REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

ELC CASE NO. 67 OF 2017

(FORMERLY KERUGOYA ELC NO. 174 OF 2016)

LUKE NJIRU KAGEREKI.....PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....1ST DEFENDANT

EDWIN NYAGA NJAMURA.....2ND DEFENDANT

JUDGEMENT

1. By a plaint initially dated 22nd May 2008 and last amended on 28th September 2017 the Plaintiff sought the following reliefs against the Defendants:

a. A permanent injunction restraining the 1st Defendant by itself, its agents and/or servants from selling land parcel No. Kagaari/Weru/1544.

b. A declaration that the sale of the Plaintiff's land parcel No. Kagaari/Weru/1544 is illegal, null and void.

c. An order of cancellation of registration of Title No. Kagaari/Weru/1544 in favour of the 2nd Defendant.

d. General damages against the 1st Defendant for wrongful alienation of the Plaintiff's Title No. Kagaari/Weru/1544 to the 2nd Defendant.

e. General and aggravated damages against the 2nd Defendant for trespass of the Plaintiff's parcel of land known as Kagaari/Weru/1544.

f. Special damages against the 2nd Defendant amounting to Kshs.400,000/- being the value of the Plaintiff's aforesaid farm property.

g. Costs of the suit.

h. An order of eviction of the 2nd Defendant from the land parcel No. Kagaari/Weru/1544.

2. The Plaintiff pleaded that at all material times prior to 8th July 2008 he was the registered proprietor of *Title No. Kagaari/Weru/1544* (hereinafter *the suit property)*. He further pleaded that sometime in 1988 he signed a personal guarantee for a third party (hereinafter *the borrower*) who had taken a loan of Kshs.200,000/- from the 1st Defendant. The Plaintiff contended that the 1st Defendant had delayed for over 16 years to recover the loan from the borrower in consequence of which its statutory power of sale became statute-barred.

3. The Plaintiff further pleaded that there was in fact no valid charge over the suit property in favour of the 1st Defendant in relation to the said loan and that the 1st Defendant had unlawfully transferred the suit property to the 2nd Defendant in purported exercise of a statutory power of sale as chargee.

4. In the alternative, the Plaintiff pleaded that no statutory power of sale had arisen by the time the 1st Defendant sold the suit property on or around 23rd May 2008 as no moneys were overdue under the charge and that the relevant statutory notice of 90 days had not been served

upon him.

5. The Plaintiff also contended that the sale of the suit property was a result of collusion between the 1st Defendant and the 2nd Defendant to deprive him of the suit property even though no particulars of such collusion were given in the amended plaint.

6. The Plaintiff, finally, pleaded that on or about 6th September 2016 the 2nd Defendant unlawfully entered or trespassed upon the suit property and *damaged* the Plaintiffs *crops, trees, grass and irrigation* system all valued at *Kshs.400,000/-* which he claimed as special damages.

7. The 1st Defendant filed a statement of defence dated 20th June 2008 which was subsequently amended on 7th November 2017. The 1st Defendant stated that the Plaintiff had voluntarily offered the suit property to be charged as security for repayment of a loan of Kshs.200,000/- which was advanced to the borrower. It was pleaded that all necessary documentation was drawn and signed and that the charge was duly registered over the suit property.

8. The 1st Defendant further pleaded that when the borrower defaulted in repayment of the said loan the relevant statutory notices were issued to the Plaintiff and the borrower whereafter the suit property was lawfully sold to the 2nd Defendant in exercise of the statutory power of sale reserved under the charge. The 1st Defendant denied any collusion with the 2nd Defendant in the sale of the suit property.

9. The 1st Defendant further stated that all previous attempts to exercise the statutory power of sale were thwarted by the Plaintiff who filed *Runyenjes RMCC No. 31/2000* and *Meru CMCC No. 706/204* whereby interim orders were issued stopping the auction of the suit property. The 1st Defendant, therefore, urged the court to dismiss the Plaintiff's suit with costs.

10. The 2nd Defendant filed a defence which was last amended on 9th October 2017 denying the Plaintiff's allegations. He pleaded that he was a bonafide purchaser of the suit property at a public auction conducted on 23rd May 2008 by the 1st Defendant pursuant to its statutory power of sale reserved in a charge. He stated that the suit property was transferred to him after the auction and that he was issued with a title deed on 9th July 2008.

