



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**PETITION NO 28 OF 2015**

**MACHAKOS WATTLEBARK CO-OPERATIVE**

**SOCIETY LTD.....PETITIONER**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LTD.....1<sup>ST</sup> RESPONDENT**

**KONZA INVESTMENT LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Vide the Further Amended Petition dated 4<sup>th</sup> October, 2019, the Petitioner seeks for the following reliefs;

- i. A declaration that the auction done by the Respondents was illegal and fraudulent thus null and void and any transfer which might have been done based on the auction be and is hereby cancelled.*
- ii. A declaration that the Petitioner is the legal owner of L.R No 1706/1 Konza (I.R No. 6607) and the same be transferred back to the Petitioner.*
- iii. The Respondents be ordered to pay damages to the Petitioner assessed at the sum of Kshs 2,400,000 plus interest at commercial rates from 12.2.2010 to date for under valuation, illegal sale and loss of user of the Petitioners property.*
- iv. In the alternative, the Respondents be ordered to compensate the Petitioner with the sum equivalent to the current value of the land and the same be assessed by the Government valuer for adoption by this court.*
- v. Any further relief or orders that this Honourable Court may grant.*

**The Petitioner's case**

2. The Petition is based on the grounds set out on its face and supported by the Affidavit of Mulinge Kimeu, the Chairman of the Petitioner, who deposed that the Petitioner was duly registered on the 26<sup>th</sup> January, 1974 pursuant to the **Co-operative Societies Act, Cap 490** and comprised of 3316 members drawn from Machakos, Makueni, Kangundo, Mbooni East and West, Mukaa and Iveti and whose primary purpose is to run a Wattle Bark Processing Company and to further empower its members financially.

3. It was averred by the Petitioner's Chairman that sometime in 1970, the society, through its members' contributions, purchased a plot measuring 7.8 acres (the suit property) located near Konza; that the aforesaid plot had the following assets: Wattle Bark Processing Machine, Sisal Processing Machine, Maize Mill Machine, Weighbridge, Lorry Registration Number KTG 954 and a plot at Konza Market measuring 50 x 100 ft and that the land was later registered as L.R Number 1706/1 Konza I.R No 6607 (*hereinafter the suit property*).

4. The Deponent averred that sometime in 2003, the then Chairman of the society, one Raphael Muia, was asked to convene an Annual General Meeting to discuss the state of the society as the same had become dormant; that the Chairman failed to convene the meeting and that through a Special Annual General Meeting held on 7<sup>th</sup> November, 2007, a vote of no confidence was passed against him and other officials in charge of the society and that they were replaced with a caretaker committee.

5. According to the Petitioner's Chairman, on 8<sup>th</sup> September, 2010, during a meeting convened by the District Co-operative Officer, the Petitioner learned that the suit property and assets therein had been auctioned by the 1<sup>st</sup> Respondent with respect to an alleged loan that stood at Kshs 15,058,519 as at the time of auction, being 12<sup>th</sup> February, 2010 and that the Petitioner's members were unaware of the loan, there being no minutes of an Annual General Meeting approving the same.

6. It was averred that no notice was ever served upon the Petitioner before the suit property was sold by the Respondents and neither did they see an advert with respect to the auction; that a search revealed that the suit property was transferred to the 2<sup>nd</sup> Respondent sometime on 11<sup>th</sup> May, 2012 and that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are guilty of fraud, the particulars of which include *inter alia*: auctioning the Petitioner's property without notice and at a lower price than the prevailing market rate.

7. According to the Petitioner, the other particulars of fraud include failure to advertise the date, time and place of the auction; auctioning the suit property being aware that it was not part of the security that was offered by the Petitioner as per the alleged charged documents; transferring the suit property to the 2<sup>nd</sup> Respondent while aware that the same was not available for auction; selling and transferring the suit property without giving notice thereof to the Petitioner and transferring the suit property to the 2<sup>nd</sup> Respondent when there was no court order, purchase through private treaty and/or payment of the purchase price to the Petitioner.

8. It was Mr. Kimeu's further deposition that a valuation report dated 22<sup>nd</sup> December, 2009, indicated the value of the suit property to be Kshs 5,000,000; that on 12<sup>th</sup> December, 2010, the 1<sup>st</sup> Respondent auctioned the property at Kshs 2,600,000, an amount that was clearly below the market price and that the Petitioner has been denied the enjoyment of its fundamental right to ownership of property pursuant to Article 40 of the Constitution and stands to suffer irreparably if the same is not remedied.

### **The 1<sup>st</sup> Respondent's case**

9. In response to the Petition, the 1<sup>st</sup> Respondent's Business Banker filed a Replying Affidavit in which she deponed that at the Petitioner's behest, the 1<sup>st</sup> Respondent granted the Petitioner several loan facilities vide the letters of offer dated 18<sup>th</sup> November, 1977, and 18<sup>th</sup> December, 1979; that the said loan facilities were secured by a charge over the suit property; that the Petitioner fell into arrears, and pending the sale of the property subject to the charge, sought to have the loan written off and that the Petitioner has through correspondence and in meetings admitted the debt.

10. According to the 1<sup>st</sup> Respondent, it began the recovery process by issuing to the Petitioner a statutory notice dated 26<sup>th</sup> May, 2008; that when the notice elicited no response, the 1<sup>st</sup> Respondent instructed its agents, M/S Nguru Enterprises Auctioneers, who prepared and effected through personal service and registered mail a Redemption Notice as well as a Notification of Sale indicating the auction sale would be conducted on 22<sup>nd</sup> July, 2008 and that the 1<sup>st</sup> Respondent, through its agents, also placed an advertisement in the daily newspaper notifying the public of the intended auction.

