REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.213 OF 2012

SUSAN K. BAUR.....1ST PLAINTIFF

ALFRED JEAN-CLAUDE BIERI.....2ND PLAINTIFF

VERSUS

SHASHIKANT SHAMJI SHAH.....1ST DEFENDANT

DAVINDAR SINGH GHATA-AURA....2ND DEFENDANT

NARINDAR SINGH GHATA-AURA.....3RD DEFENDANT

JUDGMENT

(Suit by plaintiffs claiming certain property that they purchased from the 1st defendant; agreement for sale providing that the property would be transferred to the plaintiffs and the plaintiffs would then charge it to the 1st defendant to secure the balance; sale not contested; transfer and charge however contested; transfer and charge dated on a day that the 1st plaintiff was in Switzerland; attestation of a false date declared to invalid the instrument; 1st defendant as unpaid chargee selling the property to 2nd and 3rd defendants; notices under section 65 and 74 of the Registered Land Act; held that notice under S.65 must first be given before a statutory notice under S.74; service of notices; notices served by registered post to the address in the agreement when 1st defendant was aware that the plaintiffs were in Switzerland and had their address in Switzerland and email; service of the notices held to have been irregular; right of chargor to receive the residue if sale exceeds the debt; 1st defendant not informing plaintiffs of the sale and not accounting for the residue; 1st defendant ordered to refund the purchase price with interest from the date of receipt of the proceeds of the auction sale; 2nd and 3rd defendants protected as innocent purchasers for value).

PART A: INTRODUCTION AND PLEADINGS

1. The suit was commenced by way of a plaint filed on 8 November 2010. That plaint was amended on 13 March 2012. In the amended plaint, the plaintiffs have pleaded that on 27 September 2006, they entered into an agreement vide which they purchased from the 1st defendant the land parcel Nakuru Municipality Block 17/5 at a consideration of Kshs. 5,600,000/= or USD 77000. They paid some money on the transaction and took possession until the month of June 2011, when they were evicted by auctioneers, acting under the instructions of the 2nd and 3rd defendants. At that time, there was an outstanding balance of USD 27000 which the plaintiffs aver that they offered to the 1st defendant, who declined, and instead referred her to his advocates, M/s Wachira Mbuthia & Company. When she visited the said offices, she was informed that the suit property has been sold and transferred, and when she did a search, she found that the same had been transferred to the 2nd and 3rd defendants on 20 July 2010. The 1st plaintiff subsequently came to learn that the property had been sold to the 2nd and 3rd defendants through a public auction pursuant to a charge instrument dated 27 September 2006. It is their case that the transfer of the land to the 2nd and 3rd defendants was fraudulent as the 1st defendant purported to have a charge over the suit property and that the sale was in any event irregular. It is further pleaded that the 2nd and 3rd defendants stage managed a public auction that was non existent. In the suit, the plaintiffs want a declaration that the suit property belongs to them and that the purported sale by public auction was a nullity. They thus want the title of the 2nd and 3rd defendants canceled and the title to revert to them. In the alternative, the plaintiffs want judgment against the 1st defendant in the sum of USD 50000 from the date of receipt by the 1st defendant with interest at 14% until payment in full. They have also asked for general and exemplary damages together with costs and interest.

2. In his statement of defence, the 1st defendant averred inter alia, that it was a term of the agreement of 26 September 2006 that the plaintiffs would pay the balance of the purchase price, being USD 42000, within 15 months, which balance was secured by a charge over the suit property in favour of the 1st defendant. To give effect to this agreement, the 1st defendant transferred the suit property to the plaintiffs, and thereafter on 17 October 2006, the plaintiffs charged the property to the 1st defendant. It is pleaded that the plaintiffs defaulted, after

which, the 1st defendant exercised his statutory power of sale as chargee, and that the property was sold to the 2nd and 3rd defendants through the auctioneering firm of M/s Gillette Auctioneers. He has pleaded that in selling the property, he acted in good faith and secured the best price in the circumstances, and he cannot therefore be accused of fraud.

3. On the part of the 2nd and 3rd defendants, it was pleaded that they purchased the suit property through a public auction which was held on 24 March 2010, where they were declared the highest bidders at the price of Kshs. 5,500,000/=. The property was then transferred to them and a Certificate of Lease issued. They have averred that they are bona fide purchasers for value, and also alluded to a suit Nakuru HCCC No. 204 of 2010 between themselves and the plaintiffs, being a suit whereby they obtained judgment for vacant possession. They refuted the particulars of fraud pleaded in the plaint, and pleaded that the plaintiffs' claim, if any, lies in damages.

PART B: EVIDENCE OF THE PARTIES

4. The first plaintiff, Susan Kerubo Ongaro Baur, testified that she is a resident of Switzerland. She identified the 2nd plaintiff as her friend who also lives in Switzerland. She intended to purchase a house and was introduced to the 1st defendant, who was selling his house, which comprised of the suit property. They agreed to purchase the suit property at USD 77000. She immediately transferred USD 35000 from her account to the 1st defendant's account in New York. They then proceeded to the offices of M/s Sheth & Wathigo Advocates, where they drew up an agreement of sale which is dated 27 September 2006. She executed the agreement in the presence of the 2nd plaintiff. She testified that the balance of USD 42000 was to be paid within 15 months. She thereafter left the country on 29 September 2006. She stated that on 17 October 2006, the date noted in the charge instrument, she was not in the country and she could not have signed it. On 14 December 2007, she came into the country and looked for the 1st defendant but they could not meet, as she was informed that he is away in South Africa, and they could not meet later due to the post election violence of the same year. She then left the country on 26 January 2007. She testified that on 17 July 2008, she transferred to the 1st defendant's New York account the sum of USD 15000 leaving a balance of USD 27000. She came back into the country on 12 July 2010 and went to see Mr. Shah so that she could pay the balance of USD 27000. She was referred to Mr. Wachira Mbuthia Advocate. When she went to see him, she was told that the property had been sold two weeks back. She stated that on 24 September 2009, which is the date of the Statutory Notice, she was in Switzerland, and that the 1st defendant was aware of this fact, yet the document was addressed to an address in Nairobi. In the meantime, the 2nd plaintiff who had no documents to be in the country was deported on 28 August 2009 after he was arrested on 24 July 2009. She stated that she has not been refunded a cent to date.

