



Kabundu & another v Equity Bank Kenya Ltd (Environmental and Land Originating Summons E096 of 2022) [2024] KEELC 13735 (KLR) (2 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E096 OF 2022
LL NAIKUNI, J
DECEMBER 2, 2024**

BETWEEN

PATRICK KABUNDU 1ST PLAINTIFF

LINDA MSHAI 2ND PLAINTIFF

AND

EQUITY BANK KENYA LTD DEFENDANT

JUDGMENT

I. Preliminaries

1. This is a Judgement pertaining to a suit instituted by Patrick Kabundu and Linda Mshai, the 1st and 2nd Plaintiffs herein against Equity Bank Kenya Limited, the Defendant herein. Initially, it was by way of Originating Summons on the 1st August, 2022 filed on 26th August, 2022 premised under the provision of Sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act, Cap. 21; Order 21 Rule 12, Order 37 Rule 4 of the Civil Procedure Rules 2010; Sections 90, 96 & 97 of the Land Act No.6 of 2012; Articles 22, 23, 40 & 159 of the Constitution of Kenya, 2010 and any other enabling law.
2. Upon filing of the Originating Summons and effecting of service, the Defendant did not respond. On 14th May, 2024 after confirming That service had been effected to the Defendant certified the matter to proceed on formal proof and whereby direction were taken under the provision of Order 37 Rules 11, 13 and 16 of the Civil Procedure Rules, 2010. The Originating Summons was converted to a Plaint while the Applicants and the Respondent to the Plaintiffs and Defendants respectively.
3. On 14th May, 2024, after confirming That all parties had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 25th June, 2024. It is instructing to point out That the Plaintiffs were acting in person and although Mr. Kabundu though a lay person, but appearing and testifying as PW - 1 he put up such a spirited, articulated and well organized



presentation. It was admirable indeed. PW – 1 was heard as a formal proof on the same day and closed their case thereafter.

II. The 1st & 2nd Plaintiffs' case

4. From the filed pleadings, the Plaintiffs claimed determination of the actual amount owing and the subject actual amount to be liquidated in instalments together with the current market valuation and further breach of Order No. 2 and 3 of the Decree issued by Hon. Justice P.J. Otieno dated 8th May, 2020. Furthermore, the determination of the following questions:-
 - a. Whether the Defendant has complied with Orders No.2 of the Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P.J. Otieno directing That the parties revert to the position before the auction sale without necessarily affecting the debt?
 - b. Whether the Defendant has complied with Orders No. 3 of the Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P.J. Otieno directing as follows: -
 - i. That the Defendant herein issues and serve due notices of sale to the Plaintiffs.
 - ii. That the Defendant causes the suit property to be duly valued as at the date of issuance of the said notice.
 - iii. That the Defendant to ascertain a reserve price on the subject valuation
 - c. Whether the Defendant's agents' public auction on 23rd February 2022 was based on a nullity having not complied with the Orders and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P.J. Otieno?
 - d. Whether the actions of the Defendant and its agents following the aborted auction in exercise of statutory power of sale based on the defective Statutory Notice dated 11th November 2021, was in breach of the Orders and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P. J. Otieno?
 - e. Whether the Defendant complied with the Orders and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 That they disclose to the Plaintiff the actual outstanding figure for purposes of settling the loan?
5. The Original Summons was based on the following grounds on the face of it and those of the 15 paragraphed supporting affidavit sworn by Patrick Kabundu, the 1st Plaintiff/Applicant sworn on the same day with the Originating summons where he averred: -
 - a. The Plaintiff took a bank loan of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) from the defendant on 2nd April 2013 annexed annexed in the affidavit and marked as “K – 1” was a charge dated 2nd April 2013.
 - b. On 18th August, 2014 the agents of the defendant advertised the suit property Plot No.1996 1/MN for sale by way of public auction on 19th August, 2014. Annexed in the affidavit and marked as “K – 2” was Notification of sale dated 20th June 2014.
 - c. On 8th May, 2020 the High Court in Civil Suit No. 107 of 2014 set aside the above subject auction and ordered as follows:-
 - i. The court hereby set aside the auction of the suit land Plot No. LR MNI/1996 pursuant to a public auction dated 19th August 2014.