11. The 1<sup>st</sup> Respondent's Business Banker deponed that the first auction that was conducted on 22<sup>nd</sup> July, 2008, was unsuccessful as the received bids were below the reserve price; that the 1<sup>st</sup> Respondent instructed M/S Spotlight Intercepts Kenya to issue another Redemption Notice which was done on 17<sup>th</sup> November, 2009; that the 1<sup>st</sup> Respondent commissioned a valuation report dated 22<sup>nd</sup> December, 2008, which report valued the forced market value of the suit property to be Kshs 2,500,000 and the Market value to be Kshs 5,000,000 and that the auction was conducted on 12<sup>th</sup> February, 2010.

12. It was deponed by the 1<sup>st</sup> Respondent's Business Banker that the 2<sup>nd</sup> Respondent herein was the successful bidder for the land at the sum of Kshs 2,600,000; that subsequently, a memorandum of sale was signed in the bidder's favour and that the Petitioner has at all times been well aware of all the happenings in relation to the sale of the suit property.

13. It is the 1<sup>st</sup> Respondent's case that the dispute herein is commercial in nature and does not extend to any breach of rights as alleged by the Petitioner; that due process was followed by the 1<sup>st</sup> Respondent in the registration of the charge as well as in the exercise of the power of sale and that the orders sought are incapable of being granted as the suit property was long sold.

### **Hearing & Evidence**

14. The Petition proceeded by way of oral hearing on 9<sup>th</sup> February, 2021. PW1 informed the court that he is the chairman of the Petitioner having been duly elected through an Annual General Meeting on 8<sup>th</sup> September, 2010. PW1 relied on his Affidavit sworn on 5<sup>th</sup> May, 2016, and Supplementary Affidavit sworn on the 28<sup>th</sup> June, 2016, as his evidence in chief. He also relied on his Affidavit in support of the Petition sworn on 4<sup>th</sup> October, 2019. PW1 produced in evidence documents 1-13 of the bundle of documents dated 4<sup>th</sup> October, 2019 as PEXHB1.

15. It was PW1's testimony that the auction of the suit property was unlawful; that the Petitioner never held an Annual General Meeting approving the loan and is unaware of the persons who borrowed the funds from the 1<sup>st</sup> Respondent and that the Petitioner seeks to regain its property or in the alternative be repaid the current value of the suit property and the assets therein.

16. On cross-examination, PW1 stated that whereas the Petitioner has 3,316 members, the letter of authority to file the suit was signed by only six (6) people; that the six (6) people are the officials of the society and represent the entire membership of the society; that he is unaware of the loan agreement in the Petitioner's bundle of documents as the same had been filed by the advocate; that the loan agreement indicated that the 1<sup>st</sup> Respondent gave the society a loan of Kshs 1.8 Million and that whereas indeed the loan agreement was signed, he was not aware who the signatories were.

17. PW1 stated that he has been a member of the Petitioner since 1974 and came into office in 2010; that he did not know the former officials of the Petitioner and what transpired before 2010 as the society had been dormant since 1990; that the Certificate of Registration of a Charge by the Commissioner of Co-operative Development indicated that a loan facility had been taken; that the meeting of 10<sup>th</sup> May, 1995 was a committee meeting and not a members meeting and that he did not know the officials indicated in the minutes of 17<sup>th</sup> October, 1997.

18. On being questioned about the Special General Meeting of 2007, PW1 stated that he was unaware of the same because he became an official in 2010; that the society had no notice before the land was auctioned; that the society's postal address was through the District Co-operative; that he was not in the office in 2008 and is unaware whether the officials received the auctioneers notice and that none of the members saw the advertisement for the sale of the suit property by public auction in the newspapers.

19. During re-examination, PW1 reiterated that he was duly authorized to institute the suit; that the members have never given the society the authority to borrow money; that all the minutes alluded to by the 1<sup>st</sup> Respondent are with respect to committee meetings and not members' meetings; that he has never received any notice from the bank; that he does not know the person who signed for the loan amount; that the society's address is P.O Box 55 Machakos while the 1<sup>st</sup> Respondent used P.O Box 842 Machakos and that a search reveals that the property belongs to Konza Investment Limited.

20. DW1 relied on the Replying Affidavit dated 18<sup>th</sup> March, 2016, as her evidence in chief. She produced the documents annexed on the Affidavit as DEXB1.

21. On cross-examination, DW 1 stated that the 1<sup>st</sup> Respondent gave the Petitioner a loan; that there was a letter of offer dated 18<sup>th</sup> November, 1977; that she was not with the 1<sup>st</sup> Respondent as at the time the loan was granted having joined the 1<sup>st</sup> Respondent in 2005; that before the 1<sup>st</sup> Respondent grants a loan to a co-operative society, it requires a certificate of registration, the application form, financial statements and minutes from the members of the society in an AGM authorizing the borrowing of funds and that she does not have minutes of an AGM of the Petitioner authorizing the borrowing of money from the 1<sup>st</sup> Respondent.

22. DW1 admitted on cross-examination that whereas the address in the loan agreement is P.O Box 55 Machakos, the notices that were sent to the Petitioner were sent to P.O Box 842 Machakos; that there is no evidence to show that the said postal address belongs to the Petitioner; that she could not confirm whether the notices were sent to the right address and that they never received any responses to the notices from the Petitioner.

23. According to DW1, the Petitioner borrowed Kshs. 1.8 million and Kshs 650,000; that the outstanding loan as at the time of the auction was Kshs 15.1 million; that they received a letter seeking clarification on the borrowed sums from the Petitioner; that she is aware of the letter requesting for statements but is unaware whether the same was supplied; that the charge was in respect of a property that is not dictated in the certificate of registration of charge and finally that she could not explain how the loan was taken and how much was repaid.

