



**Nyingi v Ndungu-Ngunjiri & 2 others (Environment & Land Case
125 of 2018) [2022] KEELC 4760 (KLR) (7 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 125 OF 2018**

JG KEMEI, J

SEPTEMBER 7, 2022

BETWEEN

RAPHAEL DENNIS NYINGI PLAINTIFF

AND

JULIA WANGARI NDUNGU-NGUNJIRI 1ST DEFENDANT

GARAM INVESTMENTS 2ND DEFENDANT

BARCLAYS BANK OF KENYA 3RD DEFENDANT

JUDGMENT

The Background

1. The genesis of this suit is that the 3rd defendant (bank) advanced disclosed financial facilities to the plaintiff. The said facilities were secured by the property known as LR No Thika/Mun/Block24/272 (suit land) registered in the name of the plaintiff (Nyingi). As it will unfold shortly, the plaintiff defaulted in the repayment of the loan and the bank in its exercise of its statutory power of sale allegedly instructed the 2nd defendant (Garam) to sell the suit property to the 1st defendant (Julia) and her deceased husband namely Anthony Nahashon Ngunjiri.

The Plaintiffs Case

2. On the August 21, 2014 the plaintiff filed suit against the 1st and 2nd defendants seeking a number of reliefs. With leave of the court the plaintiff filed an amended plaint on the January 5, 2015 in which the 3rd defendant was enjoined into the suit.
3. The plaintiff acquired the suit land in 2002 and developed a 4 bedroomed family home where he lives with his family. Undisputed evidence is that he lives there todate.



4. Between the years of 2002 -2005 he sought and obtained various credit facilities from the 3rd defendant for purposes of making improvements to the suit land. The suit land was offered as a continuing security in favour of the 3rd defendant.
5. The plaintiff avers that he serviced the loan as per the terms of the agreement but the 3rd defendant in concert with the 2nd defendant advertised the property for sale on the July 26, 2010. The sale was scheduled for the July 28, 2010.
6. He avers that he was never served with the statutory notice of sale nor notified of the intention to sell the property. That he learned about the sale from a neighbor who saw the advertisement in a local newspaper.
7. For that he avers that the 3rd defendant is in breach of the contract between him and the bank in the following manner;
 - a. Failing to issue the mandatory statutory notice of sale.
 - b. Failing to communicate its approval and/or rejection of the proposals if any made by the plaintiff on repayment.
 - c. Unilaterally revoking the agreement on repayment without any justification whatsoever.
 - d. Combining all the facilities and demanding immediate repayment of the outstandings on the plaintiff's account without any justifiable cause.
 - e. Instructing auctioneers to sell the suit property without issuing the mandatory statutory notice.
 - f. Failing to serve the necessary notice to sell to the plaintiff.
 - g. Failing to conduct proper valuation of the suit property before exercising its statutory power of sale.
 - h. Grossly and fraudulently undervaluing the suit property.
 - i. Failing to obtain fair market value for the sale of the suit property.
 - j. Breaching the duty of care owed to the plaintiff to obtain the best reasonable price for the aforementioned sale.
 - k. Failing to set a reserve price for the purported sale.
 - l. The said advertisement of the suit property in the Daily Nation edition of July 26, 2010 was not valid as the same did not comply with the Auctioneers Rules.
 - m. The defendant in utter and flagrant breach of its duty of care and good faith to the 1st plaintiff, has on numerous occasions, without any justification whatsoever, revoked its acceptance of various proposals made by the plaintiff towards the liquidation of his said credit facilities and/ or otherwise refused, failed or neglected to formally communicate its acceptance of certain mutually agreed proposals thereby greatly prejudicing the plaintiff.
8. In breach of its duty of care and good faith to the plaintiff, the bank has refused several proposals to liquidate the debt prejudicing the plaintiff, the plaintiff avers. The plaintiff contends that in the circumstances the defendants were precluded from selling the property at all.