- ii. The parties for back to the position That they were in before the impugned auction sale without affected the debt.
 - iii. The 1st Defendant still owed, its retains the right of sale and therefore they had been a conceded default, it may proceed with the relalization provided it issues and serves due notices of sale and causes the suit property to be valued and a reserve price ascertained.
 - iv. The Plaintiff deserved and was awarded the cost jointly and/or severely against both the 1st and 2nd Defendant. Annexed in the affidavit marked as K3 was decreed by Justice P.J. Otieno dated 8th June, 2020.
- d. On 13th October, 2021 Equity Bank (K) limited wrote to Purple Royal Auctioneers with instruction to issue Statutory Notice to recover a sum of Kenya Shillings Sixteen Million Four Sixty Nine Thousand Four Fifty Eight and Thirty Cents (Kshs. 16,469, 458.30/=) in breach of High Court Civil Suit 107 of 2014 Decree. Annexed in the affidavit marked as “K – 4” was instruction of statutory Notice dated 13th October 2020.
 - e. On 11th November, 2021 Purple Royal Auctioneers the agent for the Defendant served a Notification of sale to the Plaintiff with a valuation of a sum of Kenya shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=) as at 5th August, 2014 in breach of High court civil suit Number 107 of 2014 Decree. Annexed in the affidavit marked as “K – 5” was a notification of sale dated 11th November 2021.
 - f. On 15th January, 2022 the plaintiff wrote to Equity Bank Debt Recovery Unit stating the following: -
 - a. There was no current valuation report as Ordered or Decreed by the court despite the defendant purporting to use the 2014 valuation in breach of the Court Decree.
 - b. The amount to be recovered as per the letter of instruction was a sum of Kenya Shillings Sixteen Million Four Sixty Nine Thousand Four Fifty Eight and Thirty Cents (Kshs. 16,469,458.30) in breach of the Court Decree dated 8th May 2020 whereas the decree directed parties to revert to the position before the impugned auction.
 - c. The foundation of the impugned auction was annuity for breach of the Decree dated 8th May,2020 purporting to issue a 45 - day Notice on 11th November 2021 in breach of the Court Order/Decree for failure to revert to the figure directed by court and the current valuation. Annexed in the affidavit marked as “K – 6” was the Plaintiff letter dated 15th January 2022.
 - g. The Plaintiff's attempts to renegotiate with the Defendant on the most appropriate terms of servicing the loan arrears have not been fruitful hence the current suit. Refer to the plaintiff's letter dated 15th January 2022 as follows: -
 - a. Request for invitation for a meeting to agree on the actual figure and interest as per the Decree.
 - b. Request for the parties herein to undertake a current valuation through a preferred valuer.
 - c. To design a repayment formula towards servicing the debt arrears by mutual agreement between the parties.



- h. That notwithstanding the Plaintiffs’ attempt to negotiate with the defendant through their agents Purple Royal Auctioneers, the defendant proceeded with the public auction on 23rd February 2022 in breach of the court Decree dated 8th May 2022; annexed in the affidavit marked as “K – 7” the Daily Nation newspaper Public Auction Announcement.
 - i. On 14th May 2022 the defendant instructed auctioneers, one being Sure Auctioneers, with intent to the exercise of Statutory power of sale over the suit property Title No. LR.1996 (ORG NO 1469 /41) Registered in the name of Patrick Mukiri Kabundu despite having been served with the Court Order/Decree dated 8th May 2020 which amounted to a breach of the said Decree. Annexed herein marked as K8 instruction to agents Auctioneer dated 14th May 2022.
 - j. The Plaintiff stated That he was not served with any further written notice after 23rd February 2022 public auction before the Defendant could exercise its statutory power of sale again, which was on the foundation of a nullity in law and breach of Decree dated 8th May 2020.
 - k. The Plaintiffs further stated That to date he was not aware of the actual payoff amount and interest in the outstanding subject loan as the same is disputable by both parties.
 - l. The Plaintiffs hereby prayed That the Court Orders the defendant to file the actual owing figure in line with the Decree dated 8th May 2020.
 - m. The Plaintiffs were willing to offer the property Plot 491/X1/ Mombasa Tudor under his management which draws a monthly rent of a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000/-) as a mode of payment by installment whereas the bank can appoint a reputable estate agent to manage the four flats each with a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) per month totaling to a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000/-) per month and collect rent for purposes of servicing the loan balance thereof until the loan was cleared.
 - n. The Plaintiffs stated That proceeds from two of the remaining flats totaling to a sum of Kenya Shillings Fourty Thousand (Kshs.40,000/-) would be left under the management of the plaintiff for maintenance and repairs and rate payment
- 6. The Plaintiffs/ Applicants for the reasons whereof prayed for Judgment against the Defendant/ Respondent for orders:-
 - a. That the Honourable Court be pleased to order a permanent injunction restraining the Defendant by themselves, their agents and /or servants from selling by auction the suit property known as Plot Number 1996 1/MN Mombasa County.
 - b. That the Honourable Court be pleased to issue a declaration That the Statutory Notice issued by the Defendant’s agents PURPLE ROYAL AUCTIONEERS dated 11th November 2021 of Sale LR. No. 1996 1/MN Mombasa is null and void for being in breach of the Order and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P.J. Otieno.
 - c. That the Honourable Court be pleased to issue a declaration That the intended sale or intended exercise of statutory power of sale LR. No. 1996 1/MN Mombasa by agents or auctioneers of the Defendant in regard to the suit property above is null and void for being in breach of the Orders and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P.J. Otieno.