11. It was the 2nd Defendant's case that he took possession of the suit property upon issuance of the title deed. He further pleaded that sometime in December 2008 the Plaintiff and his family members caused malicious damage to his maize crop whereupon he reported the matter to Runyenjes Police Station. The Plaintiff and his two family members were then arrested and charged with malicious damage to property. He denied having damaged the Plaintiff's crops or other property as alleged by the Plaintiff or at all.

12. The 2nd Defendant further pleaded that prior to the filing of the instant suit the Plaintiff had filed *Meru CMCC No. 706 of 2004 Luke Kagereki Vs ICDC & Another* and *Runyenjes RMCC No. 31/2001 – Luke Kagereki Vs Benard Njiru Runyenje, ICDC & Another* with respect to the suit property. It was further pleaded that both suits were ultimately dismissed with the latter having been dismissed for want of prosecution. The 2nd Defendant therefore contended that the instant suit was *res judicata.*

13. The 2nd Defendant denied being a trespasser on the suit property and pleaded that having lawfully purchased it at a public auction, there was no legitimate reason to cancel his title to the suit property. He, therefore, urged the court to dismiss the Plaintiff's suit with costs.

14. At the hearing hereof, the Plaintiff called four witnesses and closed his case. The Plaintiff testified as PW1 whereas the borrower whom he was said to have guaranteed a loan facility, Benard Njiru Runyenje, testified as PW2. The other 2 witnesses were said to be the Plaintiff's lessees on the suit property at the time it was auctioned by the 1st Defendant.

15. The 1st Defendant called one witness, Esther Nyachieng'a, who testified as DW1. She stated that she was a portfolio officer in the employ of the 1st Defendant whose duties entailed debt collection and management of loan accounts. She adopted her witness statement dated 30th November 2017 as her sworn testimony and produced the documents in the 1st Defendant's original and supplementary lists of documents as exhibits.

16. The 2nd Defendant testified as DW2 on his own behalf as the sole witness. He adapted his witness statement dated 18th July 2017 as his sworn testimony. His evidence simply followed the script of his amended defence. His defence was that he was a *bona fide* purchaser at a public auction pursuant to the 1st Defendant's statutory power of sale. He denied any wrongdoing or destruction of the Plaintiff's property.

17. The court has noted that the parties did not file any agreed statement of issues for determination. The record shows that the Plaintiff and the 1st Defendant filed separate issues for determination whereas there is no indication of the 2nd Defendant having filed any issues. In the premises, the court shall frame the issues for determination in this suit.

18. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules,** the court may frame issues from any of the following:

a. Allegations made on oath by or on behalf of the parties.

b. Allegations contained in the pleadings.

c. Contents of documents produced by the parties.

19. The court has considered the pleadings, evidence, and the documents on record in this suit. The court is of the view that the following are the key issues which arise for determination in the suit:

a. Whether there was a valid charge over the suit property in favour of the 1st Defendant with respect to the loan facility granted to the borrower.

b. Whether the statutory power of sale had arisen by the time the 1st Defendant sold the suit property by public auction on 23rd May 2008.

c. Whether the 1st Defendant's statutory power of sale had become statute barred by the time the suit property was sold.

d. Whether there was collusion between the 1st and 2nd Defendants to deprive the Plaintiff of the suit property.

e. Whether the sale of the suit property on 23rd May 2008 was illegal, null and void.

f. Whether the 2nd Defendant's title to the suit property was protected as a *bona fide* purchaser at a public auction.

g. Whether the Plaintiff's suit is *res judicata* in view of previous legal proceedings instituted by the Plaintiff.

h. Whether the Plaintiff's crops, grass or other property was destroyed by the 2nd Defendant.

i. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

j. Who shall bear the costs of the suit.

20. The court has considered the evidence on record and the parties respective submissions on the 1st issue. The Plaintiff contended that even though he signed a personal guarantee dated 10th March 1988 to guarantee repayment of the loan of Ksh.200,000/- granted to the borrower, and that even though the schedule to the guarantee specified the suit properly as the one to be charged, the envisaged charge was never executed. He contended that the charge he signed over the suit property dated 10th March 2008 was in respect of a different loan of Kshs.200,000/- he had sought from the 1st Defendant which was never disbursed.