5. In cross-examination, she conceded that she did not pay the balance of the purchase price within 15 months as agreed. She also agreed that the agreement contained a clause that the property would be charged to the 1st defendant to secure the balance of USD 42000. She however denied that the document in the transfer of the lease to them, which is dated 17 October 2006, was signed by her as she was out of the country by then. She agreed giving her photographs to Mr. Wathigo, the Advocate who prepared the documents, but denied signing the transfer of lease document. She stated that Mr. Wathigo was not previously known to her as he was the lawyer of the 1st defendant. She also denied signing the charge instrument on 17 October 2006 as she was not in the country. According to her, her signature was forged. She denied having received the statutory notice contained in the letter dated 24 September 2009. She stated that the address belonged to her sister and she gave it to Mr. Wathigo, who is the advocate who prepared the agreement, so that it can be used in the agreement. She did not notify of her change of address. She was also not aware of a letter dated 2 October 2009 written by the 2nd plaintiff and which letter referred to the notice of 24 September 2009. She was not aware of any auction sale of the property as she was not in the country on 24 March 2010 when the auction took place. She did not pay any fees to transfer the land to the 2nd and 3rd defendants or any bills. She was of the view that the 1st defendant committed fraud by not serving her with the statutory notice and selling the property secretly as he knew her address in Switzerland. She also testified that some of her household items were sold on instructions of the 2nd and 3rd defendants.

6. PW-2 was Mr. Emron Francis who is a clerical officer in Nakuru Law Courts. He produced the court file in respect of Criminal Case No. 3683 of 2010. The accused in the said case was the 2nd plaintiff who had been charged with being unlawfully in Kenya and failing to register as an alien. The 2nd plaintiff was convicted on 20 July 2010 and sentenced to a fine of Kshs. 20,000/= or to serve six months in jail. He was in prison up to 23 August 2010 when he was released.

7. PW- 3 was Mr. Caled Wanjala Sunguti, the District Land Registrar, Nakuru. He testified that the 2nd and 3rd defendants became registered as owners of the suit property on 20 July 2010. He did not find the transfer documents in the land parcel file nor did he see any document for payment of stamp duty, nor consent to transfer the property to the 2nd and 3rd defendants. He however affirmed that there is an instrument of transfer from the 1st defendant to the plaintiffs which is dated 17 October 2006. The same was presented on 19 October 2006 for registration. On 26 October 2006, the transfer to the plaintiffs was effected, and on the same date, a charge in favour of the 1st defendant was registered. He had no experience of a situation where an individual is chargee. His file did not have any receipt for payment of stamp duty on the charge or transfer from the 1st defendant to the plaintiffs. In cross-examination, he stated that the instruments were franked meaning that stamp duty was paid. He stated that the transfer was registered on 19 October 2006 although the register indicates 26 October 2006. From the presentation numbers, the transfer was done before the charge. He did not have in his file the transfer by chargee document. He also did not doubt any of the entries in the register. He conceded that his file is missing a lot of documents.

8. PW-4 was Mr. Alfred Omangi who works with the Immigration Department. He gave a travel history of the 1st plaintiff. He testified that she entered the country on 25 June 2006 and left on 29 September 2006. She then came back again on 12 December 2006 and left on 1 March 2007. Her next entry was on 24 July 2009 and she left on 28 August 2009. The next period was her entry on 10 September 2010 and departure on 29 October 2010.

9. PW-5 was Mr. James Gatune Wathigo who is an advocate of the High Court of Kenya. He testified that in the year 2006, he practiced in the law firm of M/s Sheth & Wathigo Advocates, from which he retired in the year 2008. He testified that on 27 September 2006, he prepared the sale agreement between the plaintiffs and the 1st defendant. He knew the 1st defendant, who was his client, but he was not familiar with the plaintiffs, who were brought by the 1st defendant. He testified that the agreement was signed before him. After that day he did not see the plaintiffs again. He testified that the sum of USD 35000 was paid and he prepared a charge for the balance. He testified that the charge is dated 17 October 2006. He stated that on that day, the plaintiffs appeared before him to execute the charge. He stated that it was also him who attested to the charge. In cross-examination, he testified that he prepared the charge and transfer documents simultaneously with the sale agreement and that all these documents were signed on the day that the agreement was executed. He stated that although they bear the date of 17 October 2006, they were actually signed before him on 27 September 2006. He denied that the documents were forged.

He stated that he registered the transfer and the charge on 27 October 2006. He averred that the usual practice is to leave the documents undated until they are ready to be presented for registration. He affirmed that a clause in the agreement provided that the property would be charged for the unpaid balance of USD 42000. He stated that he was the one who inserted the date of 17 October 2006 when the documents were presented for registration. He also noted a mistake at paragraph 3 of the agreement which provided for 2 days for payment of the balance. I questioned the witness who stated that he started practicing in the year 1975 and his area of speciality has been in conveyancing.

10. PW- 6 was Mr. Samson Kibiego Ngarngar who works at the post office in Nakuru. He testified that there was a Certificate of Postage sent to the 1st plaintiff from the law firm of M/s Wachira & Company Advocates and another sent by Gillette Auctioneers. He testified that these letters were never collected and were returned to sender.

11. With the above evidence, the plaintiffs closed their case.

12. The 1st defendant testified that he previously owned the suit property and the plaintiffs approached him with an intention to purchase. They did not have the whole of the purchase price and Mr. Wathigo advised that the property could be charged. The agreement of 27 September 2006 was then written and executed. The purchase price was of USD 77000 with the sum of USD 35000 being paid on execution. The balance was to be paid within 15 months, and according to clause 6 of the agreement, was to be secured by creating a charge over the property, meaning that, the property was to be transferred to the purchasers then charged. He stated that on the day that the agreement was signed, they also signed the transfer document and the charge instrument, before Mr. Wathigo. Thus, although the charge and transfer are dated 17 October 2006, they were actually signed on 27 September 2006. He testified that it was Mr. Wathigo who stated that they would be dated on the day that they were to be presented for registration since the plaintiffs wished to travel overseas. At the time that he sold the property, the same had a charge held by Barclays Bank. This was discharged and the property transferred to the plaintiffs after which a title was issued in their names. It was then that the property was charged in his favour. He stated that the 15 month period for the payment of the balance lapsed on 27 December 2007 and that the purchasers did not pay him anything within this period. It was in July 2008 that a sum of USD 15000 was paid to him and on 10 July 2008, he wrote to the 1st plaintiff an email asking for the balance. There was still left a balance of USD 27000 which he stated that he was not paid. He then hired an advocate, Mr. Wachira Mbuthia. A 3 month notice asking for the balance was made on 24 September 2009. The demand was made in Kenya Shillings being Kshs. 2,774,101.90/= being a conversion from US Dollars, of the balance. He stated that on 2 October 2009, the 2nd plaintiff came to see him over the demand notice and wrote a note but he informed him that the matter is now with the lawyers. No money was paid and it is then that Gillete Auctioneers were instructed. The auctioneers then issued a 45 day redemption notice, advertised the property in the Daily Nation newspaper, and held the auction on 24 March 2010 after a valuation was done. He did not attend the auction, but he came to learn that the 2nd and 3rd defendants were the highest bidders, at Kshs. 5.5 million. He did not personally know the 2nd and 3rd defendants although they were familiar faces, they being of Asian origin, just like himself. During the period that the property was in the hands of the plaintiffs, it had accumulated land rent of Kshs. 3,300/= and land rates of Kshs. 51,825/= which he paid. He also paid Kshs. 3,000/= for the clearance certificate, an accumulated water bill of Kshs. 23,335/= and an accumulated power bill of Kshs. 18,472.90/=. The auctioneer charged Kshs. 293,700/=. After the auction, the 1st plaintiff came to see her to pay the balance, but he could not receive it, as the property had already been sold. He stated that he has no objection to the plaintiffs receiving what was left over from the sale. He also testified that he deserves to be paid the amount he expended plus interest after the 15 months.

13. In cross-examination, by counsel for the 2nd and 3rd defendants, he stated that the market value of the property was Kshs. 7 million and the forced sale value was Kshs. 5 Million according to the valuation report prepared before the auction sale. The property fetched Kshs. 5.5 Million which was above the forced sale value. He denied that the auction was stage managed. He stated that the purchase price was paid to the auctioneer, who then forwarded the sum of Kshs. 4,100,000/= to his lawyer, Mr. Wachira Mbuthia.

14. Cross-examined by counsel for the plaintiff, he stated that the 1st plaintiff came to see him about 6 months after the auction. He was aware that she was a resident of Switzerland and they used to communicate through email. He had her physical address in Switzerland but he did not send any notices to her using her address in Switzerland or her email address. He testified that the payment of USD 15000 was paid on 23 July 2008, after he had written to the 1st plaintiff on 10 July 2008, and giving her the correct swift code. She had tried to transfer the said sum of USD 15000 before, but it did not go through because he had given her the wrong swift code The auction price was of Kshs. 5,500,000/= but he could not recall what was paid to him after the sale. The money was paid to him by Mr. Wachira Mbuthia. He did not write to the 1st plaintiff to inform her that the property had been auctioned and the reason he gave was that the matter was with his lawyers. He testified that the sale agreement in Kenya Shilllings was Kshs. 5,600,000/= which was converted into US Dollars to come to the figure of USD 77000. He was not however too sure of the conversion rate used. He stated that the balance was to be paid over 15 months although a clause in the agreement gave a completion date of 30 September 2006. He agreed that he did not see Mr. Wathigo on 17 October 2006. He testified that the statutory notice sent indicated a loan of Kshs. 2, 774,101/= which he stated was the balance of the purchase price plus interest. He however agreed that he had not given any loan to the 1st plaintiff. The letter also indicated interest of 18.5% which he stated was the bank interest rate at the time. He was not however ready to pay the balance due to the plaintiffs with interest at 18.5%. He agreed that property prices have now risen tremendously.

15. He knew that the the 2nd plaintiff was living in the house but he was not aware if he was served personally with the statutory notice. On the note dated 2 October 2009, said to have been written by the 2nd plaintiff, he did not see who brought the same as he just found it at the reception. He did not admit that it was a forgery.

16. In re-examination, he stated that the plaintiffs never informed him that they have changed their address from the one indicated in the agreement.

17. DW-2 was Mr. Philip Mwaura, the proprietor of Gillette Auctioneers. He has been an auctioneer since the year 1992. He testified that he received instructions to sell the suit property and he served a 45 day notice to the 1st plaintiff through registered post using her address in Nairobi. He also posted the Notification of Sale. There was no compliance with the notice and he advertised the property in the Standard Newspaper of 10 March 2010, which was a Wednesday. He also put up handbills in town. He conducted the auction and the 2nd and 3rd defendants were declared the highest bidders. After the auction, they paid a sum of Kshs. 1,400,000/= and he issued them with the Memorandum and Certificate of Sale. He forwarded to the law firm of M/s Wachira Mbuthia Advocates the sum of Kshs. 1,100,000/= after he deducted his fees. He stated that he conducted the auction at his offices in Plutos Building in Nakuru Town. In cross-examination, he

inter alia stated that his fee was of Kshs. 293,700/= which fee was based on the amount that he was meant to recover which was Kshs. 2,902.404.10/= which was the figure given in the redemption notice. He was not aware that the chargee was also the vendor of the property and did not know of the details of how the property came to be charged.

18. DW-3 was Mr. John Bwoma who is a valuer working with Regent Valuers International in Nakuru. He produced the valuation report in issue in the case. The report was prepared on 22 March 2010 by one Mr. Kihara A.T one of their valuers, who had since left the company. He stated that their firm received instructions from M/s Wachira Mbuthia & Company Advocates to value the property. The valuation report indicated that the market price is Kshs. 7 Million and the forced sale value is Kshs. 5 Million. He testified that the report was prepared two days to the auction and the same showed that the property was at the time owner occupied. He did not think that the valuation was done so as to sell the property at an undervalue.

19. DW-4 was Mr. Davinder Singh Gatta Aura, the 2nd defendant. He stated that the 3rd defendant is his father. He testified that in the month of March 2010, his father saw the advertisement of the suit property, and they developed an interest in purchasing it. He attended the auction which was held at the offices of Gillette Auctioneers. There were other persons as well, who participated in the auction, and they were declared the highest bidders at Kshs. 5.5 Million. They then prepared two banker's cheques of Kshs. 700,000/= each to cover the deposit. The balance was to be paid in 30 days, and on 16 April 2010, they forwarded to M/s Wachira Mbuthia & Company Advocates, the sum of Kshs. 4,100,000/=. They then engaged the same law firm to transfer the property to them. They paid stamp duty and the property was duly transferred. They went to take possession, but were not successful, and they sued the plaintiffs for vacant possession and mesne profits. They obtained judgment for mesne profits of Kshs. 300,000/= which they executed by attaching some household goods. It was in 2011 that they got vacant possession. He denied colluding with the 1st defendant whom they did not know at a personal level.

20. DW-5 was Ms. Wangechi Mwangi, who is the in-charge of the Environment and Land Court registry in Nakuru Law Courts. She produced the file Nakuru HCCC No. 204 of 2010 which was the case where the 2nd and 3rd defendants had sued the plaintiffs for vacant possession and mesne profits. The plaint was filed on 30 July 2010. The matter is now concluded, the plaintiffs having received judgment on 7 September 2010 for mesne profits for Kshs. 300,000/= in default of defence.

21. With the above evidence, the defendants closed their case.

PART C: SUBMISSIONS OF COUNSEL

22. In his written submissions, Mr. Robert Ndubi, learned counsel for the plaintiffs, submitted inter alia that the charge is invalid. He pointed out that there are no names against the signatures in the charge instrument, and on the reverse, the dates are not shown, and neither does the advocate state how he identified the signatures. He pointed out that the charge is also missing the passport numbers of those who signed it. He submitted that it was impossible to tell when the charge was prepared, signed and attested. He also submitted that the charge does not disclose that the same secures a balance of a purchase price and not money lent. He submitted that the Land Registrar ought to have rejected the charge. He submitted that the charge contravenes Section 65 if the Registered Land Act. He further submitted that the address used, that is P.O Box 49100-00100 to send the notices, is not in the charge document. He submitted that Section 74 of the Registered Land Act, makes it mandatory that a notice be served on the chargor. He submitted that the 1st defendant knew that the 1st plaintiff resided and worked in Switzerland, and he had her email and physical address in Switzerland, but no attempt was made to serve her using these means. He also stated that there was no demand issued pursuant to Section 65 (2) of the Registered Land Act. He submitted that the statutory notice was faulty, as it indicated a balance of Kshs. 2,774,101.90/=, yet the balance due could only be Kshs. 1,944,000/=. He submitted that even if the sale was proper, there was non-compliance with Section 78 of the Registered Land Act, which requires that the residue of an auction sale be paid to the chargor. He submitted that for these reasons, the 1st defendant ought to refund the entire USD 50000 or the excess money after the auction, with interest from the date of auction. He submitted that the plaintiffs are also entitled to general and exemplary damages for wrongful attachment.