- d. That the Honourable Court be pleased to issue a declaration That the service of the Statutory Notice on the 2nd Plaintiff is null and void for being in breach of the Orders and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P. J. Otieno.
 - e. That the Honorable Court be pleased to order the Defendant to file an account of the actual outstanding loan balance in tandem with the Orders and Decree dated 8th May 2020 in High Court Civil Suit No. 107 of 2014 issued by Hon. Justice P.J. Otieno That the loan balance revert back to where it was before without affecting the debt.
 - f. That the Honorable Court be pleased to Order That the Plaintiff be allowed to liquidate the decretal sum herein by way of installment.
 - g. That the Honorable Court be pleased to Order the Defendant to appoint a reputable Real Estate Agency to take inventory of tenants in occupancy of the suit property, collect rent and manage the building whereas proceeds from monthly rent of the four units of the proposed property would go towards the payment of the loan facility installment until the outstanding loan is cleared.
 - h. Any other relief this court might deem fit to grant.
 - i. Costs of this suit and interest
7. The Plaintiffs/Applicants testified as PW - 1 on 25th June, 2024 at 1 p.m. and he testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Kabundu (Acting in Person)

8. PW - 1 was sworn and testified in English language. He identified himself as Mr. Patrick Kabundu. He was a citizen of Kenya with all the particulars as stated in the national identity card. He adopted witness statement dated 1st August, 2022 and his supporting affidavit and the documents attached to the Originating Summons. They were eight in number from page 9 to 48 of their pleadings and the supporting affidavit of the Originating summons dated 1st August, 2022. He sought for the Court to grant the prayers as sought from the Originating Summons.
9. PW - 1 recalled That some time back in the year 2014, he chared his property known as Plot No. MN/1/1996 at Kisauni; he was owner of the property as per the certificate of lease issued to him in the year 2004. It was a confirmation of a grant of his property. He charged the property to Equity Bank on the 2nd April, 2013 for a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) as per the terms and condition on the repayment of a sum of Kenya Shillings One Hundred Thousand (Kshs.100,000/-) per month with effect from May 2013. He made several payments for months i.e. a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/-) but he started havin difficulties in repayment and he defaulted on 19th August, 2014, Equity Bank Limited the property to be sold through public auction – Messrs. Purple Auctioneers during which period, he got a person to purchase the property through private treaty but Equity Bank Limited did it. They proceeded with the sale.
10. He filed a suit HCCC No. 107 of 2014 trying to stop the public auction during That period, the judes were attending the annual colloquiem and when the filed reached the judge – he directed That it be transferred to Mombasa. He amended the Pleadings and brought it against Equity Bank of Kenya. The Court granted the injunctive orders and they proceeded with but by this time the property had been sold to a third party who was not a party to the suit. They sold the property for a sum of Kenya Shillings Six Million (Kshs. 6,000,000/-).



11. PW - 1 sought to set aside the public auction. They had not done the current valuation contrary to the provision of Section 97 of the *Land Act*. At page 35 and 36 of his bundle in the decree; the Court cancelled the Auction on 8th May, 2020. He visited Equity Bank Ltd and they had informed him That he owed them a sum of Kenya Shillings Sixteen Million Four Hundred and Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469,458.30/=) As part of the decree the Court had directed the property revert back to the date of selling the property which was a sum of Kenya Shillings Five Million Nine Hundred Thousand (Kshs. 5,900,000/-) as the property had not been transferred nor registered. He tried to engage the bank but they refused to engage him.
12. PW - 1 confirmed with reference to the letter to Equity Bank at pages 44, 45 and 46 dated 15th January, 2022; they suggested That he continued paying but Equity Bank Limited issued a statutory notice to sell the property in page 51 giving a figure of a sum of Kenya Shillings Sixteen Million Four Hundred and Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents Kshs 16,469,458.30/-). They used an old valuation as per 5th August, 2014. The bank refused and PW - 1 served them with the decree. He visited the public auction but luckily nothing took place. Hence he decided to file the suit seeking the orders as stated. PW - 1 offered to be paying in installments until completion of the loan. He wished to be granted the orders as prayed in his pleadings.
13. PW - 1 stated That he was in occupation of the suit property as it was his matrimonial property. He was of the view That he owed Equity Bank Limited of a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/-) as a proposal which included interests and other auxiliary expenses.
14. The 2nd Plaintiff stated That she fully supported what the PW - 1 had stated. PW 1 told the court That he would undertake to file the submissions and offer to make payments in installments.