21. When the Plaintiff was challenged during cross-examination to produce evidence of having applied for such loan, he responded that his application was merely oral. The court is satisfied from the evidence on record that the 1st issue must be answered in the affirmative. The evidence reveals that only one loan was sought and obtained. That loan was sought and obtained by the borrower and not the Plaintiff. There is evidence on record to demonstrate that it was the borrower who requested the Plaintiff to sign the personal guarantee and to charge the suit property to secure repayment of the loan.

22. The court is of the opinion that the letter of offer, personal guarantee, and the charge over the suit property should be interpreted holistically. That is the best way by which the intention of the three parties concerned could be ascertained. The mere fact that the charge dated 10th March 1988 omitted to specify that the loan was to be disbursed to the borrower and not the Plaintiff did not alter the intention of the parties to the transaction. This court is obligated to adopt a purposive and not merely a pedantic construction of the documents in issue.

23. There is another reason why the court must reject the Plaintiff's contention that the charge dated 10th March 1988 was with respect to a separate loan facility other than the one granted to the borrower. The court has seen the pleadings in previous proceedings filed by the Plaintiff in Runyenjes and Meru Law Courts. In *Meru CMCC No. 706/2004 Luke Njiru Kagereki Vs ICDC & Another,* the Plaintiff stated in paragraph 4 of the plaint dated 23rd November 2004 and amended on 26th January 2005 as follows:

> **"Pursuant to a guarantee executed by the Plaintiff in favour of the 1st Defendant in or about 1984 the 1st Defendant extended financial accommodation to the tune of Ksh.200,000/- to one Benard Njiru Runyenje (hereinafter the *"loanee"*) against the security of, inter alia, a charge over the Plaintiff's land parcel No. Kagaari/Weru/1544"**

24. By an affidavit sworn by the Plaintiff on 23rd March 2004 in support of an application for interlocutory injunction in the said suit, the Plaintiff stated on oath that he had charged the suit property to the 1st Defendant to secure the payment of the loan facility granted to the borrower. In those circumstances, the Plaintiff was merely taking the court for a ride by shifting goal posts in order to obscure and obfuscate the real issues in controversy. The 1st issue is accordingly answered in the affirmative.

25. The 2nd issue is whether the 1st Defendant's statutory power of sale had arisen by the time the suit property was sold by public auction on 23rd May 2008. The Plaintiff contended that the power had not arisen for two main reasons. First, it was contended that the borrower had fully repaid the loan facility hence there was no outstanding amount due. Second, it was contended that the statutory notice of 90 days had not been issued by the 1st Defendant under **Section 74 of the Registered Land Act (Cap. 300)** which was in force then.

26. At the trial hereof, the borrower testified on behalf of the Plaintiff as PW2. He was not a truthful and credible witness. He was also an evasive witness. In his witness statement, he stated that he believed the proceeds of sale of his own property had fully discharged the loan facility from the 1st Defendant. He denied in the early part of his cross examination that he was ever required to provide additional security for repayment of the loan. When confronted with the letter of offer and the guarantee document both of which stated that the suit property

was to be charged to secure repayment of the loan, he changed tact and conceded that the suit property was given as additional security. He also conceded that he is the one who requested the Plaintiff to charge his land as security and that he took him to the 1st Defendant's office for documentation.

27. The borrower also admitted during cross-examination that he had, in deed, defaulted on the loan facility in consequence whereof his own property *Title No. Kagaari/Kigaa/2654* was auctioned. He claimed that he did not know for how much his property was sold and what was the outstanding balance after the sale. He stated that had never requested the 1st Defendant for a statement of account and that he had never lodged any claim against the 1st Defendant with respect to the sale of his property.

28. The court has also seen some letters by the borrower to the 1st Defendant whereby he admitted default and sought indulgence to regularize the loan account. Under the terms of the personal guarantee signed by the Plaintiff, an admission of indebtness by the borrower is binding upon the guarantor. **Clause 3(4) of the guarantee** dated 10th March 1988 stipulated as follows:

> **"Any admission or acknowledgement by the Principal Debtor of the amount of his indebtness to the Corporation or otherwise in relation to the subject matter of this Guarantee or any judgement or award obtained by the Corporation against the principal debtor or proof by the Corporation in Bankruptcy which is admitted or any statement of account furnished by the Corporation the correctness of which is certified by an official of the Corporation shall be conclusive and binding on the Guarantor(s)."**

29. The court is thus satisfied on the basis of the material on record including the statement of account from the 1st Defendant that there was a default on repayment of the loan facility granted to the borrower. The borrower himself acknowledged the defaulted and he did not seek any legal remedies from the 1st Defendant with respect to the sale of his own property.

30. The next aspect for consideration is the giving of statutory notices. The Plaintiff contended that no statutory notices were served prior to the exercise of the statutory power of sale by the 1st Defendant. It was submitted that on the authority of the cases of **Nyangilo Ochieng & Another V Fanuel B. Ochieng & Another Kisumu Civil Appeal No. 148 OF 1995 [1996] eKLR** and **Nicholas Ruthiru Gatoto V Ndarugu Merchants & Another Milimani Civil Case No. 4275 of 1994 [2014] eKLR** the auction of 23rd May 2008 was null and void.

31. The 1st Defendant, on the other hand, contended that both the Plaintiff and the borrower were served with the 90 day statutory notices as well as the notification of sale on several occasions in consequence of which the Plaintiff had filed previous cases before the Magistrates courts to stop the sale of the suit property. It was further submitted that the Plaintiff had even acknowledged receiving the notices during cross examination.

32. The Plaintiff's advocate submitted that the copies of the statutory notices which were contained in the 1st Defendant's further list of documents dated and filed on 21st November 2018 should not be trusted as genuine since they were filed so late in the day. It was submitted that the late filing could be an indication that they were fabricated at the last minute in order to prejudice the Plaintiff's case. The court was, therefore, urged to disregard the notices on record.

33. The court has considered the entire evidence on record on the issue of the statutory notices. The mere fact that the notices were introduced late in the proceedings does not necessarily mean that they are not genuine. The record of proceedings shows that the Plaintiff himself did not serve the documents in his list of documents until the Plaintiff had given his evidence in-chief. The court had to adjourn the proceedings after the Plaintiff's evidence to enable his advocate to serve those documents to enable the Defendants' advocates undertake effective cross-examination.

34. The court agrees that there is scanty evidence of direct service of the statutory notices from the 1st Defendant's side. If it were not for the Plaintiff's admission during cross-examination that such notices were served, the 1st Defendant would have had a difficult time proving service thereof. The court has noted that both in his amended plaint and evidence in-chief, the Plaintiff contended that the notices were never served. However, when confronted with the notices during cross examination, the Plaintiff conceded that, indeed, he received the statutory notices.

35. During the cross examination by Ms. Wairimu for the 1st Defendant, the Plaintiff was recorded as follows:

> **"Prior to the said sale, I had been served with a redemption notice. I had signed for it. It was dated 20th March 2007. I was also served with a notification of sale on the same date. I did not do anything until 22nd May 2008 when I filed an application to stop the sale. The Milimani court directed that the suit be heard at Embu. The said application was heard on 11th June 2008. At the time of hearing, the sale had taken place …"**

36. The court is of the opinion that there was no need for separate or additional evidence of service of the statutory notices since service was admitted by the Plaintiff. A party is not required to tender evidence to prove a fact which has been admitted by the adverse party. The court is thus satisfied that the Plaintiff was duly served with the relevant statutory notices. The object of the notices is to accord the chargor an opportunity to redeem the charged property. The Plaintiff himself conceded that he did absolutely nothing to redeem his property. He did not even make a proposal for payment by instalments. He waited for the auction advertisement to move the court for an injunction. The court is satisfied that the 1st Defendant's statutory power of sale had accrued.

