



REPUBLIC OF KENYA



Equity Bank (Kenya) Limited v Wahome & 2 others; Rucha (Interested Party) (Commercial Case 057 of 2020) [2025] KEHC 6079 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 057 OF 2020**

A MABEYA, J

MAY 16, 2025

BETWEEN

EQUITY BANK (KENYA) LIMITED PLAINTIFF

AND

ALICE MUTHONI WAHOME 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

HON. ATTORNEY GENERAL 3RD DEFENDANT

AND

CHARLES PASSPORTOUT MBAE RUCHA INTERESTED PARTY

JUDGMENT

1. Vide a plaint dated 26/10/2020, the plaintiff sought the following orders: -
 - a. An order of permanent injunction restraining the 1st defendant from trespassing, charging, selling, leasing or any other manner interfering with the suit parcel known as LR NO. 6725/147.
 - b. An order declaring that the 1st defendant's right to redeem the whole of that property known as LR NO. 6725/147 was extinguished by dint of the sale by private treaty conducted between the plaintiff and the interested party on 15th July, 2005.
 - c. An order do issue directing the Chief Land Registrar to cause to be removed the caveat registered as entry number 5 to pave way for the completion and/or registration of the plaintiff's power of sale.



- d. An order do issue to the Chief Registrar to cancel entry number 6 being discharge of the charge in respect of LR NO. 6275/147 in the name of the 1st defendant.
 - e. An order does issue compelling the Chief Land Registrar to register the conveyance between Equity Bank Limited to the 1st Interested Party.
 - f. Cost of this suit.
 - g. Any other relief that this Honourable Court may deem just and fit.
2. The plaintiff's case was that it advanced the 1st defendant a loan facility of Kshs. 1,400,000/- and that the said facility was secured by a charge over LR No. 6725/147 ("the suit property"). That it was a term of the agreement that the facility was to be repaid over a period of 36 months in equal installments of Kshs. 66,000/- on every 5th day of each month.
 3. However, the 1st defendant defaulted whereby the plaintiff opted to exercise its statutory power of sale. It proceeded to issue all the statutory notices to the 1st defendant demanding the outstanding debt of Kshs. 1,904,035.45 but the 1st defendant still failed to satisfy the debt.
 4. The plaintiff therefore offered the suit property for sale by public auction which however failed to materialize. It therefore proceeded to dispose of the suit property via a private treaty to the Interested Party on the 15/7/2005 for a sum of Kshs. 800,000/- thereby extinguishing the 1st defendant's equity of redemption.
 5. That on the 10/7/2008, the plaintiff discharged the property and released to the Interested Party the original conveyance between Equity Building Society and the 1st defendant dated 28/7/1998, original mortgage over the suit property between it and the 1st defendant. That however, although those documents had been presented and booked for registration, the same was not effected for reasons known to the 2nd defendant.
 6. It was the plaintiff's case that when it changed its operating systems from manual to a computerized system, it resulted in the misplacement of information relating to the sale of the suit property. That on the 23/11/2018, the 1st defendant offered to pay the outstanding debt while fraudulently misrepresenting that she was still the registered owner of the suit property.
 7. That after negotiations the 1st defendant paid a sum of Kshs. 1,400,000/- whereby the plaintiff released the original conveyance and a discharge of charge to the 1st defendant. That however, it had since refunded the said sum to the 1st defendant.
 8. The 1st defendant filed a statement of defence and counterclaim dated 19/5/2021 and sought the following orders: -
 - a. An order for damages against the plaintiff and Interested Party.
 - b. An eviction order of the Interested Party from the suit property.
 - c. That the Officer Commanding Police Station in the area do assist in effecting the eviction order.
 - d. A declaration that she is the sole legal owner of the suit property without any encumbrance.
 - e. Costs of the suit and
 - f. Any other order the court may deem fit.