III. Submissions

19. On 25th June, 2024, immediately after the closure of the Plaintiffs/ Applicants', the Honorable Court directed the parties to canvass the originating summons through written submissions. Thereafter, on the 19th September, 2024 the Applicants having fully complied and the Honorable Court reserved a date for delivery of Judgement on 22nd October, 2024 accordingly.

A. The Written Submissions by the 1st & 2nd Plaintiffs.

19. In support of the originating submissions dated 1st August 2022, the 1st and 2nd Plaintiffs acting in person filed their written submissions. Mr. Kabundu commenced by providing the Court with a background of the matter. He stated That they urged the Court to grant them the afore - stated reliefs. He submitted That on 2nd April 2013, they charged PLOT MN/1996 at Kisauni to Equity Bank Limited for a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=). From That time, they were paying a monthly repayment of a sum of Kenya Shillings One Hundred Thousand (Kshs 100,000/=) per month. Indeed, they made several payments. However, they started defaulting in payments on 19th August 2014.
20. As a result, the Plaintiffs managed to get a buyer of the suit property to purchase it through private treaty. But the Defendant ignored this proposal and proceeded with the sale and That made the Defendant to sell the suit property through public auction by Purple Royal Auctioneers for a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000/=). This led the Plaintiffs to file a civil suit - HCC No 107 of 2014 whereby they prayed to stop the public auction but without success. Eventually, the Plaintiffs managed to amend their pleadings and court granted them temporary injunctive orders for setting aside the public auction. He referred Court to pages 35 and 36 of the originating summon



- dated 1st August 2022 being a Decree of the court which cancelled the public auction take took place on 8th June 2020.
21. The 1st Plaintiff informed Court That he visited Equity Bank Limited credit section. While there, he was informed That they owed them a sum of Kenya Shillings Kenya Shillings Sixteen Million Four Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469,458.30/=). But according to him this was in contraction to the Court documents. That as per the Court Decree it directed That the property loan owed reverted back to the date of selling of the property which was at a sum of Kenya Shillings Five Million Nine Hundred (Kshs. 5,900,000/=) as the suit property had not been transferred. It was still in the names of Patrick Kabundu. The suit property was their residential and matrimonial home where they still occupied today.
22. He referred Court to his letter dated 15th November 2022 to the Defendant on pages 44, 45 and 46 of the originating summons which simply read as follows:-
- a) There was no current valuation report as ordered or decreed by the court but you purported to use the 2014 valuation was in breach of the Decree.
 - b) The amount to be recovered as per your letter of instructions was 16,469,458.30 which is breach of the court Decree dated 5th May 2020 as the decree directed That parties revert to the position before the auction which was as per written witness statement of Ms. Lydia of Purple Royal Auctioneers being Ksh. 5,926,202.40 which was disputed by myself
 - c) That the auction foundation is anality for breach of a decree dated 8th May 2020 purported to issue a 45 days' Notice on 11th November 2021 on the foundation in breach of the court Order/ Decree for lack of reverting to the right figure as directed by the court and current valuation.
24. He submitted That on 11th November 2021 Purple Royal Auctioneers purported to issue a Notification of Sale under instruction from the Defendant claiming an outstanding of Kenya Shillings Sixteen Million Four Hundred and Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469, 458.30/=) as per 13th October 2021 with the Auctioneer's fees of a sum of Kenya Shillings One Hundred and Fifty Seven Thousand (Kshs. 157,000/=) which he argued was in breach of Decree direction e.g No current valuation report and produce a valuation for year 2014 and 2022. He averred That the Defendant purported to charge an outstanding loan of Kenya Shillings Kenya Shillings Sixteen Million Four Hundred and Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469,458.30/=) in stead of Kenya Shillings Five Million Nine Hundred Thousand (Kshs. 5,900,000/=) which was in breach of Decree dated 8th June 2020 and issued on 10th January 2022.
25. PW – 1 stated That on 11th November 2021, the Defendant purported to use an old valuation report dated 15th August 2014 and not a current valuation in breach of the court Decree. That on 9th February 2022 at 11:00 am at the office of Thafra Auctioneers situated at west Bank Villa Links road, Nyali next to Amal Plaza Mombasa Town public auction was to take place. That the notification of Sale of the 45 days' Notice was founded on a foundation in breach of court Decree which was in force still today. During hearing, the Honorable Court directed the Plaintiffs to give a proposal of repayment of the subject owned being a sum of Kenya Shillings Six Million Five Hundred Thousand (Kshs 6,500,000/=) including interest. The court directed That the Plaintiffs to undertake to file in Court the proposed offer on the repayment in installments. As a result, the Plaintiffs made the following proposal as stated herein below:-



Principal Amount	Interest Earned	
January	5,926,202.40x1.5%	88,893.04
February	6,015,095.44x1.5%	90,226.40
March	6,105,321.40x1.5%	91,579.80
April	6,196,901.20x1.5%	92,953.50
May	6,289,854.70x1.5%	94,347.80
June	6,384,202.50x1.5%	95,763.00
TOTAL INTEREST	554,363.50	
TOTAL PRINCIPAL +INTEREST	6,480,565.90	
Amount payable in six and half years (6 1/2)		
Amount payable (principal + interest) per month	83,084.17	
INTEREST PER MONTHS	7,107.22	
INTEREST PER YEAR	85,286.64	
LOAN REPAYMENT PER MONTHS	75,976.95	
LOAN REPAYMENT PER YEAR	997,010.04	
INTEREST CHARGED AT	18% PER ANNUM	

26. Indeed, for their case and during the hearing the Plaintiffs adapted their affidavit in support of the originating summons dated 1st August 2022 and the list of Documents which consisted of eight annexures listed from pages 9 to 48. Equally, the Plaintiff's Witness statements dated 1st August, 2022 were adapted and the exhibits as listed below:
- a. The charge from Equity Bank from page4s 9 to 30 – Plaintiffs' Exhibit 1;
 - b. A notification of sale issued by Purple Royal Auctioneer under instructions of Equity Bank dated 20th June 2014 - pages 31 to 34 – Plaintiffs Exhibit – 2;
 - c. The Decree of the High Court Civil Suit No. 107 of 2014 on pages 35 and 36 – Plaintiffs Exhibit no. 3.



- d. A copy of a letter of instruction by Equity Bank instructing Purple Royal Auctioneer to issue a statutory notice on pages 37 to 39 of the originating summons – Plaintiffs Exhibit No. 4.
 - e. A copy of the notification of sale by Purple Royal Auctioneer dated 11th November 2021 on pages 40 to 43 – Plaintiffs Exhibit No. 5.
 - f. A copy of the letter to Equity Bank by the Plaintiffs requesting for a meeting with the Plaintiffs to comply with directions of the Decree issued on 10th January 2022 on to pages 44 to 46 – Plaintiffs Exhibit No. 6.
 - g. A copy of the newspaper advertisement of the public auction dated 7th February 2022 on page 47 – Plaintiffs Exhibit No. 7.
 - h. A copy of a letter from Equity Bank to Sure Auctioneer subject intended exercise of statutory powers of sale over property title number LR 1996/I/MN in the name of Patrick Kabundu dated 14th May 2022 – Plaintiffs Exhibit No. 8.
27. To support their case, the 1st and 2nd Plaintiffs relied on the following three (3) issues for the Court’s consideration. These were:-
- a). Whether the Defendant and Purple auctioneer or Sure auctioneer while giving statutory notice to the Plaintiffs’ complied with the subject Decree dated 8th June 2020 issued on 10th January 2022 and its failure to comply makes the statutory notice void in law.
 - b). Whether the Plaintiff had met and/or certified the condition to warrant installment payments;
 - c). Whether the Plaintiffs were entitled to costs of the originating summons
28. The Plaintiffs submitted That it was not in dispute That on 10th January 2022 the Honorable Court through Justice P.J Otieno gave specific orders and directions in terms of the following:
- i). Before any statutory orders was to be issued Equity Bank was to undertake a current valuation.
 - ii). That the outstanding loan was to be returned to the outstanding figure as per the last auction which was(Kshs. 5,926,202.40/=).
29. On this end, the Plaintiffs referred Court to the notification of sale by Purple Royal Auctioneer dated 11th November 2021 on pages 40 to 43. He argued That clearly it was it in breach of the above orders dated 10th January 2022. They went ahead and used a valuation report of a sum of Kenya Shillings Six Million Five Hundred (Kshs. 6,500,000/=) which was done on 5th August 2014 being 6 years old report in breach of the above subject orders. He averred That notwithstanding the orders of the court, the Defendant reverted back the loan to a sum of Kenya Shillings Five Million Nine Hundred and Sixty Six Thousand Two and Two Hundred and Fourty Cents (Kshs.5,926,202.40/=). The bank went ahead and charged the outstanding loan to a sum of Kenya Shillings Kenya Shillings Sixteen Million Four Hundred and Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469,458.30/=) in breach of the above court orders. To buttress on this point, the Plaintiffs cited the case of “Commercial Bank of Africa Limited – Versus - Ndirangu (1990-1994) EA.70 (CAK)” where the Court held That a flagrant disobedience of a Court order, if allowed to go unchecked, would result in the onset of an erosion of Judicial Authority. Additionally, on the same point the Plaintiffs cited the cases of “Africa Management Communication International Limited – Versus - Joseph Mathengo Mugo & another Milimani HCCNO.242 of (2013)eKLR; Martin Nyaya Wambora & 4 others vs speaker of the senate & 6 others Keruguyo Petition No.3 of 2014(2014) eKLR whereby the Courts held That anything done in breach of or disobedience of a Court order was null and void in law.



