



Buchunju (Suing for and on Behalf of the Estate of the Late Buchunju Kapchanga- Deceased) v Muyundo & 7 others (Environment & Land Case 143 of 2017) [2023] KEELC 20567 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 143 OF 2017
EC CHERONO, J
OCTOBER 5, 2023**

BETWEEN

MAIKUMA WEKESA BUCHUNJU (SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE BUCHUNJU KAPCHANGA- DECEASED) ... PLAINTIFF

AND

**DONALD WEKESA MUYUNDO 1ST DEFENDANT
CO-OPERATIE BANK KENYA LIMITED 2ND DEFENDANT
FREDRICK MUTAYI KHAEMBA 3RD DEFENDANT
ONESMUS W. MACHARIA T/A WATTS AUCTIONS 4TH DEFENDANT
KENYA COMMERCIAL BANK LIMITED 5TH DEFENDANT
AGRICULTURAL FINANCE CORPORATION 6TH DEFENDANT
COUNTY LAND RREGISTRAR, BUNGOMA COUNTY 7TH DEFENDANT
ATTORNEY GENERAL 8TH DEFENDANT**

JUDGMENT

1. By a plaint dated 17th October, 2017 the plaintiff prays for judgment against the defendants for;
 - a. A declaration that the entire transaction and/or processes leading to the transfers of suit land; title no. Ndivisi/Ndivis/177 measuring approximately 8.25 Ha from the late Buchunju Kapchanga-deceased to the 3rd defendant and subsequently to the 1st defendant was and/or is null and void ab initio.



- b. A permanent injunction restraining the defendants, their servants, trustees, agents and/or any person claiming through them from trespassing onto, entering, and offering for sale. Transferring and/or in any other way from interfering or dealings with the suit property.
 - c. Cancellation of the 1st and 3rd defendants' titles in respect of the suit land; title no Ndivisi/Ndivisi/177 measuring approximately 8.25 Ha and same do revert to the original owner, the late Buchunju Kapchanga-deceased pending commencement and finalization of succession proceedings.
 - d. Costs of this suit and interest.
2. Upon service of summons, the 1st, 2nd, 4th, 5th and 6th defendants entered appearances and filed their defence denying the plaintiffs claim and placed the plaintiff to strict proof thereof.
 3. The 2nd defendant entered appearance on 22nd November, 2017 through the firm of Kiruki & Kiyika advocates and filed their statement of defence dated 11th April, 2018.
 4. The 6th defendant entered appearance through the firm of Rashid Ngaira on 22nd November, 2017 and filed their statement of defence on even date.
 5. The 4th and 5th defendant entered appearance on 13th December through the firm of Mukele Moni & Company Advocate's and filed their statement of defence dated 13th April 2018.
 6. The 8th defendant entered appearance on 30th November, 2017 through Joseph M. Ngumbi, senior state counsel.
 7. The 1st defendant entered appearance through the firm of Ng'etich Chiira & Associates and filed their statement of defence and counterclaim dated 21st April, 2018.
 8. The court directed the parties to file their compliance documents under *Order 3, 7 & 11 of the Civil Procedure Rules* and thereafter, the case was fixed for hearing and proceeded on various dates with all parties on board closing their respective cases.

Plaintiffs Case

9. The plaintiff is the administrator of the Estate of the Late Buchunju Kipchanga (deceased) who was the registered proprietor of land parcel no. Ndivisi/Ndivisi/ 177 (hereinafter referred to as the 'suit land') where he lived with his family until his demise in 2005. Prior to his death the deceased had charged the suit land to the 6th defendant to secure a sum of Kshs. 9,000/= in 1976 which he repaid but on 3rd January, 2017 when the plaintiff visited the offices of the 7th defendant, he was surprised to discover that the suit land had been transferred to the 1st defendant and charged with the 2nd defendant on 5th December, 2016. It was further revealed to him that in 1981, the 3rd defendant had acquired the suit land and charged it with the 5th defendant in 1986.
10. It was the plaintiff's case that the 1st and 3rd defendants had fraudulently acquired the suit property and charged with the 2nd and 5th defendants yet that is where the deceased and his family lived since 1963 and that the deceased is buried therein. The plaintiff urged that the deceased was the legal owner of the suit land and that title of the same should revert to him for the family to finalize succession proceedings.
11. PW1 Maikuma Wkesa Bushunju adopted his statement dated 27th September, 2019 and produced into evidence his list of documents dated 17th October, 2017 and reiterated that he was aware that the deceased had taken up a loan with the 6th defendant and to his knowledge the same had been repaid. It was his statement that his family has been in occupation of the suit land since 1963 to date and that



he only found out that the land had been transferred in 2017 when he begun succession proceedings upon his father's demise in 2005.

