-managed” and/or “fixed” between the 1st to 4th Defendants, as the 4th Defendant was privy to all the details pertaining to the impending sale prior to the same.
10. Further, that the 4th Defendant is the Plaintiff’s immediate neighbor as he owns a farm just next to the suit land, and had approached the Plaintiff seeking to purchase the suit land at the price of Kshs.5,000,000/=, to which proposal the Plaintiff responded by stating that he was selling the said land at Kshs.11,000,000/=.
11. The Plaintiff particularized the fraud, irregularities and illegalities allegedly committed by the 1st to 4th Defendants in paragraphs (a) to (w), of his *Plaint*.
12. He further averred that he had carried out developments on the suit property within the meaning of Section 41 of the Land Laws (Amendment Act) No. 28 of 2016, subsequent to obtaining the loan in question, and which developments far exceed the value of Ksh.500,000/=, which value was attributed to those developments by the 1st Defendant in the Valuation Report submitted by Real Appraisal Limited dated 19th October 2021, on the 1st Defendant’s instructions.



13. The Plaintiff also averred that the Valuation Report carried out by Real Appraisal Limited dated 19th October, 2021, did not fall within the 12 months limit required by law, pursuant to the provisions of Rule 11 (b) (x) of the Auctioneers' Rules, 1997. He further contended that the said Valuation Report did not contain an accurate description of the improvements and developments on the suit property, hence the figure of Kshs.500,000/=, indicated thereon as the estimated value of the improvements erected thereon is without basis.
14. The Plaintiff further averred that the following improvements were situated on the suit land: 7843 mature tea bushes, 1200 Avocado trees (Hass variety), 10 beehives, one poultry house, a pigsty, a cowshed, staff quarters, mature eucalyptus tress and a family house still under construction all of which estimated to be valued at Kshs.4,000,000/=.
15. The Plaintiff also averred that he had the receipts to show his purchase of assorted building materials in respect of the family-house under-construction, 10 truck-loads of goat manure, delivered on the suit land by Ngabuya Transporters, photographs of the beehives situated on the suit land, farm implements and assorted chemicals used in agriculture.
16. It was his further contention that the actual value of the suit land which measures approximately 6.1 Acres inclusive of the improvements that he had carried out thereon is Kshs.24,000,000/=. Further, he contended that the value of Kshs.7,000,000/=: assigned to the suit property by Real Appraisal Limited dated 19th October, 2021, at the 1st Defendant's behest is neither factual nor accurate.
17. Further, the Plaintiff averred that the Valuation report by Real Appraisal Limited dated 19th October, 2021, although inaccurate, nevertheless partially captured some of the improvements carried out by him on the suit property, particularly, the main gate, which appears on page 4 of the said Valuation report, servant's quarter block appearing on page 5, a pig shed which is captured on page 5, semi-permanent structures and a parcel of land under subsistence farming on page 6 and tea bushes on page 6. Further, that the said valuation report having been undertaken in year 2021, did not capture the improvements carried out on the suit land by the Plaintiff in year 2022.
18. The Plaintiff relied on the Valuation report carried out by Spring Tide Properties Limited dated 20th June, 2023, pursuant to the directive of this Court, and which gave a figure of Kshs.14,200,000/=: as the value of the suit property. Further, he averred that the said report did not and could not capture the improvements on the suit land which had been erased by the 4th Defendant following his entry.
19. The suit is opposed by the 1st, 2nd and 3rd Defendants through their joint Statement of Defence dated 21st February, 2023. The 1st Defendant admitted to having issued a loan to the Plaintiff on or about 3rd July, 2018, for the amount of Kshs.1,200,000/=: repayable within a period of three (3) years from the said date, and the said loan was secured by the title to the suit property. It was further contended that the Plaintiff together with one Sarah Wanjiru Mari, defaulted on the said loan repayment, leading to the 1st Defendant to issue demand notices to them.
20. It was the 1st Defendant's averment that the Plaintiff and Sarah Wanjiru Mari, continued with the said default, hence breaching the terms of the applicable loan agreement resulting in the 1st Defendant issuing a Forty (40) day Notice, to them to pay off the outstanding amount on the loan together with interest.
21. The 1st Defendant contended that following the continued default by the Plaintiff and Sarah Wanjiru Mari, and in exercise of its statutory power of sale, it issued instructions to the firm of Josrick Merchant Auctioneers to dispose of the suit land. Further, that Josrick Merchant Auctioneers served upon the Plaintiff and Sarah Wanjiru Mari a 45-day Redemption Notice, and Notification of Sale on 24th



- February, 2022, and the same was posted on the main gate to the suit property because the then care-taker of the suit land declined to receive the said Notices.
22. The 1st Defendant further contended that at the expiry of the 45-day Redemption Notice, Josrick Merchant Auctioneers placed an advertisement in the Daily Nation Newspaper on Monday 28th February, 2022, for the sale of the suit land in exercise of the 1st Defendant's Statutory power of sale, and a public auction was conducted on 23rd March 2022, at Murang'a Township – outside Mahesh Petrol Station from 11:00AM, which auction was not successful.
 23. The 1st Defendant averred that it subsequently commissioned the 3rd Defendant to dispose off the suit land in exercise of the 1st Defendant's Statutory Power of Sale wherein, on 16th September, 2022, the 3rd Defendant issued and served a 45-day Redemption Notice, and Notification of Sale to the Plaintiff, and Sarah Wanjiru Mari.
 24. It was further contended that the auction was carried out on 7th December, 2022, and the same was carried out legally and procedurally and in compliance with the applicable statutory requirements. The 1st Defendant averred that the Plaintiff having admitted to the existence of the debt owed to it, its statutory power of sale is unfettered.
 25. Further, the 1st Defendant contended that it was the Plaintiff's obligation to provide information relating to any change in the Plaintiff's Postal address, as per the terms of the relevant loan agreement, and the 1st Defendant could not utilize unofficial means to communicate with the Plaintiff.
 26. It was further contended that in compliance with the provisions of Section 101 of the *Land Act* No.6 of 2012, the Plaintiff will receive the remainder of the sale price of the suit land after it has deducted all the relevant loan fees, interests and penalties. The 1st Defendant also contended that the Plaintiff defaulted on his loan obligation, hence has not approached this Court with clean hands.
 27. The 4th Defendant also opposed the suit herein and filed his Statement of Defence dated 21st February, 2023. He refuted the Plaintiff's claim that the auction carried out on 7th December, 2022, in respect of the suit land was tainted with irregularities, fraud and collusion among the 1st to 4th Defendants.
 28. He affirmed that the said auction was a regular public auction, and the suit property together with improvements erected thereon became the property of the purchaser (4th Defendants) at the fall of the hammer during the mentioned auction.
 29. He denied the existence of a house under construction being located on the suit property, as well as any bee hives, a pigsty, poultry house and avocado trees of the Hass variety. He further stated that he was not party to any fraud in respect of the auction of the suit property, and that he emerged as the highest bidder at the auction in question.
 30. The 4th Defendant averred that upon being declared the highest bidder at the auction held on 7th December, 2022, he paid 25% of the purchase price being Kshs.1,325,000/=, pursuant the applicable Conditions of Sale and subsequently paid off the remainder 75 percent of the purchase price within sixty (60) days, of the said auction following which he was issued with a Certificate of Sale dated 21st December, 2022.
 31. He refuted the Plaintiff's claim that the suit land touches a tarmac road, and admitted that he is an immediate neighbor to the suit property, and is conversant with the value of land in that vicinity and that an acre of land in that locality is valued at Kshs.1,000,000/=.



32. The 4th Defendant confirmed that he was in communication with the Plaintiff on 6th December, 2023, a day prior to the auction in question. He contended that from his communication with the Plaintiff, it was evident that the Plaintiff was fully aware of the impending auction.
33. Further, that the Plaintiff's Farm manager one Mary Wangari, communicated to him on 26th November, 2022, informing him of the auction scheduled for 7th December, 2022, from which information he inferred that the Plaintiff was equally aware of the same auction.
34. The 4th Defendant described himself as an innocent Purchaser for value without notice of any defect of the suit property.
35. The Plaintiff filed his response to the 1st, 2nd and 3rd Defendants' Statement of Defence on 20th April, 2023, and reiterated that the 1st Defendant failed to serve him with the Notices in respect of arrears due on the loan and Demand Notices as contemplated under Section 96 (3) of the Land Act No.6 of 2012 as read together with Section 60 of the Land Laws Amendment Act No.28 of 2016.
36. Further, that the only Statutory Notice which he received was dated 13th October, 2020, and the same did not contain the name of the person served, and service was purportedly through registered post, which mode of service was not tenable during the COVID 19 pandemic.
37. He argued that the 1st Defendant deliberately avoided the direct and instantaneous means of communication, such as email and Whatsapp Messenger, which methods were approved under Order 5 Rule 22B of the Civil Procedure Amendment Rules 2020.
38. It was his further contention that he was in communication with the 1st Defendant's Credit Officer, based at the 1st Defendant's Muranga office by the name of Nick (phone number 0728428495), through Whatsapp Messenger which fact demonstrates that the 1st Defendant was well aware that the Plaintiff operated an email address and a mobile number with Whatsapp Messenger.
39. Further, he stated that it was selective for the 1st Defendant to have acknowledged the repayment of loan instalments through Whatsapp Messenger while insisting on service through registered post in respect to the Notice of Sale of the suit property.
40. The Plaintiff further contended that he sent a message to the 1st Defendant on 15th October, 2021, through WhatsApp Messenger requesting that his loan statement be sent to him via email, However, the same was not sent to him, and that the 1st Defendant deliberately opted for service through registered post in order to frustrate and prejudice the Plaintiff. He disclaimed any knowledge of the auction purportedly carried out on 23rd March 2022, by Josrick Merchant Auctioneers.
41. He reiterated that the 1st to 4th Defendants, colluded to preserve public the auction of 7th December, 2022, in favor of the 4th Defendant, who is an immediate neighbor to the suit land. That the 2nd Defendant attended a party hosted by the 4th Defendant following the auction of 7th December, 2022, which goes to show that there was collusion between the 1st to 4th Defendants, in auctioning the suit land. He described the aforesaid auction as a mere formality.
42. He refuted the 1st to 3rd Defendant's contention that he was indolent in terms of repaying the loan in question, and insisted that he never received any of the required notices in the process leading up to the exercise of the 1st Defendant's Statutory Power of Sale.
43. He reiterated that the Valuation Report relied upon by the 1st Defendant was obsolete, and/or invalid at the time of the start of the public auction in question, and the same was false in respect to the value of the improvements erected on the suit property.