He submitted That since Mombasa County Government breached the order, the Mombasa County Executive *Order No. 1 of 2014* was null and void.

30. The Plaintiffs on the applicable provision for payments of the decretal sums in installments was found under the provision of Order 21 Rule 12 of the Civil Procedure Rules, 2010. It provides as follows:
1. Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order That payment of the amount decreed shall be postponed or shall be made by installments with or without interest notwithstanding anything contained in the contract under which the money is payable.
 2. After passing of any such decree, the court may on application of the judgment debtor and with the consent of the decree-holder or without the consent of the decree holder for sufficient cause shown, order That the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or taking of security from him, or otherwise, as it thinks fit" (emphasis added)
32. Thus, he asserted That it was not in dispute That the Plaintiffs owed the Defendant the lender of the funds in dispute. However, due to hard times the Plaintiffs were not in the position of making the lumpsum payment of Kenya Shillings Six Million Five Hundred Thousand (Kshs. 6,500,000/=) which included principal plus interest and as proposed to outset the outstanding loan repayments in monthly payment being principal plus interest of Kenya Shillings Eighty Three Million Eighty Four Hundred and Seventeen cents (Kshs. 83,084.17/=) being monthly repayment of loan payment of Kenya Shillings Seventy Five Million Nine Seventy Six Hundred and Ninety Five Cents (Kshs. 75,976.95/=) monthly interest of Kenya Shillings Seven Million One Hundred and Seven and Twenty Cents (Kshs. 7,107.22/=) being a loan repayment of six and a half years (6 1/2).
33. They proposed to be making a monthly payments to be made on every 20th of the month to the Defendant's known account. As a precautionary measure, this matter to be mentioned every six months to produce monthly payment receipts and failure to meet those terms the court to direct the Defendant to issue a statutory notice with a current valuation. The Plaintiffs also proposed within the period of six months, if the Plaintiff would be able to raise a sum of Kenya Shillings Five Million (Kshs. 5,000,000.00/=) lumpsum then they would make the payment directly to the Defendant as a final lumpsum payment of the outstanding loan. Additionally, the Plaintiffs proposed That an estate agent be appointed by the court to take up the four flats, in Tudor which garnered a monthly rent of Kenya Shillings Twenty Thousand (Kshs. 20,000/=) per unit totaling to a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000/=) per month. In other words, the estate agent be collecting the monthly rent of the four flats and pay directly to the Defendant until the outstanding balance was cleared. The Plaintiffs undertook to pay the monthly commission of the agent being 10% of the rent collection thus a sum of Kenya Shillings Eight Thousand (Kshs. 8,000.00/=) per month to avoid deduction of monthly payments to the Defendant. To support the case the Plaintiffs referred the Court to the case: "Hildegard Ndalut – Versus - Lelkina Diaries Ltd & Anor.(2005) eKLR" the court observed That:

"Both parties have referred to the case of Keshavii Jethabhai & brothers limited – Versus - Saleh Abdulla [1959]EA 260, which is a case from a High court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad – Versus - Imperial Bank of India (1933) AIR Nag.33-That a defendant should be required to show his Bonafides by arranging fair payment of the proportion of the debt-in persuading the court to allow payments by the way of installments. This in my view, is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of Judgment. The Judgment Creditor might genuinely be in a difficult position in paying the decretal



amount at once. However, he has to show seriousness in paying the amount. In That event he should show his bona fides by arranging fair down - payment proposals to liquidate the amount” (emphasize mine).