12. PW2 Christopher Mandu Eyeya adopted his witness statement dated 27th September 2019. He testified that he was a neighbor and friend to the deceased and that the deceased informed him that he had repaid the loan advanced by the 6th defendant. He also testified that he was aware one Fredrick Mutayi Khaemba filed a case against the deceased in 1983 claiming the suit land.
13. PW3 Samuel Nayombe Chenonoi adopted his statement dated 27th September,2019. It was his testimony that he knew the deceased and his family and that they reside in the suit property. He stated that he was aware that the deceased had cleared his loan with the 6th defendant and that he has never been notified of any auctions being carried out over the suit land. The witness confirmed receiving a letter dated 4th December,2015 indicating that the suit land had been sold by public auction.

The 1st Defendants Case

14. It is the 1st defendant's case that he is the registered proprietor of the suit land having purchased the same after successfully bidding in an auction that took place on 4th December,2015 as a result of a newspaper advertisement dated 16th November,2015 at the price of Kshs.3,800,000/= (Three Million Eight Hundred Thousand Kenya Shillings Only). The 1st defendant averred that he placed a deposit of Kshs.950,000/= (Nine Hundred and Fifty Thousand) and borrowed the balance of the purchase price from the 2nd Defendant and the 5th defendant transferred title of the suit land to him and he charged it with the 2nd defendant for Kshs.2,000,000/= (Two Million Kenya Shillings Only) a loan facility which he is servicing to date.
15. It was the 1st defendants' case that despite acquiring title over the property, the plaintiff has been in occupation of the suit land denying him use of the suit land and as such he has incurred losses of Kshs.100,000/= per since 5th December,2016 to date. In his counterclaim he therefore sought orders against the plaintiff for;
 - a. The plaintiff's suit be dismissed with costs
 - b. Vacant possession of the suit land to the 1st defendant.
 - c. Orders of eviction to issue against the plaintiff forthwith
 - d. Mesne profits of Kshs.100,000/= per month until the plaintiff vacates
 - e. General damages for loss suffered.
16. DW1 Donald W. Munyundo adopted his witness statement dated 21st April,2012 and produced into evidence his list of documents dated an even date and his further list of documents dated 1st January,2022. The witness testified that he purchased the suit land in an auction on 4th December, 2015 and he applied for a loan facility with the 2nd defendant on 10th February,2016 and the purchase price was paid to the 5th defendant directly by the 3rd defendant. It was his evidence that at the time of the purchase he was not aware of any claim to the property.

2nd Defendants Case

17. It was the 2nd defendant's case that they are charges in the property having advance a loan facility of Kshs.2,000,000/= (Two Million Kenya Shillings Only) to the 1st defendant who purchased the suit land from the 5th defendants through and 4th defendant who were exercising their statutory power of



sale after the 3rd defendant who had taken up a loan facility with them and offered the suit land as security defaulted in payments.

18. DW1 Shadrack Tarus adopted his witness statement dated 11th April, 2018 and produced into evidence his list of documents of the same date. The witness reiterated that they did due diligence before granting the loan and paying the sum of Kshs.2,000,000/= directly to the 5th defendant.

4th and 5th Defendants Case

19. It was the 4th and 5th defendant's case that the 3rd defendant charged with them the suit property for a loan facility of Kshs.40,000/= on or about the 14th March, 1986. That the 3rd defendant defaulted in repayments and the 5th defendant exercised its statutory power of sale and instructed the 4th defendant to sell the suit land to recover the defaulted amount. The 4th defendant through a public auction on 4th December, 2015 announced the 1st defendant as the successful bidder and the property was sold and a certificate of sale issued.
20. DW1 Walter Mukudi Klerul adopted his witness statement dated 14th March, 2022 and produced into evidence his list of documents dated 9th July 2019. He testified that all relevant notices were served upon the deceased and his estate and that the auction of 4th December, 2015 as legal

6th Defendants Case

21. It was the 6th defendants' case that sometimes in 1976 the deceased applied for and received from them a loan facility of Kshs.9,000/- (Nine Thousand Kenya Shillings Only) for farming development and the deceased offered the suit land as security and a charge was registered in favour of the 6th defendant. It was further averred that the deceased defaulted in repayments causing the 6th defendant to send out various notices which went unanswered prompting the 6th defendant to exercise its statutory power of sale. The 6th defendant's averred that it bid in the public auction and acquired the suit land which was subsequently sold and transferred to the 3rd defendant.
22. DW1 James Shamatta adopted his witness statement dated 22nd November, 2017 and produced into evidence his list of documents dated 22nd November, 2017 and 21st January, 2021. The witness testified that the deceased defaulted in repaying his loan with them and they exercised their statutory power of sale as a result through an auction that was scheduled for 8th May 1980. It was his testimony that there were no bidders and as such they acquired the land for Kshs. 20,000/= and later sold it to the Fredrick Mutayi Khaemba in 1980 and the same was registered in his name on 11th September, 1981. The witness testified that when they transferred the suit land to themselves the deceased never objected to the same

7th and 8th Defendants Defence

23. The 7th and 8th defendants denied there being any fraudulent and illegal activities in the record of the suit land and placed the plaintiff to strict proof thereof.