9. The 1st defendant contended that she was the registered owner of the suit property and that she has never received any statutory notices as alleged by the plaintiff. That she went into arrears in settlement of the loan facility and made payments totaling to Kshs. 900,000/-. That the suit property had not been sold by public auction.
10. She denied ever making any fraudulent misrepresentation to the plaintiff but rather that the plaintiff willingly and knowingly agreed to the amount payable in settlement of the loan at Kshs. 1,400,000/- and that upon payment, the plaintiff released a discharge of charge and thus the plaintiff had no legal basis to seek rectification of the title.
11. The 1st defendant further contended that at no time in her engagement with the plaintiff did the latter suggest that there was any deficiency in its documentation or its impediment to the discharge of charge over the suit property. That only when she presented her documents to have the discharge registered that it was confirmed that the original title to the suit property was missing.
12. She finally contended that the Interested Party's occupation of the suit property was illegal and unknown to her and that his continued stay on the suit property amounted to trespass.
13. The 2nd and 3rd defendant filed a joint statement of defence dated 20/9/2022 denying the allegations made against them by the plaintiff. They put the plaintiff to strict proof thereof.
14. The Interested Party filed a defence dated 8/6/2021 to the 1st defendant's counterclaim. He contended that the 1st defendant had willfully offered the suit property as security for a mortgage to the plaintiff. That she ought to have known from notices of the advertisement in the East African Standard of 2/4/2002 of the intended public auction by M/S Marchet Auctioneers (K) Ltd.
15. That he had had uninterrupted use and possession of the suit property since July 2005 and thus the 1st defendant by her conduct waived her right to claim any relief against him. That further, the 1st defendant's claim on trespass was barred by the provisions of section 4 (2) of Limitation of Actions Act.
16. That he together with Emmy Karimi Mbae and Catherine Kageni Mbae were entitled to ownership and title to the suit property as purchasers for valuable consideration. That the 1st defendant fraudulently made representations to the plaintiff and police of the lost title with the intent to induce the plaintiff to wrongfully discharge the charge over the suit property.
17. At the trial, the plaintiff called one witness, Kariuki Kingóri (Pw1), who adopted his statement dated 26/10/2020 as his evidence in chief and produced the bundle of documents as PExh1. He reiterated the plaintiff's averments as summarized above in his evidence in chief.
18. In cross-examination, he stated that the plaintiff wrote a letter on 28/8/2000 recalling the outstanding loan of Kshs. 1,904,033.45 payable within 3 months but the same was not heeded. That the plaintiff attempted to sell the property through a public auction but was unsuccessful. He admitted that no valuation report had been obtained prior to the sale and no proclamation notice was issued. That since the plaintiff had not valued the property, the Court could not ascertain what the forced sale value was.
19. He admitted that the plaintiff had no evidence to show that any bids were given for the property. That the sale to the interested party took place on the 15/7/2005 for Kshs. 800,000/-. That the notice of 28/8/2000 was the only notice that was issued to the 1st defendant and there was no notice give for the private sale. Further, that no valuation was carried out prior to the private sale and therefore, the plaintiff could not tell the value of the property.
20. It was admitted that following the sale by private treaty, the plaintiff did not release the discharge of charge to the Interested Party but rather to the 1st defendant when she settled the outstanding amount.