24. During re-examination, DW1 testified that the 1<sup>st</sup> Respondent did not have any other facility except the suit property; that it is the Commissioner for Co-operative Development who issues a certificate of registration of charge which confirms that the 1<sup>st</sup> Respondent is holding security after granting a loan; that the Commissioner issues the certificate after confirming that the provisions of the Co-operative Societies Act have been complied with and that there is no evidence to show that the letter of December 2010 was received by the 1<sup>st</sup> Respondent. DW1 stated that the notice of 26<sup>th</sup> May, 2008, was by way of registered post and that there were two newspaper advertisements of the auction.

25. Despite service, the 2<sup>nd</sup> Respondent did not participate in the proceedings.

### Submissions

26. It was the Petitioner's counsel's submissions that the Petitioner's former officials and the 1<sup>st</sup> Respondent colluded to fraudulently obtain the loan; that the 1<sup>st</sup> Respondent as a reputable institution ought to have known the necessary requirements before granting loans to a Co-operative society; that the 1<sup>st</sup> Respondent has not outlined any difficulties faced in following the said mandatory requirements nor any reasons for failure to obtain them and that it follows that the loan was obtained illegally and is not binding on the Petitioner.

27. According to counsel, the mandatory provisions of Sections 90 and 96 of the **Land Act** and **Rule 15(d)** of the Auctioneers Rules were not complied with; that the alleged statutory notice was addressed to the Director-Wattle Bark Growers, P.O Box 842 Machakos whereas the Petitioner is Machakos Wattle Bark Growers Co-operative Society Limited of P.O Box 55 Machakos and that there is no evidence of the notice having been sent, nor received.

28. Counsel submitted that the Petitioner did not receive the notice and that in any event, a notice sent through registered post only takes effect once received. Reliance was placed on the case of **Peter Kuria Munyuira vs Housing Finance Company of Kenya Limited & Anor (unreported)** where the court stated thus;

***“A notice sent through registered post takes effect after the collection of the registered mail of the chargor from the Postal Corporation of Kenya. It is therefore incumbent upon the chargee to ensure the registered mail sent through any process is received and there must be evidence of receipt and the date it was collected or received by the addressee.”***

29. According to counsel, where receipt of notice is denied by the chargor, the burden falls upon the chargee to establish that the notice was served. Counsel cited the cases of **Obel Omuom vs Kenya Commercial Bank Ltd, Court of Appeal at Kisumu, Civil Appeal No 148 of 1995 (1996) eKLR** and **Stephen Boro Githia Vs Nicholas Rithiru Gatoto & 2 others [2017]eKLR** where the court held as follows:

***“It was his testimony that a notice had been posted to the plaintiff's address. However, he did not produce a certificate of posting or any documentary evidence to show that the statutory notice was indeed served on the plaintiff. See Ochieng and Another vs Ochieng and Others, Civil Appeal No.148. of 1995 EALR [1995-98] at pg 260. In the circumstances it is plain that the plaintiff was not served in terms of section 153 of the Registered land Act (Cap. 300).***

*It is trite law that non-service of a statutory notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor's equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit (sic) property amounts to an illegality."*

30. It was counsel's further submission that service of a statutory notice is mandatory and failure to do so is fatal and makes the statutory power of sale null and void. To buttress this position, reliance was placed on the cases of *Kenya Commercial Bank Ltd Vs Pamela Akinyi Ochieng, Civil Appeal No 114 of 1991(unreported)* and *Martha Khayanga Simiyu vs Housing Finance Co-operation of Kenya & 2 ors, Nairobi HCC 937 of 2001[2001]2 EA 540.*

31. According to counsel, the sale of the suit property by way of public auction is null and void for want of service of the statutory mandatory notice. Reliance was placed on the case of *Shafi Grewal Kaka vs David Katana Ngomba [2010] eKLR* which adopted with approval the ruling of the court in *Elizabeth Wambui Njuguna vs Housing Finance Co-op of Kenya [2006]eKLR [Hcc No. 1678 of 2001 (Milimani) Samuel Kiarie Muigai vs Housing Finance Co. Kenya Ltd]* where the court stated as follows:

*"...the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the statute, which derogates from the chargor's equity of redemption."*

32. It was submitted for the Petitioners that **section 15(d)** of the Auctioneers rules was equally not complied with as the alleged notification of sale was served on one Eunice Mutua who is a stranger to the Petitioner; that due to the glaring breach of statutory duty of care owed to the Petitioner and the fact that the suit property was sold contrary to **Sections 90,96 and 97 of the Land Act and Rule 15(d)** of the Auctioneers Rules, the purported sale was illegal and should be cancelled and the property reverted to the Petitioner pursuant to **Section 143 of the Registered Land Act**. Reliance was placed on the case of *John Kirughamio Maganga vs Consolidated Bank of Kenya & 2 others [2020] eKLR* where it was stated thus;

*"It is my opinion and understanding upon reading the decisions of the court of appeal in this area I get the learning that the law remains that the court will not countenance failure to comply with the law nor reward a party for own violation of a statute by allowing a perverter of the law to keep a benefit thereby obtained. This court has all along held it strongly that to depart from this path would defeat the very purpose of a justice system based on the rule of law."*

33. In conclusion counsel submitted that they had made out their case warranting the grant of the orders sought.

34. The 1<sup>st</sup> Respondent's counsel submitted this matter as filed is fatally defective and that the matter is a simple dispute between a chargor and a chargee, raising no constitutional questions and consequently invokes the principle of constitutional avoidance. Reliance was placed on the Supreme Court case of *Communications Commission of Kenya & 5 Others vs Royal Media Services & 5 others [2014]eKLR* where it was stated thus;

*"The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court articulated the principle of avoidance in the minority Judgment as follows [at paragraph 59]:*

*"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."*

*Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).*

*From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."*

35. On whether the 1<sup>st</sup> Respondent's charge over the suit property was valid, counsel submitted that the 1<sup>st</sup> Respondent produced sufficient evidence of the existence of the loan including, a copy of the Loan Agreement duly signed by the Petitioners Chairman, Secretary and Treasurer and the Certificate of Registration of Charge; that under **section 28(3)** of the **Co-operative Societies Act**, officials of a society have ostensible authority to bind the society and that the Petitioners argument that any borrowings by its former officials is not binding on the society without proof of minutes of approval cannot stand.