In support of his case the plaintiff called

Plaintiffs Submissions

24. It was the plaintiff's submission that the 6th and 5th defendants did not exercise their statutory power of sale in strict adherence to the provisions of Section 56(2), 90 (1), 96(2) of the *Land Act* and Rule 15 of the *Auctioneers Act* rule 1997. The plaintiff quoted the case of Stephen Buoro Gitihia v Ruthiru Gatato [20170] Eklr, Micheal Gitere & Another v Kenya Commercial Bank LTD [2018]eklr in support of



their argument that the 6th and 5th defendant's did not ensure the serve of the three months statutory demand and redemption notice exposing the deceased property to disposal without notice.

25. The plaintiff cast doubt in the manner in which the 3rd defendant acquired title of the suit land and pointed out that the 6th defendant lodged a caution on the suit land on 27th November, 1987 who it is argued did not serve the state of the deceased with statutory notices in compliance with Section 66 of the *Law of Succession Act*. It was further submitted that the 1st defendant being an advocate appreciates the law on securities and can therefore not claim to be an innocent purchaser for value. The plaintiff contended that the 2nd, 4th and 5th defendants did not adduce proof of purchase of the suit land as alleged and further stated that it was suspect that the title was charged on 5th December 2016 while the loan was committed on 4th January, 2017. The plaintiff faulted the 2nd defendant for its failure to provide a loan statement to prove that the 1st defendant had completed the loan repayment or he was still servicing the loan.
26. The plaintiff submitted on various issues of determination;

1. Whether this court has jurisdiction to hear this suit.

27. The plaintiff on this relied on Section 13(1), (2) (3) and 19 of the *Environment and Land Court Act*, No. 19 of 2011 and Section 101 of the *Land Registration Act*.

2. Whether the suit herein is time barred.

28. It was the plaintiff's submission that his case was founded on fraud, mistake and misrepresentation occasioned by the defendants jointly and thus this suit was proper before this court for determination. Reliance was placed on Section 4(1) 26 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, Section 3 of the *Environment and Land Court Act*, No. 19 of 2011, Section 1A, 1B, 3A and 5 of The *Civil Procedure Act*. The plaintiff equally quoted various case laws amongst them the courts dictum in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 30thers (2014) Eklr while citing Malawi Railways Limited v Nyasulu (1998) MWSC 3.

3. Whether there was a loan agreement between the deceased and the 6th defendant.

29. The plaintiff submitted that there was no enforceable loan agreement between the plaintiff and the 6th defendant capable of being enforced. They averred that the 6th defendant contravened the provisions of *Section 19 and 21 of the Agricultural Finance Corporation Act, Cap 323* or provision of loans to farmers, repayment of the said loans and extension of time for repayment.

4. Whether there was a valid charge by the deceased in favour of the 6th defendant

30. It was submitted for the plaintiff that there was no charge prepared/executed between the deceased and the 6th defendant which upsets the provisions of Section 80 of the *Land Act*. It was submitted that the notification of charge dated 25th May, 1976 was improper as he same was not stamped and dated. He urged the court to find that the said notification of charge invalid for want of proper execution hence null and void. In support of his submissions counsel reproduced the provisions of Section 20 of the Agricultural Finance Act and further stated that the 6th defendant failed to comply with Section 34 and 27 of the said Act on appraisal and inspection of the land offered as security.

5. Whether the 6th defendant exercised the statutory power of sale in compliance with the law

31. The plaintiff contended that the 6th defendant failed to comply with the requirements set in law while exercising their statutory power of sale and reproduced the provisions of Section 90, 96, 97, 98 of the



Land Act on the remedies of a charge, charges power of sale, duties of a charge in exercising power of sale and on powers incidental to the power of sale. The plaintiff further quoted the provisions of Section 33 of the Agricultural Finance Act and stated that the 6th defendant failed to produce a written authority to its agent who allegedly bid in the auction leading to the transfer of the suit land to itself. The plaintiff claimed that the deceased was illiterate and the signatures in acknowledgment of foreclosure notices dated 23rd June, 1979 and 3rd December, 1976 were forgeries as the deceased signed by affixing his thumbprint only. It was also submitted that the 6th defendant flaunted the provisions of Section 21 of the Auctioneers Act on Auction sales and Rule 15, 16, 17 and 18 of the Auctioneers Rules on immovable property, advertisement, auctions and proceeds of sale.

32. It was the plaintiff submission that the 6th defendant did not provide details on the firm of Auctioneers used to conduct the auctions, the advertisement, the actual sale, valuation report, attendees of the auction, certificate of sale, proof of payment etc.

6. Whether there was sale and/or loan agreement between the 3rd defendant and the 6th defendant

33. The Plaintiff contended that the lack of a sale agreement between the 3rd and 6th defendant denoted that no agreement was ever entered into.

7. Whether there was a valid charge by the 3rd defendant in favour of the 6th defendant

34. The plaintiff referred the court to items no 18,19,21 and 22 of the 6th defendant's list of documents and submitted that apart from the said documents the 6th defendant did not produce a valid charge between themselves and the 3rd defendant. It was his submission that the lack of a charge or notification of charge to that effect denoted that there was no enforceable interest registered between the two.

8. Whether there was a loan agreement between the 3rd and 5th defendants

35. The plaintiff submitted that there was no loan agreement between the two defendants and as such no enforceable interest created between them

9. Whether there was a valid charge between the 3rd defendant in favour of the 5th defendant

36. The plaintiff challenged the procedure in execution and registration of the charge between these two defendants. It was his submission that the 5th defendant allegedly executed the charge on 24th March, 1986 while the charge was registered on 14th March, 1986. Counsel submitted that having proved that the 6th defendant did not have property title to transfer to the 3rd defendant, the 3rd defendant could not also have had property title to charge or transfer to the 5th defendant.

10. Whether the 5th defendant exercised their statutory power of sale in compliance with the law.

37. The Plaintiff contended that the 5th defendant failed to produce the further charge as alleged securing Kshs. 40,000/= with the 3rd defendant and as such it can be assumed none was executed. It was his submission that it is unclear how statutory notices were served on the estate of the 3rd defendant and how the auctioneers were instructed and the manner in which the auction was carried out. The plaintiff quoted the case of *Martevé Guest House Limited v Njenga & 3 others* (supra)

11. Whether the 6th, 3rd and 1st defendants held good titles in respect to the suit land.

38. It was submitted for the plaintiff that the 6th, 3rd and 1st defendants did not hold good title of the suit land as their acquisition was tainted with fraud, irregularities and illegalities. It was the plaintiff's contention that the manner in which the 6th defendant conducted the alleged power of consent was



questionable as the procedure was marred with irregularities in the bidding process. Counsel submitted that the 6th defendant did not produce a copy of a certificate of title or transfer forms to prove that they indeed transferred the suit land to themselves. Counsel quoted the case of Mrteve Guest House Limited v Njenga & 3 others and Section 77 (3) of the Registered [Land Act](#).

12. Who is in possession and/or actual occupation of the suit land.

39. The plaintiff submitted that the deceased settled in the suit land in 1963 and that the defendants of the deceased are in occupation of the suit land to date

13. Whether the reliefs sought are available for the plaintiff.

40. The plaintiff submitted that he has proved his case and that the defendants have failed to prove their case by failure to produce crucial documents. It was contended that the 6th defendant did not acquire good title and as such the subsequent transfers and charges are unenforceable. Counsel quoted various cases already mentioned above and the case of Railal Gordhanbhi Patel vs. Lalji Makanji (1957) EA 314.

14. Who ought to be awarded costs of the suit.

41. The plaintiff submitted having proven its case they are entitled to costs as per Section 27 of the [Civil Procedure Act](#).

1st Defendants Submissions

42. The 1st defendant submitted that the plaintiff's evidence was pure hearsay and the same were unsupported by evidence. The 1st defendant submitted on various issues for determination.

1. Whether the suit herein is time barred.

43. On this limb the 1st defendant submitted that he raised a notice of preliminary objection dated 29th July, 2020 indicating that the suit was time barred and offends the provisions of Section 4(1) of the [Limitation of Actions Act](#). It was submitted for the 1st defendant that the current suit is for recovery of land and the same ought to have been filed on or before 14th September, 1993, twelve (12) years from the date the suit land was registered in the name of the 3rd defendant in 1981 as per the green card produced by the 6th defendant. To counter the submission by the plaintiff that this suit is not time barred as per Section 22 of the [Limitation of Actions Act](#) the 1st defendant laid emphasis on the rider to that provision and reproduced it in support of his argument.

44. It was further submitted that the deceased thus his estate was well aware of the intention of the 6th defendant to exercise its statutory power of sale as evidenced by the letter dated 1st February, 1985 addressed to M/S Kiarie & Company Advocates who were acting for the deceased at the time Kabuchanja wherein the deceased was informed that the suit land had been sold and the proceedings in Kisumu SRMCCC No. 609 of 1981 A.F.C. vs. Buchunju. The 1st defendant therefore argued that the deceased ought to have instituted this suit at least by 1997 and this suit can therefore not stand many years later.

2. Whether the 1st defendant has valid title to the suit property being a bona fide purchaser for value.

45. On this the 1st defendant submitted that he was an innocent purchaser for value having procedurally purchased the suit land in an auction and having been issued with a certificate of title for the suit land. It was argued that the 1st defendant conducted due diligence prior to purchasing the suit land. It was further the 1st defendant's submission that the plaintiff has no locus to challenge the sale by auction



to the 1st defendant by the 5th defendant as that was a transaction involving the 3rd and 5th defendants and further that a person prejudiced by an irregular exercise of the power of sale shall- have a remedy in damages against the person exercising that power. Reliance was placed on Section 99(4) of the [Land Act](#), the case Nairobi HC Civil Suit No. E024 of 2020 Paul Ngei Wolile & 2 others v Dalali Treders Auctioneers & Another [2021] eKLR and Simon Njoroge Mburu v Consolidated Bank of Kenya Ltd [2014] eKLR.

46. The 1st defendant submitted that the plaintiff did not lead any evidence to prove that he (the 1st defendant) had notice of the alleged irregularities. Reliance was placed in the case of Weston Gitonga & 10 others v Peter Rugu Gikanga & Another [2017] Eklr. The 1st defendant contended that he purchased the property in good faith for value and quoted the case of Samwel D. Omwenga Angwenyi vs. National Land Commission & 2 others (2019)Eklr and the provisions of Section 26 [Land Registration Act](#)

3. Whether the 1st defendant is entitled to vacant possession and orders of eviction against the plaintiff.

47. The 1st defendant submitted that he was entitled to the aforementioned orders having proven he was a bona fide purchaser for value he is entitled to occupation and quiet enjoyment of the suit land to the exclusion of the plaintiffs' beneficiaries who are currently in occupation of the land

4. Whether the 1st defendant is entitled to mesne profits and damages for loss of use of the suit property.

48. It was submitted for the 1st defendant that having purchased the suit land for value he was entitled to utilize it for his benefit and that with the plaintiff's beneficiaries physical presence in the suit land he has been deprived of this right and as such he is entitled to damages for trespass and mesne profits from the date of registration i.e. 5th December, 2016 at the rate of Kshs. 100,000/= per month. Reliance was placed in the case of Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR, Jeremiah O. Samba v Samson Osano Ochi [2004] eKLR, Civil Appeal 208 of 2018 Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020]eKLR and Peter Muiu Kaliuka v Joseph Mutetei Nguli [2018] eKLR

5. Whether the 1st defendant is entitled to costs of the suit to be borne by the plaintiff

49. The 1st defendant urged the court to dismiss the plaintiff's case and allow its counter claim with costs.

The 2nd Defendants Submissions

50. The 2nd defendant discussed the following issues for determination;

1. Whether the 1st defendant successfully applied for a loan.

51. It was submitted that it was not in contention that the 1st defendant charged the suit land for a loan with the 2nd defendant thus creating a valid contract with them. Reliance was placed in the case of Samuel Mutemi T/A Samtech Building Contractors v County Government of Machakos [2020] eKLR. The 2nd defendant argued that the plaintiff has not proved any fraudulent dealings between the 1st and 2nd defendant and as such the plaintiff's claim ought to be dismissed.



2. Whether the 1st defendant was the legal owner of the suit land and if the 2nd defendant registered a charge over the suit property as security for repayment of the loan.

52. On this limb it was submitted that the 1st defendant was the absolute holder of the title for the suit land having purchased it in a public auction for value as per Section 24 of the [Land Registration Act](#) and as such had the right to create a legal charge with the 2nd defendant. Reliance was placed in the case of Samuel Adivane Kisago vs. Patrick Musungu (2020) eKLR and Section 25 (1) (a) (b) of the [Land Registration Act](#).
53. The 2nd defendant submitted that the 1st defendant was a bona fide purchaser for value as he purchased the suit land from an auction after satisfying himself of the ownership of the property. The 2nd defendant denied any involvement in the alleged fraud and reiterated that the plaintiff had not satisfied the claim for fraud or misrepresentation as pleaded. The 2nd defendant in support of his claim quoted various cases amongst them the case of Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M'Chuka alias Muriungi M'Gichuga) v Kioro [2022] eKLR

3. Who should meet the costs of the suit.

54. The 2nd defendant urged the court to dismiss the plaintiff's case with costs.

4th and 5th Defendants Case

55. The 4th and 5th defendants framed the following issues for determination;

1. Whether the plaintiff has pleaded and proved the allegations of fraud as against the 4th and 5th defendants.

56. It was submitted that the plaintiff has failed to plead and prove any particulars of negligence against the 4th and 5th defendant as the particulars of fraud illustrated in the plaint are general and no evidence has been led to prove the allegations of fraud to the required standard of proof. The defendants quoted the case of Nancy Kahoya Amadiva v Expert Credit Limited and Another Civil Appeal No. 133 of 2006 (Nairobi) [2015] eKLR and Pamba Ong'weno Amila v John Juma Kutulo Civil Appeal No.55 of 2013 (Kisumu) [2015] Eklr.

2. Whether the 5th defendants dealt with the suit property in accordance with the law

57. On this limb it was submitted that 5th defendant advanced a loan facility of Kshs.40,000/= to the 3rd defendant who was the registered owner of the suit land as per Section 24, 25 and 26(1) and (2) of the [Land Registration Act](#). The 5th defendant submitted that the plaintiff failed to discredit the validity of the charge created in its favour and the resultant auction in exercise of its statutory power of sale.
58. It was submitted that the 5th defendant followed the law in exercising their statutory power of sale as evidenced in their testimony and as supported by their documents and more specifically items no. 3 to 13 of their list of documents. Counsel further submitted that once a statutory power of sale has been legally activated, any irregularities in the sale is only remediable with damages to the charge and that the purchaser at an auction is immunized from suit under Section 99 of the [Land Act](#). Reliance was placed in the case of Etrade Limited & Another vs. Thrift Estates Limited & Others [2019] eKLR

3. Whether the plaintiff's suit is time barred.

59. It was submitted that the plaintiff's case was time barred having been filed 38 years after the alleged cause of action arose as per Section 7 of the [Limitation of Actions Act](#). Counsel quoted the case of



Beatrice Wambui Kiarie vs. Beatrice Wabui Kiarie & 9 others (2018) eKLR. It was also averred that Section 26 of the *Limitation of Actions Act* has a rider on actions for recovery or enforcement of mortgage transactions affecting property that has been purchased for value.

Analysis and Determination

60. I have carefully considered the pleadings filed herein, the testimonies of the parties and their witnesses, the documents produced as exhibits as well as the applicable law. From the materials placed before me, I find the following issues commend for determination;
- i. Whether this suit is time barred
 - ii. Whether the 1st defendant is an innocent purchaser for value
 - iii. Whether the 1st Defendants entitled to the orders sought in the counterclaim; and
 - iv. Who should bear the costs of the suit?

i. Whether this suit is time barred

62. The plaintiff asserts that from his pleadings that his claim is founded on fraud, mistake and misrepresentation which was discovered in the year 2017 and that as such time started running in the said year. The applicable provisions on a claim based on fraud, mistake and misrepresentation is Section 7 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of action. In regard to actions founded on recovery of land the limitation period is twelve years.
63. Section 26 of the Limitation of Actions Act on the other hand provides for an extension of the limitation of time in case of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section provides thus:
- Where, in the case of an action for which a period of limitation is prescribed, either:
- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”
64. Before determining whether the plaintiff's suit is statute barred by dint of section 7 of the Limitation of Actions Act and whether the plaintiff can seek refuge in section 26 of the same Act, it will be important to first and for most establish the main cause of action in the suit.
65. In the case of Edward Moonge Lenguuranga vs James Lanaiyara & another (2019) eKLR, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. The court defined a cause of action to be the legal theory upon which a Plaintiff brings a suit. That being the case, it is important to look at the facts as pleaded and the prayers contained in the plaint to determine the cause of action raised by the Plaintiff.
66. The plaintiff contends that they only became aware of the transfer of the suit land in the year 2017 when they began succession proceedings for the estate of their deceased father-Buchunju Kapchanga. However, the 6th defendants have contended that the deceased was served with six (6) statutory notices dated various dates between the years 1976 and 1978, a foreclosure notice dated 23rd June, 1979 and a



letter addressed to the deceased's advocate M/S Kiarie & Co. Advocates dated 1st February, 1985 which letter is in reference to a suit instituted by the 6th defendant against the deceased - Buchunju Kapchanga being the Resident Magistrate Court, Kisumu Civil Suit No. 609 of 1981 for eviction from the suit land.

67. Further, PW1 in his statement testified that he was aware that one Fredrick Khaemba had sued his father Buchunju Kapchanga-Dcd in a criminal case dating back to the year 1983 where the said complainant was claiming rights over the suit land herein. Again, PW2 in his statement stated that he was served with a letter dated 4th December, 2015 which letter he transmitted to the family of the deceased informing them of the sale by auction to the 1st defendant. From the foregoing, it is clear that the deceased became aware of the looming sale of the suit land in the years between 1976 and 1978 and became aware of the transfer in 1981 and again in 1985. Notably, the proceedings of the criminal proceedings instituted by one Fredrick Khaemba against the deceased form part of the plaintiff's documents and at this time the suit land had already been transferred to the said Fredrick Khaemba and indeed these were the averments of the said Fredrick Khaemba in the criminal proceedings. I find that the deceased therefore ought to have filed this current suit at that time and that the current suit has been brought out of time.
68. That notwithstanding, it should be noted that part b of Section 26 of the *Limitation of Actions Act* states as follows;
- Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-
- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
 - (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made."
69. From the material before this court, it is clear that the suit land has been passed to various owners who have purchased the same for value and that the same has even been charged by various financial institutions thus the plaintiff cannot seek shelter under the proviso of Section 26 of the *Limitation of Actions Act*.
70. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.
71. In the case of *Bosire Ongero vs Royal Media Services* [2015] eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

ii. Whether the 1st defendant is an innocent purchaser for value

72. The 3rd Defendant herein avers that he is an innocent purchaser for value without notice of any fraud or impropriety. In the case of *Lawrence Mukiri v Attorney General and 4 Others* [2013] as well as *Katende v Haridar and Company Limited* the court defined a bona fide purchaser as follows:
- ...a bona fide for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-
- (a) He holds a certificate of title;



- (b) He purchased the property in good faith;
 - (c) He had no knowledge of the fraud;
 - (d) The vendors had apparent valid title;
 - (e) He purchased without notice of any fraud;
 - (f) He was not party to any fraud.”
73. This brings us to the question on the extent of due diligence to be exercised by a purchaser at a public auction. The Court of Appeal has held that there is no duty placed on such a purchaser where he participates in an auction that has been duly advertised.
74. The court in considering a similar question in the case of *Abdi Adan Hussein & 2 others v Attorney General & 2 others* [2017] eKLR held as follows: -
- The plaintiff argues that he was an innocent purchaser for value and was not party to any fraud. This brings me to the question; what is the extent of due diligence to be exercised by a purchaser? In *Captain Patrick Kanyagia and Another v Damaris Wangeci and others*, NBI civil appeal no 150 of 1993 (unreported) the Court of Appeal held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by the court of appeal in *David Katana Ngomba v Shafi Grewal Kaka* [2014] eKLR. In *Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others* Civil Appeal No.227 of 1995 (unreported), the Court of Appeal held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice.
75. In the present case, the defendants have not demonstrated that the plaintiffs had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the testimony of the 1st plaintiff, the action to purchase was based on the advertisement for sale advertised in the newspaper. The plaintiffs duly participated in the auction and their bid was accepted.” We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security. (Pall J, in *Muhani and Another v National Bank of Kenya Limited* [1990]eKLR”
76. The Plaintiff in his plaint dated 3rd November, 2017 makes allegations of fraud on the part of the Defendants. It is trite that fraud requires a higher standard of proof than ordinary civil cases. Not only must allegations of fraud be particularized but they must also be specifically proved on a standard higher than that required in ordinary civil cases.
77. The court in the case of *Ruhangi Properties Limited & 2 others v Standard Chartered Bank of Kenya Ltd & 2 others* [2000] eKLR considered similar allegations and stated as follows:
- “Fraud of course, in addition to requiring particulars, requires a higher standard of proof. Establishing a prima facie case of fraud with a probability of success especially on affidavits presents the plaintiffs’ advocate with a very difficult task; more so when as here the statute



provides that in these circumstances damages are an adequate remedy. The difficulties in relation to a prima facie case of fraud were considered by the Court of Appeal in CA 215/96 Central Kenya Limited v Trust Bank and others at pages 9-11 of the judgment. The onus is on the applicant and the burden of proof is heavier than in an ordinary civil case”.

78. In the instant case, it is my finding that the 1st defendant was an innocent purchaser for value without notice of any fraud or impropriety. Furthermore, the 1st, 2nd, 4th, 5th and 6th defendants would be absolved of any wrong doing as they have not been proved that they party to any fraudulent dealings affecting the suit property as set out under the provision of (i) and (ii) of section 26 of the Limitation of Actions Act which provides as follows: -

Provided that this section

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.
- iii. Whether the 1st defendant is entitled to orders as sought in his counter claim

a. Whether an eviction Order in respect of the suit property should issue in favour of the 1st Defendant against the plaintiff

79. The 1st Defendant who is the Plaintiff in the counterclaim is seeking for orders that an eviction Order does issue vesting the suit property in his favour. It is common ground that the 1st Defendant purchased the suit property at a public auction held on 4th December, 2015 pursuant to instructions issued by the 5th Defendant to the 4th Defendant and he was duly issued with a certificate of sale.

80. I note that it is not in dispute that the 1st defendant is the registered owner of the suit land. Section 26(1) of the Land Registration Act provides as follows;

‘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. ’

81. I have already held that the 1st defendant was an innocent purchaser for value and that his title over the suit land was therefore obtained procedurally and I need not belabour on the legality of his tile.

82. Further, Section 24 (a) of the Land Registration Act NO.3 of 2012 states as follows;



“subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....’

83. Further, in the case of *Willy Kipsongok Morogo v Albert K. Morogo* [2017] Eklr the Court held as follows: ‘ the evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the *Land Registration Act.*’
84. I am further inclined to agree with the submissions made on behalf of the defendants that the plaintiff’s right over the suit property were extinguished upon exercise of the statutory power of sale. The court of appeal in the case of *Nancy Kahoya Amadiva v Expert Credit Limited & another* [2015] eKLR stated as follows on this point:-

Property passes to the purchaser and thus the mortgagor loses his equity of redemption upon execution of a valid contract of sale. It is not allowed to continue until conveyance or registration notwithstanding that some time elapses before conveyancing formalities are completed vesting the legal title to the purchaser. (See *Fisher and Lightwood Law of Mortgages* and *James Ombere Okoth* case (supra). The cases follow the rule enunciated
85. In *Mbuthia v Jimba Credit Corporation and another* by Apaloo JA though dissenting):

Since then, the law is settled that the equity of redemption is lost on the completion of a valid agreement for a valid sale (see *Ze Yun Yang v Nova Industrial Products Limited* [2003] 1 EA 362). This is notwithstanding that the mortgagee and purchaser may adjust the conditions of the contract as they agree. It is not lost on us that the 2nd respondent by the acceptance of his bid during the public auction and subsequent completion of a valid agreement for sale of the suit premises effectively locked out the appellants right of redemption over the suit premises. The Registration of Lands Act, which is inapplicable in the present case, on the other hand expressly provides for this duty in section 77(1) thereof.”
86. Having found that there was no illegality in the sale, there is no reason why the suit property should not be vested in the 1st defendant.
87. The Court in the case of *Janet Mwendwa v Nancy Mavutha Musyaka* [2017] eKLR declined to set aside a vesting order that had been issued by the Magistrate’s court on the basis that it found no impropriety or illegality in the conduct of the public auction.
88. I therefore find that the 1st defendant is the absolute proprietor of the suit land and his Certificate of title having not been challenged, he is entitled to all rights and privileges thereto and hence entitled to protection of the law as envisaged under sections 24, 25 and 26 of the *Land Registration Act.* Further, based on these findings, I hold that the plaintiff should indeed be evicted from the suit land.

b. Whether the 1st defendant is entitled to mesne profits and damages

89. The 1st defendant has sought for mesne profits as against the plaintiff who he claims is in occupation of his land denying him use of the same.
90. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: - “mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together



with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;’

91. While Order 21 Rule 13 of the Civil Procedure Rules provides as follows: -13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or (iii) the expiration of three years from the date of the decree, whichever event first occurs. (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.
92. I note that except for pleading mesne profits, the 1st defendant did not furnish the court with any evidence on the extent of encroachment and the loss he had suffered.
93. In the case of Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR, the Court of Appeal while dealing with the issue of mesne profits held as follows:
- “We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”
94. Based on the evidence placed before me while associating myself with the legal provisions and decisions cited above, I find that the 1st defendant has failed to discharge his burden of proof to show that he is indeed entitled to a claim of mesne profits and I hereby decline to award him the same.

iv. Who should pay costs?

95. It is trite that costs usually follow the events. Section 27 of the *Civil Procedure Act* gives the Court discretion to grants costs. As the successful party is always entitled to costs except in exceptional circumstances. In my view, no exceptional circumstance exists in this suit and I therefore find that the defendants being successful litigants are entitled to the costs of the suit as well as the counter-claim for the 1st defendant

Conclusion

96. The upshot is that the 1st defendant has proved his counterclaim against the plaintiff on a balance of probabilities.
97. I therefore dismiss the plaintiff’s case against all the defendants and enter judgment for the 1st defendant on his counterclaim against the plaintiff in the following terms:
- a) The plaintiff’s claim against the defendants is dismissed with costs.
 - b) A declaration is hereby issued that the 1st Defendant is the bona fide purchaser for value of all that parcel of land known as Ndivisi/Ndivisi/177.
 - c) An eviction order is hereby issued against the plaintiff within ninety (90) days of this judgment.
 - e) The defendants shall have the costs of this suit and the 1st defendant shall have the costs of the suit as well as the counterclaim



It is so ordered.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 5TH DAY OF OCTOBER, 2023.

HON E C CHERONO

ELC JUDGE

In the presence of

Mr. Otieno H/B Wamomba for Plaintiff

Mr. Okaka H/B for Mr. Macharia for the 4th and 5th defendants

Mr. Khisa for 2nd defendant.

M/S Joy C/A