34. Additionally, in the case of:- Lavington Security limited – Versus - Nairobi City water & sewerage company Its[2014] eKLR”, Gikonyo J stated as follows:-

“...of great significance in application (sic) of this nature are; the circumstances of the case; the conduct of the parties; the willingness of the bona fides of the applicant to pay a fair proportion of the debt; and of course, That the application is made without undue delay...”

If the Plaintiff was entitled to costs of the originating summons it was trite law That cost follow the event, therefore he submitted That this suit be dispensed with in favor of the Plaintiff, the Plaintiff be awarded costs. Plaintiffs were guided by “Cecillia KAMM Ngoyu – Versus - Barclays Bank of Kenya & another eKLR Hon. John Mativo clearly stated That the basic rule on attribution of costs is That cost.

35. In conclusion, having demonstrated the facts and the laws stated above, the Plaintiffs urged the Honorable Court to invoke the provision of Articles 165 (3) and 22 and 23 of *the Constitution* of Kenya, 2010 and grant the prayers in the originating summons in terms of prayers b, c, f, g, h.

IV. Analysis and Determination

36. I have carefully read and analyzed all the pleadings herein, both the oral and all the documentary evidence adduced in court, the written submission, the cited authorities made by the Plaintiff and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

37. In order to arrive at an informed, reasonable and Equitable decision, the Honourable Court has condensed the subject matter into three (3) key issues for its determination. These are:-

- a. Whether the 1st & 2nd Plaintiffs have made out their claim?
- b. Whether the Plaintiffs are entitled to the prayers sought?
- c. Who will meet the costs of the suit

ISSUE No. a). Whether the 1st & 2nd Plaintiffs have made out their claim?

38. Before analyzing the issues presented in the Originating summons (Converted to a Plaint) which proceeded as a formal proof. we need examine the aspect of a formal proof case. The term “formal proof” has been considered by Emukule J in the case of “Samson S. Maitai & Another – Versus - African Safari Club Limited & Another [2010] eKLR” and approved by Havelock J in “Rosaline Mary Kahumbu – Versus - National Bank of Kenya Limited [2014] eKLR” as follows:

“In the present circumstances however, the Defence was struck out and thus the Defendant does not have the opportunity or privilege to present its evidence and argument. In light of the absence of a Defence on the file, it follows logically, That the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus;

“..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is That which leads to a conviction as to the truth or



falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If That party adduces sufficient evidence to raise a presumption That what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption That whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence That is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis That it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

39. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth; I agree. This suit before this Court is based on a defaulted loan and the sale of the suit property to a third party.

40. Under this sub – heading, the Honourable Court has deciphered That the main issue is on the notices and the statutory sale by the Defendant. To begin with, the Plaintiffs claimed determination of the actual amount owing and the subject actual amount to be liquidated in instalments together with the current market valuation and further breach of Order No. 2 and 3 of the Decree issued by Hon. Justice P.J. Otieno dated 8th May, 2020. It is trite law That in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence That those facts exist. This is what in law is termed as the “Burden of Proof” and is encapsulated for by Section 107 of the *Evidence Act* Cap 80 laws of Kenya which provides as follows:-

107. Burden of Proof (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.”

41. The provision of Order 37 rule 4 of the Civil Procedure Rules pursuant to which the application was brought provides That:-

“ Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require; That is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgage.”

42. The brief facts of the case were That the Plaintiff took a bank loan for a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) from the Defendant on 2nd April 2013. On 18th August, 2014 the agents of the Defendant advertised the suit property Plot No.1996 1/MN for sale by way of public auction