36. Counsel submitted that the 1<sup>st</sup> Respondent is protected by the indoor management rule. Reliance was placed on the case of *OP'kalou Farmers Savings & Credit Co-operative Society Ltd vs Oiko Credit, Ecumenical Development Co-operative Society, UA [2020] eKLR* where the court stated thus;

*"Even if not all the documentation regarding the application and approvals of the loan were not availed to this court the above documents are sufficient evidence that the parties were desirous of entering into another agreement in 1999. I am persuaded to agree with the defendant's submission on the doctrine of 'indoor management' which was discussed in Royal British Bank v Turquand (Supra) where it was held:*

*“...that the parties who had dealings with the company need not inquire into the indoor management but could assume that its requirements had been complied with. The rule in Turquand’s case was again subject to exceptions. Even this solution would have been principle that a director or other officer could bind the company if he had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority. By this circuitous route English and Scottish company law developed a pattern of legal rules which were acceptable to modern practice and worked, on the whole, satisfactorily.”*

*The defendants being outsiders could not know every detail of the internal operations of the plaintiff’s operations if it had no notice of it and hence cannot be prejudiced by any irregularities committed by the plaintiff’s officers. Also, if some preliminaries were required that the plaintiff’s officials failed to comply with, it cannot be construed against the defendant.”*

37. It was further submitted that the Petitioner’s indebtedness was discussed in various meetings and the Petitioner is estopped from denying the same and that out of the loaned amount, the sum of Kshs. 550,000 was used to finance the purchase of the property as the Certificate of Official Search details that there was a discharge of charge of the title on 22<sup>nd</sup> May 1979 and that on the same date, there was a transfer of title to the Petitioner and a charge to the 1<sup>st</sup> Respondent to secure the principal sum of Kshs 1,350,000.

38. Counsel submitted that the 1<sup>st</sup> Respondent has adduced certificates of registration of charge duly issued by the Commissioner of Co-operative Development; that pursuant to **Section 52 (2) of the Co-operative Societies Act**, the certificates are deemed as conclusive evidence that the requirements of the Act with respect to registration of charges were complied with and that there is an irrebuttable presumption that the charge over the property was valid. Counsel cited the case of *Njuguna Ngujiri & 6 Others vs Savings & Loan (K) Ltd & 5 Others [2009] eKLR* where the learned judge stated thus;

*“I have perused the charge dated 7th June 2005. The said charge was lodged at the lands office on 15th June 2005. It was registered with the Commissioner of Cooperative Societies on 22 June 2005. In law, once the charge was registered, the same became a legal instrument capable of legal enforcement. Under Section 52 (2) of the Cooperative Societies Act, the registration of the charge cannot be challenged on the grounds that certain conditions precedent had not been fulfilled. I hold that the officials of the 2nd defendant had both the ostensible and the actual authority to enter into the loan agreement with the 1st defendant. I was not persuaded by the argument advanced by the plaintiffs that there was a requirement that two thirds of the members of the 2nd defendant approve the decision of the management committee before the suit property could be charged to the 1st defendant.”*

39. With respect to the validity of the sale of the suit property, counsel submitted that contrary to the Petitioner’s assertions, there is sufficient evidence of the Petitioner’s indebtedness; that the statutory notices were duly served and a former official of the Petitioner admitted receipt of the same and that the Petitioner cannot be heard to say that it was not served with the 90 day notice under Section 69 of the Transfer of Property Act of India (1882). Reliance was placed on the case of *Beatrice Atieno Onyango vs Housing Finance Company Limited & 3 others [2020] eKLR* where the court stated thus;

*“The Plaintiff admitted in her email dated 22<sup>nd</sup> June 2018 that she had received the notice and that she would pay the balance before the time elapses. In light of the clear and uncontroverted admission, I find that the Plaintiff was served with the 90-day statutory notice under section 90 of the Land Act consequently the Bank was entitled to exercise its statutory power of sale in accordance with the prescribed procedures.”*

40. It was further submitted that as a result of the admission aforesaid, the Petitioner’s argument that the notice was posted to an incorrect address was inconsequential; that upon the lapse of the 90-day notice, a 45 days’ redemption notice was served and upon its lapse the property was advertised for sale in the daily newspaper and that the Petitioner’s apparent failure to read the newspapers cannot be used to punish the 1<sup>st</sup> Respondent.

41. Counsel for the 1<sup>st</sup> Respondent submitted that the Petitioner’s argument that the 1<sup>st</sup> Respondent failed to issue a 40 days’ notice under **Section 96 of the Land Act** cannot stand as at the time, the charge was regulated by the **Transfer of Property Act of India (1882)** which did not have this requirement. In support of this contention counsel cited the case of *Fredrick A. Makumbi vs Kenya Commercial Bank Limited [2013] eKLR* where the court stated;

*“It is instructive to note that the Defendant has by the statutory notices issued to the Plaintiff created confusion on which law the exercise of statutory power of sale relate to. The charge instrument indicates that the relevant law is RTA. The statutory notices sent to the plaintiff for three months and forty days’ notice both reflect the applicable law as per the Land Act. This dichotomy can undoubtedly lead to confusion on the part of the Plaintiff. If indeed the correct law was RTA all the Plaintiff required was a three months’ statutory notice. However, if the applicable law was the Land Act the Defendant was obligated to give the plaintiff three months’ statutory notice and then forty days’ notice before completing any contract of sale.”*

42. It was submitted that the 90 days’ notice having been issued to the Petitioner under the **Transfer of Property Act**, and the auction having been conducted before the promulgation of the **Land Act**, any reference to the Land Act is erroneous and that despite the repeal, the applicable law is the **Transfer of Property Act (1882)**. To buttress this position counsel relied on the case of *Argos Furnishers Limited vs Eco bank Kenya Limited & Another [2014] eKLR* where it was held;

*“I wish to state that, a repealed law continues to apply to transactions which were carried under the repealed law. The basis of that approach is the too familiar constitutional philosophy that there should be no wrong suffered without a remedy. The aim of the law here is; to preserve a right which had accrued; and enforce obligation or liability which had attached. There are ample decisions on this subject but see section 23(3) of the Interpretation and General Provisions Act.”*

43. On whether the Petitioner is entitled to the prayers sought, counsel submitted that with respect to the prayer declaring the auction illegal and the cancellation of any transfer arising therefrom, the same could not lie as the transfer was pursuant to a valid sale by public auction; that there can be no declaration that the Petitioner is the owner of the suit property as the same was lawfully sold and that equity of redemption was extinguished on the fall of the auctioneer's hammer. Reliance was placed on the case of Joyce Wairimu Karanja vs James Mburu Ngure & 3 others [2018] eKLR where it was stated;

***“Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under section 99 of the Land Act. Thirdly, a mortgagor's equity of redemption is extinguished upon the fall of the hammer in a public auction.”***

44. Counsel also relied on the case of Kamulu Academy Limited & another vs British American Insurance (K) Limited & 2 others [2018] eKLR where the court held;

***“The Equity of redemption is extinguished at the fall of the hammer. On 17<sup>th</sup> May 2016, the charged property was sold by public auction to the 3<sup>rd</sup> defendant being the highest bidder for Kshs.27 million. The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not. I find the applicant's application has been overtaken by the events as the sale which the 1<sup>st</sup> plaintiff sought to stay has already taken place. The 3<sup>rd</sup> defendant purchased the property at a public auction and is therefore protected by provisions of section 99 of the Land Act.”***

45. Counsel submitted that there is no evidentiary basis for the prayer of damages as set out in prayer 3 as the property was sold above the forced sale value and further that the sale did not offset all the arrears. In conclusion, counsel submitted that the Petitioner did not prove his case on a balance of probability and urged that the suit should be dismissed.

### **Analysis & determination**

46. Having carefully considered the pleadings, the testimonies and submissions by the parties herein, the following issues arise for determination:

i. Whether the Respondents violated the Petitioner's rights to property under Article 40 of the Constitution of Kenya, 2010.

ii. Whether the Petitioner is entitled to the orders sought?

47. The Petitioner instituted this suit pursuant to the provisions **Article 22(1)** as read with **Article 258(1)** of the **Constitution**, which empowers any person to institute a suit claiming violation and/or threatened violation of their rights and freedoms as set out in the Bill of Rights. The Petitioner alleges contravention of its right to property as protected by **Article 40** of the **Constitution**.

48. **Article 162** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011** set out the jurisdiction of this court, which includes, *inter alia*, determination of matters concerning the environment, the use and occupation of, and title to land as well as matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under the Constitution.

49. This court's jurisdiction also extends to claims concerning breaches of other fundamental rights related to the environment and land. This position was articulated by the Court of Appeal in Daniel N Mugendi vs Kenyatta University & 3 others [2013] eKLR who stated thus;

***“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.”***

50. Whereas indeed, this court has jurisdiction to hear and determine constitutional Petitions, it is prudent for the court to determine the justiciability of the matter and whether it indeed invokes the principle of constitutional avoidance.

51. As correctly cited by the 1<sup>st</sup> Respondent, the principle of constitutional avoidance was expounded by the Supreme Court in the case of Communications Commission of Kenya (Supra). The Court observed as follows:

***“The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court (Kentridge AJ), articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:***

***“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”***

***Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”***

52. Likewise, the High Court in the case of *C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] eKLR* with regard to this principle persuasively noted as follows:

*“Similarly, in Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:*

*“All the authorities above would point to the fact that the constitution is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”*

*The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in Re Application by Bahadur[1986] LRC (Const) the Court expressed itself as follows at page 307;*

*“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under the Constitution. This case highlights the un-wisdom of ignoring that advice.... The Constitution sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of the Constitution might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See Harrikissoon v A-G [1979] 3 WLR 62).*

*It was further observed in the case of Minister of Home Affairs vs. Bickle & Others (1985) LRC Const(per (Georges C.J):*

*“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”*

53. The above examination makes it clear that this doctrine necessitates that this court should avoid making determinations on constitutional issues that have their foundations in existing statutory laws which are sufficient and adequate mechanisms to deal with the specific issue and that where a dispute is one which can be determined under another area of law other than under the Constitution, it is best that it be so determined and pure constitutional issues left to be determined as such.

54. Having set out the above foundation, it follows that the question to be answered is whether there is a valid constitutional question before this court. The Petitioner asserts that the Respondents violated its rights to property as espoused under **Article 40** of the **Constitution** as a result of the illegal and fraudulent sale and transfer of the suit property. On its part, the 1<sup>st</sup> Respondent avers that the disposition of the suit property was lawfully carried out in the exercise of its rights as a chargee under a statutory power of sale.

55. Indeed, an analysis of the facts reveals that the main contention is whether or not the Petitioner is indebted to the 1<sup>st</sup> Respondent; whether the acquisition of a loan by the Petitioner’s former officials was lawful and/or procedural, and whether the Petitioner was served with the statutory notice before the suit property was sold to the 2<sup>nd</sup> Respondent at a public auction.

56. The Petitioner is a co-operative duly registered under the Co-operative Societies Act. Although the question of whether or not a loan borrowed by officials of the society was borrowed with the requisite authority is a matter clearly within the civil jurisdiction of this court, the Petitioner’s allegation that it was dispossessed of its land unlawfully by the 1<sup>st</sup> Respondent raises a constitutional issue as to whether the Petitioner was deprived of its property unconstitutionally (see **Article 40** of the **Constitution**).

57. It is trite that under **Article 40** of the **Constitution**, the Petitioner has the right to property, which right includes the right to acquire and own property. **Article 40** of the **Constitution** provides as follows:

*“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya.”*

58. The Petitioner’s basis for alleging infringement of its right to property is premised on several aspects. For ease of reference, the court will determine these aspects sequentially. The first point of contention is whether or not the Petitioner was indebted to the 1<sup>st</sup> Respondent. According to the Petitioner, it is not indebted to the 1<sup>st</sup> Respondent and that its members had never given authority for the acquisition of the loan.

59. The 1<sup>st</sup> Respondent produced in evidence copies of the duly executed loan agreements dated 18<sup>th</sup> November, 1977, for Kshs 1,800,000 and 18<sup>th</sup> December, 1979, for Kshs 650,000. PW1 did not impugn the signed loan agreements, only stating that he did not know who signed the agreement on behalf of the Petitioner.

60. The 1<sup>st</sup> Respondent also produced in evidence a copy of the minutes of meetings held by the Petitioner’s officials on 10<sup>th</sup> March, 1995, 17<sup>th</sup> January, 1977, and 8<sup>th</sup> September 2010. During the aforementioned meetings, the issue of indebtedness of the Petitioner with the 1<sup>st</sup>

Respondent was discussed. The Petitioner's contention that the meetings alluded to by the 1<sup>st</sup> Respondent were committee meetings and that the general membership was unaware of the loan points to a potential conflict within the Petitioner's members.

**61.** A distinction has to be made between the **Co-operative Societies Act, cap 490, (revised in 1972)** that was applicable in 1979, and the applicable **Cooperative Societies Rules**, when the Petitioner is said to have borrowed the money, and which was repealed by Act No. 12 of 1997 and the *current Co-operative Societies Act, Act No. 12 of 1997*.

**62. Rule 34 (1) of the Co-operative Societies Rules** which were applicable in 1979 provides, *inter alia*, that the committee of a registered society shall be the governing authority of the society and subject to any directions from a general meeting of the society and the by-laws of the society it shall direct the affairs of the society with powers to enter into contracts and to borrow money in accordance with **rule 45** of the Rules.

**63.** It is clear from the foregoing that the receipt of loans from non-members was subject to the conditions set out under the rules in the Act or under the society's by-laws. **Rule 45** provides as follows:

*“The conditions under which a registered society may receive deposits and loans from persons who are not members under Section 41 of the Act shall be that-*

- a) the Commissioner is satisfied that the society genuinely needs the deposit or loan;*
- b) the Commissioner is satisfied that the terms of the deposit or loan and the rate of interest are reasonable;*
- c) repayment of the deposit or loan is secured to the satisfaction of the Commissioner;*
- d) the maximum liability fixed under rule 44 of these Rules is not exceeded; and*
- e) the Commissioner has given written approval for the deposit or loan.”*

**64.** A reading of the above Rule shows that under the Act, there was no requirement for a resolution by members authorizing the borrowing of funds. As the Petitioner did not produce in evidence their by-laws nor indeed alluded to any breach of its by-laws in this regard, the court concludes that the officials of the society had due authority to take the impugned loan from the 1<sup>st</sup> Respondent.

**65.** According to the Petitioner, they did not charge the suit property to secure the loan and that further, the Certificate of Registration of Charge adduced by the 1<sup>st</sup> Respondent does not indicate that the suit property was charged. On its part, the 1<sup>st</sup> Respondent contends that the suit property was duly charged; that the Certificate of Registration of Charge is conclusive evidence that the requirements of the Act with respect to registration of charges was complied with and that there is an irrebutable presumption that the charge over the property was valid.

**66. Section 49** of the *current Co-operative Societies Act, Act No. 12* of 1997 which was last amended in the year 2008 empowers a society to charge its property with the approval of the Commissioner, and subject to a special resolution by the general meeting. The section provides as follows;

*“A registered society may from time to time, with the consent of the commissioner, charge the whole or any part of its property, if its by-laws expressly empower it to do so and to the extent to which its by-laws empower it to do so, subject to a special resolution by the general meeting.”*

**67. Section 52 (1)** of the *current Act* provides as follows:

*The Commissioner shall, with respect to each co-operative society, register in such form as may be prescribed by or under this Act, all charges requiring registration and shall enter in the register, with respect to every charge, the following particulars-*

- a) .....*
- b) the amount secured by the charge;*
- c) short particulars of the property charged; and the persons entitled to the charge.*

**68. Section 52 (2)** of the *current Act* provides as follows:

*“The Commissioner shall issue a certificate under his hand of the registration of any charges registered under this part, stating the amount secured, and the certificate shall be conclusive evidence that the requirements of this part as to registration have been complied with.”*

**69.** The provisions of the current Act are slightly different from the **Co-operative Act** that was repealed by **Act No. 12 of 1997**, and which is applicable in this case. **Section 49** of the repealed Act provided as follows:

***“A registered society may from time to time, with the consent of the commissioner, charge the whole or any part of its property, if its by-laws expressly empower it to do so and to the extent to which its by-laws empower it to do so.”***

70. Unlike the *current* Act, under the repealed law, there was no requirement for a special resolution to be passed at a general meeting before a society could charge its property. The charging of the society’s property was only subject to its by-laws, which by-laws were not produced in evidence by the Petitioner.