44. He further averred that he has approached the Court on account of the fraud, illegalities and irregularities committed by the 1st Defendant as the auction which was conducted on 7th December, 2022, was irregular and unprocedural.
45. The Plaintiff also responded to the 4th Defendant's Defence through his Reply dated 20th April 2023, and reiterated that during the public auction dated 7th December 2022, the fall of the hammer in favour of the 4th Defendant did not materialize legally, regularly or procedurally.
46. He faulted the Valuation Report dated 19th October 2021, for undervaluing the improvements made on the suit property. He noted that the said Valuation Report, despite the undervaluation, is nevertheless clear on the improvements which were on the suit land, at the time of inspection.
47. He reiterated that the public auction was fixed in favour of the 4th Defendant, hence he was not the highest bidder. Further, that the 3rd Defendant's employee informed him only one day to the public auction that only the 4th Defendant could salvage the suit land from being auctioned.
48. It was his contention that the 4th Defendant does not possess a valid title to the suit property in view of the violation of legal procedure attending the public auction in question.
49. The suit was canvassed by way of viva voce evidence. The Plaintiff gave evidence for himself and called six witnesses. The 1st to 3rd Defendants called one witness to dispute the Plaintiff's claim. The 4th Defendant gave evidence for himself and called no witness.

The Plaintiff's Case

50. PW1 Danson Murigi Gitau, adopted his Witness Statement dated 20th June, 2023, and produced his List of Documents as P exhibits 1-63 and Further List of Documents as P exhibits 66-73. He admitted to having applied for and obtained a loan for the amount of Kshs.1,200,000/=, from the 1st Defendant, which was repayable in monthly instalments ranging between Kshs.39,000/- and Kshs.40,000/=.
51. It was his further testimony that he repaid the said loan faithfully until the onset of the COVID 19 pandemic, and that in October 2022, he made a lumpsum payment of Kshs.150,000/=, towards repayment of the same loan.
52. That he sought for an extension of the loan repayment period, which request was declined by the 1st Defendant, and that the 1st Defendant auctioned the suit property without serving him with the relevant Notices, and that his mode of communication with the 1st Defendant was through text messages.
53. That the 1st Defendant would visit the suit land, and leave the letters with the casual laborers working on the suit property, or at the window sills whereupon the Plaintiff would come across the said letters on opening the store, situated on the suit land.
54. Further, that he would visit the suit land every 2 to 3 months, and that he did not receive the 1st Defendant's letters timeously as some of the letters would be received long after the time for the action/s which those letters required had passed.
55. It was the Plaintiff's further testimony that there was collusion, fraud and neglect of the 1st Defendant's duty of care in the process which culminated in the auctioning of the suit property. That he had approached the Court seeking justice, and that there was poor communication with the 1st Defendant, who was privy to the Plaintiff's Postal address, email address and phone number through its Claims Manager as well as the Plaintiff wife's email and phone number.



56. He reiterated that both his wife's and his contacts were also provided for in the Loan Agreement, and loan statements. Further, that upon finding demand letters in his store situated on the suit land, he approached the 1st Defendant in respect of the arrears due on the loan. That he reached out to the 1st Defendant and continued paying off the loan.
57. It was his further testimony that the suit land was auctioned and he was informed of the said public auction by his neighbours. He also testified that he tried to reach out to the manager of the 1st Defendant, who was unresponsive to his pleas, and that he contacted the Auctioneer (3rd Defendant), who informed him that he needed to carry out the said auction if not, the same would be done by another person.
58. Further, he testified that his neighbor, Michael (the 4th Defendant), purchased the suit property at the said public auction, and the same was carried out in fraudulent manner. Further, that the 1st Defendant failed to supply him with his loan statement.
59. On cross-examination by Mr. Mabonga for the 1st, 2nd and 3rd Defendants, the Plaintiff admitted that he applied for the loan in question in year 2018. He also stated that he lodged the application for loan jointly with his wife, and the loan was expressed to be paid off within three (3) years, and therefore, the loan was supposed to be paid off in full by year 2021.
60. He admitted that the loan was outstanding as at year 2021, and that his Postal address is P.O Box 23054-00100 Nairobi, and he shared the same with the 1st Defendant. Further, that he is a Bio-Medic by profession, and that he was cultivating the suit property prior to the public auction of the same. It was his further testimony that he was engaged in tea farming, with the intention of venturing into organic farming. That the above mentioned Postal Address is what is stated in his loan agreement.
61. The Plaintiff also stated that the loan agreement was not in his possession, as it was not shared with him. Further, that he personally visited the Lands office to register the Charge in respect of the suit property, and that the 1st Defendant took his documents, and he was asked to provide a plan of how he intended to utilize the loan amount. Further, that the bank requested the Charge, and that he complained of not having been given the loan.
62. The Plaintiff testified that he was not served with the Notices, and that upon discovering the letters, he called the 1st Defendant, and the 1st Defendant never called him to confirm that the Plaintiff had been served with the Notices. He referred to paragraph 29 of his Witness Statement where he complained of not having been served electronically with the Notices
63. Further, he testified that it took him time to receive the letters sent to him during the COVID 19 pandemic. He admitted that he was served while at his home, but the letters took a long time to reach him. That he put in a request in October, 2020, during which time the loan had matured, and that he communicated verbally with the 1st Defendant's employee, and tried to negotiate an extension of time for repayment of the loan, which extension was not granted.
64. The Plaintiff further testified that the loan was expressed to mature in three (3) years' time, and he admitted that he does not reside on the suit property, and that the loan was to be utilized for pig farming, and he was engaged in both tea farming and pig farming.
65. It was the Plaintiff's further testimony that he intended to engage in organic farming using manure, and that he was served with the Statutory Notice through the Post Office, but the same reached him late. That he was served with a 40-days' notice, which he received after the expiry of the stated period, and that he did not receive a Redemption Notice, and that he received the referred Notices late. That



- the suit land was sold through public auction, and the entire process was fraudulent in nature, as the relevant Notices were not served upon him.
66. The Plaintiff affirmed that a Valuation Report was done by Real Appraisal on 19th October, 2021, and which report he disputed because it did not provide the correct values with regard to the value of the improvements found on the suit land. Further, that the Valuation Report was undertaken 10 months prior to the sale by public auction, of the suit property.
 67. That the suit land was sold in year 2022, and ten months fell outside the required timelines. That he carried out his Valuation on 14th June, 2023, a year after the sale of the suit land, and the his Valuation Report did not consider the developments carried out on the suit property by the Purchaser.
 68. The Plaintiff further stated that before he received the loan, an Appraisal Report was undertaken, but he did not receive the said Report. Further, that he provided information himself and disputed the value of the land, and that he gave information to the Corporation (the 1st Defendant) himself.
 69. It was the Plaintiff's further testimony that he was never informed about the use of the proceeds, and he has not written to the Corporation (the 1st Defendant), about the same. That he was not informed of what was done to the proceeds, and that he filed another suit to stop the auction wherein, he sought an injunction. That he was seeking justice through the said suit, which suit was withdrawn, hence he did not obtain an injunction.
 70. The Plaintiff further testified that he did not receive any information about the amount which was outstanding on the loan. He stated that the 1st Defendant's branch Manager was involved in the sale of the suit land, and also admitted to not knowing the role of the branch Manager, and that the Branch Manager is supposed to pursue the loan logically.
 71. He also testified that the Branch Manager attended the celebration party hosted by the 4th Defendant, where it was stated that nobody could challenge what they had done; being the sale of the suit land to the 4th Defendant.
 72. The Plaintiff further testified that he did not come across the advertisement in the Newspaper, and that there was communication between the Auctioneer and the 4th Defendant. That he communicated with the Auctioneer, who informed him that there was nothing he could do with respect to the public auction.
 73. The Plaintiff testified that the Bank Manager, had an interest in the suit property, which informs his push for the sale of the said land. He further testified that he tried to locate a buyer for the suit land through private treaty, and that a deal was struck elsewhere and the said public auction was marred with fraud.
 74. The Plaintiff admitted that it has come to his understanding that upon the maturity of the loan, the suit land was sold through public auction on 7th December, 2022.
 75. On further cross-examination by Mr. Baragu, for the 4th Defendant, the Plaintiff admitted that he does not live on the suit land, and information related to the same was relayed to him by his farm workers. Further, that he used to visit the suit property every 2 to 3 months, as he had hired a Farm Manager, and tasked him with managing the daily activities at the suit land. It was his further testimony that the information which he has provided to the court was relayed to him by his Farm Manager and his neighbours.
 76. That he has not visited the suit land since December 2022, and that the 4th Defendant occasioned destruction on the suit land, which destruction he witnessed upon visiting the said land. Further, that