23. On the part of the 1st defendant, Mr. Wachira Mbuthia, submitted inter alia that the plaintiffs appear to have abandoned prayers (b) and (d) sought in the plaint since these issues are the same as those pending in Nakuru HCCC No. 204 of 2010. He submitted that the 1st plaintiff had no problem with the agreement which provided that the property would be transferred to her and then charged to secure the balance. He submitted that the plaintiff's claim that her signature was forged, cannot be true as the documents were signed before Mr. Wathigo, who was the plaintiff's own witness. He submitted that once an advocate gives evidence on oath that he witnessed the execution of a document, the court cannot otherwise hold unless there are compelling reasons to do so and he relied on the case of ***Jopa Villas LLC vs Overseas Private Investment & 2 Others (2009) eKLR***. He submitted that the charge was in conformity with the requirements of Sections 65, 38 and 74 of the Registered Land Act. He pointed out that a chargee does not have to be a banking institution and relied on the case of ***Edward Charles Nginyo vs Hans Jurgen Zahlten & 4 Others (2015) eKLR***. He submitted that the remedy of one after an auction sale is in damages. He submitted that the omission of a postal address in the charge was an omission of form and he relied on the case of ***Robert Kibagendi Otachi & Another vs Housing Finance Corporation of Kenya & 3 Others, Court of Appeal, No. NAI 251 of 1996***. He submitted that the statutory notice was proper as it gave a notice of 3 months. He submitted that if the issue raised is the dispute on the amount owed that cannot vitiate the sale. He relied on the case of ***Shah vs Devji (1965) EA 91, Kenya Commercial Bank vs Harumeri (2000) 2 KLR 691***, cited in the case of ***Julius Mainye Anyega vs Ecobank Kenya Limited (2014) eKLR***. He further submitted that the chargee, was entitled to charge interest after the lapse of 15 months. On service of the notice, he submitted that the plaintiffs did not advise of any change of postal address and the 1st defendant was guided by Section 153 of the Registered Land Act. He relied on the case of ***Ooko vs Barclays Bank (2002) 2 KLR 394***. He submitted that after the notice, the 2nd plaintiff went to see the 1st defendant and wrote the note of 2 October 2009, which demonstrates that he received the notice. He submitted that no other demand was contemplated apart from that under Section 74 of the Registered Land Act. He submitted that the plaintiffs have not proved any fraud and pointed at the burden of proof in a case of fraud as held in the case of ***Kinyanjui Kamau vs George Kamau Njoroge (2015) eKLR***. He submitted that the plaintiffs are bound by their pleadings and referred me to the case of ***Sammy Likuyi Adiema vs Charles Shamwati Shisikani (2014) eKLR and Dakianga Distributors vs Kenya Seed Company Limited (2015) eKLR***. He submitted that the issue of payment of the residue of the proceeds of the auction sale was not pleaded and therefore no order can be made in this suit as it was not fully canvassed. He thought that the 1st plaintiff lied under oath in denying her signatures.

24. On his part, Mr. Mutonyi, learned counsel for the 2nd and 3rd defendants, submitted inter alia that the charge could not be said to be invalid as the agreement of the parties did provide that the balance would be secured by a charge. He thought that Mr. Wathigo gave sound

professional advise on how this balance may be secured as it saved the 1st defendant from the rigours of a suit to recover the balance in the event of default. He also submitted that the plaintiffs cannot challenge the capacity of the 1st defendant to charge and referred me to the same case as referred by Mr. Mbuthia, that of ***Edward Charles Nginyo*** (supra). He submitted that the evidence of the 1st plaintiff, that the signature in the charge is not her's, cannot be believed, as this was confirmed by Mr. Wathigo, who was her own witness. He submitted that the dating of the document after execution was common practice among conveyancers. He submitted that there was no law requiring that parties affix their PIN and ID numbers in a charge instrument. He submitted that the statutory power of sale was properly exercised. He thought that there was no need for a demand notice under Section 65 (2) of the Registered Land Act, as in this case, the date of repayment was specified. He submitted that the statutory notice was served properly through registered post, as this was the official postal address given, in the sale agreement and transfer of lease. He did not also see any fault in the manner in which the auctioneer served the Notification of Sale and Redemption Notices, as the plaintiffs could not be served personally, since they were out of the country. He submitted that once the auction was conducted, the remedy of the chargor lay in damages and he relied on the case of ***Bomet Beer Distributors Limited & Another vs Kenya Commercial Bank & Others (2005) eKLR and Savings and Loan Kenya Limited vs Mayfair Holdings Limited (2012) eKLR***; ***Kitur & Another vs Standard Chartered Bank & Another (No.2) (2002) 1 KLR 640*** ; ***Jacob Ochieng Muganda vs Housing Finance Company of Kenya Limited (2002) eKLR;*** and ***Nancy Kahonya Amadiva vs Expert Credit Limited & Another (2015) eKLR.*** He submitted that the plaintiff has not proved any fraud and relied on the case of ***Vijay Morjaria vs Nansingh Madhusingh Darbar & Another (2000) eKLR*** and ***Urmila w/o Mahendra Shah vs Barclays Bank International Limited & Another (1976-1980)1 KLR 1168***. He submitted that the allegation that his clients colluded was non-existent. He further submitted that the 2nd and 3rd defendants are innocent purchasers for value without notice and were protected by Section 143 of the Registered Land Act. He relied on the case of ***David Katana Ngombe vs Shafi Grewal Kaka (2014) eKLR***. He finally submitted that the plaintiffs do not deserve any of the prayers sought and that their case should be dismissed with costs.

D. ANALYSIS AND DECISION

25. I must first thank counsel for their very thorough and well researched submissions which have gone a great length in helping me to write this judgment. I have gone through the pleadings, the evidence and these submissions and I have the following view of the matter.

26. There is no dispute that the plaintiffs intended to purchase from the 1st defendant the suit property and that they entered into a sale agreement on 27 September 2006. I have looked at the sale agreement which was produced as an exhibit. I will copy some of the critical clauses of the agreement which are clauses 4, to 10 drawn as follows :-

4. The purchase price shall be paid as follows :-

(i) US Dollars 35000 on the signing of this agreement.

(ii) The balance of US Dollars 42000 shall be paid over a period of Fifteen (15) months.

5. The sale is subject to the Law Society Conditions of Sale (1989) Edition in so far as they are not inconsistent with the conditions contained in this Agreement.

6. The property will be charged for the unpaid amount of US Dollars 42000.

7. The completion date shall be on 30th September 2006.

*8. The vendor's advocates are M/s Sheth & Wathigo Advocates of Post Office Number *** (redacted) Nakuru.*

9. The purchaser's advocates are M/s Sheth & Wathigo Advocates of Post Office Number *** (redacted) Nakuru.

10. The property sold is subject to the Acts, Easements, Caveats, terms and conditions under which the title is held but is otherwise free of all encumbrances. The vendor shall discharge the property from the Barclays Bank of Kenya Limited.