- on 19th August, 2014. On 8th May, 2020 the High Court in Civil Suit No. 107 of 2014 set aside the above subject auction. The court hereby set aside the auction of the suit land Plot No. LR MNI/1996 pursuant to a public auction dated 19th August 2014.
43. On 13th October, 2021 Equity Bank (K) limited wrote to Purple Royal Auctioneers with instruction to issue Statutory Notice to recover a sum of Kenya Shillings Sixteen Million Four Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469,458.30) in breach of High Court Civil Suit 107 of 2014 Decree. On 11th November, 2021 Purple Royal Auctioneers the agent for the defendant served a Notification of sale to the plaintiff with a valuation of a sum of Kenya Shillings Six Million Five Thousand (Kshs. 6,500,000/=) as at 5th August, 2014 in breach of High court civil suit Number 107 of 2014 Decree.
44. The amount to be recovered as per the letter of instruction was a sum of Kenya Shillings Sixteen Million Four Sixty Nine Thousand Four Fifty Eight Hundred and Thirty Cents (Kshs. 16,469,458.30/=) in breach of the Court Decree dated 8th May 2020 whereas the decree directed parties to revert to the position before the impugned auction. The foundation of the impugned auction was annuity for breach of the Decree dated 8th May,2020 purporting to issue a 45-day Notice on 11th November 2021 in breach of the Court Order/Decree for failure to revert to the figure directed by court and the current valuation. The Plaintiff's attempts to renegotiate with the Defendant on the most appropriate terms of servicing the loan arrears have not been fruitful hence the current suit.
45. On 14th May 2022 the defendant instructed auctioneers, one being Sure Auctioneers, with intent to the exercise of Statutory power of sale over the suit property Title No. LR.1996 (ORG NO 1469 /41) Registered in the name of Patrick Mukiri Kabundu despite having been served with the Court Order/Decree dated 8th May 2020 which amounted to a breach of the said Decree. The Plaintiff stated That he was not served with any further written notice after 23rd February 2022 public auction before the defendant could exercise its statutory power of sale again, which was on the foundation of a nullity in law and breach of Decree dated 8th May 2020.
46. Under the provision of Section 90 of the Land Act, No. 3 of 2012 a chargee who intends to exercise the statutory power of sale is also required to issue a notice under Section 96 of the Land Act which provides:-
- 96.(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.
47. The provision of Section 90 of the Land Act states;
- (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.

48. Likewise, the provision of Section 92 (2) of the Land Act states;

- (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.

49. The Defendant issued a statutory notice of sale in accordance with the provision of Section 90 of the Land Act. The Defendant also issued a statutory notice to the plaintiff pursuant to the provision of Section 96 (2) of the Land Act. According to the averments of the Plaintiffs the Court nullified the said statutory sale in the year 2020 and the Defendant went ahead to exercise its statutory power to sale in the year 2022. By and large, I am fully satisfied That indeed the Defendant herein acted within the confines of the law as graphically stipulated herein. As such, the claim by the Plaintiffs must fail accordingly.

ISSUE No. b). Whether the Plaintiffs are entitled to the prayers sought

50. The Plaintiffs sought a permanent injunction against the defendant on the suit land. The 1st Plaintiff has admitted to being indebted to the Defendant. From the record he made no effort to repay the debt. He breached the terms of the letter of offer and the term of the loan has lapsed without any payment having been made by the plaintiff.

51. In the case of “Showind Industries – Versus - Guardian Bank Limited & Another (2002) 1 EA 284” the court held as follows: -

“.....an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant’s conduct does not meet the approval of Court of equity or his equity has been defeated by laches”

52. The conduct of the 1st Plaintiff from year 2013 when he took the loan, which is close to 11 years since then, he is a person who was unwilling to fully settle the outstanding loan advanced to them by the Defendant hereof. Further the court takes cognisance That the property had already been sold to a third party. The Applicant has not produced any evidence before this Honourable Court to show That he undertook and satisfied his obligation under the charge and in as much as the Defendant did not



enter appearance, the Court cannot be ignorant of the fact That whoever comes to equity must come with clean hands. To this end I make a finding That the suit by the 1st and 2nd Plaintiffs herein cannot succeed in its entirety and should be dismissed.

ISSUE No. c). Who will bears the costs of the suit

53. It is now well established That the issue of costs is at the High Court’s discretionary power. The costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds That costs follow the events.
54. The Black Law Dictionary defines cost to means:-
- “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”
55. The provision of Section 27 (1) of the [Civil Procedure Act](#), cap. 21 provides as follows:-
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact That the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided That the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
56. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes That the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under Section 27 remains at the discretion of the court.
57. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted That;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase That “Cost follow the event” was driven by the fact That there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
58. In this case, as this Honourable Court has opined above That the 1st and 2nd Plaintiffs have not established their case. However, in the interest of Justice, Equity and Conscience, there shall be no orders as to costs.



V. Conclusion and Disposition

59. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds That the 1st and 2nd Plaintiffs have failed to establish their case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-
- a. That the suit as per the originating summons dated 1st August, 2022 filed on 26th August, 2022 fails in its entirety and should be dismissed.
 - b. That there shall be no orders as to costs.

IT IS SO ORDERED ACCORDINGLY.

JUDGMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS.....2NDDAY OF DECEMBER.....2024.

.....
HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Patrick Mukiri Kabundu acting in person as the 1st Plaintiff/Applicants.
- c. No appearance for the Defendant/ Respondent