- during his visit, he noticed that the 4th Defendant, was on the suit land, and there was nobody else besides him thereon.
77. The Plaintiff admitted that he fell into arrears with regard to loan repayment, and that he opted to repay the loan through the Account Number as opposed to the Paybill Number, as the loan was repayable through either of the two. Further, that the farm was under the supervision of one Mary Njeri Wangari, who used to keep him informed although not always.
78. It was his further testimony that the 1st Defendant made advanced plans to dispose off the suit property to the 4th Defendant, and there was collusion between the said parties, but he had no proof of the said collusion. He admitted that he had no proof of the stated collusion, and that he was aware of the date of the public auction. However, he did not attend the said public auction.
79. The Plaintiff further stated that as at year 2021, he was still in financial difficulties, and he could not service the loan in question. He testified that on page 144 of the trial bundle, he could see some items listed thereon, which items he purchased.
80. It was his further testimony that as per page 145 of his trial bundle, there are receipts dated 2nd July, 2019, and 13th June, 2022. That receipt No 2523 and No 2525, are in respect of different years, and that as per page 6 of his trial bundle, the 4th Defendant, uprooted four avocado trees and 4,000 tea bushes from the suit property.
81. Further, that he found out that the loan which he obtained from the 1st Defendant matured following the visit by the Auctioneers to the suit land to affix the Auction Notice on thereon. That he was informed of the auction by his neighbours, and that the 4th Defendant was one of his neighbours. That when he communicated with the Auctioneer about the said auction, the Auctioneer referred him to the 4th Defendant herein.
82. It was his further testimony that the auction in question was pre-arranged, and a decision made beforehand to the effect that the 4th Defendant, would purchase the suit property. That he called the 4th Defendant through his phone number, which was already in his possession, and they spoke about the purchase price in respect of the suit land.
83. Further, that the Valuation Report undertaken at the instruction of the 1st Defendant fell outside the 12 months requirement. That the suit land was sold in December 2022, while the 1st Defendant's Valuation report was undertaken in October 2021. He added that he commissioned a separate valuation of the suit property, as per the directives issued by this Court, which report was filed in June 2023.
84. He testified that he encountered difficulties in accessing the suit land during the valuation exercise conducted in June, 2023. However, he was able to observe that there was massive destruction wrought on the suit land, and that there was no other suit in existence between the parties in regard to the suit land, as the other suit was withdrawn.
85. It was his further testimony that there was collusion between the Bank Manager, an employee of the 1st Defendant, and the 4th Defendant, and his farm workers did inform him of the said collusion. That although his land was sold, but the same was not through public auction, because a day to the public auction in question, both the 3rd Defendant and the 4th Defendant clearly knew that the 4th Defendant would emerge the highest bidder.
86. He alleged that he had started to repay the loan in year 2018, but began to encounter difficulty in loan repayments following the onset of the COVID 19 pandemic, between year 2019 and 2020.



87. He referred to the receipts for the items which he purchased with the loan amount, which loan he alleged was procured for development purposes, and one of the items shown in the receipt referred to was 3000 tea bushes. It was his further testimony that at the time of the auction, he had planted 7000 tea bushes, on the suit property.
88. Further, that the 4th Defendant occasioned destruction to the suit property, and has substantially altered the condition of the said land, including demolishing the houses erected thereon. Further, that he purchased the suit land in year 2007, and the suit land was undervalued during the public auction held on 7th December, 2022.
89. PW2 Sarah Wanjiru Mari, the wife to the Plaintiff herein, who lives in Kasarani, Nairobi, and works for the Nairobi City County, testified that she prepared the Inventory marked P exhibit 64, and that there were items belonging to the Plaintiff in the store located at the suit property prior to the public auction of 7th December, 2022.
90. On cross-examination by Mr. Mabonga for the 1st, 2nd and 3rd Defendants, she stated that she prepared the Inventory on 23rd November, 2022. Further, she testified that she listed the items in a single document, and was unaware that the suit land would be the subject of an auction. She affirmed that the Inventory was computer generated, and was accompanied by a certificate. That she had the receipts of the items listed in the Inventory, and that there were two receipts, shown on page of the trial bundle. Further, that the total number of items set out in Inventory were 92, and that the receipts enclosed by the Plaintiff are for some of those items.
91. She also testified that she did not receive any Notices from the 1st Defendant, and that she was aware of the loan, and the Plaintiff had repaid the said loan partly. Further, that together with the Plaintiff, they had not repaid the loan amount in full, and she was aware that a portion of the loan amount remained unpaid.
92. On re-examination, PW2 stated that the Inventory has a list of 92 items and there are receipts in support of the aforesaid items
93. PW3 Mary Njeri Wangari, from Muringa village, adopted her Witness Statement dated 17th March, 2023, as her evidence in chief. It was her testimony that she used to work as the Farm Manager at the suit property, and it was her duty receive and issue receipts pertaining to all items purchased and delivered at the suit land. Further, that she was in charge of the workers, employed to work on the suit land by the Plaintiff.
94. It was her further testimony that the ownership of suit land later changed hands from the Plaintiff to the 4th Defendant, and that she no longer works on the suit property following the change in ownership in favour of the 4th Defendant. Further, that she knows the 4th Defendant as a neighbour to the suit property, and that she resides in Gatanga.
95. On cross-examination by Mr. Mabonga for the 1st, 2nd and 3rd Defendants, PW3 testified that the land was taken over by a new owner. That she started working as the Farm Manager of the suit property in year 2017, and it was her duty to receive all the documents related to the suit land.
96. She denied having any knowledge of the loan advanced by the 1st Defendant, and secured by the title to the suit land. She further refuted having received any Notices from the 1st Defendant. She reiterated that she only knew about workers working on the suit property, and was not privy to any Notices.
97. On further cross-examination by Mr. Baragu for the 4th Defendant, PW3 testified that the suit land used to belong to the Plaintiff, but she could not recollect the last time when the Plaintiff visited the suit



- property. It was her testimony that the road leading to the suit land is not tarmacked, and that she knew the 4th Defendant and has his phone number, and that the 4th Defendant used to visit the suit property.
98. It was her further testimony that the 4th Defendant's mother lives on a parcel of land adjoining the suit property, and that she was unaware that the suit property was the subject of an impending sale. She added that her phone number was 0728258912, and denied sending the Notices from the 1st Defendant to the Plaintiff.
99. Further, that there were houses built on the suit property, made out of corrugated iron sheets, and the said houses were occupied by the workers who were working on the suit land. Further, that there was a pig-shed erected on the suit property.
100. It was her further testimony that she stopped harvesting tea leaves from the suit property in December 2022, following the sale of the property. That there were avocado trees on the suit land, which she planted herself, and she denied handing over the Chaff-Cutter which was placed in the store at the suit land to any of the neighbours.
101. Further, that prior to the auction of the suit land, she had not been evicted from the said land, but the eviction came about following the sale of the property. That it is the 4th Defendant, who occasioned the eviction from the suit land, and she was not present during the actual eviction.
102. PW4 Kennedy Kinyanjui Waitherero, adopted his Witness Statement dated 17th March, 2023, as his evidence in chief, and testified that he used to work as a tea-picker on the suit property, and resides on the suit land together with his family.
103. On cross-examination by Mr. Mabonga for the 1st, 2nd and 3rd Defendants, PW4 testified that in year 2022, he picked tea leaves from the suit property for about 3 months. Further, that he heard rumours that suit land was being sold, and he was not in a position to verify the authenticity of those rumors.
104. Further, that he was not aware when the suit land was sold, and that he was evicted from the suit land in January, 2023. That he picked tea leaves from the suit land in December 2022, and affirmed that he knew the 4th Defendant being a neighbor to the suit property.
105. PW4 further testified that upon asking the 4th Defendant, what was happening, the 4th Defendant stated that he had purchased the suit property without any explanation of how exactly he had made that purchase. That Milka Wangare was the assistant Farm Manager, while Mary was the Farm Manager, and she used to reside in Murang'a, and she operated an office on the suit property.
106. It was his further evidence that both Milka Wangare, And Mary, were tasked with receiving any information related to the suit land on behalf of the Plaintiff in the absence of the Plaintiff.
107. On cross-examination by Mr. Baragu for the 4th Defendant, PW4 testified that he used to live on the suit land, wherein he also grew subsistence crops and harvested the farm produce. That following the eviction, he did not return to the suit property, and that the road to the suit property is a Murram road, not a Tarmac road. Further, that he was unaware that the suit land would be sold, but had heard a rumour to that effect.
108. He also testified that he saw a tractor on the suit property, which was clearing the compound in the period following the sale of the property. That they were instructed not to farm on the suit property in January, 2023, and that in December, 2022 he had picked tea leaves on the suit land. That there was temporary house built on the suit land for occupation by workers, and that the Plaintiff also had a house on the suit property, in which he could spend nights during his visits.



109. On re-examination, PW4 stated that the houses built by the Plaintiff and occupied by the Plaintiff's farm hands were demolished by the employees of the 4th Defendant. Further, that he saw the Plaintiff during his visits to the suit land, however, he never witnessed the Plaintiff spending a night at the property.
110. PW5 Isaac Oscar Kamwonyo, adopted his Witness Statement dated 17th March, 2023, and as his evidence in chief.
111. On cross-examination by Mr. Mabonga for the 1st, 2nd, and 3rd Defendants, PW5 testified that he started working on the suit land in year 2020. He admitted that he witnessed the destruction visited on the suit land, and that in November 2022, he received information that the suit land would be sold off and the said sale took place in December 2022, in favour of Michael, the 4th Defendant herein.
112. Further, that the 4th Defendant destroyed items located on the suit land in December 2022, and that he vacated the suit property on 28th December, 2022. Further, that he no longer works on the suit property, and that he comes from Kangema area, and he did not know the 4th Defendant prior to his employment by the Plaintiff. That he knew that the 4th Defendant was a neighbor to the suit land.
113. On further cross-examination by Mr. Baragu for the 4th Defendant, PW5 testified that he is farm hand and used to pick tea leaves from the suit land until December 2022, when he stopped working in that capacity. He added that there was a rumour that the suit land had been purchased by the 4th Defendant.
114. PW6 Milka Wangare Kuria, testified that she resides in Kinyona area, and adopted her Witness Statement dated 17th March, 2023, as her evidence in chief.
115. On cross-examination by Mr. Mabonga for the 1st, 2nd, and 3rd Defendants, she testified that Mary is her daughter, and Mary was the Farm Manager at the suit property. She denied that she was engaged as an Assistant Farm Manager at the suit land, and stated that Mary would give her some money for the payment of farm workers. Further, that upon the suit land was fenced, and a gate was erected through which every visitor to the suit land would pass, including anybody who wished to access the office situated on the suit property.
116. That it was possible for the employees at the suit property not to see a visitor, coming in, and that there were eight houses on the suit land, plus a house built using iron sheets. She also stated that one of the houses was occupied by the employees, while the other was used to house livestock.
117. On further-cross-examination by Mr. Baragu for the 4th Defendant, she stated that she was not aware that the suit land was the subject of an impending sale. She also affirmed that Mary is her daughter, and that she harvested the maize growing on the suit land, having been allowed to access the said land by the 4th Defendant. Further, that the road leading to the suit land is a Murram road, and that the suit land was purchased by the 4th Defendant.
118. On re-examination, PW6 stated that she does not work on the suit land, and that the farm hands used to pick tea from the suit property. It was her further testimony that as the tea farm is located far away from the gate, it is possible for the employees not to see a visitor enter the suit property.
119. PW7 Boniface Kariuki Waweru, the Registered Land Valuer and a Chartered Surveyor from the Royal Institute of Chartered Surveyors, testified that he composed the Valuation Report in respect of the suit land dated 20th June, 2023, which appears as the Plaintiff's exhibit no. 74. He produced the Valuation report as an exhibit and also produced exhibit no. 75, the search results conducted by himself over the suit property. He also produced exhibits No. 76 and 77, which are the Valuation receipt, and a letter forwarding the Valuation report respectively.



120. It was his testimony that he visited the suit property on 17th June, 2023, and observed that the tea bushes growing thereon were mature. Further, that the trees growing on the suit property were aged between 5 and 10 years, while the young trees were between 6 months to 1 year in terms of age.
121. On cross-examination by Mr. Mabonga for the 1st, 2nd and 3rd Defendants, PW7 testified that he became a Valuer in year 2018, and had worked as a Valuer for about 5 years. He referred to page 6 of the Valuation Report, and stated that those were the only improvements located on the suit land. He also testified that there were other structures located on the suit property, which were destroyed.
122. That the reasons for the destruction of the said improvements are not stated in the Valuation report, for the reason that he was not allowed access to the suit property. That he took photographs of the suit land from the fence, and that the said report is accurate as recorded on page 7 thereof.
123. PW7 further testified that he got information pertaining to the suit property from the Plaintiff, who is the registered owner, and he did not do an actual count of the tea bushes growing thereon. It was his testimony that he was in a position to estimate the same, and that the photographs he took are accurate, notwithstanding that he did not gain access to the suit land.
124. That he inspected the suit property from the fence, and then took photographs of the said land and developments therein. Further, that in case of two conflicting Valuation reports, each Valuer should defend his/her own report. He also testified that his report was compiled on 17th June, 2023. He added that he was informed that the suit land had been sold through a public auction. However, he was not in a position to ascertain the date of the said public auction.
125. Further, that the Valuation report contains a seal, and signature on every page, and he is the maker of the said Valuation Report. He further testified that the evidence relied on in preparing the Valuation report was sourced verbally, and he assigned the values stated therein himself.
126. PW7 admitted that if the information provided by his sources was inaccurate, it meant that the resultant report would also be inaccurate. He reiterated that he inspected the suit land on 17th June, 2023, wherein, he observed from the fence that there were destroyed buildings therein. He admitted that he did not get inside the property.
127. PW7 affirmed that he did not factor in the buildings established by the 4th Defendant, and he admitted that he did not access the suit land from the gate which in itself was a limiting factor as it placed a limit on the amount of information which he had access to. Further, he admitted that the said limiting factor was not recorded in his report.
128. He further testified that he was accompanied by brother to the registered owner/Plaintiff during his visit to the suit property, and not by the Plaintiff himself. That he saw Eucalyptus trees on the suit land, and took photographs of the same. He reiterated that the photographs contained in his report pertain to the suit land, and not to the neighboring parcel of land.
129. On re-examination, PW7 stated that the Valuation report was sealed and stamped and it not possible for the seal and stamp to be bleached out. He affirmed that the Valuation Report provides the source of the information stated therein. He further testified that on page 11 of the said report, he had attached Google Map, which assisted him in undertaking the Valuation exercise.
130. Further, that the specifications indicated on page 5 shows his examination of the (Registry Index Map), and he confirmed that he valued the correct parcel of land as per both the R.I.M. and the Google Map. That the Valuation Report is in respect of the suit land, and he admitted that he did not access the suit



land through the gate, and that the resistance which saw him unable to access the suit property did not prevent him from undertaking a valuation of the same

The 1st, 2nd And 3rd Defendants' Case

131. DW1 Nicholas Kiplagat Kipsang, stated that he is the Credit Officer of the 1st Defendant at its Murang'a branch. He adopted his Witness Statement dated 21st February, 2023, as his evidence in chief, and also produced his List of Documents marked as D exhibits 1-18.
132. It was his evidence that they charged the suit land upon the loan application made by the Plaintiff, and that it is the 1st Defendant's policy to serve any notices on the client or the person found in the land in question. That the 1st Defendant's staff visited the suit land in the Plaintiff's company and appraised the said land resulting in an Appraisal report. He testified that during the Appraisal visit, there was a pig-sty, structures used by farm hands and a dairy shed on the suit land. Further, that there were tea bushes and some semi-permanent structures located on the suit land.
133. On cross-examination by Ms. Mureithi for the Plaintiff, DW1 stated that he has worked for the 1st Defendant for 10 years, and has been attached to the Murang'a branch of the 1st Defendant for 6 years. He explained that his daily assignments as a Credit Officer include receiving proposal from clients, reviewing the same to ascertain their viability and to prepare Appraisal reports whereby, the viability of loans is assessed.

4th Defendant's Defence.

134. DW 2: Michael Kigaya Noru, the 4th Defendant testified that he resides in Nairobi at Kenyatta Road, and he is a private developer. He adopted his witness statement dated 5th May 2023, as his evidence in Chief. He also produced his list of documents as 4th Defendant's Exhibits 1-9.
135. It was his further evidence that in relation to the suit land, he purchased it through a public auction as he was the highest bidder. That he paid 25% of the purchase price at the fall of the hammer, and later 75%, and therefore he had paid the full purchase price.
136. He urged the Court to allow him obtain the title deed. He claimed that he saw an advertisement of a public auction sale of the suit property by Digital Auctioneers, and he attended the said auction that was held at Murang' a Township That after bidding, he emerged the highest bidder, and he paid the 25% of the purchase price, and later 75% being the full purchase price, and he was declared the owner of the suit land.
137. He further testified that after satisfactory payment of the full purchase price of the suit property, he was issued with the certificate of sale dated 21st December 2022. He admitted that he is an immediate neighbour of the Plaintiff, and thus the suit land, as he owns Loc.12/Gacharage/3214.
138. It was his further evidence that the Plaintiff was aware of the public auction date as he called him on 6th December 2022, lamenting that he would not manage to repay the outstanding debt within the time left. Further that the Plaintiff's Farm Manager one Mary Wangari had on 26th November 2022, sent to him the Notification of public auction sale, and informed him that the land was up for auction.
139. He denied having caused any destruction on the Plaintiff's property, nor building materials, and stated that there was no building that was under construction on the suit property. He alleged that he purchased the suit property for valuable consideration, without notice of any fraud, and also claimed that he holds a valid title for the suit property through the certificate of sale, and he is an innocent purchaser for value.



140. On cross-examination by Mrs Mureithi for the Plaintiff, 4th Defendant affirmed that he was the highest bidder in the public auction. He denied that he was privy to the other bidders, and /or the public auction's outcome. He stated that he is a neighbour of the Plaintiff, and he knew the suit land. That the market value for one acre at that area was approximate 1,000,000/=.
141. However, he did not have a Valuation Report with him, and he confirmed that on the eve of the public auction, the Plaintiff had called him, and requested him to purchase the suit land. He denied that the said public auction was pre-arranged, and that he did not know the other bidders. Further he confirmed that though he was issued with a Certificate of sale, he was not yet registered as the owner of the suit land.
142. On cross-examination by Mr. Maboga for the 1st -3rd Defendants he confirmed that he knew about the public auction in November 2022. after being confirmed by the Plaintiff's Farm Manager called Mary. He also confirmed that he communicated with the Plaintiff on 6th December 2022, and the Plaintiff wanted him to purchase the suit land. That he called the auctioneer who confirmed that the sale would go on, and that during the said public auction, he was declared to be the highest bidder.
143. In the re-examination, he claimed that he was not concerned with how much the other bidders offered, and he confirmed to having spoken to the Plaintiff on 6th December 2022, the eve of the public auction.
144. After the viva voce evidence, the court directed the parties to file and exchange written submissions, and the parties herein complied.

The Plaintiff's Submissions

145. The Plaintiff filed his written submissions dated 4th June, 2024, through the Law Firm of Purity Mureithi & Co Advocates, and he reiterated the averments set out in his Plaint dated 27th January, 2023. He identified four (4) issues for determination by the Court as follows:
- 1) Whether the 1st Defendant breached its duty of care imposed by Section 97(1) of the [Land Act](#) 2012, in respect of the sale of the suit property.
 - 2) Whether the public auction conducted on 7th December 2022, by the 3rd Defendant was legal.
 - 3) Whether the 4th Defendant legally acquired the suit property, and if he is liable for damages in the destruction of the improvements on the suit property.
 - 4). Whether there was collusion, illegalities, fraud and irregularities between the 1st to 4th Defendants to circumvent the outcome of the auction held on 7th December, 2022."
146. It was the Plaintiff's submissions that pursuant to Section 97 (1) of the [Land Act](#), a duty of care is imposed on a Chargee to ensure that it obtains the best price, that is reasonable at the time of sale. He placed emphasis on the terms "best price reasonably obtainable" and "time of sale" found in Section 97 (1) of the [Land Act](#) to bolster the argument that the 1st Defendant did not undertake an accurate valuation of the suit property in the process leading up to the public auction of the said land on 7th December, 2022.
147. Reliance was placed on the definition of the term "land" as set out in Black's Law Dictionary, 9th edition. Further, the Plaintiff submitted that land includes the soil, and anything attached to it either by the course of nature such as trees or, by the hand of man such as the improvements erected thereon.