21. In re-examination, Pw1 told the Court that he had admitted that the plaintiff had no valuation report as it had not filed the same prior to the close of pleadings. That by a letter dated 10.7.2008, the plaintiff gave the Interested Party the transfer documents and no discharge was required as the sale was a forced sale.
22. The 1st defendant testified as Dw1. She adopted her witness statement dated 10/12/2021 as her evidence in chief wherein she rehearsed what had been stated in the defence and counterclaim. She produced her bundle of documents as DExh1.
23. In cross-examination, she admitted to have offered the suit property as security for a loan from the plaintiff. That vide a letter dated 8/10/2019, the plaintiff released documents to her but indicated that it had misplaced the title over the suit property while giving her the discharge of charge which she registered without the original title.
24. She admitted that she had only received the statutory notice but no other notices. That after settling the agreed amount, she refused to accept the cheques from the bank in attempted refund for the same.
25. It was her testimony that vide a police abstract dated 16/12/2019, she reported the loss of the original title. That had the bank sold the suit property as alleged, it would not have stated that it had her title or accepted her money or further sworn the affidavit it did affirming the loss of the title.
26. She testified that as the Interested Party was said to have bought the suit land in 2008, he should explain why he took so long to transfer the title. That there was a possibility that the Interested Party and the plaintiff may have colluded and obtained the title irregularly.
27. In re-examination, she reiterated that she only received the statutory notice of 28/8/2000 and did not receive any other or notice of private treaty or aborted sale.
28. The 2nd and 3rd defendant did not call any evidence.
29. The Interested Party testified in support of his case by adopting his witness statement dated 8/6/2021 as his evidence in chief in which he reiterated the averments in his statement of defence. He produced his bundle of documents dated 10/6/2021 as IPEXh1.
30. He told the Court that he commissioned a valuation report over the suit property. That he paid the stamp duty and Capital Gains Tax on the suit property of Kshs. 400,000/- and that on presenting the requisite documents at the Land registry, the said documents disappeared.
31. In cross-examination, he stated that he saw an advertisement in a newspaper of 2/4/2002 for the sale of the suit property by Marchet Auctioneers. That he did not attend the public auction of 3/4/2002 but instead, he was called to the offices of Shefflo Auctioneers who gave him the offer to buy the suit property by private treaty. He gave an offer of Kshs. 800,000/- which was accepted on 15/7/2005.
32. It was his testimony that the suit property was transferred to his name but the documents disappeared at the Lands office. That he was arrested by the DCI and accused of stealing documents. He reiterated that he had been in possession of the suit property since 2005 to date. That there had been no communication between him and the plaintiff between 2008 and 2017.
33. In re-examination, he told the Court that the valuation dated 16/2/2005 was commissioned by the plaintiff.
34. The parties filed their respective submissions that are on record and which the Court has carefully considered.



35. The plaintiff submitted that the 1st defendant's counterclaim lacked merit. The allegation of breach of the contract of mortgage for the sale that happened in 2005 was outside the 6 years permitted in law and therefore time barred. The claim of alleged fraud in the exercise of statutory power of sale was caught by *Limitation of Actions Act* section 4(2). That the claim for recovery of land could also not be made outside 12 years from the date the interested party took possession of the suit property. The case of *Edward Moonge Lengusuranga v James Lanaiyara & Another* [2019 eKLR] was cited in support of those submissions.
36. That public auction having been unsuccessful, the sale by private treaty for Kshs.800,000/- extinguished the 1st defendant's equity of redemption. For that submission, reliance was placed on the case of *Captain Patrick Kanayagia & Another v Damaris Wangechi & 2 Others* [1995] eKLR.
37. It was further submitted that contracts entered between the plaintiff and the 1st defendant 13 years after the property had been sold to the Interested Party cannot stand as they were undertaken by mistake and based on a misrepresentation of facts. That on the authority of *Kelly Petroleum v East Africa Building Society Bank Limited & Another* [2019] eKLR, there was no proof that at the time the sale by private treaty was entered into the sale was not exercisable or that there was impropriety in the sale.
38. In conclusion, it was submitted that the failure by the 2nd defendant to act on documents presented for registration by the Interested Party and his communication with the 1st defendant reeks of intentional collusion.
39. For the 1st defendant, it was submitted that at all time, she continued dealing with the plaintiff regarding the suit property as is evidenced from the plaintiff's acceptance of Kshs. 1,400,000/- to redeem the suit property. That the conduct of the plaintiff led her believe that her interest in the suit property was still valid in 2020. That therefore, the plaintiff was estopped from invoking the *Limitation of Actions Act* to claim that the counterclaim was time barred.
40. That under section 54 of the ITPA and section 99 of the Government Lands Act (both repealed), a sale of property valued above Kshs. 100/- could not establish any legal interest without proper registration. That in the premises, the purported sale of the suit property by private property did not create any valid interest in favour of the Interested Party as it had not been registered and could not therefore extinguish her right of redemption.
41. That the plaintiff had not followed the procedure set out in sections 60 & 69A of the ITPA thus no proper exercise of statutory of sale had been undertaken capable of extinguishing her right to redemption. Reliance was placed on the cases of *Miriam Wairimu Wambugu (Suing on behalf of the Estate of the late Jacob Juma) & 2 Others v Jane Wanja Njiru* [2022] eKLR & *Cieni Plains Company Ltd & 2 Others v Ecobank Kenya Ltd* [2017] eKLR, *First Choice Mega Store Ltd v Ecobank Kenya Ltd* [2017] eKLR & *Mosioma v Housing Finance Co. of Kenya Ltd & 3 Others* [2021] KEHC 72 (KLR).
42. Finally, it was submitted that a sale agreement between a mortgagee and a purchaser through private treaty cannot create an interest in the property if it is not registered as was held in the Court of Appeal case of *Industrial & Commercial Development Corporation v Kariuki & Gatheca Resources Ltd* [1977] eKLR.
43. For the 2nd defendant and 3rd defendant, it was submitted that after paying the agreed Kshs. 1,400,000/- in full settlement of her loan account and the subsequent discharge, the plaintiff's interests in the property were extinguished as was held in *Martha Jerotich Ruto v National Bank of Kenya* [2019] eKLR.



