



Datini Mercantile Limited v Kenya Commercial Bank Limited & 5 others (Civil Suit 411 of 2008) [2024] KEHC 2039 (KLR) (Commercial and Tax) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 411 OF 2008
FG MUGAMBI, J
MARCH 1, 2024**

BETWEEN

DATINI MERCANTILE LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

JOSEPH KAMANDE MUIRURI 2ND DEFENDANT

PATRICK MAINA KAMAU 3RD DEFENDANT

JOHN KIARIE 4TH DEFENDANT

ASHUT ENGINEERING LIMITED 5TH DEFENDANT

GENERAL PLASTICS LIMITED 6TH DEFENDANT

JUDGMENT

Background

1. The plaintiff vide a plaint amended on 5th February 2010 filed this suit seeking a declaration that the sale of the plaintiff's assets by the 1st defendant was null and void, and that the plaintiff was thus entitled to damages under Section 69B of the Transfer of Property Act; a declaration that the sale of the suit property to the 5th & 6th defendants was a nullity; that the appointment of the receiver/managers was premature or in the alternative their functions were taken over by the 1st & 4th defendants. The plaintiff further sought that the name of the 6th defendant be replaced with that of the plaintiff and that the facility offer agreement dated 30th September 1998 be declared a nullity. This was in addition to prayers for special damages, costs and interest at court rates.



2. The plaintiff's case is that it was the registered owner of property L.R. No. 209/8596 Industrial area, Enterprise road, Nairobi (the suit property), which comprised of buildings, a factory and equipment, all valued at over Kshs. 290,000,000/= by Muyoti & Associates in May 1999.
3. On 3rd December 1996, the plaintiff sought an overdraft facility from the 1st defendant bank, which was granted at Kshs. 47,500,000/=. The facility was secured by a legal charge on the suit property registered on 1st October 1997 and which was insured for Kshs. 300,000,000/= together with a debenture, dated 25th September 1997, carrying a 27% annual interest rate.
4. The plaintiff contends that on 21st October 1999, the 1st defendant unjustly demanded repayment of Kshs. 47,133,311.91 and subsequently appointed the 2nd and 3rd defendants as receiver managers of the plaintiff's business on 25th October 1999, under the debenture. This action, along with the alleged mismanagement of the business by the defendants including charging excessive fees and penalties led to significant business losses for the plaintiff.
5. The plaintiff also claims that the defendants sold the property at a gross undervalue of Kshs. 20,600,000/= against the determined maximum price of Kshs. 35,000,000/= without giving proper notice, violating the terms of the legal charge and debenture. This resulted in substantial damages to the plaintiff.
6. The 1st, 2nd and 3rd defendants, through an amended defense dated 5th September 2008, refuted the plaintiff's claims and sought dismissal of the case with costs. They argued that their charges were valid per the agreement executed by the plaintiff's directors and that the suit property was sold at the best price in the circumstances.
They contended the appointment of the receiver manager was lawful and in line with the letter of offer and the Company's Act. They asserted that their actions were independent and diligent, with their fees contractually justified.
7. They also claimed that the case was res judicata, citing a previous lawsuit on the same matter, being Milimani HCCC No. 1264 of 2001. Finally, that in any case, the current suit was time-barred under the Limitations of Actions Act.
8. The 5th defendant, in an amended statement of defence dated 20th June 2019, also denied the plaintiff's allegations, arguing that the sale of the suit property was lawful and it was a bona fide purchaser without knowledge of the plaintiff's claims, having purchased the suit property at a public auction and at the fall of the hammer. They agreed that the suit against the 5th defendant was time-barred.
9. The 4th and 6th defendants did not participate in the proceedings. During the trial, the plaintiff called three witnesses. The 1st, 2nd and 3rd defendants presented two witnesses, while the 5th defendant presented one witness.

The Plaintiff's Evidence.

10. Kenneth Kimani Nyoike, PW1, testified as the son and representative of the late Humphrey Njau Nyoike, a director of the plaintiff company. He confirmed his authority to proceed with the case backed by a grant of letters of administration.

He presented evidence of correspondences between his late father and the 1st defendant, detailing the plaintiff's request for an overdraft facility of Kshs. 47,500,000/=: later sought to be converted into a long-term loan alongside a new overdraft of Kshs. 15,000,000/= for working capital.



11. Despite requests to convert this into a long-term loan and for additional working capital, these were largely unmet or approved by the 1st defendant. Over time, owing to difficult economic conditions and a constrained environment repayment, efforts were constrained making it impossible for the plaintiff to settle the overdraft facility and interest thereon.
12. As a result, the 1st defendant appointed receiver/managers. PW1 argued that the receiver managers intended to sell the company's assets for far less than their valued worth of Kshs. 290,000,000/=, ignoring the plaintiff's objections to the low prices and poor timing due to political uncertainties. He highlighted that previous offers for the company had ranged between Kshs. 120,000,000/= and Kshs. 140,000,000/=, contrasting sharply with the eventual sale price of Kshs. 20,600,000/= to the 5th defendant through a private treaty, with the transfer completed on 10th December 2002.
13. During cross-examination, PW1 acknowledged the overdraft's interest rates of 33% per annum and a default rate of 17% per annum and the bank's right to vary these rates. He confirmed the additional security provided by a director's guarantee of Kshs. 47,500,000/= each and the bank's right to sell the property by way of public auction or private treaty in case of default. He confirmed that the receivers had notified the plaintiff appropriately before selling its assets to recover the owed sums.
14. PW1 further testified that the plaintiff was given a chance to sell the property, and received an offer of Kshs. 50,000,000/= as evidenced by a letter dated 31st January 2002. He acknowledged the public auction of 23rd October 2002, where the 5th defendants emerged as the highest bidders with Kshs. 35,000,000/=. Still during cross-examination by the 5th defendant's counsel, PW1 referred to a valuation report by Tysons Ltd dated 23rd July 2002, indicating the forced sale value of the property was Kshs. 28,000,000/= and the market value was Kshs. 35,000,000/=.
15. Herma Karanja Mwangi, PW2, testified in his capacity as the plaintiff's administrative manager. His testimony largely echoed that of PW1, particularly regarding the overdraft facility provided by the 1st defendant and the valuation report. This report, prepared before the company entered receivership, assessed the plaintiff's assets at approximately Kshs. 300,000,000/=.
16. During cross-examination by counsel for the 1st, 2nd and 3rd defendants, the witness testified that the plaintiff company was forced to close due to its inability to repay the Kshs. 47,500,000/= loan from the 1st defendant, exacerbated by the global recession. He confirmed that the company was indebted to the 1st defendant at the time of receivership and acknowledged that the property was advertised for sale, with notifications sent out in June 2002, making the company and its late director, Mr. Humphrey Njau Nyoike, aware of the impending sale.
17. When cross-examined by the 5th defendant's counsel, PW2 revealed that there were about four attempts to sell the suit property, and he attended the last auction in September 2002 as Mr. Nyoike's personal assistant. He later learnt that the suit property was sold at Kshs. 20,000,000/= but the memorandum of sale found at page 7 of the 5th defendant's documents indicates that it was sold at Kshs. 35,000,000/= . Upon re-examination, PW2 clarified that the September 2002 auction was unsuccessful, with the receivers rejecting offers as too low.
18. PW3, Joe Gatimu Waruguru, also a son of the deceased plaintiff and a director of the plaintiff company, testified in his capacity as the plaintiff's business development manager. In cross-examination by counsel for the 5th defendant, PW3 testified that no auction took place.
19. Wilfred Abincha Onono, PW4, testified as an expert witness, being a Certified Public Accountant and Managing Consultant with IRAC. He recalculated the outstanding loan amount owed by the plaintiff to the 1st defendant from 21st October 1999 to 12th June 2001, determining it to be Kshs.



71,679,508.50, while the bank's demand was slightly lower at Kshs. 71,304,000/=. During cross-examination, he noted his calculations were based on interest rates specified in a letter from the 1st defendant dated 27th October 1999. Further cross-examination by the 5th defendant's counsel revealed that, according to his findings, the plaintiff had made no payments and had defaulted in 1999.

The 1st, 2nd & 3rd Defendants' Evidence

20. Paul Njuguna, a director of Tysons Limited, testified as DW1 and produced a valuation report dated 23rd July 2002. He reported that when Tysons Limited valued the plaintiff company, which had been closed for three years, the land and buildings were valued at Kshs. 35,000,000/=:, and the plant and machinery at Kshs. 24,491,100/=:, totaling Kshs. 59,491,100/=:. He noted discrepancies between their valuation and the plaintiff's, particularly in the reported building area; 68,000 square feet in the plaintiff's report versus 55,000 square feet in theirs.
21. DW1 criticized the plaintiff's report for omitting critical valuation information such as the building's condition, any repairs, economic conditions at the time, and the state of the plant and machinery.
22. During cross-examination by the plaintiff's counsel, DW1 affirmed that his report acknowledged the prevailing economic conditions, specifically noting the valuation and sale occurred around an election period, which adversely affected the marketability and affordability of properties. Addressing the discrepancy in property values between his report and the plaintiff's, he testified that property values can depreciate. He attributed the lower valuation in his report to the dilapidated condition of the property at the time of their assessment, compounded by the election period's negative impact on property values.
23. Francis Munyua Kiranga, a recovery manager with the 1st defendant was DW2. He produced the 1st defendant's exhibits. He also testified that the plaintiff failed to repay its loan, leading to the appointment of receiver managers on 25th October 1999 to oversee the plaintiff company and attempt to recoup the loaned funds. Despite these efforts, the recovery was unsuccessful, resulting in the activation (crystallization) of the debentures. Subsequently, the property was sold at a public auction to the 5th defendant and the transfer completed on 3rd December 2002.
24. During cross-examination, DW2 disclosed that he joined the 1st defendant's employment in 2008, after the completion of the transactions in question. He stated that the legal charge secured for the overdraft facility provided to the plaintiff permitted the sale of the property upon default, contingent on issuing statutory notices. However, he admitted not seeing any notices issued to the plaintiff or by the auctioneers prior to the sale of the property.
25. DW2 noted that the offer letter indicated that securities were established through a debenture, which required demands and notifications to be sent to the customer, in this case, the plaintiff. He also mentioned that by the time of the property's sale, the plaintiff's loan had been written off, explaining why the account statement showed a nil balance in 2003.
26. He stated that there was no sale on 23rd October 2002 but then mentioned an auction on 19th September 2002. Under further cross-examination by counsel for the 5th defendant, DW2 confirmed the property was sold for Kshs. 35,000,000/=: to the 5th defendant and acknowledged a letter from the plaintiff to the 1st defendant dated 23rd October 2002, which was sent post-auction. He justified the closure of the plaintiff's business as a measure to protect the 1st defendant's interests due to the plaintiff's lack of working capital.



The 5th Defendant's Evidence

27. Amit Shah, a director of the 5th defendant took the stand as DW3. He testified that their company purchased the suit property at a public auction on 19th September 2002 for Kshs. 35,000,000/=. A memorandum of sale was subsequently signed by R.D. Shah, another director of the 5th defendant's company.
28. During cross-examination by the plaintiff's counsel, Shah admitted he was unaware of the plaintiff's receivership status at the time of purchase. He mentioned that the certificate of sale was issued a month after the payment, made via banker's cheque, but acknowledged the absence of evidence in court confirming the 1st defendant's receipt of this payment.
29. Upon re-examination, DW3 clarified that a 25% deposit was paid on the auction date, 19th September 2002. He argued that the transfer of the property to the 5th defendant implied full payment to the 1st defendant, as such a transfer would not have occurred otherwise.
30. Respective parties filed their submissions along the lines already summarized by the testimonies of the various witnesses. The plaintiff's submissions and supplementary submissions are dated 14th June 2023 & 3rd August 2023. The 1st, 2nd, & 3rd defendants' submissions were filed on 25th July, 2023 and the 5th defendant's submissions were filed on 28th July, 2023. Rather than regurgitate the contents of the said submissions which I have carefully considered, I will refer to them in my determination.

Analysis

31. I have carefully considered and analyzed the pleadings, the evidence and submissions made by the respective parties. In my view, the following issues arise for determination:
 - i. Whether the plaintiff's claim is time barred as against the 5th defendant;
 - ii. Whether the 1st defendant's exercise of statutory power of sale had crystallized; and
 - iii. Whether the suit property was sold fraudulently;

Whether the plaintiff's claim is time barred as against the 5th defendant.

32. Counsel for the 5th defendant contended that the contract at the heart of the present litigation was executed on the 30th September 1998, that the appointment of the receiver managers was on 25th of September 1999 and the auction took place on 19th September 2002. This timeline reveals that by the time the 5th defendant was joined to the proceedings, a period exceeding nine years lapsed and the suit was therefore time barred.
33. The plaintiff denied this argument stating that the present suit was actually filed in July 2008 and it is only the joinder of the 5th defendant in accordance with Order 1 rule 10 that took place on 5th February 2010. The plaintiff further maintained that the conveyance of the property in question to the 5th defendant was executed on 3rd December, 2002, having been disposed of by the 1st defendant through a flawed auction on the 5th of September, 2002. Citing the case of *Mtana Lewa V Kahindi Ngala Mwangandi*, [2015] eKLR, the plaintiff argued that no contractual relationship existed between the plaintiff and the 5th defendant.



34. Section 4(1) of the *Limitation of Actions Act* provides as follows:

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

- i. actions founded on contract;
- ii. actions to enforce a recognizance;
- iii. actions to enforce an award;
- iv. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- v. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

35. From the facts at hand, I am persuaded by the argument that the cause of action against the 5th defendant cannot have accrued at the time that the plaintiff took up the facility with the 1st defendant or where there was a default in that facility. At no point did the 5th defendant have a contractual relationship with the plaintiff.

36. It is my view that in the present circumstances, the plaintiff's cause of action against the 5th defendant arose when the plaintiff discovered the breach or loss occasioned by the 5th defendant to the Company. More specifically, through the wrongful transfer of the plaintiff's property to the 5th defendant. I am therefore of the opinion that the plaintiff's cause of action against the 5th defendant arose on 3rd December, 2002. Going by the provisions of section 4(1) of the *Limitation of Actions Act*, an action against the 5th defendant should have been filed by December 2008.

37. Again, in my view, even though the 5th defendant was enjoined to this suit after it had already been filed against other defendants, the calculation of time for purposes of limitation for the 5th defendant typically started running from 5th February 2010 when they were formally enjoined to the case, not from the date the original lawsuit was filed.

38. I say so because this is the point at which the 5th defendant was notified of the claims against them, received summons to appear and file their defense and this is therefore when they were officially brought into the suit.

39. It is therefore my finding that the suit against the 5th defendant is filed out of time, considering the period between 3rd December 2002 and 5th February 2010.

Whether the 1st defendant's exercise of statutory power of sale had crystallized.

40. It is acknowledged as between the plaintiff and the 1st, 2nd and 3rd defendants that by a letter of offer dated the 30th of September, 1998, the plaintiff was the beneficiary of an overdraft facility amounting to Kshs. 47,500,000/=, extended by the 1st defendant.

41. It is further not disputed that this facility was secured by a legal charge, dated 1st of October, 1997, over L.R. No. 209/8596, situated in Industrial Area along Enterprise Road, Nairobi, together with a debenture issued on the 25th of September, 1997, accruing interest at an annual rate of 27%, and directors' personal guarantees in the sum of Kshs. 47,500,000/=.



42. The parties have not produced the debenture on which basis the receiver managers were appointed. The 1st defendant confesses that this is because the document could not be traced. I note that in their submissions, the plaintiff denies the existence of the debenture stating that it was never done and did not exist.
43. I find this to be an afterthought and in bad faith noting that the plaintiff pleaded the existence of the debenture as part security at paragraph 5A and 5B in their amended pleadings. The existence of the debenture is corroborated by the letter of offer, signed by both parties and dated 25th September 1997 confirming the debenture as one of the securities.
44. In light of the foregoing, the plaintiff is precluded from asserting the non-existence of the debenture dated 25th of September, 1997. While this denies the Court an opportunity of confirming the terms in the said debenture, it is my finding that the existence of the debenture is a fact admitted and pleaded by both parties and therefore not an issue in the present proceedings.
45. What the plaintiff takes issue with is the premature appointment of the receiver managers supposedly under the debenture. A demand was sent to the plaintiff on 22nd October 1999 informing them of the intention to appoint the receiver managers. Subsequently, three days later, a Notice to Directors dated 25th October 1999 was sent by the 1st defendant, notifying them that the debenture had become enforceable and of the appointment of the 2nd and 3rd defendants as receiver managers.
46. The plaintiff alleges that this was premature. The 1st, 2nd and 3rd defendants have denied this. What is clear however is that at no point did the plaintiff raise any objection either upon notice being given by the 1st defendant or during the tenure of the receiver managers. The plaintiff had the opportunity to challenge the appointment or even the conduct of the receiver managers under the framework provided for in the then *Companies Act*, but chose not to do so.
47. On the contrary, the plaintiff submitted to the process of receivership, voluntarily handed over to the receiver managers, admitting and acknowledging the debt owing. This can be discerned from the correspondence of 6th March 2000, where the plaintiffs expressly admit that Datini Mercantile Limited was placed under receivership...due to its inability to repay an excess amount of Kshs. 7million over and above the approved limit of Kshs. 40 million. The plaintiff is therefore estopped from challenging the appointments at this stage.
48. Similar sentiments were expressed by the Court of Appeal in *Hastings Irrigation (K) Ltd V Standard Chartered Bank (K) Ltd & 2 Others*, [1987] eKLR, where the Court stated that:
- “No complaint is made there that the appointment of the receivers was premature or other than correct, as Mr. Thiongo seemed to be claiming in the submissions, neither, as the respondents point out in their joint notice of opposition filed in the High Court, was any objection made to that appointment for the first six months of the receivership.”
49. The plaintiff has equally alleged mismanagement of its business by the receiver/managers, accusing them of exploiting their powers and fiduciary relationship through the imposition of exorbitant fees, interest rates, and penalties irregularly. No substantiating evidence was presented to support these claims.
50. It is therefore my finding on this issue that the plaintiff is precluded at this point in time, from raising any objections regarding the appointment of the 2nd and 3rd defendants as receiver managers and that any allegations of mismanagement have not been proved.



51. The plaintiff also further submitted that at the time of selling the suit property to the 5th defendant, the 1st defendant's statutory power of sale had not crystallized since the 1st defendant had not issued it with all the statutory notices required by law.
52. The plaintiff cites a number of judicial pronouncements including the Court of Appeal's decision in Euro Bank Limited (In Liquidation) V Twictor Investments Limited & 2 Others, [2020] eKLR. This case elucidates that for the 1st defendant's statutory power of sale to crystalize, in a charge registered under the Registration of Titles Act Cap 281 (subsequently repealed), as is the circumstance in the present case, it is imperative that a notice be issued in conformity with Section 69A of the ITPA (likewise repealed).
53. The plaintiff contended that a communication dated the 22nd of October, 1999 from the 1st defendant, which served as a reminder of the plaintiff's financial arrears, does not suffice as a statutory notice. This was so given its omission of a definitive three-month timeframe for rectification of the default.
54. The plaintiff does not deny being in arrears. The picture tells of a company that admittedly found itself in financial difficulty and regrettably unable to service a facility with the 1st defendant. The plaintiff's plea for intervention so as to put the company back on its feet and sell it as a going concern is expressed by letters dated 14th October 1998, 21st October 1998 and 6th March 2000. Then there are various pleas for time to allow the plaintiffs to secure a purchaser for the suit property vide the letters of 31st July 2001 and 5th November 2001 and even pleas for interest waiver on the principle amount (see letter of 2nd February 2002)Top of Form.
55. The 1st, 2nd and 3rd defendants highlighted, through the plaintiff's statement of account annexed to their supplementary list of documents dated the 8th of May, 2023, that the plaintiff's indebtedness to the first defendant as of the 29th of September, 2001, amounted to Kshs. 67,357,335.85.
56. From the aforementioned correspondence, it is manifest that at the point of deciding to appoint receiver/managers for the plaintiff, the indebtedness had exceeded the sanctioned limit of Kshs. 40,000,000/= . Since the overdraft facility was secured through multiple securities, the 1st defendant had the option to pursue any of the aforementioned securities for debt recovery in the event of default.
57. From the correspondence sent to the plaintiff on 22nd and 25th October, 1999, the 1st defendant opted to enforce the debenture dated the 25th of September 1997, appointing receiver managers to assume control of the plaintiff company. In my view, given the security of the overdraft facility by both a legal charge and a debenture, the sale of the disputed property could be conducted under any of the securities.
58. Either way, whether the 1st defendant was exercising its statutory power of sale under the charge or the debenture, a statutory notice ought to have been given as provided for under sections 69A and 69G of the ITPA respectively. For the avoidance of doubt, section 69A(1) provides as follows:

“ A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-

- a. notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or..”



59. Section 69G(1) also provides that:

“A mortgagee entitled to exercise the mortgagee’s power of appointment of a receiver shall not appoint a receiver until either..... the case of a conditional mortgage or an usufructuary mortgage, notice requiring payment of the mortgage-money has been served on the mortgagor or chargor, or one of two or more of them, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service.”

60. There are numerous judicial pronouncements on this subject, some of which have been cited by the plaintiff including *Beatrice Atieno Onyango V Housing Finance Company Limited & 3 Others*, [2020] eKLR, *Alfred Mwai Kariuki & Another V Kenya Commercial Bank of Kenya Limited & Another*, [2012] eKLR, *Trust Bank Ltd V Okoth* [2001] 1 EA 274 and *Maithene Malindi Enterprises Limited V Kaniki Karisa Kaniki & 2 Others*, [2018] eKLR.

61. These decisions are clear on the requirements that a statutory notice should comply with. It should:

- i. State the nature and extent of the default of the chargor and if the default consists of non-payment of any money due under the charge;
- ii. State the amount required to be paid to rectify the default;
- iii. Provide the time for such rectification, being not less than three months, by the end of which the payment in default must have been completed;
- iv. State the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in the section, including sale of the property.

62. The need to comply with these requirements is based on the purpose of the statutory notice which is to put the debtor on notice that the statutory power of sale has crystalized. In *Lord Waring V London and Manchester Co. Ltd.*, [1935] Ch 310 at 318, Crossman J. stated as follows on the purpose of section 104 (2) of Transfer of Property Act, 1925, which is in similar terms as the Section 69B (2) of ITPA:

“Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course, if the purchaser becomes aware, during that period of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance.”

63. I have looked at the purported notice of 22nd October 1999 and I must agree with the plaintiff that the same does not comply with the basic requirements of a statutory notice. I do however note that M/S Kenya Shield Auctioneers purported to issue the plaintiff with the requisite 45 days notification of sale prior to the public auction. The Notification is dated 12th June 2001. It was issued for the auction scheduled for 10th August 2001 which was held on 19th September 2002.

64. Since the said Notification of Sale was based on a nonexistent statutory notice, it cannot remedy the situation and as such was inconsequential. It is therefore my finding that the purported sale to the 5th defendant was irregular as no statutory notice was issued.



Whether the suit property was sold fraudulently.

65. The other argument is that the plaintiff's property was sold fraudulently and that the 5th defendant was not a bona fide purchaser. The plaintiff's claim is that the suit property was sold at a gross undervalue which fact is denied by the 1st defendant. The 1st defendant cited the case of *Mbuthia V Jimba Credit Finance Corporation & Another*, [1988] KLR 1 where the Court of Appeal quoted the English case of *Standard Chartered Bank V Walker*, [1982] 3 A.E.R 938. It was their case that they not only acted reasonably but also in good faith in dealing with the plaintiff's assets.
66. It is clear from the correspondence between the parties that there had been a number of attempts to sell the suit property by both private treaty and public auction. The plaintiff had been given an opportunity to also source buyers by private treaty but from my reading of the correspondence herein, while there were promises from potential buyers, there was no firm commitment prior to the sale to the 5th defendant.
67. By their letters of 14th March 2001 and 31st July 2001, both the plaintiff and the receiver managers expressed apprehension that the sale may not yield the optimum price indicated in the valuation reports. They agreed that the market forces and the political climate at the time would have had a negative effect on the intended sale. It is also clear that at the time of the sale, the suit property was not a going concern.
68. It is now settled law that the chargee has the right to decide the time of sale and most often than not, a chargee will give preference to its own interest over that that of the chargor. However, in exercising its statutory power of sale, a chargee should be mindful of the chargor's interest and take reasonable care so as to obtain whatever was the true market value of the charged property. This was the holding by the Court of Appeal in *Mbuthia V Jimba Credit Finance Corporation & Another*, [supra] while quoting the dicta of Lord Denning M.R in *Standard Chartered Bank V Walker*, [supra].
69. As far as the auction is concerned, the plaintiff argues that the same did not take place. The 1st, 2nd, & 3rd defendants however submitted that the auction that was conducted on 19th September 2002 was advertised and on the day of the auction, the highest bidder who bid Kshs. 36,000,000/= backed out and a bid for Kshs. 35,000,000/= was later accepted.
70. I have seen the advertisements but I also agree with the defendants that indeed the said auction took place on 19th September 2002 as was confirmed by PW2 who testified that he attended the said auction as the personal assistant for Mr. Humphrey Njau Nyoike (deceased) one of the plaintiff's directors since they were notified of the same sometime in June, 2002.
71. Upon review of the evidence, it is also apparent that numerous details regarding the auction remain unclear and insufficiently explained. The 5th defendant confirmed having participated, placed a bid of Kshs. 35,000,000/= and were declared the highest bidder. Thereafter, they paid Kshs. 8,750,000/= to the Auctioneers being 25% of the purchase price and were issued with a receipt.
72. The balance of the purchase price was then paid on 3rd December 2002 through the 5th defendant's bank, Habib Bank Ag Zurich. Additionally, the 5th defendant indicated that they fulfilled all requisite formalities for the transfer of ownership, including the payment of stamp duty totaling Kshs. 824,005/=.
73. The 5th defendant was hard pressed to provide evidence of payment of the deposit or any amount for that matter. The witness was not able to provide a copy of the banker's cheque that was allegedly



- used to make payment for the deposit on 19th September 2002, a situation that strikes as peculiar for a company dealing.
74. A cheque dated 3rd December 2002 for Kshs. 26,250,000/= was however produced as evidence for payment of the balance. The total purchase price differs with that provided in the transfer of the property to the 5th defendant, which captures the sale price as KShs. 20,000,000/=. Given these circumstances, I am compelled to conclude that there exists detrimental information that the defendants chose not to disclose to the court, information likely unfavorable to their case.
 75. The case put forward by the 1st, 2nd, & 3rd defendants differs in facts to that of the 5th defendant. They aver that the highest bid on the auction was Kshs. 36,000,000/= but the bidder backed out while consultations on whether to accept the bid were ongoing then later they received a bid of Kshs. 35,000,000/=.
 76. In a letter dated 23rd October 2002 addressed to a director of the plaintiff by the 1st defendant, the receiver managers recounted their efforts to dispose of the suit property on four different occasions the latest one being via the public auction held on 19th September 2002 but were unsuccessful in all of them. They further conveyed to the plaintiff that they had later received an offer of Kshs. 35,000,000/= and were inclined to accept the said offer in the event the plaintiff did not introduce a better offer on or before 1st November 2002.
 77. PW1 in his testimony indicated that his understanding of the letter of 23rd October 2002 was that the bid for Kshs. 35,000,000/= came after the 19th September 2002 auction had been closed and that offer had not yet been accepted by the 1st, 2nd, & 3rd defendants at the time of writing the letter.
 78. It is therefore clear from the contents of the letter dated 23rd October 2002 that as at 1st November 2002, the receiver managers had not accepted the Kshs. 35,000,000/= offer to purchase the plaintiff assets and the said offer was neither a bid nor the highest bid at the public auction that was held on 19th September 2002.
 79. This presents a factual contradiction that raises significant questions. How could the 5th defendant have purportedly paid Kshs. 8,750,000 to the auctioneers amounting to 25% of the purchase price, received a receipt, and a memorandum of sale that confirmed the sale of the plaintiff's assets to them while approximately a month later, the receiver managers communicated to the plaintiff's director that there was still an opportunity to submit an offer exceeding Kshs. 35,000,000? This discrepancy suggests a misalignment in the reported events and irregularity regarding the sale of the property.
 80. Accordingly, based on the evidence and circumstances presented, my conclusion is that the 5th defendant cannot be considered an innocent purchaser for value. On the contrary, it appears that the 5th defendant was aware that the suit property was sold below its value and actively participated in the irregularities surrounding the auction process. This conclusion is further supported by the defendant's inability to furnish any proof that the purported sum of Kshs. 35,000,000/= was indeed paid towards the outstanding facility.
 81. The complexity of the transaction intensifies, as evidenced by the Transfer by Chargee dated 8th February 2003. This document reveals that the plaintiff's assets were, in fact, sold to the 5th defendant for a significantly lower amount of Kshs. 20,600,000, thereby adding a layer of dispute regarding the actual sale price and the transparency of the auction process.
 82. In light of the foregoing, I am persuaded that the 1st defendant fraudulently sold the plaintiff's assets to the 5th defendant without following due process that was transparent and free from any illegalities.



83. In a scenario where a borrower company defaults on a loan, leading the bank to enforce security through the appointment of a receiver manager and eventual sale of the business, and where it is established that the sale was conducted at an undervalue and possibly in bad faith, the court has several remedies at its disposal to address the grievances and rectify the situation. These remedies aim to ensure fairness, rectify any injustices, and where possible, restore the parties to their original positions, or compensate for losses incurred.
84. This Court notes that the Bank Statements for the plaintiff's account for the period between 30th September 1992 and 31st December 2002 have not been provided. Without this vital documentation, it becomes impossible for the Court to ascertain the actual purchase price paid for the suit property, if any payment was made at all, and whether such payments were applied towards reducing the plaintiff's outstanding liabilities. The 1st defendant states that by this time the loan had been written off. Still no receipts were presented to confirm that the monies were received by the 2nd and 3rd defendants.
- The failure to provide this essential information necessitates the drawing of an adverse inference against the party withholding it, as it impedes the Court's ability to thoroughly evaluate the financial transactions related to the suit property.
85. In the circumstances of this case, the plaintiff is entitled to restitution by way of damages which in my view should be quantified as the market value of the property allegedly sold.
86. The plaintiff produced a valuation report dated 15th March 1999 which returned a market value of Kshs. 290,000,000/=. Obviously by this time the plaintiff company was thriving, and some factors may have existed then that changed after the facility was taken. The valuation by Tysons Limited dated 23rd July 2002 was carried out 2 months before the auction and returned a market value of Kshs. 59,491,100/=. Parties have both accepted that the timing of this valuation and the sale had negative effects on the value of the property. As such, the Court cannot rely on this as a fair valuation of the property. The average of the 2 valuation reports comes to Kshs. 172,000,000/= which I would assess as a fair market value of the suit property.
87. Although it was stated that there was an amount that remained payable to the 1st defendant even after the auction, from my findings detailed herein, and on the basis that the 1st defendant has not filed any counterclaim against the plaintiff's claim, I am unable to award any monies to the 1st defendant.

Determination

88. Consequently, it is my finding that the plaintiff's suit is merited and I hereby award damages to the tune of Kshs. 172,000,000/= together with interest from the date of judgment herein until payment in full. The plaintiff shall also have the costs of this suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 1ST DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