148. Further reliance was sought in the provisions of Section 2 of the Valuation and *Rating Act* (CAP 266), to buttress the proposition that the improvements attached to the land in question are deemed to form part of the said land.
149. Referring to the definition of the term “lawful improvements” as per Section 41 of the Land Laws (Amendment) *Act No. 28 of 2016*, the Plaintiff submitted that from the above provisions of the law, the improvements attached to the land in question have to be quantified and that Real Appraisal Limited, being the makers of the Valuation Report dated 19th October 2021, failed to quantify the specific legal improvements and gave a under valued amount of Kshs.500,000/= as per the said Valuation report.
150. The Plaintiff contrasted the figure of Kshs.500,000/=, stated in the said Valuation Report, and the sum attributed to improvements found on the suit property in the Valuation Report, commissioned by the Plaintiff (the Plaintiff’s Exhibit 72), pursuant to the directives of this Court issued on 14th June, 2023. He reiterated the averment that the 4th Defendant destroyed several improvements erected on the suit land and, therefore, the same could not be noticed during the physical inspection of 20th June, 2023.
151. The Plaintiff relied on his Exhibit 8 appearing on pages 85 to 111, of his bundle of documents for an actual depiction of the status of the suit land, prior to the 4th Defendant’s entry and destruction of various improvements that were erected thereon.
152. It was his further submissions that the 1st Defendant failed to exercise the duty of care imposed by law to obtain a reasonable best price during the public auction conducted on 7th December 2022. That the discrepancy between the figure of ksh 14,200,000/=, stated in the Valuation report undertaken pursuant to the Orders of this Court, and the sum stated in the Valuation report conducted at the behest of the 1st Defendant dated 19th October 2021, demonstrates that the forced market value used at the public auction of 7th December, 2022, was inaccurate, false and was inaccurately arrived at.
153. Further that the value of Kshs.500,000/=, in respect of improvements as per the 1st Defendant’s Valuation report dated 19th October, 2021, stands in stark contrast to the figure of Ksh.5,700,000/=, in the Valuation report undertaken on the Orders of this Court. He further underscored that the latter report did not account for the improvements destroyed by the 4th Defendant upon entry into the suit property.
154. Further, the Plaintiff submitted that during cross-examination, DW1 corroborated the said submission as follows:
- “At the time of the Appraisal, there were pigsties, semi-permanent structures and there was a dairy shed and 8 heifers at the moment in 2018. There were also tea bushes and some permanent structures.”
155. The Plaintiff also submitted that he is entitled to damages pursuant to the provisions of Section 99 (4) of the *Land Act*, 2012, having become the victim of an improper and irregular exercise of the Statutory Power of sale. It was further submitted that the 1st Defendant breached its duty of care in terms of Section 97 (1) of the *Land Act* and also contravened Section 97 (3) of the *Land Act*.
156. Reliance was sought in the holding of the Court of Appeal in the case of *Criticos V National Bank of Kenya Limited* (as the successor in Business to Kenya National Capital Corporation Limited “kenyaC”) & another (Civil Appeal No. 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022).
157. Further, the Plaintiff reiterated that the Valuation report dated 19th October, 2021, was invalid at the time of the public auction conducted on 7th December 2022, having been done outside the mandatory



- 12 months required by law. That as the Valuation report dated 20th June, 2023, was not challenged by the 1st Defendant, the damages sought by the Plaintiff are, therefore, justified.
158. It was the Plaintiff's further submission that he was not properly served with the requisite notices during the COVID 19 outbreak. He stated that 1st Defendant refused and/or neglect to give him information related to his loan account, and he sought out his loan statement from the 1st Defendant's on numerous occasions without success, and that he saw for the first time the statement issued by the 1st Defendant on 26th September, 2023, upon the same being served upon the Plaintiff's advocates during the Pre-trials exchange of documents.
159. Reliance was placed in the decision of the Court in the case of Captain J. N. Wafubwa V Housing Finance Company of Kenya [2012] Eklr, to anchor the proposition that 1st Defendant improper and irregular sale of the suit land is part of a trend exhibited by banking institutions in Kenya and which the Courts have taken note of.
160. Further reliance was sought in the provisions of Article 35 (1) (b) of *the Constitution* in support of the argument that the 1st Defendant denied the Plaintiff access to crucial information by declining to provide him with his loan statement despite repeated requests for the same.
161. The Plaintiff denied having received the Statutory Notice dated 13th October, 2020, and insisted that the same does not form part of his bundle of documents because it was not served upon him. He underlined that DW1 admitted during cross-examination that the policy at the 1st Defendant is to effect personal service or registered post if personal service cannot be effected.
162. He further submitted that DW1 admitted under cross-examination that the Plaintiff's Postal Address as appearing on the loan agreement is not the same Postal Address which the 1st Defendant used in the Statutory Notice to the Plaintiff dated 13th October, 2020.
163. Further reliance was sought in Section 33 (1) of the *Agricultural Finance Corporation Act* (CAP 323), and was submitted that the 1st Defendant despite having the phone numbers of the Plaintiff, and his wife did not consider personal service in respect of the Statutory Notice for sale of the suit land.
164. It was further submitted that there was a discrepancy in the amount of arrears stated in the Statutory Notice dated 13th October, 2020, which provides two conflicting amounts namely, Kshs.891,532.84 and Kshs.1,308,781.88. Further, that the account analysis authored by the 1st Defendant also dated 13th October 2020, provides the sum of Kshs.720,766/06/= being the arrears.
165. He also submitted that from the above anomalies, there is doubt concerning the actual amount owed by the Plaintiff to the 1st Defendant, and that could well explain the 1st Defendant's reluctance to supply the Plaintiff with his loan statement. The Plaintiff pointed out that he did not receive the 1st Defendant's Demand Notice dated 15th September, 2020, and noted that the said notice while stating the Plaintiff's Postal Address as 23054, did not provide the relevant Postal Code, and the same is not accompanied by a receipt of postage which raises questions as to how it was served.
166. Further, it was submitted that the Notice stated the amount of arrears due from the Plaintiff as at 15th September, 2020, to be the sum of Kshs.799,891/=, which sum conflicts with the sum stated in the loan analysis by the 1st Defendant as at 17th September, 2020, wherein , the figure indicated is regard to arrears is Kshs.717,766.06/=.
167. With regard to the 1st Defendant's Demand Notice dated 2nd September, 2019, the Plaintiff faulted it for lacking the relevant letterhead, and receipt of postage stamp and further stated that he was not served with the said Notice. He faulted the figure stated thereon pertaining to arrears being



- Kshs.402,181/00, and argued that the said sum did not tally with the amount stated in the balances column of loan analysis statement authored by the 1st Defendant, and dated 3rd September, 2019, wherein the entire sum of arrears is Kshs.396,262/42.
168. The Plaintiff similarly challenged the Demand Notice by the 1st Defendant dated 18th March 2019, for lack of a letter-head, and postage receipt and claimed that he was not served with the said Demand Notice. He also submitted that he was not served with the 45-day Redemption Notice, dated 11th January 2022, and the Notification of Sale.
 169. It was his further submissions that the Notice of Sale appearing on page 45 of the 1st Defendant's trial bundle lacks a date, and that both Notices were addressed to the Plaintiff leaving out his wife in contravention of the provisions of Section 96 (2) and (3) of the *Land Act*, 2012.
 170. He also submitted that his wife was part and parcel of loan agreement executed with the 1st Defendant, having given her consent as a spouse in respect of the said loan, and therefore, she was entitled to be served by the 1st Defendant with the necessary notices independently of her husband. Reliance was placed on the provisions of Section 60 (b) of the Land Law Amendment *Act No. 28 of 2016* to undergird the foregoing submissions.
 171. The Plaintiff also submitted that DW1, confirmed during the trial that mobile number 0728428495, belongs to him and that he was dealing with the Plaintiff as the 1st Defendant's Credit Manager in Murang'a County. That he demonstrated, that he was in communication with DW1, through the above phone number on Whatsapp Messenger, and utilized the said forum to request DW1, for his loan statement.
 172. The Plaintiff added that pursuant to the provisions of Section 107 of the *Evidence Act*, DW1 having argued that his mobile number was no longer working, DW1 was under an obligation to prove to the Court that the same was not working during the time when the Plaintiff sent to DW1 the messages appearing on page 69 of the Plaintiff's trial bundle.
 173. The Plaintiff urged the Court to find and hold that the 1st Defendant was keen to ensure that the suit property was auctioned on the basis of inflated arrears.
 174. Turning to the 1st Defendant's Notice of Sale dated 5th September, 2022, which appears on page 51 of the 1st Defendant's trial bundle, the Plaintiff submitted that the same was stated to have been served upon one Milka Wangari on 16th September 2022, which is contrary to the provisions of Section 33(1) of The *Agricultural Finance Corporation Act* (CAP 323), as read together with Section 96 (3) of the *Land Act*.
 175. Further, the Plaintiff stated that the said Milka Wangari, is a neighbor to the suit property, there being only one parcel of land separating her parcel, and the suit land and she appeared in the current suit as his witness, namely PW6. He argued that Milka Wangari, is not one of the persons contemplated under Section 96 (3) of the *Land Act*. He submitted that the 1st Defendant deliberately neglected to serve his wife with the said Notices but instead served one Milka Wangari.
 176. Reliance was sought in the report of the Auditor General on the Agricultural Finance Corporation for the year ended 30th June, 2021. The Plaintiff drew on the contents of the said report to buttress the argument that the Country in general was the subject of COVID 19 restrictions. He also submitted that in view of the COVID 19 restrictions then obtaining in Kenya, it is telling that the 1st Defendant opted for physical service of the relevant Notices upon the Plaintiff, rather than service through electronic means.