37. The court is further of the view that even if there was any irregularity in the exercise of the statutory power of sale the Plaintiff's remedy could only lie in damages and not in the cancellation of the auction as was held in the case of **Nairobi Civil Appeal No. 133 of 2006 Nancy Kahoya Amadiva Vs Expert Credit Ltd & Another [2015] eKLR.** In the said case the Court of Appeal held, *inter alia*, that:

"26. We find it necessary to consider the remedies available for a sale arising out of a non-valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under the RLA and the RTA. Ringera J in *David Ngugi Mbuthia V Kenya Commercial Bank & Anther (HCCC No. 304 of 2001)* unreported set the principle thus: a person damnified by a transfer of property by a mortgagee to an auction purchase pursuant to any irregular or improper exercise of statutory power of sale is entitled to recover any damages directly suffered by him from the auctioner. The same judge restated the position in *Hilton Walter Osinya V Savings & Loan (K) Ltd (HCCC No. 274 of 2001)* unreported. We agree with the above observation of Ringera J. (as he then was)".

38. The 3rd issue is whether or not the 1st Defendant's statutory power of sale had become statute barred under the **Limitation of Actions Act (Cap. 22).** The Plaintiff pleaded that there was an unreasonable delay of over 16 years by the 1st Defendant in realizing the security the subject of the charge dated 10th March 2008 and consequently its statutory power of sale had become time-barred. The Plaintiff's advocate did not pursue this issue in his written submissions and no authority was cited in support of this novel proposition. The court's view of the matter is that as long as there is a valid charge which remains undischarged, and as long as there is an amount owing under the terms of the charge, the chargee's statutory power of sale cannot be said to be statute-barred. A charge is in the nature of a continuous security for the repayment of a loan. In the case of **Rajnikant Khetshi Shah Vs Habib Bank A.G. Zurich [2016] eKLR** the High court held as follows on the issue:

"These arguments are quite robust and useful, but one matter stands out and is agreed by the parties: That the charge herein is still subsisting on the suit property. In my considered opinion, as long as the charge is still subsisting and has not been discharged, the cause of action consisting in a discharge of charge is unaffected. Similarly, unless there exist circumstances to the contrary, as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive …"

39. The 4th issue is whether there was a collusion between the 1st and 2nd Defendants to deprive the Plaintiff of the suit property. Although the issue of collusion was pleaded by the Plaintiff in his amended plaint, no particulars thereof were given. At the trial hereof, the Plaintiff conceded during cross-examination that he had no evidence of any collusion between the 1st and 2nd Defendants as pleaded in his amended plaint. The court, therefore, finds no evidence of collusion in the disposal of the suit property.

40. The 5th issue is whether the 2nd Defendant's title to the suit property is protected as a *bona fide* purchaser at a public auction. The 2nd Defendant contended that he was an innocent purchaser for value for the suit property hence should not held liable for any impropriety or irregularity which may have taken place prior to the public auction. The 2nd Defendant relied on the case of **Nancy Kahoya Amadiva V Expert Credit Ltd & Another (Supra)** and the case of **Joyce Wairimu Karanja V James Mburu Ngure & 3 Others Kiambu Civil Appeal No. 118 of 2047 [2018] eKLR.**

41. In the latter case Joel Ngugi J referred to the provisions of **section 99 of the Land Act** and held, *inter alia* that:

"31. In my view, there is little reason to belabor the point. 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 morgagor's equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagee re-issues the statutory notice if a planned auction is temporarily stopped by the court and then permitted to proceed through the lifting of the temporary orders."

42. The relevant provisions of **Section 99** of the **Land Act** stipulate that:

"(1) This section applies to:

a. A person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

b. A person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies:

a. is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

b. is not obliged to see to the application of the purchase price;

c. is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the

part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

43. It is thus clear from the foregoing that a purchaser at an auction conducted by a chargee pursuant to its statutory power of sale was not only protected under the provisions of the RLA and the RTA (now repealed) but also under section 99 of the Land Act which is currently in force. The court is, therefore, satisfied that the 2nd Defendant acquired a good title to the suit property which is not liable to impeachment.

44. The 6th issue is whether the sale of the suit property was illegal, null and void. This issue was raised by the Plaintiff in his amended pleadings, evidence and written submissions. This issue was raised in very unusual circumstances. It is common ground that the Plaintiff's application for interim orders was not heard until after the auction had taken place. The auction took place on 23rd May 2008 whereas the interim orders seeking to stop the auction were made on 11th June 2008.

45. Upon realizing that the sale had already taken place, the Plaintiff amended his application for injunction and included a prayer for a declaration that the purported sale of the suit property was "illegal, null and void". It is evident that the Plaintiff obtained an order to that effect *ex-parte* and at the interim stage before the suit could be heard. It is on the basis of that interim order that the Plaintiff submitted that this court should hold that the sale of the suit property was illegal, null and void *ab initio.*

46. The court is unable to agree with the Plaintiff's submissions for two reasons. First, the orders made on 11th June 2008 were merely interim orders pending the hearing and determination of the main suit. The court is of the opinion that such interim orders are only provisional in nature. They can be confirmed or vacated upon a full hearing by the trial judge. It, therefore, follows that such interim orders although issued by a judge of co-ordinate jurisdiction are not binding on the trial court.

47. In the case of **Trust Bank Ltd V Karan Ramji Kotedia, Civil Appeal No. 61 of 2000** (unreported) the Court of Appeal considered a similar situation and made the following observations:

"In granting the injunction, the learned judge, however, made certain conclusive and definitive findings on an interlocutory application, which findings may be somewhat embarrassing to the judge who will eventually hear the substantive suit. All we can say on this point is that such findings are unnecessary and uncalled for in an application for an interlocutory injunction and they cannot in any case be taken as binding even if the judge himself had the misfortune to hear the main suit."

The Court of Appeal also took a similar position in the cases of **Kenya Pipeline Co. Ltd V Richard Kioko Kiundu [2015] eKLR** and **National Bank of Kenya V Duncan Owuor Shakali & Another Civil Appeal No. 9 of 1997.**

48. The 2nd reason is that the grounds advanced by the Plaintiff for impeaching the auction of 23rd May 2008 have not been demonstrated upon a full hearing of the suit. As the court has already found, there was a valid charge over the suit property to secure the repayment of the loan advanced to the borrower; there was a default by the borrower; the relevant statutory notices were duly served; and the 1st Defendant duly exercised its statutory power of sale. The Plaintiff has, therefore, failed to prove his pleaded case against the Defendants hence the *ex-parte* orders he obtained on 11th June 2008 cannot be confirmed.

49. The court has also noted the 2nd relief sought in the amended plaint is in exactly the same terms as the prayer in the application for interim relief. In both the application and the amended plaint, the Plaintiff was seeking a declaration that the sale of suit property was illegal, null and void. This court is of the opinion that such a declaration can only be granted upon conclusion of the trial because it is a relief of a final nature. Such a declaration cannot be granted on an interim basis pending the hearing and determination of the main suit. The 6th issue is therefore answered in the negative.

50. The 7th issue is whether the Plaintiff's suit is *res judicata* in view of the previous legal proceedings instituted by the Plaintiff. This issue was raised by the Defendants but pursued more by the 2nd Defendant at the trial and in his written submissions. It was the Defendant's contention that the instant suit is *res judicata* because the Plaintiff had previously filed *Runyenjes RMCC no. 31 of 2001* and *Meru CMCC No. 706 of 2004.*

51. Whereas the Plaintiff claimed that the said suits were dismissed on account of lack of jurisdiction by the Magistrate's court to try them, the 2nd Defendant contended that *Runyenjes RMCC No. 31/2001* was dismissed for want of prosecution and not for want of jurisdiction. None of the parties provided copies of the proceedings or judgement in that suit. The court has however, had the advantage of perusing the court file in that suit. The record shows that vide a notice of motion dated 21st March 2012 brought under **Order 17 rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules** the 2nd Defendant therein (ICDC) applied for dismissal of the Plaintiff's suit for want of prosecution. By an order dated 19th July 2012 the Magistrates court dismissed the said suit with costs for want of prosecution.

52. The legal effect of such dismissal for want of prosecution is not much in dispute. In the case of **Njue Ngai Vs Ephantus Njiru Ngai & Another [2018] eKLR,** the Court of Appeal held, *inter alia*, that:

"21. Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. There can be no doubt therefore that Njue's appeal to the High Court was decided by a competent court. The dismissal also meant that the decision of the Appeals Committee stood unchallenged and final, warts and all. The fresh suit filed by Njue was christened a *'Declaratory Suit'* which he contended was an alternative

to '*Judicial Review*'. By whatever name called, it was a new suit and, as earlier stated, he was time barred in filing a Judicial review application to quash the decision of the Appeals Committee made 12 years earlier. The semantic change was merely a clever turn (but that legal ingenuity was within a cul-de-sac)."