SPECIAL CONDITIONS

A. The vendor shall obtain and provide the following documents to the purchaser's advocates :

*(i) Or*iginal Certificate of Lease.

(ii) Transfer duly signed.

(iii) Consent to t*ransfer.*

(iv) Rates Clearance Certificate from Nakuru Municipal Council.

(v) Discharge of Charge from Barclays Bank of Kenya Limited.

B. The purchasers has (sic) seen and inspected the property and are buying it as it is.

C. The vendor shall clear all the rates and land rent up to date.

D. Each party shall bear their own Advocates costs but the purchasers shall pay for the stamp duty and the Registration fees on the transfer.

SIGNED AND WITNESSED…

29. From the above, it will be seen that the purchase price was of Kshs. 5,600,000/= or the equivalent of USD 77000. The sum of USD 35000 was paid on execution and it was agreed that the balance would be secured by a charge of the suit property . The balance was to be paid over a period of 15 months. Though clause 7 of the agreement provides that the completion date was to be 30 September 2006, that clearly was erroneous since the purchasers had 15 months to pay the balance of USD 42000. If all went well, the completion date thus ought to have been 27 December 2007.

28. It will therefore be seen from the above that what the parties intended was to have the property transferred to the plaintiffs and then charged to the 1st defendant in respect of the balance. I am honestly at a loss as to why the parties thought that this was a good idea, because on my part, I really do not see any utility in such an arrangement. It is a tenuous arrangement prone to bring forth a torrid time for the vendor, for the law does impose quite a number of obligations on a chargee. A vendor is generally adequately covered by a properly drawn sale agreement. Where there is default by a purchaser in paying the balance of the purchase price within the time provided, such agreement can be nullified, and the vendor automatically retains the right to resell the property, for he would still be the proprietor of the property. It is in fact not uncommon to have the vendor compensated, either by forfeiture of the deposit, or part of it, or by a making of a provision for payment of damages. Without meaning any disrespect to Mr. Wathigo, I would not regard the advice that he gave to the parties, that it is best to charge the property for the balance of the purchase price, as very good advice. True, it was a way to secure the balance of the purchase price, but in my view, it was not the best way to do so in the circumstances of the matter. An ordinary sale agreement in my view was the best way to go and would have adequately covered the interests of the parties.

29. The agreement of sale is of course not disputed, but the transfer and the subsequent charge of the property are hotly disputed by the plaintiffs. I have seen the transfer and charge instruments. They are both dated 17 October 2006. The transfer document was attested by Mr. Wathigo, who attested that the plaintiffs and 1st defendant appeared before him on 17 October 2006. The charge instrument is a simple one in terms of the model RL 9 in the Registered Land Act. It has two pages, front to back. On the front page, the charge indicates that to secure payment of the principal sum of Kshs. 3,066,000/= with NIL interest, the plaintiffs have charged the property to the 1st defendant. The charge indicates that the principal sum shall be repaid on the 30th day of November 2007 together with any interest then due. It is said that the chargors acknowledge understanding the effect of Section 74 of the Registered Land Act. On the attestation page, which is the reverse page, there is no indication of the date that the chargors appeared before the person attesting. That part is blank. It is thus as follows :-

> *I certify that the above named Susan Kerubo Baur and Alfred Jean-Claude Bieri appeared before me on ……. day of ……. 2006 and being identified by ……. (or being known to me) acknowledged the above signatures or marks to be his (their) and that he (they) had freely and voluntarily executed this instrument and understood its contents.*

(signed)

Signature of and designation of person certifying. (NO NAME)

30. I have overwhelming evidence that the 1st plaintiff was not in the country on 17 October 2006 when it is purported that she signed the transfer and charge documents. The fact of the matter is that she was in Switzerland at the time. Mr. Wathigo, the advocate who appended his signature as the attesting witness did concede that the documents were signed on 27 September 2006 and not 17 October 2006 as noted in the documents. There cannot be any question therefore that the documents were not signed on 17 October 2006 as they claim. It cannot be contested that the transfer and charge required attestation. Indeed, Section 110 of the Registered Land Act (repealed in 2012 by the Land Registration Act), which was then applicable, did require attestation. Section 3 (3) of the Law of Contract Act, is also applicable in my view. It provides as follows :-

> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
>
> (a) the contract upon which the suit is founded-
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) **the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:** (emphasis mine)
>
> *Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

31. The person attesting needs to be present when the document is being signed and therefore needs to indicate the correct date when he attested the signatures. In our case, it cannot be said that the plaintiffs appeared before the attesting witness on 17 October 2006, and that attestation is therefore invalid. It was said by Mr. Wathigo, that it is common practice in conveyancing to sign documents and leave them, after which they will be dated later. I was surprised that such words could come from an advocate who has practiced for over fourty years. If that is indeed the practice, then such practice cannot be condoned, and needs to stop. Documents must bear the correct dates of signature and the person attesting must indicate the correct date when he saw these signatures being appended. An advocate worth his salt ought to know that. Anything else is illegitimate, illegal, and null and void. It is cheating, to provide in a document, that the person appeared before you on a date that he in fact did not. This court, cannot condone the back-dating or front-dating of signatures, as that would be abetting an illegal

activity. I am at a loss as to how an advocate can actually deliberately append the wrong date in a document. The insertion of the wrong date in our instance was not a mistake which could be excused but was deliberate. Mr. Wathigo had a duty to indicate the correct date when the documents were signed, and again, with respect, it was unprofessional on his part to deliberately give a false date in an instrument. In our case, I must hold that the transfer is invalid, as it was not executed nor attested, on the date indicated. So too the charge. My view therefore is that the transfer and charge need to be declared null and void for want of proper attestation.