177. Further reliance was sought in the Amendment Rules to the Civil Procedure Rules published on 26th February, 2020, through Legal Notice No. 22, which rules are found in Order 2 Rule 22 B of the Civil Procedure Rules. He reiterated that he had made a request to the 1st Defendant for his loan statement through Whatsapp Messenger as attested to on page 69 of the Plaintiff's trial bundle.
178. With regard to the question of the legality and/or validity of the public auction conducted by the 1st Defendant on 7th December, 2022, the Plaintiff submitted that the same was invalid because the Valuation report dated 19th October, 2021, which was used to identify the forced market price had been carried out outside the 12 months period, prior to the said auction. Further, that the said Valuation Report was conducted exactly 13 months and 19 days to the public auction in question.
179. Reliance was placed on the provisions of Rule 11 (1) (b) (x) of the Auctioneers Rules, 1997, to anchor the proposition that the requirement for a Valuation Report to be done not more than 12 months to the proposed sale is mandatory in nature. He further faulted the mentioned Valuation Report for failure to record specific values in respect of the improvements situated on the suit land.
180. It was further submitted that PW6 Milka Wangari, is not a member of his family, and is not related to him in any way, but is only his neighbor. He argued that, in view of the lack of a familial relationship with Milka Wangari, the service of the notice of Sale of the suit property upon her was in contravention of the provisions of Rule 15 (c) of the Auctioneers Rules 1997.
181. The Plaintiff further submitted that from the extract contained on page 84 of his trial bundle, it emerges that on 6th December, 2022, a day prior to the public auction of the suit property, he was in communication with one Peter, a member of staff of the 3rd Defendant via Whatsapp Messenger whereupon, the said Peter confirmed that the 4th Defendant is the only person with whom the Plaintiff needed to talk in respect of the impending auction. The Plaintiff argued that from the said statement by PETER speaking on behalf of the 3rd Defendant, it is evident that the 1st to 4th Defendants had pre-arranged the auction of 7th December, 2022, in favour of the 4th Defendant.
182. Citing the provisions of Rule 16 of the Auctioneers Rules, 1997, the Plaintiff faulted the Newspaper Advertisement appearing on page 52 of the 1st Defendant's trial bundle for failing to state the time during which the auction scheduled for 7th December, 2022, would take place. He reiterated that the said auction was a mere formality meant to hoodwink the public, as the 4th Defendant had been identified as the "highest bidder" on the eve of the same auction.
183. Further, that during the cross-examination of DW1, it emerged that the 3rd Defendant failed to attach any evidence to demonstrate that bidders had bid in the auction of 7th December, 2022. That it would have been easy for the 1st and 3rd Defendants to have presented such evidence of there having been bidding on the day of the public auction to dispel the Plaintiff's allegations of fraud against them, and the fact that they did not present such evidence demonstrates that the auction had a pre-arranged outcome and in favour of the 4th Defendant who is the Plaintiff's next-door neighbor.
184. Reliance was placed in the decision of the Court in the case of Maina Wanjigi & Another V Bank of Africa Kenya Ltd & 2 others [2015] eKLR, on the necessary ingredients of a valid public auction.
185. He also submitted that the 3rd Defendant failed to discharge its duties as spelt out under Sections 23 of the Auctioneers Act (CAP 56), by referring the Plaintiff to the 4th Defendant on the eve of the auction in question. He submitted that pursuant to Section 26 of the Auctioneers Act, the 3rd Defendant is liable in damages to the Plaintiff having breached Rules 11 (b) (x), 15 (c) and 16 of the Auctioneers Act which are mandatory provisions.



186. Turning on to the issue of the acquisition of the suit property by the 4th Defendant, it was submitted that the title of the land can only be acquired lawfully if the process resulting in such acquisition is itself lawful. Further, that where title to land is the outcome of illegal or wrongful procedure, such title is a nullity. Reliance was sought in the holding of the Court in the case of *Maina Wanjigi & Another V Bank of Africa Kenya Ltd & 2 others*(Supra).
187. The Plaintiff reiterated that the process of the realization of the 1st Defendant's Statutory Power of Sale was fraudulent, defective and irregular and premised on an invalid Valuation report, hence, the same was incapable of passing a good title to the 4th Defendant.
188. He submitted and reiterated the argument that the suit property was sold to the 4th Defendant at depressed value of Kshs.5,300,000/=, which is variance with the figure of Kshs.14,200,000/=, stated in the Valuation Report which was undertaken following the directive issued by this Court.
189. He also submitted that the figure of Kshs.14,200,000/=, is exclusive of the destruction occasioned to the suit land by the 4th Defendant, upon his entry therein as appears on photographs found on pages 123 to 140 of the Plaintiff's trial bundle, and which destruction was adverted to by both PW4 and PW5 in their Witness Statements both dated 17th March, 2023.
190. On the question of whether there was fraud, irregularities and/or illegalities, between the 1st to the 4th Defendants attending the public auction of the suit property on 7th December, 2022, it was submitted, that the 1st Defendant proceeded to exercise its Statutory Power of Sale, without serving the Plaintiff with the necessary Statutory Notice and Notice of Sale.
191. He submitted that the 3rd Defendant proceeded with the public auction whose outcome he was clearly aware on the eve of the said public auction, as evidenced by the message sent to the Plaintiff through Whatsapp Messenger asking him to talk to Michael (the 4th Defendant herein).
192. The Plaintiff submitted that conditions of sale as advertised by the 3rd Defendant flouted Rule 16 (1) of the Auctioneers Rules 1997. That the suit land was conveyed to the 4th Defendant at a depressed value, and there were no bids produced by any of the Defendants demonstrating that the 4th Defendant was the highest bidder.
193. Further, that as a result of the conduct of the public auction of 7th December, 2022, he has fallen into depression having invested heavily in the suit land, which was his only home. He urged the Court to find it unconscionable for a property worth Kshs.14,200,000/= to be sold over loan arrears amounting Kshs.759,927/- and taking to account that the Plaintiff had already paid to the Defendant Kshs.959,400/- out of the original loan amount of Kshs.1,200,000/-.

The 1st To 3rd Defendants' Submissions

194. The 1st, 2nd and 3rd Defendants filed their written submissions dated 19th June, 2024, through the Law Firm of Eurry S. Mabonga &co Advocate. They submitted that the Plaintiff applied for and was granted a loan for the amount Kshs.1,200,00/=, by the 1st Defendant on 3rd July, 2018. That the loan in question was secured by the title to the suit land, the Charge thereof was registered by the Plaintiff himself as per the 1st Defendant's policy.
195. They also submitted that the Plaintiff defaulted on the said loan repayment which led to the initiation of a recovery process to recover the outstanding amount. They contended that Notices were served upon the Plaintiff as set out on pages 25 to 27 of the 1st -3rd Defendants' trial bundle although the Plaintiff claimed he that have received the same Notices late.



196. Further, that the 1st Defendant issued a Statutory Notice to the Plaintiff dated 13th October, 2020, and the Plaintiff did admit during the trial to having received the said Notices and a similar admission is contained in the Plaintiff's Reply to 1st -3rd Defendants' Defence in paragraph *para_6 6*. Further, that the Plaintiff only challenged the mode of service, but did not question the service of the requisite Notices and he acknowledged receipt of the relevant Notices in paragraphs 5 and 6 of his reply to the 1st -3rd Defendants' Defence.
197. The 1st to 3rd Defendants admitted to having instructed Real Appraisal Valuers Ltd, to conduct a valuation of the suit property to obtain the possible market price. They also submitted that the 1st Defendant instructed the 3rd Defendant to realize the suit property with a view to recovering the outstanding loan amount, together with interest. That a 45-day Redemption Notice was issued and the said Notice was received by the Plaintiff's care taker.
198. It was also submitted that on the back of the said Notices, it is written that the Plaintiff was called to pick up the Notices, but he refused to do so, and therefore service was effected through the Post Office, and the Plaintiff did confirm receipt of the said Notice as attested to on pages 50 to 51 of the 1st – 3rd Defendant's trial bundle. That the 3rd Defendant put out an Advertisement in the Standard Newspaper on 7th November, 2022, of the intended auction of the suit land.
199. The 1st, 2nd and 3rd Defendants identified the following four (4) issues for determination by the Court:
- a. Whether the 1st Defendant breached its duty of care imposed by Section 97 (1) of the *Land Act* in respect of the suit property.
 - b. Whether the public auction conducted on 7th December, 2022, by the 3rd Defendant was legal.
 - c. Whether the 4th Defendant legally acquired the suit property, and if he is liable for damages in the destruction of improvements on the suit property;
 - d. Whether there was collusion, illegalities, fraud and irregularities between the 1st to 4th Defendants to circumvent the outcome of the auction held on 7th December, 2022.
200. They submitted that the 3rd Defendant discharged its obligation as set out under Section 97 (1) and (2) of the *Land Act*, by ensuring that a Valuation was undertaken by a professional valuer in respect of the suit property prior to the auction. That the reason behind a Valuation report is to protect the interests of the Chargor.
201. Reliance was sought in the decision of the Court in the case of *Olkasasi Limited V Equity Bank Limited* [2015] eKLR. They also submitted that the Valuation that was done following the directive issued by this Court was undertaken many months after the sale of the suit land, and the said Valuation report contained many gaps, and did not assess the property in question.
202. Reliance was also sought in the definition of the word "value" as set out in the holding of the Court in the case of *Union of India V Bombay Tyre International Ltd* (1984) 1 S.C.C. 467 and in *Gurbachan Singh V Shivalak Rubber Industries*, A.I.R. 1996 S.C. 3057, and submitted that value refers to the intrinsic worth, costs or price for sale of an article of property.
203. Further, that valuation is a question of fact, and the value of property should be determined fairly and reasonably. That the correct principle of valuation applicable to any given case is a question of law. That the Valuation Report filed by the 3rd Defendant meets the legal threshold as there was proper estimation based on observation the suit property.



204. Reliance was placed in the decision of the Court in the case of *Zum Zum Investments Limited V Habib Bank Limited* [2014] eKLR to support the proposition that once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived by the Defendant's valuer was not the best price reasonably obtainable at the time.
205. It was also submitted that the Valuation report undertaken by the Plaintiff's Valuer is a mere Valuation report and does not demonstrate why the court should overlook the valuation report relied upon by the 3rd Defendant. They described the Valuation report filed by the Plaintiff as a mere report, which was prepared merely for the purpose of litigation as indicated on the face of the same report.
206. Turning to the issue of the legality and validity of the public auction conducted on 7th December, 2022, it was submitted that all requisite notices were issued and served upon the Plaintiff, and his wife either directly, through their care-takers and through Registered Post. They reiterated that the Plaintiff acknowledged receipt of those Notices, although he claims to have received the said Notices late, including the Statutory Notice which the Plaintiff claimed had the wrong Postal Address.
207. It was further submitted that the Plaintiff is a confessed defaulter who has presented contradicting claims to the effect that he was not served, that he was served, but received the documents late, and further that the service in question was not proper.
208. Reliance was sought in the decision of the Court in the case of *Francis J.K. Ichatba V Housing Finance Company of Kenya, Civil Application No. 108 of 2005*, to buttress the proposition that he who seeks equity must do equity and a person who refuses to make repayments in respect of a debt which he owes cannot be protected by the Court from the consequences of his own default.
209. That the Plaintiff has made an unequivocal admission of his indebtedness, which in itself constitutes a sufficient basis for the dismissal of the current suit. It was further submitted that the Plaintiff contradicted himself having stated that he was never served with the relevant Statutory Notices, then admitting in his pleadings and during cross-examination that he was served with the same.
210. On the question of there being a discrepancy in the amounts claimed as arrears from the Plaintiff, it was submitted that the Plaintiff did admitted that two figures are shown in the 45-days-Notice, with one of figures pertaining to the arrears and the other figure denoting the Principal amount and interest thereon. They submitted that there was no confusion in the stated figures and attributed to the Plaintiff any confusion arising from the same.
211. With regard to the Redemption Notice, they submitted that it was served by the 3rd Defendant upon the Plaintiff through Registered Post, and also through the Plaintiff's care-taker. It was further submitted that the Plaintiff and his wife share the same postal Address; and further that during the trial, the Plaintiff stated that he asked his wife to pick the Notices from the Post Office, whereupon she was required to produce the Plaintiff's identification documents.
212. Reliance was placed on the provisions of Rule 15 (c) and (d) of the Auctioneers Rules, in support of the proposition that service through Registered Post, complies with the said provision. It was his further submission that the 3rd Defendant's Newspaper Advertisement published in the Daily Nation Newspaper complied with the foregoing as it stated the time, place and date of sale of the suit property. Further reliance was sought in decision of the Court in the case of *Anne Wachisi Situma & Another V I & M Bank Limited & 2 others* [2021] eKLR.
213. On the question whether the 4th Defendant acquired lawful title to the suit property and whether he is liable to the damages occasioned to the improvements situated on the suit land, it was submitted that



the same is a repetition of issue number 2 and concerns the legality of the auction conducted on 7th December, 2022.

214. It was also submitted that the real issue in contention in the subject dispute is the matter of the Valuation of the suit property, and it was submitted that the Plaintiff did not demonstrate that the suit land was sold for a price which was 25 percent below the market value. It was further submitted that the lack of a Valuation Report does not amount to an illegality, which can set aside an auction, but is an irregularity and does not entail such drastic consequences as the quashing of an auction. Reliance was placed in holding of the Court in the case of *Stephen Kibowen V Agricultural Finance Corporation* [2015] eKLR to anchor the preceding position.
215. On the question whether there was collusion between the 1st to 4th Defendants in regard to the public auction conducted on 7th December, 2022, reliance was sought in the words of Hon Justice Sila Munyao, without mentioning of the lawsuit from which the particular quotation was drawn, for a list of specified matters that may affect a sale. The Court cannot consider such a quotation, unaccompanied by the full citation of the relevant case from a competent, Superior Court, as constituting an authoritative statement of the law for its own guidance.
216. It was reiterated that Notices were issued to the Plaintiff who confirmed receipt of the same. It was further submitted that the gist of the Plaintiff's claim concerns the mode of service of the relevant Notices as well as the time when he received the same.
217. The Plaintiff's claim of collusion between the 1st to 4th Defendants regarding the public auction held on 7th December, 2022, was refuted by the 1st to the 3rd Defendants with the assertion that the public was free to participate in the same.
218. On the issue of the alleged destruction of the improvements situated on the suit property, it was admitted that the 4th Defendant having acquired the suit property lawfully did effect some developments thereon, several weeks after the auction in question, and was within his rights to do so, therefore, the 4th Defendant's actions do not amount to "destruction."
219. It was further submitted that were the Court to assume that the Notices were not served upon the Plaintiff as claimed, and were the Court also to accept that the notices were served upon the Plaintiff's farm worker as opposed to the Plaintiff himself, still the Plaintiff is not entitled to the Orders sought in the suit on account of being a loan defaulter.
220. The 1st to the 3rd Defendants relied in the decision of the Court in the case of *Yusuf Ali Abdi Co. Ltd V Family Bank Limited* [2015] eKLR to anchor the proposition that an applicant such as the Plaintiff who admits to defaulting on a loan approaches the Court with dirty hands, therefore, he is not entitled to the Orders sought.

The 4th Defendant's Submissions

221. The 4th Defendant filed written submissions dated 18th June, 2024 through the Law Firm of M/s K.m. Mburu & Associates. After setting out the background and the pleadings of the parties in the suit, the 4th defendant set out five (5) issues for determination as follows;
 - i. Did the 4th Defendant emerge as the highest bidder during the public auction?
 - ii. Is the 4th Defendant an innocent purchaser for value of the suit property?
 - iii. In the event the Plaintiff has suffered any loss and damage owing to the Defendants' acts, where does the remedy lie?



- iv. Is the Plaintiff entitled to the orders sought given the circumstances and/or fact obtaining herein?
 - v. Who should bear the costs of this suit?
222. The 4th Defendant submitted that he emerged as the highest bidder during the public auction conducted on 7th December, 2022, by the 3rd Defendant in exercise of the 1st Defendant's Statutory Power of Sale. Reliance was placed on the following documents which were submitted by the 4th Defendants as exhibits during the trial:
- a. A copy of the Agreement for sale dated 7th December, 2022.
 - b. A copy of the Memorandum of sale dated 7th December, 2022.
 - c. A copy of the Transaction Voucher dated 7th December, 2022.
 - d. A copy of the Transaction Voucher dated 15th December, 2022.
 - e. A copy of the Credit Voucher dated 19th December, 2022.
 - f. A copy of the Certificate of sale dated 21st December, 2022.
223. It was his submission that all six aforementioned documents were not controverted by the Plaintiff during the trial. Reliance was sought in the holding of the Court in the case of William Kabogo Gitau vs George Thuo & 2 Others [2010] eKLR, to buttress the proposition that the applicable standard of proof in the subject suit is on a balance of probabilities.
224. It was also submitted that the Plaintiff merely pleaded fraud as against the 1st to 4th Defendants, but failed to present evidence to demonstrate that the sale of the suit land through the public auction was fraudulent. Reliance was sought in the decision of the Court in the case of Central bank of Kenya Ltd V Trust Bank Ltd & others (1996) eKLR, to buttress the argument that fraud is a very serious allegation, and must be proven on a standard of proof higher than on a balance of probabilities.
225. He further submitted that Josrick Merchants Auctioneers conducted a valuation of the suit property on 23rd March, 2022, but the resulting auction was unsuccessful. He argued that the auction conducted on 7th December 2022, was undertaken within 12 months from the Valuation Report submitted by Josrick Merchants Auctioneers.
226. It was further submitted that the remedy for a party who has suffered damages as a result of improper auction lies in damages not in a reversal of the auction against an innocent purchaser. Reliance was placed in the holding of the Court in the case of Bomet Beer Distributors Ltd & Another V Kenya Commercial Bank Ltd & 4 others [2005] eKLR and in Joyce Wairimu Karanja V James Mburu Ngure & 3 Others [2018] eKLR.
227. The 4th Defendant further submitted that he is entitled to the costs of the suit, the Plaintiff having failed to prove his case against the Defendants.
228. The court has considered the available evidence, the exhibits produced during the trial, the submissions by the parties herein and the cited authorities and court finds the issues for determination are:-
- I. Whether the Plaintiff is entitled to the Orders sought?
 - II. Who shall bear the costs of the suit?



Whether the Plaintiff is entitled to the Orders sought?

229. The Plaintiff alleged that the public auction that took place on 7th December 2022, was irregular and/ or illegal because he was not properly served with the Notice of sale as provided by Section 96 of the [Land Act](#). It was his allegations that by the time the suit land was sold through the mentioned public auction, the 1st Defendant Statutory power of sale had not crystalized.
230. Further he alleged that the said public auction was pre-arranged and/ or fixed, and that the said land was not sold to the highest bidder, but to the 4th Defendant herein, who knew that he would emerge the winner even before the said public auction was undertaken on 7th December 2022.. Further that the Suitland was undervalued as the Valuation Report that was relied upon was prepared more than 12 months prior to the public auction.
231. The Defendant denied all the above allegations and averred that the Plaintiff was a Deliberate loan defaulter, who was properly served with the requisite Notices, but which Notices he failed to honour, and consequently the 1st Defendant exercised its statutory power of sale, as provided by Section 96 of the [Land Act](#).
232. Since the Defendants denied all the allegations made by the Plaintiff, and the Plaintiff is the one who had alleged, then the burden of proof was upon him to call sufficient evidence and prove his allegations on the required standard of balance of probabilities. See section 107 of the [Evidence Act](#) which provides as follows;

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

See the case of Hellen Wangari Wangechi Vs Carumera Muthini Gathua [2005] eKLR, the Court held as follows:

“It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”

233. In determining this issue, the court will rely on various decided cases. In the case of Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 others [1996] eKLR, the Court of Appeal declared as follows:

“It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered [Land Act](#) (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale...It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered [Land Act](#). That burden is not in any manner on the chargor. Once the chargor alleges non receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent.”



234. In referring to the holding of the Court of Appeal in the case of Obel Omuom –Vs- Kenya Commercial Bank Ltd, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996)eKLR, the Court in the case of Jane Wairimu Ngure (Suing as administratrix of the Estate of Peter Tharao Ngure (Deceased) v National Bank of Kenya Limited & 2 others [2019] eKLR, declared as follows:

“...that in instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee , to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the Court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargor, and that in the ordinary course of events, the notice must have reached the chargor.”

235. Further, in the case of Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540, the Court reasoned as follows:

“The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding such payment and the chargor has failed to comply within three months of the date of service of such notice... The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice... Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the Registered Land Act and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor’s equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargor’s remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the charger.”