53. It is thus clear that the Plaintiff did the best he could to deliberately mislead this court on the reason for dismissal of his earlier suit. The 1st Defendant's valuation dated 17th February 1988 valued the suit property at Kshs. 180,000/- whereas the valuation report by Tysons Limited dated 19th February 2007 valued the suit property at Ksh.1.2 million. It was not demonstrated that the value of the subject matter was at any time beyond the jurisdiction of the Magistrates Court. The court, therefore, finds that the instant suit was barred under **section 7 of the Civil Procedure Act (Cap. 21)** by reason of the dismissal order made on 19th July 2012.

54. The position with regard to *Meru CMCC No. 706/2004* was also not clear. Although the 1st Defendant produced copies of the plaint and the decree indicating that the suit was dismissed upon a hearing, there was no indication on the face of the decree why the suit was dismissed with costs. The Defendants did not produce a copy of the judgement by which the suit was dismissed. It is, therefore, not possible to determine whether that suit was dismissed for lack of jurisdiction or on merit.

55. The 8th issue is whether the Plaintiff's crops, grass or other property was destroyed by the 2nd Defendant. The Plaintiff contended that his crops and other properties worth Kshs.400,000/- were destroyed by the 2nd Defendant during his entry into the suit property. It is obvious that the claim was in the nature of special damages which must be pleaded with particularity and strictly proved. There is no evidence on record to support the sum of Kshs.400,000/- claimed as special damages. No reports from any experts were tendered in evidence to demonstrate the alleged loss.

56. In the case of **Ouma V Nairobi City Council [1976-80] KLR 375 at page 385-386** Cheson J (as he then was) held as follows regarding a claim for special damages:

"Thus for a plaintiff to succeed on a claim for special damages, he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, Ratcliffe V Evans (1892) 2 QB 524 where Bowen LJ said at pages 532 & 532:

> **The character of the act themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**

57. The court is of the opinion that the following passage of Chesoni J at page 386 aptly summarizes the Plaintiff's claim for special damages in this suit:

"In the instant case there was an allegation and list of some stolen or broken property of the plaintiff. This was in the pleading, but certainty and particularity of proof were lacking. In the circumstances the claim for specific damages must fail ..."

58. Although the Plaintiff gave particulars of damaged items under 4 distinct heads in paragraph 17 of his further amended plaint of 28th September 2017, the value of the properties under each head was not particularized. The Plaintiff simply pleaded a global sum of Ksh.400,000/- as the value of all the crops and items which were alleged to have been destroyed. The court, therefore, finds that the Plaintiff has failed to meet the threshold of particularity. The Plaintiff also failed to substantiate the global figure of Ksh.400,000/- through credible documentary evidence. In the circumstances, the Plaintiff is not entitled to any special damages.

59. The 9th issue is whether the Plaintiff is entitled to the reliefs sought in the further amended plaint. In view of the court's findings and holdings on the preceding issues, it is evident that the Plaintiff is not entitled to the reliefs sought, or any one of them. The Plaintiff has failed to demonstrate that the sale of the suit property under the chargee's statutory power of sale was irregular or illegal. He has failed to demonstrate any grounds for cancellation of the 2nd Defendant's title to the suit property. He has failed to demonstrate that the 2nd Defendant was a trespasser on the suit property. He has failed to demonstrate his claim for special damages. In a nutshell, the Plaintiff has failed to prove his case against the Defendants to the required standard. The issue is consequently answered in the negative.

60. The 10th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap. 21).** As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason to deprive the successful litigants of the costs of the action. The Defendants shall accordingly be awarded costs of the suit.

61. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case to the required standard. The Plaintiff's suit must fail. Accordingly, the court makes the following orders:

a. The Plaintiff's suit be and is hereby dismissed in its entirety.

b. The Plaintiff shall pay the 1st and 2nd Defendants costs of the suit to be taxed by the taxing officer of the court.

c. Any interim orders in place are hereby vacated in their entirety.

62. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** at **EMBU** this **11TH DAY** of **JULY, 2019.**

Mr. Karuti for the Plaintiff (present in person); Ms Ndorongo for the 2nd Defendant and holding brief for Ms. Wairimu for the 1st Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

11.07.19