32. With the annulment of the transfer and charge, what the parties will fall back on is the agreement which is not disputed. The agreement provides that the plaintiffs needed to pay the balance within 15 months. If the plaintiffs had paid the balance within the 15 months, I would probably be inclined to hold that they deserve the property, but payment was not made as agreed. In my view, since the plaintiffs did not pay the balance of the purchase price within 15 months as agreed, the agreement would lapse after this period, unless the parties extended the completion period, and the parties needed to be taken back to the position that they would be in if the contract had not been performed. The agreement did not provide for any damages or interest to be paid. I am therefore of the view that what the plaintiffs are entitled to is a refund of the purchase price paid and strictly speaking the refund ought not to be with interest. However, I do think that there are special circumstances in this case which would make the plaintiffs be entitled to interest, so as to compensate them for the loss they have incurred, in not having the money paid to them when in law they were entitled to the same. In this case, the 1st defendant believed that he had a valid charge and proceeded to sell the property through a public auction. I do not think he can be faulted for that action of selling the property, for he was an unpaid seller, who genuinely believed that he held a proper charge. He however never disclosed to the plaintiffs that he has sold the property. Upon the sale, there was certainly a residue which the plaintiffs would have been entitled to as provided by Section 78 of the Registered Land Act. The selling price was Kshs. 5.5 Million. What the 1st defendant was entitled to was just about Kshs. 2 Million or so, and even if you take into account any expenses, there is no question that there would have been a residue of at least Kshs. 3 Million or so, which ought to have been returned to the plaintiffs immediately after it was paid.

33. The 1st defendant never informed the plaintiffs that the property had been sold, and never disclosed to them what the auction price was, or what the residue that they were entitled to was. He in fact never gave any account to the plaintiffs. He had the email of the 1st plaintiff and he could easily have written an email to her, informing her of the auction sale, what the purchaser price was, and what the residue entitled to her was. He never did and instead he continued to hold this money, illegally in my view, whether by himself or through his lawyer, and he has therefore unjustly benefited from it since 2010 to date. On the other hand, the plaintiffs have been prejudiced by not having this money with them. In my view, it is only fair that the plaintiffs be refunded the purchase price with interest from the time that the auction sale took place, for that is the time that the 1st defendant must have deemed the agreement as completely voided, and it is the date that he received the auction money for which he ought to have issued a cheque for the residue to the plaintiffs.

34. The money paid by the plaintiffs totals USD 50000. I believe that justice will be done if I order the 1st defendant to refund to the plaintiffs this sum of USD 50000, together with interest at court rates, from the date of auction, when full payment was made by the 2nd and 3rd defendants, which is 16 April 2010. Payment of this money ought to be made in US dollars, the same currency that the purchase price was paid. The plaintiffs also deserve the costs of this suit as against the 1st defendant. I make no orders as to costs either in favour of, or against, the 2nd and 3rd defendants.

35. I should leave it at that, but there are a few legal issues that have arisen which I am compelled to address. First, there is nothing to bar an individual from having a charge in his favour. It is not a must that a charge can only be held by a bank or other lending institution. That indeed was the holding by the Court of Appeal in the case of ***Edward Charles Nginyo vs Hans Jurgen Zahlten & 4 Others , Court of Appeal at Malindi, Civil Appeal No. 34 of 2015, (2015) eKLR*** which held that an individual can hold a charge. I need not belabor that point any further.

36. Secondly is the manner of exercise of the statutory power of sale in case of default. In our case, if there was a valid charge, there is no doubt that the 1st defendant would have been vested with the chargee's statutory power of sale. An issue did arise as to whether a notice ought to first have been issued under Section 65 of the Registered Land Act, before a statutory notice could issue under Section 74 of the Act. It was argued by counsel for the plaintiff that first the 1st defendant needed to send a notice under Section 65 (2) of the Registered Land Act, before he could send a statutory notice under Section 74 of the Act.

Section 65 (2) of the Registered Land Act, states as follows:-

> 65 (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.

37. This section needs to be properly understood and it invokes two scenarios. In the first scenario, there is a debt but the date of repayment is not specified. Let us assume that Tom gives Jerry a loan of Kshs. 1 Million, which is secured by a charge over Jerry's property, but in their transaction, it is not mentioned when Jerry needs pay the debt to Tom. In other words, the date of repayment is not specified. In such a case, before Tom can move to sell, he must first call the debt by giving Jerry a notice of 3 months. It is on expiry of this 3 month notice that the debt can now be said to be payable. The second scenario is where there is a date specified for repayment of the debt. Let us say, that Tom agrees with Jerry that the debt is payable on 31 December of the given year. Here there is a specific date of repayment. In such a case, Tom in the event that he has not been paid by the due date, needs to demand the debt on the date specified. If he does not demand the debt on the date specified, and that day passes, then Tom needs to give Jerry a 3 month notice calling for the debt. I think the law envisages that if the call is not made on the date specified, then this is treated as a waiver, which means that a notice of 3 months calling for the debt, now requires to be made. That to me is the interpretation of what I would give to Section 65 (2) of the Registered Land Act. This interpretation appears to be what Ransley J, also gave, in the case of ***Kipsang Sawe Sisei vs Kenya Commercial Bank (2005) eKLR*** when he faulted the respondent bank for not issuing a notice under Section 65 of the Registered Land Act before embarking on a sale of the property.

38. On the facts of our case, Mr. Mbuthia, in his submissions, argued that since the date of payment was specified, then there needed no notice under Section 65 of the Registered Land Act. I disagree. I have no evidence before me that there was a demand on 27 November 2007, the date of repayment noted in the charge, or a notice on 27 December 2007, which is actually 15 months of the date of the agreement, from the 1st defendant to the plaintiffs, demanding payment of the balance of the purchase price. If I was to hold that the charge was valid, I

would have held that there needed to be a notice issued pursuant to the provisions of Section 65 (2) of the Registered Land Act. A notice needed to be given because the debt was not demanded on the date that it fell due. There was a specific repayment date and since no notice was given on the due date, a 3 month notice calling for the debt would have been required.

39. On expiry of the notice under Section 65(2) is when the so called statutory notice under Section 74 would kick in. Section 74 is drawn as follows :-

> ***74 (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.

40. I do not think that the above notice, though of 3 months, is the same as the notice under Section 65 of the Registered Land Act. If they were, then there would have been a cross-reference to the other section, or we would not have both Section 65 and Section 74. The two sections of the law are independent, and in my view, they do provide for different types of notices. The notice under Section 65 in my view is merely a call on the debt. The notice under Section 74 is now a notice, which invokes the chargee's statutory right of sale. Under Section 65, the debtor is merely asking for repayment. Under Section 74, the debtor is now giving notice of intention to sell. They thus serve two different purposes.

41. Under Section 74, the chargee is supposed to issue a three month notice which notice takes effect on the date of service of the same as mentioned in subsection 2. It is therefore essential that this notice be served as required by law. The law on service is under Section 153 of the Registered Land Act, which is drawn as follows :-

> ***153.*** A notice under this Act shall be deemed to have been served on or given to any person -
>
> (a) if served on him personally;
>
> (b) if left for him at his last known place of residence or business in Kenya;
>
> (c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;
>
> (d) if served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorized to accept such service;
>
> (e) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land.

42. The best notice is of course that served personally but other forms of service are equally acceptable. Thus a notice is deemed served if left at the person's last known residence or place of business; or if sent by registered post to his last known postal address; or if served to his attorney in law. Where service cannot be effected by any of the above means, service may be effected by displaying it at a prominent place on the suit property. In our case, the notice was sent to the plaintiffs through the postal box provided in the sale agreement. It was argued by the defendants that the notice was thus properly served. On my part, I disagree.

43. There would have been no problem with the notice if indeed that was the postal address last known to the chargee. But in this instance, the chargee knew that the plaintiffs are not in the country, and therefore knew, or ought to have known, that they will not receive the postal notice sent to them to the postal address in Nairobi. The chargee, knew that the plaintiffs were in Switzerland. He knew their address in Switzerland. He had the email address of the 1st plaintiff and indeed communicated to her through this email address. How then, could he have expected the plaintiffs to have notice through a letter which he very well knew that they would not receive ? The address in the agreement cannot be said to be the last known address of the plaintiffs. Neither did the charge instrument provide that any notice sent through the address in the agreement would be deemed as good notice. A notice should be construed just as the word suggests, that is, it should notify the person of something. A person cannot be said to be notified, if the sender sends a letter to an address that he knows that the recipient is not at, and yet has another address of the recipient, which he knows that the recipient is at. A notice is not merely sent as a formality; it should seek to notify. Since the 1st defendant had knowledge of the current address of the plaintiffs, he cannot claim to have sent the statutory notice to the last known address of the plaintiffs. Out of abundant caution, he could have sent a notice to the address in the agreement, but he needed to send a notice to the address that he knew the plaintiffs to be located, and which he knew, without doubt, that they would receive.

44. In our case, there was mention that the notice was actually received on the allegation that the 2nd plaintiff wrote a note dated 2 October 2009. I am afraid that I do not have conclusive evidence that the 2nd plaintiff wrote that note. The 1st defendant did not see the 2nd plaintiff writing that note. Neither did he state that the 2nd defendant gave him the note. What he said is that he got the note at his reception. The receptionist was not called as a witness. No document examiner's report was tendered to show that indeed the signature in that note is the

signature of the 2nd defendant. In absence of any corroborative evidence, I am unable to make a conclusive finding that the said note was written by the 2nd plaintiff. In any event, the evidence of the postal officer was that the statutory notices were returned unclaimed, and if that was the only mode via which the notices were sent, I wonder how the 2nd plaintiff would have known that such letter existed. If I had held the charge to be valid, I would not have given too much weight to the note of 2 October 2009 as being evidence that the statutory notice was received.

45. The effect of the fact that no demand notice under Section 65 was sent, and no proper statutory notice was served upon the plaintiffs, would have meant that the auction sale was irregular, as the right of sale had not arisen.

46. The 2nd and 3rd defendants did purchase the suit property at the auction. I think they were innocent purchasers for value without notice. The provisions of Section 74 (3) therefore would have applied. The said provision states as follows :-

> (3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

47. The above provision states that a person suffering damage due to an irregular exercise of the power of sale will have his remedy in damages as against the person exercising the said power. There have been a raft of decisions emphasizing this point, including the authorities tendered by both Mr. Mbuthia and Mr. Mutonyi for the defendants, and I see no need to rehash the same. The sale herein was irregular and therefore the plaintiffs would have been entitled to damages. If I was to hold the charge valid, I would therefore have found an appropriate measure of damages to award the plaintiffs.

48. My holding however is based more on the invalidity of the transfer and the charge as I have explained earlier in my analysis.

49. I now make the following final orders :-

> **(i) That judgment is hereby entered for the plaintiffs against the 1st defendant in the sum of USD 50000 the said sum to attract interest at court rates from 16 April 2010 till payment in full.**
>
> **(ii) The plaintiffs shall have costs of this suit as against the 1st defendant.**
>
> **(iii) There will be no orders as to costs for or against the 2nd and 3rd defendants.**

50. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 1st day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms. Barbara Wangari holding brief for Mr. Robert Ndubi for the plaintiffs.

Ms. Wanjiru Kamau holding brief for Mr. Wachira Mbuthia for the 1st defendant.

Mr. G.K. Mbiyu instructed by M/s Mutonyi Mbiyu & Company Advocates, for the 2nd and 3rd defendants.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU