



Karanja v Equity Bank Limited & 2 others (Environment & Land Case 625 of 2016) [2024] KEELC 6482 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 625 OF 2016**

M SILA, J

OCTOBER 3, 2024

BETWEEN

MICHAEL NJAU KARANJA PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

ANTIQUA AUCTION AGENCIES 2ND DEFENDANT

VANICE KWAMBOKA MORWABE 3RD DEFENDANT

JUDGMENT

(Suit by plaintiff challenging an auction sale conducted by the 1st defendant as chargee, through the 2nd defendant, as auctioneer; plaintiff having charged the suit property to the 1st defendant and constructing a five storey apartment block; plaintiff falling into arrears; 1st defendant instructing the 2nd defendant to conduct a public auction; 2nd defendant publishing the auction and conditions of sale in the newspaper; conditions requiring a bidding deposit of Kshs. 500,000/= ; 25% at fall of hammer; and payment of balance within 30 days; 3rd defendant declared the successful purchaser despite not having made a bidding deposit; not paying 25% at fall of hammer; and not paying the balance within 30 days; 1st and 2nd defendants exhibiting a false Memorandum of Sale; the deposit being made 5 days after the auction; balance being financed by the 1st defendant and paid after 7 months; in all this there having been a bidder who had abided by the conditions of sale but not declared the purchaser; court of view that the auction sale was a sham and fraudulent; Auctioneers' Rules providing that the purchaser shall be the highest bidder who has abided by the conditions of sale; 3rd defendant cannot be said to be a purchaser as she never abided by the conditions of sale; whether 3rd defendant as purported purchaser protected by Section 99 of the *Land Act*; Court of opinion that Section 99 only protects a bona fide purchaser; 3rd defendant not protected as she is not a purchaser let alone a bona fide purchaser; sale nullified; orders made for cancellation of title



and subsequent charge by 3rd defendant; orders made for payment of damages by the bank, the auctioneer and mesne profits by 3rd defendant)

A. Introduction and Pleadings

1. Public auction sales. Such sales are in many cases conducted for purposes of offsetting debts owed to creditors. They could be public auction sales of goods or of landed property. One common instance of such auction sales is where a chargee exercises its statutory right of sale as provided under Section 96 of the *Land Act, Act No. 6 of 2012*. Public auction sales are open to the entire mass of the public and are conducted competitively by way of bidding so that the highest bidder carries the day. This being a competitive process, it is expected that the playing field be level, that the rules of engagement apply equally to all, and that no one person will be given an unfair advantage over any other competitor. It is expected that such sale be transparent and above board, and all members of the public are given a fair and equal opportunity to purchase, with no preferential treatment being given to any bidder.
2. Such sales need to be accorded integrity otherwise members of the public will start keeping away from them. A bidder expects nothing less than a fair and transparent process, for there is no need to go and bid where there is possibility of a hidden hand, and machinations that are taking place under the table, and the system is rigged. A debtor expects no less because the amount raised in the public auction is what will be used to offset his debt. The higher the price the better for him for the debt will either be obliterated and allow him a balance, or there will be much less left to pay. If the public lose faith in the process, and it is inevitable that they will if the process remains manipulated; they will shy away, leading to a clogging of unsold collateral that will be detrimental to the economy.
3. The question in this case is whether the 1st defendant, in exercise of its statutory power of sale, adhered to the above expectation when it sold the plaintiff's land parcel Kisii Municipality/Block 1/155 (the suit property) to the 3rd defendant, through the 2nd defendant who acted as auctioneer.
4. The background of the case is that the plaintiff was the erstwhile registered proprietor of the suit property which he charged so as to be availed financial facilities by the 1st defendant. He first charged the suit property on 19 September 2013 to secure the sum of Kshs. 15,000,000/=. On 19 June 2014, a further charge to secure Kshs. 5,000,000/= was registered. The purpose was to enable him complete construction of a five-storey apartment block on the suit property. He regrettably ran into financial trouble, was unable to pay the loan as scheduled, and quickly fell into arrears. The 1st defendant, as chargee, triggered the process of exercising its statutory power of sale.
5. On 14 October 2015 the 1st defendant (also sometimes described herein as the bank or chargee) issued a three month notice requiring the plaintiff to settle his arrears. On 10 March 2016, the bank issued another three month notice (the statutory notice) calling in the whole debt. On 1 July 2016, the 1st defendant issued the plaintiff with a forty (40) days redemption notice informing the plaintiff that she would sell the suit property to realize the outstanding amount of Kshs. 22,470,368.35/=. She then proceeded to instruct Antique Auctions Agencies, the 2nd defendant, to issue a 45 days redemption notice and a notice dated 6 October 2016 was issued together with a notification for sale.
6. Faced with an imminent sale of the suit property, the plaintiff filed this suit on 24 November 2016 through a plaint. In it, he pleaded that he was unable to pay the monies owed because his family suffered illness. In the suit, as originally filed (for there was a subsequent amendment) he sued Equity Bank Limited and Antique Auctioneers (also sometimes referred to herein as the auctioneer) as 1st and 2nd defendants, seeking orders of injunction to stop the intended sale, an opportunity to enlarge the repayment period, costs and any other relief deemed fit. Together with the suit, the plaintiff filed an application for injunction to stop the intended sale, and interim orders were given. The bank filed a



reply to the application urging that it be dismissed. The parties appeared before Mutungi J on 8 March 2017. The good judge looked at the matter and clearly did not see the need of arguing the application. He made the following orders –

- (1) That the plaintiff do pay a sum of not less than Kshs. 3,000,000/= to the 1st defendant in the next 90 days from 8 March 2017.
 - (2) That the 1st defendant should accommodate the plaintiff to enable him service the loan by way of regular agreed instalments.
 - (3) That the matter be mentioned on 15 June 2017 to ascertain the status and for further directions and orders on the pending application.
7. The matter was subsequently mentioned on 11 July 2017 when counsel for the 1st defendant informed court that the plaintiff had only deposited a total of Kshs. 1,927,010.60/= which fell short of the Kshs. 3,000,000/= ordered and she asked for a discharge of the orders. The court obliged by discharging the interim orders and gave liberty to the bank to realize the security.
8. The 1st defendant continued from where she had left and instructed the 2nd defendant to sell the suit property. The 2nd defendant placed an advertisement in the Daily Nation of 4 September 2017 informing the public that the suit property would be sold by way of public auction on 22 September 2017. Alarmed by the unfolding events, the plaintiff filed another application dated 21 September 2017, beseeching the court to yet again stop the intended sale. This time, Mutungi J, was not moved to issue an order of injunction. He reminded the plaintiff that he had earlier accorded him some leeway which he did not take advantage of and in light of that he could not be able to issue a second order of injunction. It is not clear what took place on 22 September 2017, suffice to state that no sale took place.
9. The parties subsequently appeared in court on 16 January 2018 when counsel for the plaintiff informed court that the plaintiff had now deposited Kshs. 3,000,000/= and asked for 60 months to clear the balance. This offer was not accepted by the bank which insisted on proceeding to auction the suit property. The court was not persuaded to indulge the plaintiff given his earlier default, and was cognisant that it could not rewrite the contract of the parties given the insistence by the bank in obtaining its pound of flesh, but nevertheless advised him to negotiate with the bank. It is either negotiations never took place or were not fruitful as the bank proceeded to instruct the 2nd defendant to proceed with the sale. The 2nd defendant placed an advertisement in the Daily Nation of 21 February 2018 advertising that the suit property would be sold by way of public auction on 7 March 2018 at their offices, Blessed House, 2nd Floor, Door No. 4, Ngara Road, Opposite Ngara Post Office, Nairobi.
10. What took place on 7 March 2018, the day of the auction, is subject of great controversy and is the bedrock upon which the suit is now founded. The bank and the auctioneer assert that a public auction that was above board took place and the property was rightfully sold to the 3rd defendant. The plaintiff hotly contests this, contending that no auction took place, and asserts that the 3rd defendant did not bid at all. He insists that whatever took place was a fraud. We will go into the details of that a little later; for now, let me just say that the suit property was transferred, by way of transfer by chargee, to the 3rd defendant and she became the registered proprietor. She charged the property back to the 1st defendant so as to be allowed some financial accommodation to finance the purchase, took possession of the property, made some renovations to complete the same, and put tenants therein. In essence since the day of the disputed auction, the suit property has been in the hands of the 3rd defendant.
11. Now that there was a third party in the picture, the plaintiff proceeded to amend his plaint on 9 December 2019 to include the new registered owner as the 3rd defendant. He also made additional pleadings to assail the sale. He pleads the following particulars of irregularity and fraud :



- a. Selling and transferring the property without due process.
 - b. Selling the property below the market value.
 - c. Selling the property by private treaty without requisite notice.
 - d. Selling the property to the 3rd defendant who had no capacity and did not meet the conditions for purchase by auction as stipulated in the notice.
 - e. Collusion between the 1st and 2nd defendants to finance the 3rd defendant to purchase the property after 6 months from the date of the auction.
 - f. Selling the property with conflict of interest.
 - g. Selling the property without serving statutory/requisite notices to the plaintiff, the family and the tenants.
 - h. Purporting to issue a notice of termination of tenancy on a letter head.
 - i. Failure to issue a notice of termination of tenancy in the prescribed form.
 - j. Undervaluing the suit property.
 - k. Denying the plaintiff a right of exercising the equity of redemption.
 - l. Selling the suit property below its market value.
 - m. Failure to deposit the balance out of the sale in court or pay to the plaintiff.
 - n. Failure to pay the plaintiff the balance after recovery of the loan defaulted amount.
12. The plaintiff pleads that as a result of the foregoing he lost his lifetime investment of more than Kshs. 50 million, lost income that he would have received from rent, and lost sentimental value attached to the suit property. In the amended plaint, he asks for the following orders :
- i. A declaration that the sale and subsequent transfer and registration of the suit property by the 1st and 2nd defendants to the 3rd defendant was irregular null and void.
 - ii. An order of nullification and cancellation of sale, transfer and registration of the suit property in favour of the 3rd defendant.
 - iii. Refund of the balance of the market value of the suit property after recovery of the loan amount to the plaintiff.
 - iv. Costs of the suit.
 - v. Any other relief this court may deem just and expedient to grant.
13. The 1st defendant had earlier filed defence on 25 April 2019 which she kept faith in despite the amendment to the plaint. In that defence, she pleaded that the plaintiff failed to pay the loan as agreed, and also failed to make payment after being accorded opportunity by court. She pleaded that she proceeded to instruct the 2nd defendant to advertise and sell the property through a public auction. She contended that the disputed sale of 7 March 2024 was lawful and justified, and was of the view that the case of the plaintiff is overtaken by events.
14. The 3rd defendant appointed counsel and also filed defence. In it she pleaded that she was an innocent purchaser for value who participated in the auction process. She denied colluding with the 1st and



2nd defendants and asserted that she became a bona fide purchaser for value upon executing the Memorandum of Sale hence she is protected by Section 99 of the Land Act. She denied being party to any fraud. She added that the plaintiff's equity of redemption got extinguished when the property was sold to her. She asked that the suit be dismissed with costs. The plaintiff filed a reply to defence more or less joining issue, pleading that Section 99 of the Land Act is not applicable since the process used to acquire the property was fraudulent without following due procedure.

15. No appearance nor defence was filed by the 2nd defendant though in the course of the proceedings, counsel acting for the 1st defendant mentioned that she also acts for the 2nd defendant.
16. It is with the above background and pleadings that the matter proceeded for hearing.

B. Evidence of the Parties

17. The plaintiff testified as the sole witness in support of his case. He testified that he owned the suit property and wished to develop it with a five storey building. His money got exhausted when he got to the 2nd floor which led him to borrow money from the 1st defendant. He first took Kshs. 15 million, then a further Kshs. 5 million. He stated that he completed the development and tenants moved in save for one unit that needed some finishing. He testified that his mother fell ill and he also suffered challenges to his health which caused delay in repayment. He recalled filing the suit and also recalled the order of court which he did not fully comply with. He later learnt through a friend that the suit property had been advertised for sale. He testified that he was in Nairobi on 7 March 2018 and he proceeded to the offices of the 2nd defendant. He stated that he met a lady receptionist and there were some people moving around. He asked the receptionist whether there was an auction that day and he was informed that he will need to talk to the one who does auctions but was informed that they are all away in the field. He pointed at the conditions of sale noted in the advertisement of 21 February 2018 which inter alia required one to deposit Kshs. 500,000/= in order to participate in the auction and stated that he has not seen any documentation of any person who deposited this amount. He further pointed at another condition which required the successful bidder to pay 25% in cash or banker's cheque at the fall of the hammer. He stated that he has not seen any proof of payment made at the fall of the hammer. He insisted that there was no auction anyway on that day since he was there in the offices of the 2nd defendant. He later accessed his loan account and found Kshs. 9 million deposited on 12 March 2018 which was five days after the date of auction. He asserted that the person who purported to buy the property did not meet the conditions of sale as there was no deposit of Kshs. 500,000/= and no 25% paid at the fall of the hammer. He referred to the Memorandum of Sale displayed by the defendants which indicated Kshs. 10 million paid on 9 March 2018 and that the balance would be paid on 7 June 2018. According to him this was improper as the newspaper advertisement required that the balance be paid within 30 days. He added that no valuation of the property was done before the sale in order to ascertain the true value and that the last valuation was one done in 2016. He did state that he engaged a valuer who valued the property at Kshs. 50,000,000/=. He continued that he was never called to be informed that the property was sold, how much it fetched, or whether there was any balance left over and neither was he served with the auctioneer's fees. He stated that nothing has been displayed to show who participated in the auction, who bid, and what amount. In his opinion the exercise was not free or fair. He asserted that he was ripped off and that whatever was done was intended to defraud him of the property. He wanted the sale cancelled and the property returned to him or alternatively he be paid the value of the property and he can then repay back the bank its money.
18. Cross-examined, he testified that he was in the offices of the 2nd defendant from 11am to 2pm to see if the property will be sold and no auction took place. He added that the receptionist also told him that there was no auction to be conducted on that day. It was on 12 March 2018 that he saw Kshs. 9 million



check into his account despite the Memorandum of Sale indicating the sum of Kshs. 10 million. He thought that if there was a sale he would have seen money reflect on 7 March 2018. He got no money as excess of what was received in the auction. He insisted that the Memorandum of Sale showing that the property was sold for Kshs. 29 Million was fake. He testified that the 3rd defendant did not put any security bid to be entitled to participate in the auction and further that no money was paid on 7 March 2018. He adverted that he was never allowed to exercise his right of redemption and that he had planned to sell a property in Nairobi to pay off the loan. He was categorical that the conditions of sale were never followed and neither was the balance paid in accordance with the conditions. He admitted not presenting documents to show how much rent he received. He was not aware of any improvements done by the buyer which would hike its value after the sale.

19. In re-examination he pointed out that the valuation report shown to him during cross-examination, one dated 26 February 2018, was one done by the 3rd defendant and not the bank. He asserted that he had a problem with the procedure followed to sell.
20. DW – 1 was Vincent Wesonga. At the time that he testified, he was the Branch Manager of the 1st defendant at its Luanda Branch. He was previously the Credit Manager at the Kisii Branch. He relied on a pre-recorded statement dated 15 May 2016 and supplemented it with oral evidence in court. In the written statement he elaborated the loan advanced to the plaintiff and his failure to pay as agreed. He explained that the plaintiff had two loan accounts for the charge and further charge being account numbers 45 (redacted) and 39 (redacted) while the repayments were being defrayed from a current account number 49 (redacted). He explained that all requisite notices were duly issued. He referred to the order to pay issued by Mutungi J which was not complied with and stated that as at 5 January 2018 the amount owing in loan account No. 45 was Kshs. 17,549,219.73/- and that in loan account No. 39 was Kshs.6,957,641.33/- thus the total amount owed was Kshs. 24,506,861.06/- . He testified that the property was sold and the balance released to the plaintiff. In court he testified that he was told by the auctioneer that the auction took place and the property sold to the 3rd defendant. He added that after the auction what remained after recovery of the loan was Kshs. 1,590,322/- which the plaintiff accessed.
21. Cross-examined by counsel for the plaintiff, he testified that spousal consent was obtained though he did not have it. He testified that notices were dispatched to the plaintiff through registered post. He testified that the 2nd defendant was appointed by a letter but he did not have the letter of instruction. He did not have any letter communicating the outcome of the sale to the plaintiff. He testified that they communicate through the auctioneer. He testified that the bank does not have a procedure of communicating about auction sales and does not communicate to the customer giving details of the sale and the amount raised. They would however communicate if the amount realized was short of the money owed. He did not witness the auction sale of 7 March 2018. He stated that an auctioneer lists the persons who attend and how much they bid. He did not have that information with him. He was aware of the conditions for sale which were displayed in the newspaper advertisement of 21 February 2018, that is deposit of Kshs. 500,000/= before bidding, and payment of 25% of the purchase price upon a successful bid. He was not aware if the purchaser had deposited the sum of Kshs. 500,000/= before bidding. He however stated that 25% was paid. The purchase price was Kshs. 29,000,000/= . He testified that Kshs. 9,000,000/= was received on 12 March 2019. He acknowledged that this was 4 days after the auction. He however stated that this was not late payment; his explanation being that an electronic money transfer (EFT) takes more than 3 days to reflect into an account. He was aware that 7 March 2018 was a Wednesday and 12 March 2018 was a Monday. He further explained that the money would not settle on a weekend and that is why it reflected on Monday. He however did not have the deposit form for the EFT. He could see that the condition of sale was that payment of 25% was to be made at the fall of the hammer. He could see that the Memorandum of Sale indicated that Kshs. 10



- million was paid by way of deposit to Equity Bank Limited but he stated that his record shows Kshs. 9 million paid, not Kshs. 10 million. He could see that the Memorandum of Sale was dated 9 March 2018 and there was no transaction on that day. He affirmed that they gave the 3rd defendant a loan to pay the purchase price. He testified that the 3rd defendant was their customer in Nairobi where she operated a business. He was not privy to how she obtained the loan to pay the purchase price. He did not have a valuation done before the auction though he insisted that one was done.
22. DW – 2 was the 3rd defendant. She also relied on a pre-recorded witness statement and gave oral evidence in court. In the witness statement, she stated that she saw the newspaper advertisement and got interested in buying the property. She engaged a valuer, Atrium Limited, to inspect and value it and she received a valuation report. She had understood the conditions of sale which were in the newspaper advertisement, including the need to make a refundable bond of Kshs. 500,000/= which she stated she paid. She attended the auction on 7 March 2018 at the offices of the 2nd defendant and made a bid of Kshs. 29,000,000/= and emerged the highest bidder. She proceeded to pay all requisite payments for the purchase. She continued to state that the property passed to her at the fall of the hammer and the plaintiff's equity of redemption got exhausted. On 4 September 2018 she obtained a certificate of lease in her name. She stated that at no point did she collude with the 1st and 2nd defendants. She stated that at the time of sale the property was largely vacant. The ground floor was being used as storage for construction materials; the first floor was partly occupied; the 2nd floor to the 5th floor were all vacant with critical facilities such as electricity, water and drainage, not in operation. She engaged Integrated Prime Consultants Limited to do for her a bill of quantities for finishing the building. She spent about Kshs. 14, 291,907.00/= to make the premises habitable and it is now fully occupied. In her oral evidence in court, she added that she paid the deposit of Kshs. 500,000/= through banker's cheque. At the auction, she stated that there were three or four other bidders and her's was declared the highest. She had savings of Kshs. 10 million in her account which she used to pay part of the purchase price and the 1st defendant financed the balance. She took about a year to renovate the premises.
23. Cross-examined by counsel for the plaintiff, she could not recall if she paid Kshs. 19 million (balance of purchase price after deducting Kshs. 10 million) by 7 June 2018 (i.e. 30 days of the auction date). She was shown the bank statement which indicates payment on 13 October 2018 and conceded that by 7 June 2018 the balance of Kshs. 19 million had not been paid. She did not have evidence of deposit of the Kshs. 500,000/= required to bid. She acknowledged that a transfer of Kshs. 9 million was made from her account on 12 March 2018. It was an internal transfer from her account to that of the plaintiff. She was making this payment towards 25% of the purchase price. She explained that after the auction, she spoke with the auctioneer and informed him that her money was in a money market fund; and that she needed time to redeem it and get it into her account. She testified that she could not have liquidated this money earlier because she did not know that she would win the bid. She got a letter of offer (to finance her) on 19 April 2018. She did not know when the bank disbursed money (balance of the purchase price) into the plaintiff's account. She was not clear whether she obtained title before the money was disbursed by the bank. She recalled paying Kshs. 9 million on 12 March 2018 and in October 2018 an amount of Kshs. 19 million was paid thus 28 million. She could not recall when the Kshs. 1 million was paid to make Kshs. 29 million. She could not explain how come the Memorandum of Sale reflected Kshs. 10 million as paid since what she first paid was Kshs. 9 million. She categorically denied being a beneficiary of fraud.
24. DW – 3 was Robert Waweru Maina. He is an auctioneer based in Nairobi and proprietor of Antique Auctions Agencies, the 2nd defendant. He testified that there was an auction in his office on 7 March 2018 which auction attracted two bidders, the 3rd defendant and another bidder by name Bonface. He testified that the earlier auction scheduled for 22 September 2017 at Kisii was not fruitful as it was



- disrupted by unruly people. That is how he scheduled another auction for 7 March 2018. He testified that the highest bidder met the conditions of sale and that is how he issued her with the Memorandum of Sale. The highest bid went up to Kshs. 29 million and it was accepted by the bank. He issued a Memorandum of Sale on 9 March 2018.
25. In Cross-examination, he was taken through the conditions of sale in the newspaper advertisement. He affirmed that one was required to make a refundable deposit of Kshs. 500,000/= payable to the auctioneering firm by banker's cheque. This requirement, he explained, was to put off people who only wish to attend and spoil the auction. He had another document with conditions of sale, which he produced as an exhibit, but which did not have this requirement. He acknowledged that what is in the newspaper is what the public would see. The other document would be given to those who visit the office to inquire. He testified that the 3rd defendant did not have a banker's cheque of Kshs. 500,000/= and indeed any amount of money before the auction. The second bidder, Mr. Bonface, had a banker's cheque of Kshs. 500,000/=. He nevertheless allowed the 3rd defendant to bid despite not having the banker's cheque. He testified that it was within his mandate to allow a person to bid with or without the banker's cheque. He testified that the decision to allow the 3rd defendant bid, without a banker's cheque, was not made by him alone. He testified that there was communication between the representative of the 1st defendant and her (3rd defendant's) bank. He stated that the bank representative at the auction confirmed that she (3rd defendant) was capable of buying the property and therefore requested him as the auctioneer to allow her to bid. This communication was not done in writing but was only verbal.
 26. He acknowledged that the other condition of sale required one to pay 25% of the bid in cash or banker's cheque at the fall of the hammer. He testified that the 3rd defendant made payment of 25% on 7 March 2018, i.e. date of auction, but he did not have any receipt or bank deposit made on that day. He eventually conceded that he did not get cash or a banker's cheque of 25% after the fall of the hammer as he advised the 3rd defendant to make payment directly to the bank. He denied that the plaintiff was present at the auction. He elaborated that in the auction room there were three persons, that is the two bidders, one bank representative by name of Julius Njoroge, and himself as the auctioneer.
 27. On the signing of the Memorandum of Sale, he testified that he got a call from the bank that the highest bidder had initiated a transfer of 25% through RTGS and he could sign the Memorandum of Sale. He asked the bank how much to put in the Memorandum of Sale, and the bank, through Mr. Julius Njoroge, told him Kshs. 10 million. By the time he signed the Memorandum of Sale he had not seen any document confirming payment. He stated that he was working under the bank's instructions. It was in court that he first saw the RTGS payment made on 12 March 2018. He acknowledged that the Memorandum of Sale was signed on 9 March 2018 though he refuted that there was irregularity. He stated that terms and conditions are allowed by creditors and there could be reason why they allowed the bidder to pay on 12 March 2018 and not on 7 March 2018. He stated that the bank did not tell him anything regarding the payment and his work was only to conduct the auction. He denied however that this was just paper work.
 28. Regarding valuation, he was aware that banks are required to value within one year of an auction. He did not have a valuation done in 2017.
 29. On his fees, he said that he took the same to the bank which approved and paid him.
 30. He insisted that what was conducted was a public auction and not a private treaty.
 31. The court also questioned him. He affirmed that the second bidder had a banker's cheque of Kshs. 500,000/= prior to the auction. His bid was one of Kshs. 28,950,000/=, a difference of Kshs. 50,000/=



as compared to the bid of the 3rd defendant. He stated that the bank refused to accept this bid of Kshs. 28,950,000/= as it was not the highest. He however acknowledged that this was the highest bid that was in conformity with the conditions of sale. He stated that if it was somebody not known to him or allowed by the bank, he would not have accepted the 3rd defendant to bid or even sell the property to her. He elaborated that he allowed her to bid because she did follow up on the property from 2017 and also because the bank said they have no problem with her bidding. He could not say ‘no’ because he worked under the bank’s instructions. He denied that preferential treatment was given to the 3rd defendant and denied fraud.

32. With the above evidence, the defendants closed their case. I invited counsel to make final submissions in writing which they did and I have taken them into consideration before arriving at my decision.

C. Submissions of Counsel

33. I note that in his submissions, Mr. Nyambati, learned counsel for the plaintiff, submitted that the 1st defendant never complied with issue of the notices under Section 96 of the Land Act and thus proceeded to sell the property irregularly. He also urged that there was no valuation pursuant to Section 97 of the Act. He added that the sale was not in conformity with the conditions of sale advertised in the newspaper. He also urged that there was non-compliance with Section 21 of the Auctioneers Act, Cap 256, and Rule 17 of the Auctioneers’ Rules. He submitted that the 3rd defendant is culpable under Section 99 (3) of the Land Act as she colluded with the 1st and 2nd defendants. He submitted that the plaintiff was entitled to damages of Kshs. 10 million. He further submitted that from the evidence it came out clearly that rent per month would be Kshs. 250,000/= and asked for 72 months as mesne profits.
34. For the 1st and 2nd defendants it was submitted that the plaintiff went into default and the requisite notices were issued prior to the sale. On the valuation, it was submitted that there had been a valuation report dated 27 September 2016, and given that the court had allowed the chargee to proceed with the sale, there was no need for a new valuation. It was pointed out that the said valuation returned a forced sale value of Kshs. 27,500,000/-. It was further submitted that the 3rd defendant had done a valuation dated 26 February 2018 before the sale which returned a forced sale value of Kshs. 24, 000,000/=. It was added that the plaintiff’s valuation of Kshs. 50 million came after the sale. It was further submitted that there was compliance with the Auctioneers’ Rules and that an auction did take place with two bidders. On the payment, counsel referred to the evidence of DW – 2 that an EFT would reflect after three days. On payment of the balance outside the 30 days it was submitted that this was not enough to invalidate the process. It was submitted that the plaintiff has already accessed the balance that remained. On the question of fraud, it was submitted that the threshold for fraud was not met. Counsel referred me to the decision in Ongori v Housing Finance of Kenya Limited & another (Civil Case 248 of 2018) [2022] KEHC 268 (KLR) (Commercial and Tax) to urge that any remedy of the plaintiff lies in damages as his equity of redemption got extinguished at the fall of the hammer. It was finally submitted that there was no prayer for damages for fraud.
35. For the 3rd defendant, it was submitted that the sale was proper and I was referred to Rules 15, 16 and 17 of the Auctioneer’s Rules. It was submitted that only the 3rd defendant met all the conditions of sale and the transfer of the property to her was regular. It was submitted that the 3rd defendant is a bona fide purchaser for value and that there was no fraud on her part. It was further submitted that Section 99 of the Land Act protects a purchaser and I was referred to the case Nationwide Finance Co. Ltd v Meck Industries Ltd, (2005) eKLR. It was submitted that a chargor’s equity of redemption extinguishes at the fall of the hammer.



D. Analysis and Disposition

36. I have considered all the above. It is patently clear from the prayers in the amended plaint that what the plaintiff impugns is the sale of the suit property to the 3rd defendant. He proceeds to seek a nullification of the sale and registration of the suit property in the name of the 3rd defendant. There is of course prayer (iii) which seeks a balance based on the market value and I would take that to be an alternative prayer. The sale is denounced on three points :
- i. That there was no notice;
 - ii. That there was no valuation;
 - iii. That there was no sale, and if there was one, it was improperly conducted;
37. I will canvass these three points and also determine what would be the consequences of a sale that does not conform with the Conditions of Sale, and the extent to which a buyer, at a public auction, is protected by Section 99 of the Land Act.
38. Before I delve into the issues above, there are some facts which are certainly not in dispute. It is not in contest that there was a charge and further charge of the property and that a total outlay of Kshs. 20 million was advanced to the plaintiff. It is also not in dispute that the plaintiff defaulted. It is further not in dispute that after he defaulted the plaintiff came to court for reprieve. He was granted relief but again he defaulted. Following the default the 1st defendant as chargee was thus within its rights to exercise its remedies under the Act.
39. The remedies of the chargee are set out in section 90 of the Land Act which provides as follows:-
90. Remedies of a chargee
- (1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
 - (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—
 - (a) the nature and extent of the default by the chargor;
 - (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and



- (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.
- (3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—
- (a) sue the chargor for any money due and owing under the charge;
 - (b) appoint a receiver of the income of the charged land;
 - (c) lease the charged land, or if the charge is of a lease, sublease the land;
 - (d) enter into possession of the charged land; or
 - (e) sell the charged land;
- (4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—
- (a) appoint a receiver of the income of the charged land;
 - (b) apply to the court for an order to—
 - (i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;
 - (ii) sell the charged land to any person or group of persons referred to in the law relating to community land.
- (5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.

40. From Section 90 (1) above we see that where a chargor is in default of payment and the default continues for one month, the chargee is entitled to serve him with a notice, to pay the money owing or perform his obligations. Section 90 (2) provides for what should be contained in the notice. Inter alia such notice is to outline the nature and extent of default. Where the default consists of non-payment of money, the notice needs to specify the amount that needs to be paid to rectify the default and must give a notice of three (3) months by the end of which the default needs to be made good.

41. From Section 90 (3) (e) above, it will be seen that one of the remedies of the chargee is the right to sell the charged property. This right, being in statute, is ordinarily referred to as the chargee's statutory power of sale. The manner of exercise of the power of sale is in Section 96 of the Act which is drawn as follows:

96. Chargee's power of sale

- (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.
- (2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.



- (3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—
- (a) the Commission, if the charged land is public land;
 - (b) the holder of the land out of which the lease has been granted, if the charged land is a lease;
 - (c) a spouse of the chargor who had given the consent;
 - (d) any lessee and sublessee of the charged land or of any buildings on the charged land;
 - (e) any person who is a co-owner with the chargor;
 - (f) any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
 - (g) any guarantor of the money advanced under the charge;
 - (h) any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
 - (i) any other persons as may be prescribed by regulations, and shall be posted in a prominent place at or as near as may be to the charged land.

42. From the above we see that a chargor is supposed to issue a 40 day notice pursuant to Section 96 (2). If there is non-compliance then the chargor will appoint an auctioneer and the Auctioneer then proceeds to comply with the rules provided in the [Auctioneers Act](#) for the conduct of auction. We will particularly look at Rules 15 – 17 of the Auctioneers Rules.

They provide as follows:-

15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

- a. record the court warrant or letter of instruction in the register;
- b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
- c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
- d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

16. Advertisement



- (1) An advertisement by an auctioneer shall, in addition to any other matter required by the court, contain—
 - (a) the date, time and place of the proposed sale;
 - (b) the conditions of sale or where they may be obtained;
 - (c) the time for viewing the property to be sold;
 - (d) in respect of movable property other than perishable goods and livestock, an accurate description of the goods to be sold and a statement as to whether or not they are to be sold subject to a reserve price;
 - (e) in respect of goods of a perishable nature or livestock an accurate description of the goods to be sold and of their condition and a statement as to whether or not they are to be sold subject to a reserve price;
 - (f) in case of immovable property all the information required to be contained in the court warrant or letter of instruction except the amount to be recovered and the exact amount of any reserve price.
- (2) Except as may be ordered by a court, advertisement by an auctioneer of a sale by auction of any property, movable or immovable, shall be by way of an advertisement in a newspaper, provided that in the case of perishable goods and livestock advertisement in a newspaper may be dispensed with if adequate notice to prospective bidders in all the circumstances can be achieved by radio or television announcement, or handbills or posters, or other means of communication.

17. Auction

- (1) Subject to Order 21, rules 62, 63, 65, 66, 68 and 69 of the Civil Procedure Rules (Cap. 21, Sub. Leg.) a public auction shall take place—
 - (a) of goods seized or repossessed under any contract or any written law between the hours of 10.00 a.m. and 6.00 p.m.; or
 - (b) in other sales between the hours of 10.00. a.m. and 10.00 p.m., and in either event—
 - (c) in a venue open to and accessible to the public, provided that it shall be lawful for an auctioneer to charge prospective bidders a reasonable sum for a sale catalogue or other list of lots for sale as a condition precedent to entry to the auction premises.
- (2) The auctioneer shall make reasonable arrangements for the identification of the items for sale by list or catalogue and by the allocation of lot numbers which shall so far as possible be indicated on the goods at the time of sale.
- (3) The auctioneer shall call out each lot for auction identifying the lot number and showing to bidders the lot for sale or in the case of immovable property identifying the lot for sale by reference to a map or sketch and shall invite bids on it.
- (4) The highest bidder shall be the purchaser subject to compliance with the conditions of sale.



- (5) The auctioneer shall, after selling the movable property, attaching goods or goods lawfully held under this custody, and for purposes of effecting transfer in favour of the purchase, file an application to the court which issued the decree or to any other competent court which is applicable.
- (6) An application under this rule shall be by motion by way of miscellaneous application, supported by an affidavit and may be heard ex parte.

43. From the foregoing, we can summarize as follows where there is default: The chargee issues a 3 month statutory notice pursuant to Section 90 (2) (b) of the Land Act. If despite the notice, default continues, he issues a 40 day notice to sell pursuant to Section 96 (2) of the Land Act. If the chargor does not make good his account and the chargee wishes to now sell the property, the chargee hands over to the auctioneer who issues a 45 redemption notice and a notification of sale in accordance with Rule 15 of the Auctioneers' Rules. The auctioneer will then advertise the property in accordance with Rule 16 of the Auctioneers' Rules. He should sell not earlier than 14 days after the first advertisement as called for in Rule 15 (e). The advertisement must have the conditions of sale as stipulated in Rule 16 (1) b). Pursuant to Rule 17 (4) the successful purchaser is the highest bidder subject to compliance with the conditions of sale.
44. These are simple and straightforward rules and I see nothing complicated. One last point before we look into whether the above was complied with is the issue of valuation. Section 97 (2) of the Land Act requires that 'a chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.' Under the Auctioneers' Rules, Rule 11 (b) (x), the letter of instruction should contain inter alia, 'the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.' We can therefore discern that a chargee is supposed to undertake a valuation and such valuation ought not to be older than 12 months of the date of sale.
45. Was the above followed?
46. On the notices, I have seen no issue with them. I in fact outlined the notices issued at the early stages of this judgment and I am persuaded that all requisite notices were issued and I need not dwell too long on this point. I also see no issue with the advertisements for sale. There was a first advertisement for the auction scheduled for 22 September 2017 which auction did not take off. There was the other advert for the sale of 7 March 2018. There is nothing wrong in these advertisements. The advertisement for the auction of 7 March 2018 contained the conditions of sale as required by Rule 16 (1)(b) of the Auctioneers' Rules and they were outlined as follows :
 1. All interested purchasers to view the property and verify all the details as these are not warranted by the auctioneers.
 2. A deposit of 25% must be paid at the fall of the hammer and or immediately after the acceptance of the bid by the chargee in cash or by banker's cheque and the balance within 30 days to the chargee.
 3. A refundable deposit of Kshs. 500,000 payable to Antique Auctions Agencies prior to the Auction date by banker's cheque only.
 4. The sale of the property is subject to the reserve price.
 5. The auctioneer has a right to reject a bid without giving any reason whatsoever.



47. It is thus clear from the foregoing that one needed to provide a refundable deposit of Kshs. 500,000/= to the auctioneer prior to the auction date by banker's cheque. There was also supposed to be paid a deposit of 25% at the fall of the hammer or immediately after acceptance of the bid, in cash or banker's cheque. Finally the balance was to be paid in 30 days. I cannot consider item 5 to be a condition of sale. An auctioneer cannot reject a valid bid without giving any reason. There is no law that supports that and we cannot encourage such practice. An auction must be conducted in accordance with the law and an auctioneer cannot put an illegal disclaimer and say that it is valid. It cannot be valid.
48. So what happened in our case? I am prepared to hold that an auction took place although the plaintiff refutes this. On how the sale proceeded it is not in question that the 3rd defendant had not made any banker's cheque of Kshs. 500,000/= prior to the auction date. The 3rd defendant had no proof of drawing any banker's cheque for this amount, or at all, and it was affirmed by the auctioneer that truly she had not made the said deposit. In essence she was not eligible to bid at the auction. Secondly, the 3rd defendant did not pay 25% of her bid after the fall of the hammer. She came with no bidding deposit and came with nothing to cover a 25% outlay in case she is the successful bidder. She was nevertheless allowed to bid and her bid accepted despite there being another bidder who had complied with the conditions of sale. Her bid was of Kshs. 29,000,000/=. Pursuant to the conditions of sale, she was supposed to pay 25% at the fall of the hammer which works out to Kshs. 7,250,000/=. You would expect a person prepared to bid up to Kshs. 7,250,000/= to walk into the auction room with this amount in form of cash or banker's cheque. The 3rd defendant had none. No money was even paid on that day. Instead, she made payment on 12 March 2018, which was five days after the auction. There was an attempt by DW -1 to allege that this money was by EFT and that it takes three days to reflect. That was a blatant lie and I wonder why DW -1 would wish to take us round in circles on that unless it was to cover up an illegality. The 3rd defendant herself stated that she made the transfer from her own account on 12 March 2018 and this was an internal transfer from her account to the loan account of the plaintiff. It is not true as tried to be insinuated by DW-1 that there was payment on 7 March 2018 which then reflected on 12 March 2018. The amount transferred was Kshs. 9,000,000/=. But then you wonder, if by 12 March 2018, not a coin had been received by the bank, why would there be a Memorandum of Sale prepared on 9 March 2018? There was no sale that took place on 9 March 2018. Further, that Memorandum of Sale provides that a deposit of Kshs. 10 million has been paid by way of deposit to the bank. The truth of the matter is that there was no deposit that was made on 9 March 2018. The Memorandum of Sale was false. To his credit, the auctioneer appeared honest to me. He said that he was instructed by the bank to sell the property to the 3rd defendant and was also instructed by the bank to write the Memorandum of sale and insert the figures therein. This was nothing but a cover up by the bank to try and purport that the 3rd defendant had paid some money on 9 March 2018 when in fact no money had been received by the bank at that time. Not even Kshs. 10 million was paid as a first deposit as indicated in the Memorandum of Sale. What was paid was Kshs. 9 million and it was paid on 12 March 2014. The next payment made was of Kshs. 1,000,000/= on 26 March 2018. It is at 26 March 2018, that Kshs. 10 million, reflected in the Memorandum of Sale, was made. That Memorandum of Sale is a fraud and does not reflect the transaction that took place on 7 March 2018.
49. Let us proceed. The conditions of sale provided that the balance of the purchase price was to be paid within 30 days. It follows that the amount was to be paid on or before 6 April 2018. This is not what happened here. The 3rd defendant did not make any payment within 30 days. In fact, the 3rd defendant did not have sufficient money to pay the bank within the provided 30 days. She now started negotiating with the bank for financing to buy the property. Even then, no financing came within 30 days. The money was eventually paid on 13 October 2018, which was more than 7 months after the auction.