44. It was further submitted that the 2nd defendant was not privy to the contract between the plaintiff and 1st defendant and thus, he had the right to contact the registered proprietor of the land and inquire about the transfer documents presented to him after many years of the conveyance between the plaintiff and interested party.
45. For the Interested Party, it was submitted that the 1st defendant's counterclaim of trespass was incompetent as it was brought more than 3 years after the trespass and was barred by the provisions of section 4 (2) of the Limitation of Actions Act.
46. That misrepresentations by the 1st defendant regarding the loss of the title over the suit property were in effect fraudulent and designed to abuse the rule of law and to defeat the due process of the law and in violation of Articles 2, 10 and 27 (1) of the Constitution.
47. I have carefully considered the pleadings, submissions and authorities relied on by the parties and the following issues crystalize for determination: -
 - a. Whether or not the statutory power of sale had accrued to the plaintiff;
 - b. If so, whether the plaintiff lawfully that power;
 - c. Whether the Interested Party is an innocent purchaser for value;
 - d. Whether this Court has the Jurisdiction to entertain the 1st defendant's Counterclaim;
 - e. Whether the 1st defendant successfully exercised her equity of redemption;

Whether or not the statutory power of sale had accrued to the plaintiff

48. It is not in dispute that the plaintiff, while known as Equity Building Society, advanced to the 1st defendant a loan facility of Kshs. 1,400,000/-. The same was secured by a charge over the suit property. The plaintiff contended that after the 1st defendant defaulted, it issued all the statutory notices to the 1st defendant demanding Kshs. 1,904,035.45 which was not paid. It then opted to exercise its statutory power of sale.
49. On her part, the 1st defendant admitted to have defaulted but had paid a sum totaling Kshs. 900,000/- towards settling the debt. She denied having received any notices as alleged.
50. Since default was not denied, it cannot be in doubt that the plaintiff's statutory power of sale had arisen and it was entitled to exercise the same in accordance with the law.

Whether the plaintiff lawfully exercised its statutory power of sale

51. The suit property was registered under the Government Land Act (now repealed). The plaintiff was therefore bound by the provisions of the Transfer of Property Act (also repealed). The mortgage between the parties clearly provided that section 69 (1) of the Indian Transfer of Property Act 1882 applied to the mortgage.
52. Section 69A of the repealed Indian Transfer of Property Act 1882 provided that no statutory power of sale was to be exercised unless there was default and a three month statutory notice for sale is given to a mortgagee.
53. The evidence on record shows that a statutory notice was sent to the 1st defendant on 28/8/2000 by registered mail. The 1st defendant herself admitted having received the notice. Accordingly, the Court



finds that there was service of the three (3) months' statutory notice and the 1st defendant's contention that no notice had been given is without basis.

54. The plaintiff contended that after the notice period lapsed and the default was not made good, it attempted to sell the suit property by public auction, failing of which it sold the same to the interested party by private treaty on 15/7/2005 for Kshs. 800,000/-.
55. It was admitted by Pw1 that apart from the initial three (3) months' statutory notice, no other notice was given to the 1st defendant. Obviously, for a proper exercise of a Mortgagee's statutory power of sale under the then legal regime, the Mortgagee was required to give a 45day notice and an auctioneer's notice of 14 days in addition to the three (3) month statutory power of sale. There was no evidence that any of these two were given by the plaintiff.
56. There having been no subsequent notices as aforesaid, there could be no proper exercise of the mortgagee's statutory power of sale.
57. What of the sale by private treaty? Under the then legal regime and the mortgage instrument, the plaintiff had the right to sell the suit property by private treaty. The Interested Party led evidence that the sale of the suit property was advertised in the East African Standard of 2/4/2002. He never attended the intended public auction by M/S Marchet Auctioneers (K) Ltd of 3/4/2002. However, he was called to the offices of a different auctioneer in 2005 where he gave his offer of Kshs.800,000/- which was accepted and he purchased the suit property on 15/7/2005 for the said amount.
58. It is trite that although sale by private treaty is permitted, it is not to be the first option. This is because the same is open to abuse and "arranged sales" to the extreme prejudice of a mortgagee. A lender must first attempt sale by public auction before resorting to sale by private treaty.
59. The Plaintiff admitted that it had no evidence of any bids made for the suit property during the public auction or any other evidence that the auction did actually occur as advertised. It only contended that it was unable to sell the suit property by public auction and that that is when it resorted to sale by private treaty. The old adage goes that, he who alleges must prove. There was no evidence of any auction or any attempted auction before sale by private treaty could be resorted to.
60. In *Mosioma v Housing Finance Co. of Kenya Ltd & 3 Others* [2021] KEHC 72 (KLR) it was held: -

“In *Sharok Kher Mohammed Ali & Another v Southern Credit Banking Corporation Limited* [2008] eKLR, Warsame J, as he then was, held of sale by private treaty: -

“As stated earlier, the rule against clogging or fettering the equity of redemption relates to the very essence of an equitable right to redeem the mortgaged property. The right to redeem a charged mortgaged property cannot be fettered or clogged by any stipulation other than under the right procedure. I think the procedure adopted by the bank is in contravention of the law and equity. In HCCC No. 265 of 2000 *Joseph Siro Mosioma v H.F.C.K & 3 Others* I addressed my mind as to whether financial institutions had powers to sell up a charged property by a private treaty. In that ruling I stated that the bank officials and/or agents in selling a property by private treaty must address their minds to the drastic effects of depriving the owner of the charged property. My position was that banks are required to give a fair amount of time and/or notice in addition to giving the mandatory statutory notice under the relevant laws before an attempt to sell the property by private treaty is endeavoured. I also deprecated the practice of banks rushing to sell the charged or mortgaged properties through private treaty without giving adequate notice and without attempting to sell the same by public auction. It was my view in that ruling that there cannot be any sale by private treaty



when there has been no previous attempts to sell the subject property by public auction. In my humble view, there must be evidence or attempts to sell the charged property through a public auction which failed either through a conduct of the borrower or some other issues relevant to the case.

I reiterate my position in that ruling that a mortgagee cannot at his convenience deal with the mortgaged property in the manner he deems fit by resorting to sell by private treaty at a first instance. The right to sell by private treaty is not availed and cannot be exercised by the mortgagee unless and until the mode of public auction has been attempted but failed due to the conduct of the borrower, where a chargee resorts to sell by private treaty without attempting to sell by public auction the resulting transaction would be void ab initio. In this case the bank purported to sell the suit property through a private treaty before it had given the mandatory statutory notice required under section 69A of I.T.P.A, and without attempting to sell by public auction. That was absolutely illegal and in contravention of the clear provisions of section 69A of I.T.P.A. I make a finding that an illegal transaction cannot be a basis to confer a right on a third party especially like the present defendant whose conduct is somewhat suspicious.”