236. Further, the Court of Appeal in Elijah Kipngeno Arap Bii v Samwel Mwehia Gitau & another [2014] eKLR pronounced that:

“...it can be stated generally that the duty of the mortgagee is to act in good faith and to see that the sale is not tainted by some kind of impropriety.”

237. Again, in the case of Sambayon Ole Semera v Kalka Flowers Limited & another [2021] eKLR the Court reasoned as follows:

“[I]t is clear from the evidence on record, that the 2nd defendant did not prove that it served statutory notices on the plaintiff with the result that its statutory power of sale of the plaintiff property, even if it had existed, had not crystalized. Any attempt to sale the plaintiff’s property was in exercise of a non-existent statutory of sale that had not in any event crystalized. It was an outright illegality that cannot be countenanced by a court of law.”



238. In the case of *Martev Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (28 April 2022) (Judgment) (with dissent - W Karanja, JA), the Court of Appeal proclaimed as follows:

“Compliance with the prerequisites with regard to service of the notice on to the chargor was mandatory and noncompliance with that prerequisite rendered the entire process undertaken by the chargee to realize the security invalid.”

239. Guided by the above case-law, this Court has interrogated the process that resulted in the public auction of the suit land on 7th December, 2022. The 1st to 3rd Defendants, in their evidence and submissions on record, argued that the Plaintiff being what they termed a “deliberate defaulter” is not entitled to the Orders sought, even if the Court accepts that there was no service of the relevant Statutory Notices upon the Plaintiff.

240. The answer to the 1st to 3rd Respondents question is as follows: a Chargee’s Statutory Power of Sale does not crystalize unless and until the Chargor is served with the relevant Notices as stipulated in the law. Therefore, it was incumbent upon the 1st Defendant to demonstrate to the Court that there was service of both the Notice of Sale of the suit property and the Notice of Redemption upon the Plaintiff.

241. The Plaintiff had contended and argued that the said Notices were not served upon him, and/ or his wife, but were served upon his neighbor, who is not a person authorized by the law to receive such Notices. It was therefore incumbent upon the Defendants herein to prove that indeed the said Notices were indeed served, and served to the rightful parties. The Defendants herein failed to discharge that duty placed upon them by the law.

242. Upon careful consideration of the evidence adduced by the parties herein, the Court is satisfied that the requisite Statutory Notices were not served upon the Plaintiff, by the 1st Defendant, hence the 1st Defendant’s Statutory Power to sell of the suit property did not crystalize.

243. The 1st to 3rd Defendants submitted that an irregularity attending a public auction does not carry the effect of rendering such a public auction invalid ,because an irregularity does not amount to an illegality.

244. However, this Court subscribes to a different perspective on the question of irregularities in the context of a public auction. In the case of *Stephen Boro Githa v Nicholas Ruthiru Gatoto* [2017] eKLR, the Court of Appeal held that:

“Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.”

245. Similarly, in the case of *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* [2019] eKLR, the Court reasoned as follows:

“I am not persuaded that a chargee can stage manage a sale, or put aside all statutory provisions that prescribe the manner in which a sale by chargee should be held, then claim that the sale is only “irregular” and seek protection under Section 77 (3) of the Registered *Land Act*. No person should be deprived of property unless such deprivation is clearly in line with the law. Neither do I believe that the transfer of such property to another party sanitizes the initial faulty title and I am not persuaded that a good title can pass if the initial purchaser never held a good title. Such persons if they can demonstrate that they are innocent purchasers



for value, without notice, can seek to be compensated by those from whom they purchased the property, but it would be an injustice to have a person's property taken away from him without due process being followed. The rule of law should always be upheld.”

246. This Court being satisfied that the Plaintiff adduced sufficient evidence to demonstrate that on 6th December, 2022, that is, on the eve of the public auction of the suit property, one PETER, a member of Staff of the 3rd Defendant being the firm of Auctioneers that sold off the suit land did refer the Plaintiff to the 4th Defendant as the appropriate contact person in respect of the impending auction, then finds and holds that there was indeed an irregularity.
247. The above action and evidence which amounted to collusion between the 1st and 3rd Defendants in the period leading up to the public auction of 7th December, 2022, as presented by the Plaintiff was not controverted during the trial by the 1st, 2nd, 3rd and 4th Defendants.
248. The 1st to 4th Defendants, did not deny that the “Michael” referred to in the messages shared between the Plaintiff and PETER, the 3rd Defendant's staff member via Whatsapp Messenger on 6th December, 2022, is the 4th Defendant herein. If that is the case, one wonders what the 4th Defendant had to do with the auction of 7th December 2022, on the eve of the said public auction, if truly that auction was not pre-arranged or stage-managed for his benefit.
249. It is trite that an illegal process of transfer of title cannot confer a good title to the party that benefits from such transfer, In the case of *Martev Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (28 April 2022) (Judgment) (with dissent - W Karanja, JA), where the Court of Appeal declared as follows:

“Since the appellant's title had its roots in the bank's flawed process in the exercise of its statutory power of sale on the basis of which the appellant got title to the suit property, the title was tainted with fraud, nullity, irregularly and illegality. The appellant's plea of an innocent purchaser for value without notice to either title or the process resulting in it being vested with title to the suit property was unsanctionable...There was a distinction between an auction sale which was rendered irregular during the sale and a sale which was void because the statutory

power of sale either had not accrued or was vitiated by fraud. While an innocent purchaser in an irregular sale could be saved by section 77(3) of the Registered *Land Act*, that section could not help an innocent purchaser in the case of a void sale, particularly in a situation such as the instant case where the bank was complicit in the fraud and had unlawfully sold the suit property.”

250. Therefore, the public auction conducted on 7th December, 2022, having been adjudged by this Court to be illegal, and irregular, the same was incapable of passing good title to the 4th Defendant over the suit property, as the said sale was not preceded by service of the requisite statutory Notices, as provided by the law.
251. Having found the said public auction was irregular, and did not met the laid down standard, this court has no option but to proceed to nullify it and finds that the 4th Defendant did not acquire a good title over the suit land.
252. Having nullified the 4th Defendant acquisition of the suit land, on grounds of illegality and/ or irregularities, the Court proceeds to directs the 4th Defendant to vacate the suit land forthwith, and to



deliver vacant possession of the said land to the Plaintiff herein, who had charged it in favour of the 3rd Defendant herein.

253. In the case of *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* [2019] eKLR, the Court reasoned as follows:

“The bank cannot benefit from its own fraudulent activities. So that the plaintiff is not prejudiced for the duration of time that she spent pursuing her rights, any interest that may be accumulated from the time the purported auction sale took place, to the time of this judgment, ought not to be loaded into the account of the plaintiff.”

254. Further, this Court directs that the ownership of the suit land shall remain in the name of the Plaintiff, and the title to the suit property shall be charged to the 1st Defendant for the amount outstanding on the loan obtained by the Plaintiff, excluding the interest and penalties due on the same for the period from 6th December, 2022, to the date of this Judgment.

255. Further, the 1st Defendant shall within seven (7) days of this Judgment, provide and supply to the Plaintiff a Comprehensive Statement of his loan account from the date of commencement of the said LOAN, to the date of this Judgment, which Statement shall include and indicate all the repayments made in respect of the loan by the Plaintiff.

256. The Plaintiff has acknowledged that he is in default of his loan repayment, and upon receipt of the Comprehensive Statement of his loan, he should commence repayment of his loan the soonest. This Judgment is not a bar to the future exercise of the 1st Defendant’s Statutory power of sale, as provided by the law, upon following the laid down procedures and requirements, and upon issuance and service of the required Notices as laid down by the provisions of the *Land Act*, 2012.

257. On the question of damages, the Court finds and holds that 4th Defendant entered unto the suit property having been declared the highest bidder at the public auction held on 7th December, 2022. As such, the Court finds and holds that the 4th Defendant cannot be held liable for the destruction of the improvements found on the suit property following his entry thereto, as he was exercising his rights as the Purchaser of the suit land.

258. During the trial, the improvements found on the suit land prior to 7th December, 2022 were listed by DW1 as follows:

“At the time of the Appraisal, there were pigsties, semi-permanent structures and there was a dairy shed and 8 heifers at the moment in 2018. There were also tea bushes and some permanent structures.”

259. Consequently, the Court finds and holds the 1st to 3rd Defendants are liable to the Plaintiff on the damages for the destruction occasioned to the improvements that existed on the suit property. For the above reasons, the Court awards the sum of Ksh.2,500,000/= as General Damages, to the Plaintiff as damages, payable by the 1st to 3rd Defendants herein jointly and severally, in respect of destruction of improvements on the suit property.

260. Having analyzed the available evidence as above, this court finds and holds that the Plaintiff has proved his case against the Defendants herein on the required standard of balance of probabilities, and therefore, this court allows the Plaintiff’s case and dismisses the Defence of the 1st, 2nd, 3rd and 4th Defendants herein.



261. Consequently, judgement is entered for the Plaintiff herein against the Defendants jointly and severally in terms of prayers Nos. a,b,c,d,h,i,j,l, and o. However, in prayer No. (O), damages is only payable by 1st to 3rd Defendants, excluding the 4th Defendant.

who should bear costs of this suit?

262. On the issue of costs, the court will be guided by the provisions of Section 27 of the Civil Procedure Act, wherein costs are granted at the discretion of the court, but always follow the event. The Plaintiff is the successful litigant, and is thus awarded costs of this suit, to be met by the 1st to 4th Defendants herein jointly and severally.

263. In a nutshell, this court enters Judgement for the Plaintiff as stated in paragraph *para_261 261*, above with costs to be borne by 1st to 4th Defendants herein jointly and severally.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 3RD DAY OF OCTOBER, 2024.

L. GACHERU

JUDGE

3/10/2024

Delivered online in the presence of;

Joel Njonjo (Court Assistant)

Mr Githinji H/B for Mrs. Mureithi for Plaintiff

Mr Mutuma H/B for Mr Mabonga for 1st, 2nd & 3rd Defendants

Mr Baragu for 4th Defendant

N/A for 5th Defendant