50. We have already seen that Rule 17 (4) of the *Auctioneers Act* says that it is the highest bidder who has abided by the conditions of sale who shall be declared the purchaser. The 3rd defendant did not abide by the conditions of sale. She cannot therefore be said to be a purchaser at all. She ought not to have been declared a purchaser at the auction.
51. The next question is whether she is protected under the law. I was referred to Section 99 of the *Land Act* which provides as follows :
99. Protection of purchaser
- (1) This section applies to—
- (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
- (b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
- (2) A person to whom this section applies—
- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
- (b) is not obliged to see to the application of the purchase price;
- (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.
- (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.
- (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.
52. I was told that the equity of redemption got extinguished once the hammer fell and that the 3rd defendant is protected by Section 99. I do not agree. Section 99 presupposes a bona fide purchaser. I have already shown that the 3rd defendant does not qualify to be called a purchaser at all. The definition of purchaser is the highest bidder who has complied with the conditions of sale. If you did not adhere to the conditions of sale, you cannot pretend to be a purchaser, leave alone bona fide purchaser. Even then, Section 99 does not avail blanket protection to all purchasers. A purchaser is excepted from protection “in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.” Therefore if a purchaser has actual or constructive notice of fraud, misrepresentation or other dishonest conduct on the part of the chargee, such purchaser is not accorded protection by the law.
53. I have gone through the case of *Ongori v Housing Finance of Kenya Limited & another and Nationwide Finance Co. Ltd v Meck Industries Ltd*, (2005) eKLR that were cited by the defendants but those cases are clearly distinguishable. In *Ongori vs Housing Finance of Kenya Limited & Another*,



the court held that the auction was proper. There had been an allegation in that case that 25% of the purchase price was not paid on the auction date but it was shown that the said amount was duly paid. Thus the court was considering an auction that had been held regularly which is not the case here. In *Nationwide Finance v Meck Industries*, the court found that the buyer was an innocent purchaser and any irregularities could not be visited upon him. This is not what we have in our case.

54. In the instance of our case, there was fraud, misrepresentation, and dishonest conduct at least in the form of collusion. It cannot be said that the auction sale that took place was above board and not a fraud. It was a purported auction skewed at all levels to favour the 3rd defendant and rule out any other potential buyer of the property. There is fraud and/or misrepresentation in the Memorandum of Sale. There was clear dishonest conduct on the part of the bank. Importantly, the 3rd defendant had actual notice of all these things. She in fact was a very active participant in the fraudulent sale. She knew that she had not made the bidding deposit of Kshs. 500,000/= but still went ahead to bid. She knew that she did not have a 25% deposit at the fall of the hammer. She signed a false Memorandum of Sale purporting that she paid Kshs. 10,000,000/= on 9 March 2018 when in fact she had not paid a single cent. She knew that what she paid was Kshs. 9,000,000/= five days after the auction but still proceeded to finalize the sale. The bank knew, and the 3rd defendant also knew, that the balance was to be paid within 30 days, or else the sale be nullified. The bank opted to close its eyes and accept payment 7 months later. The 3rd defendant of course participated in all this. She even applied to be financed. She had full notice of all that was going on and she was a full and willing participant. She participated in the knowledge that she stood to benefit from the preferential treatment that was being given to her. She cannot be protected by Section 99 of the Act. She is in fact in the same shoes as a registered proprietor who acquired title pursuant to the vitiating factors outlined in Section 26 of the [Land Registration Act](#) which provides as follows :

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

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

55. From the above, it will be seen that a title procured through fraud or misrepresentation, or a title procured illegally, unprocedurally, or through a corrupt scheme is impeachable. The title of the 3rd defendant traverses all the vitiating factors.

56. It cannot be urged that where one purchases land in an auction, despite the illegality of the auction, then the buyer is nevertheless protected. If the auction is void for being an illegality, it cannot vest good title on a purchaser. This was appreciated in the case of *Musk Deer Limited vs Benjamin Kipkurui & Another* (2018) eKLR . An auction sale was purportedly conducted by the local authority but it was for all intents and purposes and illegal sale. The appellant claimed that he is protected as an innocent



purchaser for value without notice. The court set aside the sale as it was void. On appeal, the Court of Appeal held that the sale was void, and that being the case, the sale could not entitle the purchaser to proprietorship the innocence of the purchaser notwithstanding. The court observed as follows

The last issue was whether the Judge erred by failing to find the appellant was an innocent purchaser for value of the suit premises without any notice of defect in the title. This issue was not addressed by the Judge perhaps because he determined that due to the flawed process through which the title was transferred there could not have been a valid sale and transfer to an innocent buyer. Be that as it may, looking at the events that unfolded after the so called auction which was conducted on the 16th March, 2007. The appellant was supposed to pay the balance of the purchase price and they were informed by Mr. Meenye advocate acting for the 3rd respondent that it was supposed to pay the said balance by 15th April, 2007 according to clause 7 of the conditions of sale that were relied on by the appellant. Despite the fact that this was a court initiated sale, the appellant varied the terms and conditions of sale without reference to the court; also the advocate obtained a court order on the 19th April, 2007 to confirm and make the appellant an absolute owner when it had not paid the balance of the purchase price while misrepresenting the balance had been paid. The balance was paid on 25th April, 2007 after the property had been vested.

57. Given the illegalities, the court nullified the title of the appellant.
58. I started this judgment by pointing out that auction sales are an important element in the economic system. We must demand that auction sales be given the integrity that they deserve. The purpose of having auction sales with conditions of sale that are advertised is to ensure that all members of the public are given a level playing field, because bidding is a competitive process. It ceases being a fair process when one party is given preferential treatment. What happened in our case is extremely disturbing, especially given that the 1st defendant is one of the largest banks in the country. You would expect better from such an institution. It is sad that she failed. This was a clear case of rules being bent so as to allow the 3rd defendant get the property at terms that were comfortable for her yet uncomfortable for everyone else. If the bank was going to allow persons without a bidding deposit to bid, then they ought to have put that in the Conditions of Sale. If the bank was not keen to accept 25% at the fall of the hammer or was not going to insist to be paid within 30 days, it should have informed the whole world and put this in writing in the conditions of sale. The public make decisions to bid or not bid at an auction based on the conditions of sale. You cannot ward off some people from attending an auction with stringent conditions yet allow others who have not bothered to abide by the rules to bid and purchase. Such an auction would be bogus. The conditions of sale should apply to all, and as the law provides, it is the highest bidder who abides by the conditions of sale that is the purchaser. What happened in our case was not an auction; it was a total sham. It was a shame. The 3rd defendant was clearly a preferred purchaser. She was even financed by the bank 7 months after. Yet in all this scenario, there was in fact a purchaser who had for all intents and purposes followed the rules. He had his bidding deposit and made a good bid. The 2nd and 3rd defendants stole a march on him. That was grossly unfair. If they had no intention of holding a proper public auction they should not have hoodwinked members of the public to waste their time coming to a pre-arranged auction whose outcome had already been determined behind the tent. We must insist that auctions be ethical and not allow a few connected people to be given preferential treatment and override genuine and honest bidders.
59. To ask the court to allow such auction as that which took place in our instance will be to ask the court to rubberstamp an illegality. That, this court cannot do. I will proceed to nullify and set aside the purported auction sale which I hereby do. I proceed to cancel and nullify the title of the 3rd defendant. I further make an order to the Land Registrar, Kisii to rectify the register by deleting any entry made



subsequent to the plaintiff's further charge, including the transfer by chargee and the subsequent charge by the 3rd defendant to the 1st defendant, and reinstate the register as it was prior to the purported sale.

60. What should happen to the loan? The bank committed fraud. It cannot benefit from its own fraud. If we are to say that the plaintiff pays money that has accumulated after the period of the sale we will be allowing the bank to benefit from fraud. What I will order is that the amount that was due as at the time of sale be the amount due and owing to the bank at the time of this judgment. Any interest to the bank will accrue from that amount from the date of this judgment in accordance with the charge. In addition, the bank conducted and/or allowed the 2nd defendant who was its agent to conduct a fraudulent sale. I think this is a case that warrants an award of aggravated damages if only to send a message to banks and auctioneers that they must conduct themselves above board. In the circumstances of this case, considering the amount involved which was Kshs. 29,000,000/= I will make an award to the plaintiff in the sum of Kshs. 5,800,000/= being 20% of the amount involved, as exemplary damages payable to him by the 1st defendant. I consider that essentially the 1st defendant has taken the plaintiff 6 years back by its conduct. The bank was also benefiting from the property by doing business with the 3rd defendant using property that the bank knew was unlawfully acquired and she therefore must have hugely profited. This award of Kshs. 5,800,000/= will be reduced by the sum of Kshs. 1,590,322/= that was deposited into the plaintiff's account as the amount that was in excess after taking into account the purchase price thus Kshs. 4,209,678/=. And so that there is no need to execute for this sum this balance of Kshs. 4,209,678/= be credited directly into the plaintiff's account by the 1st defendant.
61. The 2nd defendant, as the auctioneer, was the professional here and he should have known better. There was a legal and public duty imposed on him to act fairly and ensure that the law is followed. He also failed. He cannot hide behind the claim that he was acting under instructions. It is demanded of him to follow the law and the rules laid down in the Auctioneers' Rules. His conduct has also brought pain and loss to the plaintiff. He must also have benefited from being paid fees for an auction that was not conducted in accordance with the law. I will order that he pays damages of Kshs. 500,000/= to the plaintiff. I trust that going forward he will learn that bending the rules cannot pay and that he must ensure that the law is strictly followed.
62. What about the 3rd defendant? She is no purchaser. She was a participant in the fraudulent and illegal sale. She cannot be allowed to benefit from her own fraud. I have already nullified the sale to her. From the time of this judgment, she must give vacant possession of the suit premises to the plaintiff in the condition that it is. She also must have received some income for the 6 or so years that she has been in the premises. To allow her to keep the monies would be to abet a fraud. A person such as the 3rd defendant can be motivated to participate in a fraudulent sale knowing that she will still benefit from the proceeds of income even where the sale is nullified. The valuation report produced by the 1st defendant indicates that the properties were being let at between Kshs. 18,000/= to Kshs. 22,000/= per month. There are 18 units in the premises, thus an income of Kshs. 324,000/- every month if we take the lower figure of Kshs. 18,000/=. The annual income is Kshs. 3,888,000/=. She has been in charge of the suit premises for the last 6½ years. Even if we ignore the half year, she has in essence benefited to the tune of Kshs. 23,328,000/=. This is income that the plaintiff would have been receiving if it was not for the illegal sale. I will take it that she paid 10% rental income tax of kshs. 2,328,000/=. This will reduce the income to Kshs. 20,995,200/=. I will be kind to her and assume that she renovated the premises at Kshs. 14,291,907/= and that the plaintiff will benefit from this renovation. There will still be an extra Kshs. 6,703,293/=. I will grant the plaintiff this money as mesne profits payable by the 3rd defendant. As I



have said the court must endeavour to obliterate any benefit that is received through fraudulent and illegal conduct.

63. All monies awarded to the plaintiff to attract interest at court rates from the date of this Judgment.
64. One may ask what happens to the loan offered by the bank to the 3rd defendant? That is a matter that the two, who colluded to stage manage a fraudulent sale, will square out amongst themselves. They got themselves into the mess they are in; let them untangle themselves from it in their own way. It would appear that they know each other very well. I am sure they will sort themselves out.
65. There was an issue raised regarding valuation and it was said that the auction sale proceeded without a valuation. This is true. There was no valuation report that was less than 12 months old at the time of auction despite the law requiring one.
66. But I need not dwell too much on this point as I have nullified the sale on more serious grounds, and nothing turns on the lack of a valuation report.
67. The last issue is costs.
68. The plaintiff will have costs jointly and/or severally against the defendants.
69. Judgment accordingly.

DATED AND DELIVERED THIS 3RD DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :-

Mr. Okemwa h/b for Mr. G.M. Nyambati instructed by M/s G.M Nyambati & Co. Advocates.

Ms. Magoma for the 1st and 2nd defendants instructed by M/s Meritad Law Africa LLP.

Ms. Achieng' h/b for Mr. Wanyama instructed by M/s Manyonge Wanyama & Co Advocates.

Court Assistant David Ochieng.'