I associate myself fully with the foregoing view. It is clear that the intention of the law on exercise of statutory power of sale is to give the chargor as much latitude and time as possible to exercise his equity of redemption. Indeed, after the statutory notice of sale, there is another notice that has to be given in case of sale by public auction under the Auctioneers’ Rules. That notice is meant to give a chargor as much time as possible to exercise the right of redemption. Resorting to sale by private treaty as a first resort deprives a chargor that extra period that is available in public auction. Further, by subjecting a property to public auction, there is an opportunity of getting the best possible price as would be dictated by the market forces as opposed to private treaty. In private treaty, the price is set by the chargee and the purchaser and deprives the realization of the best price for the charged property. In any event, private treaty is open to abuse. The chargee may collude to dispose of the charged property to a pre-determined purchaser thereby defeating the equity of redemption. With public auction, the reserve price is usually advertised and there is transparency in the process. This is not so with private treaty which is usually secretive and opaque. I therefore hold that notwithstanding that there is no requirement or order of exercising the rights under section 69A of the T.P.A, a chargee must first attempt public auction before resorting to private treaty. In the present case, by resorting to private treaty in a discreet and opaque manner before attempting public auction, the 1st defendant acted fraudulent.”

61. In the present case, the Court has already found that after the statutory notice of sale was issued, no other notice whatsoever was issued under the Auctioneers’ Rules nor any other notice to the mortgagor of the intention to sell the suit property by Private Treaty. The whole process was shrouded in secrecy, the alleged attempted auction was to take place in 2002. Then three years later, 2005 the interested party is called to some Auctioneer’s office, offered the property, he offers Kshs.800,000/- which is accepted and the deal is sealed!
62. There was no evidence of any previous bids to show what offers had been given in the open market. Further, there was no valuation to indicate the market or reserve price for the property. The plaintiff purported to sell the property on the price dictated by the interested party.
63. Considering all the foregoing, the Court’s view is that by resorting to private treaty in a discreet and opaque manner before attempting public auction, the plaintiff acted irregularly and that the statutory power of sale was not exercised legally or regularly.



Whether the Interested Party is a bona fide purchaser for value

64. The interested party contended that he was an innocent purchaser of the suit property for value. That following the plaintiff's exercise of its statutory power of sale, the 1st defendant's right of redemption had been extinguished. That he had had uninterrupted use and possession of the suit property since July, 2005.
65. In *Lawrence Mukiri v Attorney General & 4 Others* [2013] eKLR, it was stated thus: -
- “... A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following: -
- i. He holds a certificate of title;
 - ii. He purchased the Property in good faith;
 - iii. He had no knowledge of the fraud;
 - iv. The vendors had apparent valid title;
 - v. He purchased without notice of any fraud; He was not party to any fraud.”
66. In the present case, the interested party has no title. He contended that although he purchased the property in 2005, the 2nd defendant and 1st defendant colluded to prevent him from having the suit property registered in his name. On her part, the 1st defendant faulted the interested party's delay in having his title registered stating that the delay reeked of collusion between the interested party and the plaintiff.
67. It is trite that in civil matters whoever desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. This is well provided for in section 107 of the *Evidence Act*.
68. The interested party having made allegations of purported collusion between the 1st and 2nd defendant was bound to provide evidence of such collusion. He told the court that he presented the documents for registration then they got lost.
69. There was no explanation to show why a property purchased in 2005 would wait until 2017 for attempts to be made to have them registered. A period of 12 years is too long. No evidence of any action being taken throughout that period to effect the registration. No evidence when the loss of the documents occurred and what action the interested party took to have the situation remedied.
70. In the premises, the Court finds that the interested party was not an innocent purchaser for value. The 2nd defendant properly explained the reason why he got in touch with the registered proprietor of the property.

Whether this Court has the Jurisdiction to entertain the 1st defendant's Counterclaim

71. In her statement of defence and counterclaim dated 19/5/2021, the 1st defendant sought eviction orders and a declaration that she is the sole legal owner of the suit property without any encumbrance.



72. In Samuel Kamau Macharia & 2 others v Attorney General & another [2013] KEHC 6912 (KLR), observed that: -
- “A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”
73. Article 162 of *the Constitution* as read with section 13 of the Environment and Land Court expounds on the jurisdiction of the Environment and Land Court to include all matters relating to the environment and the use and occupation of, and title to, land. It is only on matters charges and mortgages that the Court of Appeal in the case of Cooperative Bank v Patrick Kangethe Njuna & 5 others [2017] eKLR held that the same falls within the jurisdiction of this Court.
74. The Court is alive to the fact that its jurisdiction in this matter was invoked because of the relationship of the plaintiff and the 1st defendant of mortgagee-mortgagor. Looking at the nature of orders sought by the 1st defendant, I hesitate as to whether this court is clothed with the requisite jurisdiction to grant the same. But it is trite law that a counterclaim is an independent lawsuit altogether. In this regard, the Court finds that in this judgment, it cannot delve into matters that are purely the preserve of the ELC Court.
75. Accordingly, that counterclaim cannot be entertained in this fora and it is hereby struck out. The issues therein are to be determined elsewhere.

Whether the 1st defendant successfully exercised her equity of redemption

76. Having established that the plaintiff exercised its statutory right of sale irregularly and illegally, the payment by the 1st defendant and subsequent acceptance of Kshs. 1,400,000/- by the plaintiff settled the matter between the two. The returned cheque to the 1st defendant was said to have been rejected.
77. The Plaintiff’s claim against the 1st defendant was hinged on fraud. That the 1st defendant did not redeem her suit property as she attempted to do so fraudulently.
78. It is trite law that allegations of fraud are serious and must be pleaded and proved to the required standard. See John Mbugua Gitau v Simon Parkoyiet Mokare & 4 others [2017] eKLR.
79. In the present case, the plaintiff properly pleaded fraud and set out the particulars thereof. At the trial, it was testified on its behalf that the 1st defendant knew that the suit property had been sold by private treaty, yet she misrepresented that she still wanted to repay the loan. That the plaintiff accepted the Kshs.1,400,000/- in error as it had misplaced documents during migration from analog to digital. The Court does not think the plaintiff’s failure to keep its documentation properly is to be visited on its customers, the 1st defendant included.
80. The Court has already found that the plaintiff never notified the 1st defendant of any public auction or the sale by private treaty. The plaintiff did not prove that the 1st defendant had knowledge of the sale. Further, the registration of the Interested Party as the proprietor of the suit property had not been effected by the time the 1st defendant sought to redeem the suit property. The allegations of collusion between the 1st defendant and the 2nd defendant was likewise not proved.



81. Fraud cannot be inferred or assumed from the facts. See *Arthi Developers v West End Butchery* [2015] eKLR and *Virjay Morjaria v Nansigh Madhusingh Darbar* [2000] eKLR. The burden of proof was on the plaintiff to prove fraud, illegality, or misrepresentation on the part of the 1st and 2nd defendant. In any case, the plaintiff through PW1 swore an affidavit and letter that the title for the suit property was missing. Therefore, the Court finds that the allegation of fraud on the part of the 1st defendant was not proved.
82. In the circumstances, it is the Court's finding that the 1st defendant lawfully exercised her equitable right of redemption of the suit property.
83. Having found that the plaintiff unlawfully exercised its power of sale it had no authority to pass any title to the interested party. That being the case, the Court finds that plaintiff failed to prove its case on a balance of probabilities.
84. Accordingly, the Court makes the following orders.
 - a. The plaintiff's suit is dismissed with costs.
 - b. The claim by the Interested Party is hereby dismissed.
 - c. The 1st defendant's counterclaim is hereby struck out with costs.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE.