9. That the amount in the sum of Kshs 7m claimed by the bank as outstanding as at July 27, 2010 is inaccurate due to; application of exorbitant interest rates by the bank, which rates are harsh, oppressive and unconscionable; the bank has applied varying harsh oppressive and illegal penal interest rates which are unenforceable; the bank has failed to provide regular statements of accounts reading the said loan facilities.
10. He learned of the impending sale through the newspaper advertisement on the July 26, 2010. On the material date of the auction (July 28, 2010) he in the company of his father went to the venue of the auction and remained there till 5.30 pm and no auction took place. However, in the month of June 2011 an agent of Mr Ngunjiri visited the property and informed him that the property has been sold to Mr Ngunjiri.
11. The plaintiff laid a charge of fraud against the 1st and 2nd defendants as thus;
 - a. Alleging to be the proprietor of Thika/Municipality/Block 24/272.
 - b. Colluding to deprive the plaintiff of his proprietary ownership of the suit property.
 - c. Failing to disclose and seek consent from the plaintiff on the sale and transfer of the parcel of land Thika/Municipality/Block24/272 which they jointly owned.
 - d. Causing the suit property to be fraudulently registered in their names.
 - e. Failing to renounce, rectify or cancel such fraudulent registration at the earliest opportunity or at all.
 - f. Purporting to have the capacity to forcefully evict the plaintiff from the suit property without a court order.
 - g. Using forged documents to procure their registration as a proprietor.

Particulars of fraud by the 2nd defendant are;

 - a. Failing to serve the necessary statutory notice to the Plaintiff.
 - b. Failing to provide adequate notice of the intended public auction.
 - c. Failing to conduct the said auction at the time and place stated in their Newspaper advertisement.
 - d. Colluding with the 1st and 3rd defendant to appropriate the suit property at a undervalued price.
 - e. Placing an invalid notice in the Daily Nation Newspaper on July 26, 2010 which notice did not comply with the Auctioneering Rules.
12. Consequently, the plaintiff contends that the 1st defendant has taken to harassing him and his family with threats of eviction- including demanding rent arrears and deposit for the suit land.
13. The plaintiff sought the following prayers;
 - a. A permanent injunction to restrain the defendants/respondents from continuing with their unlawful acts against the plaintiff/applicant which include harassing, intimidating, threatening, entering upon, provoking, inciting, trailing the plaintiff/applicant by themselves, their agents and servants and also interfering with the quiet and peaceable enjoyment of property known as Thika/Municipality/Block24/272 situated in Happy Valley Estate.



- b. A declaration that the plaintiff is rightful owner of all that parcel of land known as Thika/Municipality/Block24/272 and the title deed thereof to revert to the plaintiff.
- c. An order for cancellation of title deed issued to the late Antony Nahashon Ngunjiri and Julia Wangari Ndungu – Ngunjiri.
- d. An order for rectification of the register directing that registration of Thika/Municipality/Block24/272 in favour of the defendant be cancelled as it was obtained or made by fraud or through a mistake and the cancellation be substituted by registering the plaintiff as the proprietor of Thika/Municipality/Block24/272 at the defendant's expense.
- e. A complete, true and accurate account of the plaintiff's account maintained at the 3rd defendant's Barclays Plaza Loita Street Branch Office including the various rates of interest applied to the credit facilities thereof from time to time.
- f. A declaration that the Daily Nation Newspaper advertisement dated July 26, 2010 issued by M/s Garam Investments Auctioneers under instructions from the 3rd defendant is not in compliance with the Auctioneers Rules, defective and invalid and is as such, null and void.
- g. A declaration that the 3rd defendant's statutory power of sale in respect of LR No Thika Municipality/Block 24/272 situate in Happy Valley Estate had not arisen.
- h. A declaration that in the circumstances, the intended sale of LR No Thika/Municipality/Block 24/272 pursuant to the said Statutory Notices and Notification of Sale was illegal, null and void.
- i. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to order be awarded to the plaintiff.
- j. General and exemplary damages.