71. According to the copy of the title in respect to the suit property, the Petitioner caused its land to be charged on 22<sup>nd</sup> May, 1979 to the 1<sup>st</sup> Respondent, which is the same day the property was registered in its name. The evidence produced in court shows that the Commissioner of Cooperative Development issued two certificates of registration of a charge in respect of the charged property.

72. In the said two certificates of registration of charge dated 9<sup>th</sup> March, 1978 and 15<sup>th</sup> May, 1979, it is indicated that the 1<sup>st</sup> Respondent created a charge for a sum of Kshs. 1,800,000 and 1,350,000 in favour of the Petitioner respectively. The said certificates do not give the particulars of the charged property.

73. Although the *current* Act provides that the Commissioner should include the particulars of the charged property in the certificate of registration (**see section 52 (1) of the Act**), the Co-operative Act that was applicable in 1979, and which was repealed by Act No. 12 of 1997, did not have this requirement. The Act as at that time only required the Commissioner to issue a certificate under his hand of the registration of any charges registered, stating the amount secured, and the certificate shall be conclusive evidence that the requirements of the Act as to registration have been complied with (see **section 53 (2)** of the repealed Act).

74. Having perused the two certificates of registration of charge dated 8<sup>th</sup> March, 1978 and 15<sup>th</sup> May, 1979, and having read the provisions of the repealed Co-operative Societies Act, it is the finding of this court that the charge that was created by the 1<sup>st</sup> Respondent in respect to the suit property was valid.

75. According to the Petitioner’s counsel, the mandatory provisions of **Section 90 and 96** of the **Land Act** and **Rule 15(d)** of the Auctioneers Rules were not complied with; that the alleged statutory notice was addressed to the Director-Wattle Bark Growers, P.O Box 842 Machakos whereas the Petitioner is known as Machakos Wattle Bark Growers Co-operative Society Limited of P.O Box 55 Machakos; that there is no evidence of the notice having been sent, nor received; that the Petitioner did not receive the notice and that in any event, a notice sent through registered post only takes effect once received.

76. On their part, the 1<sup>st</sup> Respondent’s counsel submitted that the applicable law with respect to the statutory notices is the Indian Transfer of property Act ,1882 (*now repealed*) and the Auctioneers rules of 1997 and not the **Land Act,2012**; that the 1<sup>st</sup> Respondent duly served the 3 months’ notice, which notice was admittedly received by the Petitioner’s former chairman; that upon the lapse of the 90 days, the 1<sup>st</sup> Respondent issued a 45 days redemption notice and that upon the lapse of 45 days, the 1<sup>st</sup> Respondent advertised the property for sale in a newspaper advert.

77. On the question of the applicable law, Section 162 of the Land Act, 2012 under the title ‘Savings and transitional provisions with respect to rights, actions, dispositions etc’ is instructive and states thus;

***“162. (1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”***

78. At the time material to the dispute, the suit property was registered under the provisions of the now repealed **Registration of Titles Act (Chapter 281)**. The manner in which a chargor could exercise his statutory power of sale in regard to property registered under the provisions of the repealed statute was regulated by **Section 69 A (1)** as read with **Section 100 A** of the **Transfer of Property Act (1882)** (repealed) which provided as follows:

***“69A. (1) A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until- (a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service.”***

79. **Section “100A. (1)** provided as follows:

***“A chargee under a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act and duly registered under that Act shall have the same rights, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rent and profits, or any of them) as if the charge were an English mortgage to which section 69 of this Act applies.”***

80. The requirement for a Notification of Sale is contained in the Auctioneers Rules, made under the **Auctioneers Act. Rule 15(d)** thereof provides as follows :-

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

***(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction”***

81. In support of the contention that they duly served the notices, the 1<sup>st</sup> Respondent produced in evidence the statutory notice dated 26<sup>th</sup> May 2008. On the face of it, the statutory notice shows that it was dispatched to the Petitioner by way of registered post and a copy thereof also served by ordinary post. The 1<sup>st</sup> Respondent also produced in evidence the Notification of Sale and the Redemption Notice dated 20<sup>th</sup> May 2009, the Auctioneers certificate of service thereunder dated 3<sup>rd</sup> June 2009 and a certificate of postage.

82. The 1<sup>st</sup> Respondent also produced in evidence a second Redemption Notice and Notification of sale dated 17<sup>th</sup> November, 2009. Having produced those documents, the evidential burden shifted to the Petitioner to demonstrate that he did not and could not have received the said notices. In *Nyagilo Ochieng & Another vs Phaniel B. Ochieng & 2 Others [1996] eKLR*, the Court of Appeal pronounced itself on this point thus:

*“Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya.”*

83. Section 3(5) of the *Interpretation and General Provisions Act*, on the other hand, provides that:

*“Where any written law authorizes or requires a document to be served by post, whether the expression “serve” or “give” or “send” or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post.”*

84. According to the Petitioner, they did not receive the notices because the same were not addressed to the postal address as set out in the loan document being P.O Box 55 Machakos, but were instead sent to postal address, P.O Box 842 Machakos.