The 1st Defendants Case

14. Save to admitting that the public auction took place on the July 28, 2010 the 1st defendant denied the plaintiffs claim and in particular the allegations of collusion, illegality and fraud. She also denied any forceful eviction of the plaintiff without a court order.
15. The 1st defendant filed a suit ELC 573 of 2012 seeking inter alia eviction and mesne profits, which suit was withdrawn when the plaintiff agreed to pay rent to the 1st defendant in the sum of Kshs 20,000/- commencing on September 2014. In any event the plaintiff and his father one Charles Kamau Ngure approached her severally with offers to purchase back the suit property.
16. In her counterclaim, the 1st defendant averred that she is the registered owner of the suit land together with her deceased husband having purchased the same in a public auction that took place on the July 28, 2010. That her husband was represented by her sister Jane Wairimu Ndungu who turned out to be the highest bidder at the sum of Kshs 3.1 million and on even date of the auction paid the sum equivalent to 25% of the auction price and later paid the full balance leading to the transfer and registration of the land in her name and that of her late husband.
17. In her counterclaim she sought the following orders;
 - a. An order for eviction do issue against the plaintiff and every other person claiming through the plaintiff for under him be bound by the said order and vacant possession be given to the 1st defendant of all that Thika Municipality Block 24/272 situated in Kiambu County within



30 days of the date of the order and the OCPD Thika Police Station do assist the 1st defendant in giving effect to the order.

- b. Mesne profits of Kshs 15,000/- per month since the purchase on July 28, 2010 until vacant is given to the 1st defendant.
- c. Costs of this suit and counterclaim.
- d. Interest in (c) at court rates.
- e. Such other or further relief of this honourable court may deem fit to grant.

The 2nd & 3rd Defendants Case

18. Upfront the 2nd and 3rd defendants hold the position that the plaintiff's suit does not disclose any reasonable cause of action against them. They deny the claim of the plaintiff and sought to put him in strictest proof.
19. In addition, they contend that the plaintiff was advanced various loans which was amalgamated on the October 27, 2004 with his knowledge. The loan was repayable as per the terms contained in the charge instrument. It was part of the terms of the charge that in the event of default on any one of the installments, the 3rd defendant would exercise its statutory power of sale over the charged property. The plaintiff was in default to the tune of Kshs 7.0 m and even after issuing the notification of sale pursuant to section 15(b) of the Auctioneers Rules sent via registered post on the August 4, 2008 which notice was received and acknowledged by the plaintiff.
20. The suit land was sold by public auction on the July 28, 2010 in exercise of the 3rd defendants statutory power of sale following the default on repayment of the loan facility on the part of the plaintiff.
21. They were unanimous that the plaintiffs suit should be dismissed with costs.

The Evidence

22. The plaintiff called two witnesses. The 1st defendant called two witnesses while the 2nd and 3rd defendants evened out with two witnesses as well.
23. The 1st to take the stand as PW1 was S M Muiruri, a professional valuer who produced the valuation report dated the May 7, 2015 which was prepared under the instructions of the plaintiff for the suit land. In his opinion the open market value of the suit land was Kshs 10 million with a forced sale value of Kshs 7.5 million as at the date of the valuation report.
24. When faced with two valuation reports; the one of August 3, 2005 which returned an open market value of Kshs 6.5 million and forced sale value of Kshs 4.2 million and the one dated the July 13, 2010 which had Kshs 4.2 million as open market value and 3.0 million as forced sale value, the witness was at a loss as to why the property had devalued between the period 2008 and 2010 in terms of both the open market and forced sale values instead of appreciating. He explained the circumstances that could cause property to depreciate such as demolition, civil unrest or natural disasters and was emphatic that the circumstances of this case appeared abnormal.
25. Mr Nyingi, the plaintiff came in as the 2nd witness. While adopting the contents of his witness statement dated the August 20, 2014 the witness produced documents in support of his case which documents were marked as PEX 2-10.



26. The witness informed the court that he was not served with the statutory notices by the 2nd and 3rd defendants and that he learned about the auction from the newspaper when a neighbor brought the advert to his notice.
27. Further he added that the auction was not held on the July 28, 2010 at all since he was present at the Kristina Gardens near the venue (Thika General Post Offices) from 9 am – 5 pm on the material date of the auction. He stated that from Kristina Gardens he was able to see what was going on at the alleged auction venue.
28. In cross he stated that he was not aware that the suit land had been sold and the same was brought to his attention by the 1st defendant. That he is in occupation of the suit land today.
29. The witness informed the court that despite the presence of a court order directing him to pay monthly rent to the 1st defendant, he failed to comply after he lost his job.
30. He was emphatic that he sued the 2nd and 3rd defendants because of carrying out an illegal auction without following the law with respect to issuing statutory notices to him as the owner of the suit land.
31. Maintaining that he has been in default the witness informed the court that he was advanced a loan facility totaling the sum of Kshs 6.9 million by the 3rd defendant which loan was secured by the suit land.
32. When shown the letter dated the July 2, 2010 sent to him by the 2nd defendant the witness admitted that he received the said letter and acknowledged it by signing.
33. When shown the notice issued to him by the 2nd defendant dated the August 4, 2006 notifying him of the default and giving him 45 days to redeem the property failing which the same would be sold by public auction on the October 9, 2008, he maintained his position that he was not served as the address on the letter does not belong to him arguing that his address is 20236 and not 74422.
34. When shown the valuation dated the July 13, 2010, the witness informed the court that he was aware that the 3rd defendant valued the property in 2010. In his opinion there was collusion between the defendants given that the property was sold at an undervaluation of Kshs 3.1 million while the forced sale value was at Kshs 4.5 million in 2005.

The 1st Defendants Case

35. Jane Wairimu Ndungu testified as DW1 and relied on her witness statement dated the February 19, 2015 in which she stated that she is the sister of the 1st defendant who was married to Nahashon Ngunjiri, deceased. That she attended the auction on the July 28, 2010 on behalf of the 1st defendant's husband and signed the attendance list. She stated that the auction took place at the Thika Post Office next to Kristina Wangare Gardens. She further testified and informed the court that there were 3 bidders in the auction and she emerged the highest bidder at the fall of the hammer.
36. Upon the fall of the hammer, she paid the 25% deposit in form of a cheque drawn from Mr Ngunjiri's account. In addition she stated that she signed the memorandum of sale of even date with respect to the sale of the suit land and obtained a receipt of the amount of Kshs 775,000/- from the 2nd defendant being 25% of the purchase price. The receipt is dated the July 28, 2010.
37. Julia Ngunjiri took the stand as DW2. She informed the court that she is the wife of the late Nahashon Ngunjiri and the sister of DW1. In support of her defence and counterclaim she relied on her witness statement dated the December 4, 2014. She also produced documents marked as DEX No 1-14 in support of her claim. She stated that she is aware that DW1 attended the auction on behalf of her late



husband. That her husband was the highest bidder at the auction and that he paid Kshs 3.1 million as the purchase price leading to the transfer and registration of the title in their names on the April 28, 2011.

38. Further the witness stated that the plaintiff is her rent paying tenant pursuant to the court orders issued by the court in her favour. That the plaintiff has defaulted in paying rent.
39. In cross she denied any collusion with respect to the acquisition of the property which is now registered in her name.

The 2nd and 3rd Defendants' Case

40. DW3 – Samuel Njuguna testified as DW3 and introduced himself as an employee of the 3rd defendant as the Recoveries Legal Officer. He relied on his witness statement dated the April 9, 2019 in support of the 3rd defendants defence as well as the documents produced and marked as DEX No 15-35.
41. In cross the witness informed the court that the property was sold at a public auction. That in 2005 the property was valued for purposes of the lending and in 2010 another valuation was done to establish the market value of the land for purposes of realization of the security. Asked about the discrepancy in the forced sale values of 2008 and 2010, the witness stated that he could not answer because he was not a valuer by profession. He however explained that there was no material changes to the state of the property between the two periods to warrant the apparent depreciation of the values. Further he added that even after selling the property the Plaintiff still owes the bank money which is yet to be paid.
42. DW4 – Joseph Gikonyo stated that he is a licensed auctioneer t/a Garam Investments Limited. He relied on his statement dated the April 10, 2015 as his evidence in chief.
43. The witness informed the court that he received instructions from the 3rd defendant in exercise of its statutory power of sale and did cause to be published in the Daily Nation a notice of public auction on the July 5, 2010 and July 26, 2010. That he conducted the auction on the July 28, 2010 outside the main Post Office at Thika Town whereupon the auction bell was rung at 12 pm and the auction started at 12.30 and closed at 1 pm, the suit property having been the only item on the auction schedule on the material date.
44. The witness stated that the auction attracted 3 bidders namely Jane Wairimu Ndungu, Albert Mburu and Gladys Wangari. That Nahashon Anthony Ngunjiri being represented by DW1 emerged the highest bidder at the sum of Kshs 3.1 million. The bidder paid the 25% of the purchase price at the fall of the hammer. That he was informed by the bank that the balance was later paid by the bidder.
45. Asked to explain whether he colluded with the purchaser in auctioning the property, the witness answered in the negative as he did not know any of the bidders least of all the highest bidder.

The Submissions

46. With the hearing coming to an end, the parties elected to file their written submissions; the Firm of PM Kamau & Co Advocates filed on behalf of the plaintiff; the firm of Harith Sheth on behalf of the 1st defendant and the firm of Miller & Company Advocates on behalf of the 2nd and 3rd defendants. I have read and considered the written submissions and I find no necessity to rehash them save that I propose to discuss them where relevant in the judgement.
47. The parties filed each a list of issues for the court to determine. Before I discuss the same, I would like to highlight the undisputed matters in this case.



The Analysis and Determination

48. The plaintiff's property is in Happy Valley Estate in the outskirts of Thika Town. He acquired the property in 2002 and embarked on the construction of the house which he resides today with his family.
49. According to the charges on record the plaintiff was an employee of the 3rd defendant, seeing that some of the loan facilities were advanced as staff loans.
50. The plaintiff applied and was granted various loan facilities by the bank as follows;
 - a. September 5, 2002 - Kshs 400,000/-
 - b. November 11, 2002 - Kshs 2,100,000/-
 - c. November 18, 2003 - Kshs 1,000,000/-
 - d. May 20, 2004 - Kshs 1,000,000/-
 - e. August 26, 2004 - Kshs 1,500,000/-
 - f. August 8, 2005 - Kshs 400,000/-
 - g. October 27, 2004 - letter to plaintiff informing him that the loans had been amalgamated into one loan which stood at Kshs 4,717,217/- as at October 27, 2004 with a repayment period of 276 months. The plaintiff accepted the terms of this amalgamation on the December 23, 2004.
 - h. October 17, 2004 - Kshs 800,000/-
 - i. February 10, 2004 - Kshs 365,000/-
 - j. May 19, 2004 - Kshs 900,000/-
 - k. January 5, 2005 - Kshs 1,062,000/-
 - l. February 11, 2005 - Kshs 850,000/-

h-i above are stated to be staff loans advanced by the bank to the plaintiff.
51. It is evident from the above that the plaintiff and the 3rd defendant enjoyed a contractual relationship in form of a charge in which the parties spelt out their obligations and consequences of breach thereof. The charge provided the obligations to repay the loan by the Plaintiff; security was a continuing security; interest payable and events of default.
52. It is common ground that the plaintiff was in default having failed to meet his obligations under the charge and has admitted in evidence as such.
53. It is his position that the bank sold the property to the 1st defendant and that the 1st defendant was duly registered as the title holder of the property on the November 28, 2011.
54. Further it is common ground that the plaintiff resides on the suit land today.
55. Having considered the pleadings, the evidence of the parties the written submissions and the material placed before the court, the issues for determination are;
 - a. Whether the plaintiff was served with the statutory notice before the property was sold by auction.



- b. Whether the property was sold at an undervaluation, and if yes whether the same should be nullified.
- c. Whether the auction actually took place
- d. Who meets the cost of the suit.

The Statutory Notice

56. The plaintiff's case is that he was never served with the statutory notice before the property was advertised for sale and or sold by the 3rd defendant; That the suit land was sold at a gross undervaluation; no auction actually took place; the 3rd defendant declined repayment proposals; combined the facilities and demanded repayment without any justifiable cause;
57. The 1st defendant's case is that she is the registered owner of the suit along with her deceased husband having acquired the same through an auction on the July 28, 2010; the sale was lawfully carried out in exercise of the 3rd defendant's statutory power of sale; she paid the full consideration for the sale; the chargor's equity of redemption was extinguished upon the creation of a binding contract between her and the 3rd defendant and the only remedy available to the plaintiff is damages against the bank as chargee. Further relying on section 99(2) of the *Land Act*, the 1st defendant contended that she was not obliged to inquire if there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of the exercise of the power of sale has been duly given or whether the sale is otherwise necessary proper or regular. Indeed, that section 99(4) of the said Act provides for damages against the bank to a person prejudiced by any unauthorized improper or irregular exercise of power. The 1st defendant further argued that the plaintiff failed to prove that he was not served with the statutory notice or that the property was sold at a gross undervaluation given that it gave a retrospective valuation dated the July 28, 2010, way after the actual sale took place. In reply to the allegation that there was no auction, the 1st defendant maintained that the auction took place and was attended by her representative Jane Wairimu Ndungu who successfully bid for the property. In conclusion it was the case of the 1st defendant that she is a bonafide purchaser of the suit land whose title deserves to protection from impeachment.
58. The 2nd and 3rd defendant's case is that the plaintiff was granted various facilities by the 3rd defendant which facilities were later amalgamated and restructured on the September 24, 2006 and that despite demand to pay the plaintiff consistently defaulted in servicing the loan which stood at over 7 million as at 2006 leading to the issuance of statutory notice to the exercise of its statutory power of sale by the 3rd defendant. In conclusion they maintain the position that due notice was issued including the redemption notice which was duly served upon the plaintiff; that the auction was duly carried out and a purchaser for value did pay for the property above the reserve price and denied any collusion or wrongdoing as alleged by the plaintiff.
59. The legal provision on charges at the time the loans were amalgamated on September 24, 2006 was entrenched under sections 65 – 84 of the *Registered Land Act* (RLA) cap 300 which was repealed by the *Land Registration Act* of 2012 (LRA). Section 65 of the RLA provided for creation of charges thus;
- (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that Section, and the acknowledgement shall be signed by the chargor



or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

- (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.
 - (3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.
 - (4) A charge shall not operate as a transfer but shall have effect as a security only.
 - (5) There shall be included, in an instrument of charge securing the fulfilment of a condition or the payment of an annuity or other periodical payment not of the nature of interest on a capital sum, such provisions as the parties think fit for disposing, subject to section 78, of the money which may arise on the exercise by the chargee of his power of sale, either by setting aside the proceeds of sale or part thereof and investing it to make the future periodical payments, or by payment to the chargee of such proceeds or part thereof to the extent of the estimated capital value of the chargee's interest, or otherwise."
60. In the unfortunate event of default in repayment of the loan, the law provided for the chargee's remedies under section 74(1) & (2) of the *RLA* *inter alia* that;
- (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.
 - (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may–
 - (a) appoint a receiver of the income of the charged property; or
 - (b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection."
61. Pursuant to section 74(2)(b) above, section 77 of the *RLA* obliged a chargee exercising his power of sale to act in good faith and have regard to the interests of the chargor and may sell the charged land by public auction through a licensed auctioneer.
62. On the other hand, the chargor has a right to redemption (right to extinguish the charge and retain ownership of the land by paying the outstanding debt) of the charged property in line with section 72 of the *RLA* thus;
- (1) Subject to this Section, a chargor, on payment of all money due and owing under the charge at the time of payment or on fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 74, may redeem the charged land, lease or charge at any time before it has been sold under section 77, and any agreement or provision which purports to deprive the chargor



of this right of redemption shall be void; and, for the purposes of this subsection, land, a lease or a charge shall be deemed to have been sold when a bid has been accepted at the auction sale.

- (2) If the chargor wishes to redeem the charged land, lease or charge before the date specified in the charge for repayment, he shall be entitled to do so on payment to the chargee, in addition to any other money then due or owing under the charge, interest on the principal sum secured thereby up to that date.
 - (3) If the chargor seeks to redeem the charged land, lease or charge after the date specified in the charge, or where no such date is specified, he shall give the chargee three months' notice of his intention to redeem the charge or shall pay him three months' interest in lieu thereof.
 - (4) If at any time the chargor is entitled and desires to repay the money secured by the charge, and the chargee is absent or cannot be found, or the Registrar is satisfied that the charge cannot be discharged otherwise, the chargor may deposit the amount due with the Registrar in trust for the person entitled thereto, and thereupon the obligations of the chargor under the charge shall cease, and the Registrar shall cancel the registration of the charge and shall pay the amount deposited to the chargee if the chargee applies for it within six years of the date of deposit, and if the amount is not so paid it shall be paid into the Consolidated Fund.”
63. The right to redemption is also protected under section 89 of the *Land Act* by prohibiting any rule of law, written or unwritten, entitling a chargee to foreclose the equity of redemption in charged land.
64. In this case the 2nd and 3rd defendants led evidence that the plaintiff was served with statutory notice but when the DW3 was asked this question he stated that he had difficulty answering the question. The witness pointed the court to a letter dated the August 4, 2008 addressed to the plaintiff giving 45 day notice to redeem the property failing which it would be sold by public auction on the October 9, 2008. There is a certificate of service deponed by DW2 to show that the said notification was served upon the plaintiff's wife who acknowledged the same by signing. The notification of sale dated the August 4, 2008 is enclosed. Evidence was led by DW3 that a 90 day statutory notice was served upon the plaintiff in 2008 before instructing the 2nd defendant to issue the notification of sale dated the August 4, 2008. That the sale took place on the October 9, 2008 and the 2nd defendant sold the property by public auction at a bid of Kshs 2.15m, a sale that did not materialize as the bidder could not raise the mandatory 25% deposit.
65. I have perused the letter dated the July 2, 2010 addressed by the 2nd defendant to the plaintiff informing him that out of courtesy the property was going to be re-advertised for sale by public auction within 14 days in exercise of the 3rd defendants statutory power of sale since all the requisite notices had been issued earlier. That the sale was scheduled for July 28, 2010 at the main post office at Thika Town.
66. The plaintiff led evidence that he received the said letter but denied ever being served with the statutory notice and or the redemption notice by the 2nd and 3rd defendants. He stated that his address is Post office Box No 20236 Nairobi and not 74422 as contained in the said letter.
67. Section 74 of the *RLA* obliged the bank to serve the chargor by registered post the relevant statutory notices. The bank's power of sale only arises three months after the said notice was issued and not before. This is the basis upon which a notification of sale or redemption notice of 45 days is issued and the properties put up for sale.
68. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that indeed such notice was in fact sent. The bank failed to prove service and instead its officer told the Court that he was unable to answer the question when it was put to him in cross examination.



69. The plaintiff having denied service of the statutory notice, it was incumbent upon the 3rd defendant to show by postage stamps or certificate of postage that the statutory notice was issued. The 2nd and 3rd defendant seem to be contending that the notification of sale dated the August 4, 2008 and the letter dated the July 2, 2010 were adequate notice to the plaintiff, a position that I do not agree with them. The banks power to sale is not triggered by the notification of sale or redemption notice issued by the Auctioneer but by the statutory notice upon the expiry of 90 days. The period of 90 days is the single protection to the chargor offered in law for purposes of redeeming his property because once the sale takes place his right to redeem is extinguished for ever. If the chargor elects not to redeem by doing nothing for the period, he has no one to blame as his right to redeem the property shuts down the moment the sale takes place.
70. 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.
71. In the case of *Stephen Boro Gitiba v Nicholas Ruthiru Gatoto & 2 others* [2017] eKLR the court held that;
- “It is for the chargee to make sure there was compliance with the requirements of section 74(1) of the *Registered Land Act* and the burden was not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the charge to prove, that the notice was in fact sent. The bank had failed to produce stamps showing proof of posting of the registered letter(s) containing statutory notice. In the absence of proof of such posting, the sale by auction was void. A sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land sold ...”
72. Further the court stated-
- “That section 74(1) of the *RLA* was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. That it was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. That auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.”
73. In the case of *Nyangilo Ochieng v Fanuel B Ochieng* the appellate court held that a statutory notice which does not comply with the provisions of section 74(1) of the *RLA* renders the subsequent sale based thereon void and accordingly the auction purchaser does not acquire a proper title to the property sold to him at the auction.
74. I find that the plaintiff was not served with the statutory notice by the 3rd defendant. The simplest task by the bank was to show that it served the plaintiff in 2008. If it had demonstrated service of the statutory notice either in 2008 when the first auction was attempted there would not have been any need to re-serve the said notice. However as it stands now neither service of the statutory notice was made in 2008 or in 2010 before the property was sold.
75. Consequently, the banks right to sale by public auction had not arisen in 2008 when the attempted sale took place and on the July 28, 2010 when the auction is claimed to have been held. Primarily therefore



the sale to the 1st defendant was contra statute and the same is illegal null and void. This court cannot countenance an illegality.

The Valuation

76. When exercising the power of sale the bank is under a legal obligation to act in good faith, bona fide and take reasonable precaution to obtain a proper price. A sale made at the fraudulent undervaluation will be set aside. In this case the bank carried out a valuation in 2005 where the open market price was Kshs 6.5 million while the forced sale (reserve) value was Kshs 4.5 million. Another valuation was commissioned in 2010 which returned values in the sum of Kshs 4.2m being open market value and 3.0 being the forced or reserve values. I have perused the two valuation reports prepared on instructions of the bank and the description of the developments on the land are by and large similar and no evidence was led at the hearing to show that the state of the property had changed to warrant the reduction of value.
77. If a 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 grounds of undervalue alone. *Halsburys Laws of England* 4th edition at page 276.
78. The PW1, the valuer commissioned by the plaintiff presented a valuation report dated the May 7, 2015 showing the open market value as Kshs 10 million and the forced sale value being 7.5 million. The bank's witness was unable to explain the discrepancies in the valuations and more specifically why the property had depreciated from 6.5 million to 4.2 million in 2010. The plaintiff's witness PW1 informed the court that the status of the property has remained the same since 2005 and that he was not aware of any factors such as demolition or destruction that would dissipate the value of the suit land.
79. The land having been sold at Kshs 3.1 million in 2010 raises doubt as to the reasonableness of the valuation given the lack of cogent explanation from the bank as to which of the two valuations are authentic and whether indeed it can be said that the bank acted in good faith, diligent and reasonable in protecting its right to recover the outstanding monies and also protecting the right to property of the chargor to see to it that he gets a reasonable and market price for the land.
80. That said it is to be observed that the plaintiff failed to value the land at the time of the auction in 2010 or so close to that date for purposes of comparing the prices. The valuation of 2015, 4 years down the road did not help much.
81. In the circumstances of this case, and taking into consideration the two valuations, it is not explained how the property depreciated to Kshs 3.1 million given that land prices keep appreciating on the upward trends, the court finds that the valuation was not only an undervaluation but also point to evidence of fraud. The issue is answered in the positive.

The Auction

82. The plaintiff averred that the auction did not take place. The defendants strongly argued that the auction took place. The court having reached the decision in the two issues, I find that there is no necessity to determine this as doing so becomes superfluous.

The Counterclaim

83. Having made the findings as I have above, the court is of the considered view that the title held by the 1st defendant is illegal, null and void as no interest in title was conferred in the process of the illegal sale. It is the failure of the 3rd defendant to comply with the law that has resulted in the 1st defendant being



deprived of the title to the suit property. The failure to serve statutory notice is not a mere irregularity which can be cured with damages but an illegality that goes to the root of the transaction. It is incurable by damages as suggested by the defendants. The remedy of the 1st defendant lies in refunds by the 3rd defendant. I say no more.

Other Issues

84. Since the plaintiff has admitted being in default the court is unable to grant prayer no 1 in the plaint as doing so will place a clog on the banks power of sale.
85. On the issue of repayment proposal, the court observed that the plaintiff abandoned this argument midway since no evidence was led to show that the plaintiff gave a repayment proposal and that the same was declined by the bank without any justifiable cause.
86. He who alleges must proof. This is relevant to the plaintiff's claim that the interest rate are harsh, oppressive and illegal as no evidence was led in support of this position.

Orders And Disposal

87. In the end the court finds that the plaintiff has succeeded in his case and I enter judgement as follows;
 - a. The 1st defendant's counterclaim is dismissed.
 - b. The registration of the title in the name of the 1st defendant be and is hereby declared illegal null and void.
 - c. The registration of the title in the name of the 1st defendant and her husband be and is hereby cancelled and reverted to the name of the plaintiff.
 - d. The charge registered on the property hitherto be and is hereby restored in favor of 3rd defendant.
 - e. For avoidance of doubt the plaintiff remains liable for the payment of the loan and interest and other charges in accordance to the charge unless redemption takes place.
 - f. The costs of the suit shall be borne by the defendants in favour of the plaintiff.

DELIVERED, DATED AND SIGNED AT THIKA THIS 7TH DAY OF SEPTEMBER, 2022 VIA MICROSOFT TEAMS.

JG KEMEI

JUDGE

Delivered online in the presence of;

K Kamau for the plaintiff.

Ms Otieno HB Koech for 1st defendant.

Mugo for 2nd and 3rd defendants.

Court Assistant – Mr Dominic.