85. Indeed, the statutory notice that was produced in evidence was addressed to the Directors, Machakos Wattle Bark Growers-P.O Box 842 Machakos, while the Redemption Notice/Notification of Sale was addressed to Machakos Wattle Bark Growers Co-operative society limited P.O Box 842 Machakos.

86. Whereas it was averred by the Petitioner that its address as set out in the loan agreements is P.O Box 55-Machakos, the court notes that in the letter dated 24<sup>th</sup> January, 1997 authored by the then Petitioner’s Chairman to the 1<sup>st</sup> Respondent, the Petitioner indicated its address as P.O Box 842 Machakos. Furthermore, the minutes of the general delegates meeting held on 17<sup>th</sup> January, 1997 also shows the address to be P.O Box 842 Machakos.

87. Further, a scrutiny of the Petitioner’s documents, including the letter dated 11<sup>th</sup> December, 2012 addressed to the 1<sup>st</sup> Respondent, shows that they also use the address-P.O Box 40-Machakos. It appears that the Petitioner has several addresses and the 1<sup>st</sup> Respondent cannot be faulted for using an address which originated from the Petitioner.

88. Accordingly, the court finds that it is sufficient that the notices were sent by the 1<sup>st</sup> Respondent to one of the Petitioner’s addresses. Further, no evidence whatsoever was availed herein by the Petitioner to prove that it did not, and/or could not, have received the notices that were sent using one of its addresses, or that the address that the 1<sup>st</sup> Respondent used did not belong to the Petitioner, but to a different entity all together. Consequently, it is the finding of this court that the relevant notices were duly served upon the Petitioner, and in accordance with the law.

100. With respect to whether it was necessary to acquire any court orders prior to the sale and transfer of the property, the Indian Transfer of Property Act, 1882 (now repealed) was instructive. **Section 69(1)** thereof stated as follows;

*“69(1) A Mortgagee or any person acting on his behalf where the mortgage is an English mortgage to which this section applies shall, by virtue of this Act and without the intervention of the court have power when the mortgage-money has become due, subject to the provisions of this section, to sell or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not and either together or in lots by public or private treaty subject to such conditions respecting title or evidence of title or other matter as the mortgagee thinks fit.”*

101. Guided by the above, the Court of Appeal in the case of *Nancy Kahoya Amadiva vs Expert Credit Limited & another [2015] eKLR* court held as follows:-

*“Under RTA the mortgagee has power to sell either by private treaty or public auction and does not have to go to court to prove his debt provided section 69A of the Indian Transfer of Property Act is conformed with.”*

102. Based on the foregoing, the court finds that the sale of the property by way of public auction was procedural.

103. The Petitioner contends that the property was sold at an under value. It is the Petitioner’s contention that the valuation report dated 22<sup>nd</sup> December 2009 addressed to the 1<sup>st</sup> Respondent set the current open market value of the property at Kshs 5,000,000 and that the 1<sup>st</sup> Respondent having sold the property at Kshs 2,600,000, it sold it at a price lower than the market value. In response, the 1<sup>st</sup> Respondent stated that they sold the property above the forced sale value of Kshs. 2,500,000

104. It is trite that a chargor cannot be faulted for selling the property at the forced sale value. This position was appreciated by the Court of Appeal in the case of *Mbuthia vs Jimba Credit Finance Corporation & another*[1988] eKLR where the Court held thus:-

*“If the Mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the grounds of undervalue alone, and still less if the Mortgagor has in some degree sanctioned the proceedings leading up to the sale.”*

105. A chargor, in exercise of its statutory right of sale does not have the luxury of awaiting the highest offer possible. DW I informed the court that the auction leading to the sale of the suit property was the second auction, the first having failed to attract bids above the reserve price. The fact that the auction did not invite prices attractive to the Petitioner does not in itself mean that the property was sold at an undervalue. In *Mbuthia vs Jimba Credit Finance Corporation & another (supra)* the court stated as follows:

*“... surely the true market value of property is not determined by either the subjective view-point of a mortgagor or his chosen valuers. It is difficult to think of a better and more reliable method of determining the true and fair market value of property than by a sale at a public auction.”*

106. The duty of the 1<sup>st</sup> Respondent was to obtain the best possible price taking into account the prevailing market conditions and the fact that this was a forced sale. The court is satisfied that the 1<sup>st</sup> Respondent fulfilled its duty of care in this respect.

107. Having found that the 1<sup>st</sup> Respondent sent the requisite statutory notices to the Petitioner, and in the absence of evidence to show that the Petitioner did not redeem its property even after the said notices had been sent, the 1<sup>st</sup> Respondent was entitled to sell the property at a public auction. Due notice having been given before the auction was conducted on 12<sup>th</sup> February, 2010, and the 2<sup>nd</sup> Respondent being the highest bidder, it follows that the transfer to the 2<sup>nd</sup> Respondent was lawful.

108. Indeed, **Section 69(B)(2)** of the Indian **Transfer of Property Act** provides that where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale; or that due notice was not given; or that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

109. With respect to the allegations of fraud, it is trite law that he who alleges must prove. Beyond the said allegations of fraud in the pleadings, no evidence has been adduced in that regard and the Petitioner has failed to discharge the burden of proof imposed on it.

110. The Petitioner having failed to demonstrate infringement and/or threatened infringement of its constitutionally guaranteed right to property, it follows that it is not entitled to any of the orders sought. In conclusion, the court finds that the Petition dated 4<sup>th</sup> October, 2019 is unmerited.

111. The Petition is dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 3RD DAY OF FEBRUARY, 2022.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Ms Munyao h/b for Muumbi for the Petitioner

Ms Kiplagat for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent