



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 70 OF 2016**

**ESTHER CHEROP CHEBELYO.....1<sup>ST</sup> PLAINTIFF**

**ALEXANDER CHEBELYO SABILA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ORIENTAL COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**MOSES CHEPTOEK.....2<sup>ND</sup> DEFENDANT**

**CHARLES MUSAKU MUYANGE.....3<sup>RD</sup> DEFENDANT**

**WATTS AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

**[as consolidated with ELC CASE NO. 151 OF 2016 BETWEEN CHARLES M. MUYANGE VS ALEXANDER CHEBELYO SABILA]**

**JUDGMENT**

**INTRODUCTION**

1. As can be seen from the above title, each of the plaintiffs initially sued or was sued separately, but later on the plaint in **ELC 70 of 2016** was amended on **14/8/2018** to enjoin the defendant in **ELC 151 of 2016** as the 2<sup>nd</sup> plaintiff. On **4/2/2020** the two suits herein were consolidated.

2. In **ELC 70 of 2016**, the plaintiff filed her initial plaint dated **7/4/2016** on **8/4/2016**. As stated earlier it was later amended on **31/8/2018**. The amended plaint seeks the following orders against the defendants jointly and severally:-

**(a) A permanent injunction restraining the defendants, servants, agents or assigns from disposing, selling, transferring, alienating and/or advertising for sale or otherwise purporting to exercise a statutory power of sale over all that piece of land known as Land Parcel No. WAITALUK/KAPKOI BLOCK 4/WAITALUK/ 41 measuring 1.214 Ha offered as security for loan.**

**(b) (i) A declaration that the transaction between 1<sup>st</sup> and 2<sup>nd</sup> defendants creating the Legal Charge over Land Parcel No. WAITALUK/KAPKOI BLOCK 4/WAITALUK/ 41 measuring 1.214 Ha was incomplete, ineffective thus null and void due to fraudulent title in possession of the 2<sup>nd</sup> plaintiff over the suit property and which cannot be passed to a third party and/or a declaration that the suit property is a matrimonial property incapable of being charged and sold by the defendants without the spousal consent of the 1<sup>st</sup> plaintiff herein and that defendants' actions of the charging the suit property without spousal consent thus illegally and unlawful and the same is null and void.**

**(c)(i) A declaration that the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant in collusion with the 4<sup>th</sup> defendant acted illegally, unlawfully since no accrued statutory right to sale (sic) suit parcel of land and an injunction restraining further dealings in the land by the defendants without the consent of the plaintiff.**

**(d)(i) Order for taking of accounts and certification of the amounts paid to the 1<sup>st</sup> defendant coupled with a refund of any**

amounts of such sums as shall have been certified as overpaid to the 1<sup>st</sup> defendant

(e)(i) An order of delivery of the original titles in the 3<sup>rd</sup> defendant's custody in respect of the Land Parcel No. WAITALUK/KAPKOI BLOCK 4/WAITALUK/41 measuring 1.214 Ha to be registered in favour of the plaintiffs herein.

(f) Costs and interest.

3. The 1<sup>st</sup> defendant filed its amended defence on 11/9/2018; the 2<sup>nd</sup> defendant filed his defence on 9/10/2018; the 3<sup>rd</sup> defendant filed his amended defence on 14/9/2018 and the 4<sup>th</sup> defendant filed its defence on 3/10/2018.

## PLEADINGS

### The Amended Plaintiff

4. The plaintiffs' claim in this matter is that they are husband and wife and the suit land comprised in **Land Parcel No. Waitaluk/Kapko Block 4/Waitaluk/41 Measuring 1.214** is matrimonial property; that the 2<sup>nd</sup> plaintiff without the consent of the 1<sup>st</sup> plaintiff charged it to the 1<sup>st</sup> defendant; that the defendants are guilty of fraud; illegality of action and bad faith in the transaction and have occasioned the plaintiffs embarrassment loss and irreparable damage; that the 1<sup>st</sup> defendant lacks right to exercise any of the chargee's remedies due to illegality of the transaction; that in any event the statutory notices issued are fatally defective; that the 4<sup>th</sup> defendant sold the suit property without setting a reserve price and without valid proclamations and notifications of sale and that for the foregoing reasons the disposal of the suit property at an auction was illegal hence the suit.

### The Defence

#### The 3<sup>rd</sup> Defendant's Defence

5. The 3<sup>rd</sup> defendant in his amended defence denied the claim and stated that the 1<sup>st</sup> plaintiff was fully aware of the charging of the suit property by the 2<sup>nd</sup> plaintiff; that the 3<sup>rd</sup> defendant conducted due diligence; that no consent was required from the 1<sup>st</sup> plaintiff and that the 1<sup>st</sup> defendant complied with the law after default by the 2<sup>nd</sup> plaintiff; that the 1<sup>st</sup> plaintiff has all along known the dealings between the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> defendants on the one hand and the 1<sup>st</sup> defendant on the other; that there was no fraud or collusion between the defendants to defeat the course of justice; that **prayers (a) and (b)** of the plaint have been overtaken by events; that there was no collusion between the 1<sup>st</sup> and 3<sup>rd</sup> defendants. The 3<sup>rd</sup> defendant also denied that there was any misrepresentation between the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> defendant, stated that the sale was lawful and urged that the suit ought to be dismissed with costs.

#### The 1<sup>st</sup> Defendant's Defence

6. The 1<sup>st</sup> defendant's amended defence denied the claim entirely and stated that the suit land is not matrimonial property and that therefore no spousal consent was required; that there was no fraud; that no loss or damage was incurred; that no breach of the law occurred as alleged and hence the orders sought by the plaintiffs are not deserved for the additional reasons that the 1<sup>st</sup> plaintiff has no legal interest in the suit land and that an injunctive relief cannot be granted as the power of sale has already been exercised.

#### The 2<sup>nd</sup> Defendant Defence

7. The 2<sup>nd</sup> defendant admitted the amended plaint wholly and prays that the plaintiff's case be allowed as prayed.

#### The 4<sup>th</sup> Defendant Defence

8. The 4<sup>th</sup> defendant in his statement of defence denied the claim and stated that it complied with all the provisions of the **Auctioneers Act 1996, Auctioneers Rules** and the **Land Act**.

9. In the plaint in **ELC 151 of 2016**, the plaintiff therein who is the 3<sup>rd</sup> defendant in the title above had sought eviction orders against the defendant on the ground that he had purchased the suit land at a public auction for valuable consideration on **10/4/2015**, obtained the relevant land control board consent, and notified the defendant to vacate the land in vain.

10. In that case the defendant (the 2<sup>nd</sup> plaintiff in the title above) had filed an amended defence and counterclaim. In the defence he denied claim and stating that no title in respect of **Waitaluk/Kapko Block 4/Waitaluk/41** exists, or that the plaintiff was the registered proprietor thereof; that the price of the land was **Ksh 9,506,000/=** and the amount on the plaint (**Ksh 2,500,000/=**) does not amount to the purchase price; that the consent of the land control board was fraudulently acquired and that the defendant is the rightful owner of the suit land. In the counterclaim the defendant reiterated the matters in the plaint and sought a declaration that he is the lawful owner of the suit land.

## THE EVIDENCE OF THE PARTIES

### The Plaintiffs' Evidence

**11. PW1, Esther Cherop Chebelyo**, the 1<sup>st</sup> plaintiff testified on **12/3/2020**. She adopted her written statement as her evidence-in-chief in this case. Her evidence matched the contents of the plaint; she stated that she married the 2<sup>nd</sup> plaintiff in **1973** and a church wedding was conducted between the couple in **1999** and they obtained a marriage certificate; that she lived with the 2<sup>nd</sup> plaintiff and her children on the land until **2015** when she learnt that the land had been charged and then disposed of to the 4<sup>th</sup> defendant following default in repayment of the bank loan by the 2<sup>nd</sup> plaintiff. She stated that the land is matrimonial property; that she and the 2<sup>nd</sup> plaintiff worked at ADC and using the earnings from their employment they purchased the land from one Eric Rono and took possession thereof in **1983**; she produced copies of receipts for payment for the land and birth certificates for her children sired by the 2<sup>nd</sup> plaintiff. She denied having been informed of the loan before it was taken by the 2<sup>nd</sup> plaintiff; she stated that she never attended the land control board to give her consent to the charge; that the 1<sup>st</sup> defendant never called her to sign the loan documents; that the 4<sup>th</sup> defendant never served her with any notice; that no handbills were posted on the property; that she never saw any valuers visiting the suit land; that she only learnt that the suit land had been sold when the 4<sup>th</sup> defendant asked her to vacate, informing her that “*the bank*” had sold him the land, whereupon she instituted the instant suit. She averred that the land is her matrimonial home.

**12.** While under cross-examination by Mr. Khisa for the 1<sup>st</sup> defendant she admitted that the 2<sup>nd</sup> defendant is her son and stated that the 2<sup>nd</sup> defendant owns no land in Waitaluk; she stated that her husband and her son kept her in the dark about the transactions.

**13.** Under cross-examination by Ms. Arunga for the 3<sup>rd</sup> defendant she stated that she never got to know of when the auction of the land took place. According to **PW1**, she never got to know of the advertisement of the suit land in the newspapers.

**14.** In re-examination she maintained that the 2<sup>nd</sup> defendant held the land in trust for the family.

**15. PW2, Alexander Chebelyo Sabila**, the 2<sup>nd</sup> plaintiff testified the same date as **PW1**. He adopted his written statement dated **2/10/2017** as his evidence-in-chief in this case. His evidence is that he was registered owner of the suit land, having purchased the land from one Eric Rono in **1982**; that the purchase took place after he married the 1<sup>st</sup> plaintiff; that he worked with the ADC as a farm clerk; that in **2010** he guaranteed his son a loan of **Ksh 5,000,000/=**; that in **2013** his son had difficulties in repaying the loan; that after a consultative meeting with his son they engaged a forensic expert who revealed that the loan had already been overpaid; that while awaiting reconciliation of accounts between his son and the bank he was surprised to find that the suit property had been advertised for sale by public auction by the 4<sup>th</sup> defendant; that he never informed his wife the 1<sup>st</sup> plaintiff about the loan he and his son took from the 1<sup>st</sup> defendant; that the bank never asked her to come and execute the charge; that the bank recalled the loan and his son was not able to repay and the land was therefore advertised for sale; that he registered at the auction without informing his wife of the auction; that the auctioneer never publicized any handbills and that he is not aware whether any valuers came to the land.

**16.** When cross-examined by Mr Khisa for the 1<sup>st</sup> defendant he admitted that his son had been unable to repay the loan.

**17.** While under cross-examination by Ms. Arunga for the 3<sup>rd</sup> defendant he stated that he was at the public auction on **10/4/2015** and that the 3<sup>rd</sup> defendant was absent; that an auction was conducted and he tried to bid; that he went to the land control board and informed them that there was a pending suit but they nevertheless issued the 4<sup>th</sup> defendant with a consent; that later he learnt that the land had been transferred to the 4<sup>th</sup> defendant. He has however not conducted any search on the title; an earlier suit **Kitale ELC 7 of 2015** was dismissed.

**18.** The parties agreed that the statements of **Lydia Jebitok Kirwa (PW3)** and **Chemoto Arap Tuiyott (PW4)** be admitted as evidence in this matter without calling them.

**19.** At that juncture, the plaintiffs closed their case.

### **The Evidence of the Defendants**

**20. DW1, Charles Musaku Muyange**, the 3<sup>rd</sup> defendant, had testified on **2/7/2018** in **ELC 151 of 2016** before the consolidation of these suits. By consent of the parties his evidence was admitted to be applicable to both suits when the consolidated matter came up on **12/3/2020**. His evidence is that he came across a newspaper advertisement lodged by the 4<sup>th</sup> defendant in respect of, *inter alia*, the suit land in some local dailies published on **7/4/2015** and **16/3/2015**; that he was given a copy of the advertisement through the lawyers for the auctioneers; that he sent a representative, a Mr Ogada to the auction held at Kitale outside the post office on **10/4/2015**; that there was no reserve price; that he was given **2,500,000/=** “*as a figure*,” that he paid **25%** being **Ksh 525,000/=** by way of bankers cheque (**PEXh 4**); that the 4<sup>th</sup> defendant wrote to him on **10/4/2015** acknowledging his successful bid; that he was required to execute a memorandum of sale; that the 4<sup>th</sup> defendant forwarded title documents to him thereafter; that the bank executed the transfer in his favour and the 4<sup>th</sup> defendant also gave him an application for LCB consent; that he obtained the LCB consent; that he paid the **Ksh 50,020** stamp duty assessed for the transfer of the suit property and that he paid the title deed fee and obtained a title (**PEXh 15**) in his name. He stated that he had been unable to take possession of the suit land as the 2<sup>nd</sup> plaintiff is in possession and he has resisted his attempts at taking possession. He stated that he had not been informed that the purchase price was **Ksh 9.5 Million** as the auctioneer placed it at **Ksh 2.5 Million**. He stated that the 2<sup>nd</sup> plaintiff made a bid of **Ksh 1.4 million** at the auction which was rejected. On re-examination by Ms Arunga he admitted that he and the 2<sup>nd</sup> plaintiff attended the land control board meeting.

**21. DW2, Anderson Namada**, testified on **11/2/2021**. His evidence is that he operates business as “Watts Auctioneers” (4<sup>th</sup> defendant ;) that he received instructions from Kidiavai & Co Advocates on **8/1/2014** instructing him to sell the suit property; that he issued notification of sale dated **10/1/2014** by way of registered post addressed to the 2<sup>nd</sup> plaintiff on the same date; that he also communicated with the 2<sup>nd</sup> plaintiff by cell phone; that the 2<sup>nd</sup> plaintiff instituted a suit; that the suit was finalised on **10/3/2015** and fresh instructions were issued to proceed whereupon he issued the 2<sup>nd</sup> plaintiff with a notification of sale dated **12/3/2015**; that at the scheduled auction a bank representative

named Celine Waweru, the 3<sup>rd</sup> defendant, the 2<sup>nd</sup> plaintiff and others were present; that the 2<sup>nd</sup> plaintiff could not bid as he did not have a bankers cheque; that he left the site together with his wife and son and the 3<sup>rd</sup> defendant emerged the highest bidder and was issued with a certificate of sale dated 10/4/2015.

22. **DW3, Celine Njeri Waweru**, the Assistant Manager Credit Department at Oriental Commercial Bank testified on 15/4/2021. She adopted her written statement dated 15/3/2019 as her evidence-in-chief in this matter. Her evidence is that the 2<sup>nd</sup> defendant successfully applied for credit from the 1<sup>st</sup> defendant and was advanced credit facilities on the strength of security of legal charges over 3 parcels which included the suit land; that the 2<sup>nd</sup> plaintiff acted as the guarantor to the 2<sup>nd</sup> defendant; that the 2<sup>nd</sup> defendant defaulted in repayment of the outstanding loan balance and the 1<sup>st</sup> defendant exercised its statutory power of sale and that after due diligence was exercised the suit land was auctioned off to the highest bidder.

### SUBMISSIONS

23. The 3<sup>rd</sup> defendant's written submissions were filed on 10/5/2021. The plaintiffs filed submissions on 24/5/2021. I have considered the plaintiff's case, the defendants' defence, the evidence tendered in support thereof as well as the submissions filed.

### **DETERMINATION.**

#### Issues for Determination

24. There are certain indisputable facts in this case. They are that the plaintiffs are husband and wife, that the suit land was registered in the name of the 2<sup>nd</sup> plaintiff who offered it as security for credit facilities advanced by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and the 1<sup>st</sup> plaintiff was not consulted; that the 2<sup>nd</sup> defendant ran into setbacks in repayment of the loan monies advanced to him by the 1<sup>st</sup> defendant and that the suit land has already been sold to the 4<sup>th</sup> defendant by the 1<sup>st</sup> defendant in exercise of its statutory power of sale.

25. The remnant of issues for determination in this suit are as follows:

*(a) Whether the suit land is matrimonial property and if consent of the 1<sup>st</sup> plaintiff was needed for the charge;*

*(b) Whether the proper procedure was observed in the disposal of the suit property and whether there was any fraud committed by the defendants;*

*(d) Whether variation of interest if any was valid;*

*(e) Whether the 4<sup>th</sup> defendant was a bona fide purchaser for valuable consideration;*

*(f) What orders should issue?*

26. The issues are addressed as hereunder:

#### **Whether the suit land is matrimonial property and if consent of the 1<sup>st</sup> plaintiff was needed for the charge;**

27. The plaintiff's reliance is on the provisions of the **Married Women Property Act 1882** (now repealed). Relying on that Act the plaintiff briefly submits that it gave any wife who contributed money or money's worth towards acquisition of matrimonial home a proprietary interest by imposing a trust on the husband who held the title by requiring him to hold the title in trust for both jointly.

28. All the evidence adduced by the 1<sup>st</sup> - 4<sup>th</sup> defendants does not dispute the fact that the 1<sup>st</sup> defendant was not consulted. The 2<sup>nd</sup> plaintiff on his part indicated that he never consulted the 1<sup>st</sup> plaintiff in offering the suit land as security for the credit facilities granted by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant does not insist that it sought any consent for the charge from the 1<sup>st</sup> plaintiff.

29. The 1<sup>st</sup> defendant's main point of defence is that the suit land was not matrimonial property and that no consent of the 1<sup>st</sup> plaintiff was needed for the charge. It maintains that the land was charged to it within the confines of the law which was in force at the time of execution and registration of the charge. Is there veracity in this claim? The answer lies in examining the law in force at the time of the execution and registration of the subject charges. The first charge document was received in the land registry on 20/12/2010. The further charge was registered over the suit land on 3/6/2011.

30. The plaintiffs cited the case of **EWB VS SB Mugo Muiro Investment Ltd & HFCK [2017 eKLR]** that:

**“Prior to coming into force of the Land Registration Act Cap 300, a married spouse's unregistered proprietary interest in the matrimonial home by dint of his or her contribution to its acquisition and, therefore, as a part-owner thereof, was held in trust on his or her behalf by the spouse registered as title holder and owner, and such unregistered proprietary interest was in common law an overriding interest which superseded any registered instrument conveying title in the matrimonial property including a transfer and a charge.”**

31. Emphasis is placed by the plaintiffs on the dicta of the Court of Appeal reiterating the words in the decision of **Williams & Glyn's Bank**

v. Boland [1979] 2 All E R 697 as follows:

**“Anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wife may have a share in it. He ought to make sure that the wife agrees to it or to go to the house and make enquiries of her. It seems to me utterly wrong that a lender should turn a blind eye to the wife’s interest or the possibility of it and afterwards seek to turn her and the family out on the pleas that he did not know she was in actual occupation. If a Bank is to do its duty, in the society in which we live, it should recognize the integrity of the matrimonial home. It should not destroy it by disregarding the wife’s interest in it, simply to ensure that it is paid the husband’s debt in full, with the high interest rate now prevailing. We shall not give monied might over social justice. We should protect the position of a wife who has a share, just as years ago we protected the deserted wife....”**

32. *“Matrimonial property”* is defined in **Section 6** of the **Matrimonial Property Act Number 49 of 2013** as follows:

**“(1) For the purposes of this Act, matrimonial property means-**

**(a) the matrimonial home or homes;**

**(b) household goods and effects in the matrimonial home or homes; or**

**(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.**

**(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.**

**(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.**

**(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.”**

33. In **Section 2** of the Act, *“matrimonial home”* is defined as *“any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”*

34. It is the case that the 3<sup>rd</sup> defendant has admitted that the 2<sup>nd</sup> plaintiff is in occupation of the suit property and it is not in dispute that the 1<sup>st</sup> plaintiff is wife to the 2<sup>nd</sup> defendant and she also resides on it. The plaintiff claims that the suit land was purchased through the joint efforts of the plaintiffs. Land purchase receipts are evidence of the purchase of the land in the **1980s**. Though the marriage certificate of the plaintiffs is dated **8/6/1999**, it is clear from the birth certificates of their children that many were born earlier than **1999** and this court has no difficulty in arriving at the conclusion that the claim that the plaintiffs were married in **1973** is genuine and that only the solemnization and issuance of a marriage certificate occurred later in **1999**.

35. No names of the 1<sup>st</sup> plaintiff appear on the land purchase receipts. However the land was purchased after the plaintiffs were married and this court must heed the presence of the plaintiffs and their children on the suit land as evidence that the same afforded the plaintiffs a matrimonial home.

36. **Section 2** of the **Land Act No 6 of 2012** defines *“matrimonial home”* as:

**“...any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;**

37. **Article 45 (3)** of the Constitution of Kenya provides as follows:

**“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”**

38. **Section 7** of the **Matrimonial Property Act Number 49 Of 2013** provides as follows:

**“Subject to Section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”**

39. Before the enactment of the **Matrimonial Properties Act**, the **Land Registration Act 2012** at **section 28 (a)** provided that spousal rights over matrimonial property were overriding interests. **Section 2** of the said Act provided that matrimonial property means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of the marriage.

40. The legislative provisions of the **Matrimonial Property Act** and the **Land Act** cited herein before were enacted and came into force after the registration of the charge and further charge over the suit property and there no retrospective application reflected in the said Acts.

41. Indeed the 3<sup>rd</sup> defendant has cited two cases that adopt that path and I agree entirely in the decisions therein.

42. One of the cases that the 3<sup>rd</sup> defendant relied on is **Barclays Bank Of Kenya Vs The Attorney General Milimani ELC No 369 Of 2013** where **Mutungi J** referring to the decision in **ENW –VS- PWM & 3 others (2013) eKLR** stated as follows:

**“In the said suit while still considering the application of the Land Registration Act, 2012 in as far as matrimonial property is concerned I observed as follows:-**

**“AS a further observation I would like to state that where a property while would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter such property becomes a commercial commodity available in the market and liable to be sold by the chargee under the chargee’s statutory power of sale and the exercise of such power of sale cannot be defeated by a claim that such property constitutes matrimonial property. That indeed should be viewed as what informed the requirement in the new Land Registration Act of 2012 requiring spouses to give their consent to the charging of matrimonial properties so that none of the spouses may be heard to say they were not aware or were not consulted when the charge was taken. Charges taken before the enactment of the Land Registration Act 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the enactment of the new Land Registration Act and therefore the plaintiff in the present case cannot take refuge under the new Land Act”.**

43. He also relies on the decision in **Stella Mokeira Matara v Thaddues Mose Mangenya & another [2014] eKLR** as follows:

**“Even if the plaintiff had established that she has a matrimonial home on the suit properties, the plaintiff had a duty also to prove that under the law that was applicable as at the time the charge over the suit properties was executed, a consent of a spouse was required prior to the execution of such a charge. I am in agreement with the 2<sup>nd</sup> defendant’s submissions that the law that is applicable to the charge that was executed over the suit properties as concerns the form and content thereof is the Registered Land Act, Cap. 300, Laws of Kenya (RLA). The charge herein was executed on 28th February 2011 under the RLA. The Land Act, 2012 and the Land Registration Act, 2012 on which the plaintiff has based her spousal consent argument commenced on 2nd May 2012. The RLA under which the charge herein was created was repealed by the Land Registration Act, 2012. It is now the Land Registration Act, 2012 that deals with the registration of interests in land. This is the Act that must be used as a point of reference when considering the rights and interests that were acquired and those that had accrued under the repealed RLA. As submitted by the 2nd defendant, section 107 (1) of the Land Registration Act, 2012 provides that unless the contrary is provided for in the said Act, any right, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the said Act shall continue to be governed by the law applicable to it immediately prior to the commencement of the said Act. That position finds support in section 23(3) of the Interpretation and General Provisions Act, Cap. 2 Laws of Kenya. There is nothing in the Land Registration Act, 2012 which provides that the said Act shall apply to the charges created before its date of commencement. It follows therefore that the law that is applicable to charges created under the RLA prior to the commencement of the Land Registration Act 2012 as to the form and content of such charges is the RLA.”**

44. For the charge and the further charge subject matter of the present suit, the applicable legislation is therefore the **Registered Land Act** (now repealed.) I am not persuaded that under the RLA regime spousal consent was required before matrimonial property was charged to a creditor. Consequently, I am satisfied that the consent of the 1<sup>st</sup> plaintiff was therefore not at all necessary for the charge to be registered over the suit land in this case.

***(c) Whether the proper procedure was observed in the disposal of the suit property and whether there was any fraud committed by the defendants.***

45. The plaintiff’s submission is that under **Section 74** of the **RLA** (now repealed,) after default that continues for more than one month the chargee may serve upon the chargor a notice in writing to pay the money owing or to perform and observe the agreement and that if there is no compliance with the chargee’s notice the chargee may within **3 months** appoint a receiver or sell the charged property. The plaintiffs state that failure to comply with the provisions renders the sale void. They posit that the law requires the chargor to be served with an independent notice which they aver was not the case in this dispute. The plaintiffs point out that the 1<sup>st</sup> and 4<sup>th</sup> defendants’ list of documents lists only one statutory notice addressed to the borrower which was copied to the chargor and aver that was not sufficient. The burden of establishing that notice was issued, urge the plaintiffs, lies on the chargee once the chargor has denied service thereof.

46. The plaintiffs also aver that if the borrower fails to take remedial measures, the guarantor is nonetheless entitled to be given not less than **40 days** under **Section 96(2)** before the chargee can exercise his statutory power of sale.

47. I have perused through the notice dated **24/9/2013** addressed to the borrower and copied to the chargor. It gives the borrower who is the 2<sup>nd</sup> defendant notice under **Section 74** of the **RLA** as read together with **Section 162** of the **Land Act 2012** and **Section 106** of the **Land Registration Act** that the 1<sup>st</sup> defendant would exercise its statutory power of sale if after **3 months** from the date of the notice the amount outstanding would not have been paid in full. I would have considered this as sufficient for the purposes of **Section 74** of the **RLA** had proof of service upon the chargor and the borrower been provided. However the only document produced at the hearing was the notice dated **24/9/2013**; no evidence of posting or other means of service upon the borrower and the chargor was availed to the court. This court can not presume service on the borrower. It has to be established by way of evidence. I am not persuaded that the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants have established that the appropriate notice was indeed served upon both the borrower and the chargor before the statutory power of sale was exercised.

48. The plaintiffs’ submission on this issue is that where receipt of notice is denied by the chargor the burden falls upon the chargee to

establish that notice was served. The plaintiffs cite the cases of **Wairimu Ngure Vs National Bank of Kenya Ltd & 2 Others 2017 eKLR** and **Obel Omuom Vs Kenya Commercial Bank Ltd Kisumu CA No 148 of 1995**. In the case of **Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR** the Court of Appeal stated as follows :-

**“It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent”.**

49. In view of the foregoing, this court holds that in regard to service of the statutory notice on the chargor and the borrower, the 1<sup>st</sup> Defendant has not therefore discharged the burden of proof under **Section 107** of the **Evidence Act**

50. The plaintiffs’ next step is to address the evidence of **DW2**, the auctioneer and aver that he never produced any evidence of a notice in court. The notice referred to here is the notification of sale under the **Auctioneers Act, Section 96(2)** of the **Land Act** also provides as follows:-

**“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.**

51. It is noted that the subsequent letter dated **8/1/2014** from Kidiavai & Co Advocates advised the auctioneer to issue a mandatory statutory notice of **40** days to the chargor, the 2<sup>nd</sup> plaintiff. In his evidence **DW2** stated that after receiving the advocate’s letter he sent a notification of sale dated **10/1/2014** to the 2<sup>nd</sup> plaintiff on the same date.

52. However the 4<sup>th</sup> defendant acknowledges that after the notice was issued, the 2<sup>nd</sup> plaintiff instituted a suit. When the suit was terminated on **10/3/2015**, he issued the chargor another similar notification of sale dated **12/3/2015** stating that the suit property would be sold on **10/4/2015**. However this alleged second notification dated **12/3/2015** was not produced in court as evidence but the sale nevertheless took place on **10/4/2015**. There is also no proof of postage of such notice.

53. **Rule 15** of the **Auctioneers Rules** states as follows:

**“15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—**

**(a) record the court warrant or letter of instruction in the register;**

**(b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second schedule indicating the value of each property to be sold;**

**(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;**

**(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;**

**(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.**

54. It is clear that from the rule that upon receipt of a letter of instruction the auctioneer shall issue a **45 day notice** to the chargor within which the chargor may pay the amounts set forth in the letter of instructions.

55. The 4<sup>th</sup> defendant therefore admitted that a letter of instructions from the chargee’s advocates was issued after **Kitale ELC No 7 of 2015** was terminated. However he did not produce the notice that he served the chargor after the said litigation was over. He also never produced the certificate of posting or any other evidence of service.

56. The case **Kitale ELC No 7 of 2015** having come to an end on **10/3/2015** and the sale occurred on **10/4/2015** it is clear that **45** days could not have elapsed and therefore no or no sufficient notice may have issued. The appropriate conclusion here is that if any notice was therefore issued, it did not run the full course of **45 days** as the period between the two dates was shorter than the **45 days** stipulated in the Rules. Besides the auctioneer appears to have been resigned to the view that a previous notice that had been allegedly issued to the chargor was valid for all purposes. This attitude is seen in his letter dated **15/5/2014**. Responding to the advocate’s letter of instructions to sell the suit property dated **12/5/2015**, he had stated as follows:

**“Since we had issued the 45 days demand notice which is quite valid we will proceed with the advertisement of the securities.....”**

57. From the above he appears to think that the first **45 days’** notice he had issued before **Kitale ELC No 7 of 2015** was filed was still valid. However in the opinion of this court the proper and wholistic construction of **Rule 15** of the auctioneer’s rules is that a fresh notice ought to issue upon receipt of any letter of instructions to sell charged property in realization of a chargee’s statutory power of sale. The first notice

issued more than one year previously could no longer be relied on after fresh instructions were received. I therefore hold that no notice was issued in this case by the 4<sup>th</sup> defendant and in addition to the absence of proof of other requisite prior notices as observed hereinbefore, that further vitiates the procedure followed by the 1<sup>st</sup> and 4<sup>th</sup> defendants in the realization of the security in the suit property.

58. Having found procedural defects in the process of sale in realization of the security as above, the next issue this court has to grapple with is whether or not there was fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants.

59. In support of the allegation of fraud the plaintiffs urge the court to refer to the great variance in the valuation between preparation of the registration of the charge which was **Ksh 9,000, 506/=** and the stated forced sale value of **Ksh 1,320,000/=** and avers that the requisites of the **Auctioneers Act 1996** and **Section 98 (e)** and **2** of the **Land Act 2012** were not observed. The plaintiffs' submission is that the **Auctioneers Act** provides that the reserve valuation should not be less than **75%** and more than **25%** of the market value. He faults the advertisement for sale for its failure to bear any date. It is also submitted that none of the bidders had a bid number or paid **Ksh 500,000/=** as required. The plaintiffs posit that it was because the price had been predetermined to suit a certain purchaser. The ability of the 4<sup>th</sup> defendant to have a banker's cheque prepared in Hurlingham in Nairobi on the date of the auction and for it to be presented at the sale in Kitale on the same day also puzzled the plaintiffs. Further it is claimed that the 2<sup>nd</sup> defendant took further credit facilities without informing the chargor who had guaranteed only one credit facility. The 3<sup>rd</sup> defendant is blamed for failure to conduct an official search. It was also submitted that no consent of the land control board was produced by the 1<sup>st</sup> defendant.

60. I will first address the following issues together: **Variance in values given, Failure to Have Bid Numbers and Failure to Pay Ksh 500,000/=, Further Credit Facilities without Notice to The Chargor, and Failure to obtain Consent of the Land Control Board.**

61. There would be need to find out if there is a stark contrast between the forced sale value stated or any reserve price (though it was denied that there was any reserve price) and the value of the suit land relied on before the charge was registered. However the issue is not pleaded in the amended plaint and the same can not be addressed as parties must be bound by their pleadings. Besides, the evidence of the two valuations referred to and of the reserve price were not provided at the hearing. Similarly, the rest of the issues in the subheading above were not raised in the pleadings and can not also be addressed by this court.

#### **Failure by the 1<sup>st</sup> defendant to conduct an official search/historical search.**

62. On this issue the court finds that from the totality of the evidence in the case the 1<sup>st</sup> defendant's efforts at establishing ownership were not clearly described by its witness. However it is the case that the suit land was previously registered in the name of the 2<sup>nd</sup> plaintiff and he became the chargor thereof and the 1<sup>st</sup> plaintiff was not reflected in the register as an owner thereof. The strength of this alleged ground as a basis of proving fraud is dissipated by the fact that no matter whether the search was conducted or not, this court has already found that the consent of the 1<sup>st</sup> plaintiff was not requisite for the impugned charge transaction.

#### **Failing to date advertisement**

63. It is not clear which advertisement the plaintiff refers to; nevertheless, regarding the auction that took place on **10/4/2015**, the newspaper advertisement is dated **7/4/2015**. This ground too can not stand.

#### **The 4<sup>th</sup> Defendant's Cheque.**

64. This court does not find any reason why the 4<sup>th</sup> defendant would not be able in this post-modern age of electronic communications to have a banker's cheque issued in Nairobi under his instructions for purposes of an auction in Kitale. In commercial transactions of the modern day, what occurred is perfectly possible and the plaintiffs have not demonstrated otherwise. However as seen later, this obtainance of a bankers cheque should be considered alongside other facts in order to conclude as to whether fraud occurred.

65. Should it then be concluded that there was no fraud? It is curious that no proof of statutory notices was provided by the 1<sup>st</sup> and 4<sup>th</sup> defendant. It is also quite uncanny that for a property of no mean market value, a reserve price had not been set by the chargee. The 3<sup>rd</sup> defendant stated that he was not given any reserve value, but was given by the 4<sup>th</sup> defendant a figure of **Ksh 2,500,000/=**. From a perusal of the report dated **10/4/2015** on the auction sale, bids for 2 other properties involved failed to rise above the reserve price. That implies there was a reserve price fixed in respect of other properties. Why was therefore no reserve price set for the suit property? The 3<sup>rd</sup> defendant's bid for the suit land was said to be far above the forced value. The auctioneer in the same report complains that "*drastic changes in the valuation figure just a few days to the auction really affected our auction strategies and recommend that valuation reports are supposed to always be forwarded to us earlier enough...*"

66. No evidence of such drastic changes in valuation was provided by the 1<sup>st</sup> and 4<sup>th</sup> defendants. In this court's view it was necessary for the 1<sup>st</sup> and 4<sup>th</sup> defendants to avail evidence of the kind of drastic changes in the valuation figure just a few days to the auction more so due to the plaintiffs' complaint in their amended plaint and counterclaim respectively that:

a. *There was fraud;*

b. *No reserve price was set;*

c. *The initial value of the suit land was Ksh 9,506,000/= and the sum of Ksh 2, 500,000/= does not warrant the purchase price;*

67. The presumption this court takes is that the evidence of the drastic changes alluded to would have been adverse to the 1<sup>st</sup> and 4<sup>th</sup> defendants had it been tabled. At this juncture this court must take a wholistic perspective of the events surrounding the sale. Then it becomes clear that no statutory notices were issued to the chargor and borrower by the 1<sup>st</sup> defendant, no notification of sale was issued by the 4<sup>th</sup> defendant, no reserve price was set at the sale, the 3<sup>rd</sup> defendant magically obtained finance remotely from Nairobi and effectively paid for the deposit, and no proof of payment of the balance of the purchase price was provided.

68. The inescapable conclusion is that the plaintiffs have established on a balance of probabilities that there was fraud and collusion and that involved the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the transaction. Consequently, the 3<sup>rd</sup> defendant can not hide behind the protective provisions of **Section 99** of the **Land Act** as he was clearly part of the fraud.

**Whether variation of interest if any was valid.**

69. On this issue the court only needs only refer to the charge document which is the agreement between the parties.

70. The charge dated 20/12/2010 stated at **clause 2** on page 2 thereof that the bank could vary the interest on any of the secured accounts at its sole discretion without the need for prior notification of the chargor. The same clause is contained in **clause 2** at page 4 of the further charge dated 3/6/2011. The court can not rewrite the contract between the parties and the case law cited by the plaintiff's counsel (**Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR; Spares & Services & 2 Others vs. Trans-National Bank Kisumu HCCC NO. 439 of 1994.**) no doubt supports that position. There is no merit in the claim that the 1<sup>st</sup> defendant was obliged to give the 2<sup>nd</sup> plaintiff or the 2<sup>nd</sup> defendant any notice prior to variation of interest rates.

***Whether The 4<sup>th</sup> Defendant Was A Bona Fide Purchaser For Valuable Consideration.***

71. The 3<sup>rd</sup> defendant claims that he saw an advertisement for auction and purchased the suit land at the scheduled auction. He testified that he was the highest bidder and he paid the deposit at the auction and later settled the balance. The copy of cheque for the deposit was produced in evidence at the hearing. However no evidence of payment of the balance was tendered. The 3<sup>rd</sup> defendant relied on **Section 99(1)** of the **Land Act 2012** which provides as follows:

**99. Protection of purchaser**

**(1) This section applies to—**

**(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or**

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

**(2) A person to whom this section applies—**

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

**(b) is not obliged to see to the application of the purchase price;**

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

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

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

72. The 3<sup>rd</sup> defendant also relied on the decision in **Joyce Wairimu Karanja v James Mburu Ngure & 3 others [2018] eKLR:**

. "32. In similar vein, the Court of Appeal had this to say in **Nancy Kahoya Amadiva v Expert Credit Limited & Another:**

"The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser" In **Captain Patrick Kanyagia and Another v Damaris Wangeci and others**, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**. In **Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported)**, this court held that a purchaser at a public auction was

protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice.”

73. The definition of a *bona fide* purchaser is one who genuinely intends to purchase the property offered for sale and does not intend to acquire it wrongly. A *bona fide* purchaser may successfully rely on the *bona fide* doctrine if he proves that:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

74. The 3<sup>rd</sup> defendant holds a certificate of title, having purchased the land from the 1<sup>st</sup> defendant at an auction held by the 4<sup>th</sup> defendant. The vendor being the chargee had no good title as the right of exercise of the statutory power of sale had not accrued. The plaintiffs proved a number of irregularities that occurred before and after land was sold and this court has found that fraud on the part of the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants has been proved. It can be seen that the auctioneer expressed himself to be of the belief that a notice having been issued one year previously, another one was not necessary. This can only be taken to be his understanding of the **Auctioneers Rules** and he was not corrected by the advocates for the chargee when they received his communication of intent. I therefore conclude that the 3<sup>rd</sup> defendant was not a *bona fide* purchaser for value without notice.

*(d) What orders should issue?*

75. The plaintiffs have failed to prove that matrimonial consent was needed but have established that there was fraud in the sale of the suit land. **Prayers no (a) (b)(i)** can not issue for the reason that the exercise of the power of sale has been exercised albeit wrongfully.

76. **Prayer no (c)(i), d(i) and (e)(i)** in the amended plaint dated **14/8/2018** and the prayer in the counterclaim for a declaration that the 2<sup>nd</sup> plaintiff owns the land are merited.

77. The upshot of the foregoing is that the plaintiffs have proved on a balance of probability their claims in the amended plaint dated **14/8/2018** and the counterclaim dated **2/10/2017**. The 3<sup>rd</sup> defendant has on his part failed to prove his claim in the plaint dated **19/10/2016**.

78. I therefore issue the following final orders against the defendants jointly and severally:

- i. **The plaintiffs' claim in the amended plaint dated 14/8/2018 and the 2<sup>nd</sup> plaintiff's claim in the counterclaim dated 2/10/2017 are hereby allowed.**
- ii. **The 3<sup>rd</sup> defendant's claim in the plaint dated 19/10/2016 lacks merit and is hereby dismissed.**
- iii. **A declaration is hereby issued declaring that the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant in collusion with the 4<sup>th</sup> defendant acted illegally, unlawfully and fraudulently in disposing the suit land to the 3<sup>rd</sup> defendant since no accrued statutory power of sale had accrued in respect of the suit land.**
- iv. **A declaration that the transfer to the 4<sup>th</sup> defendant is void and of no effect and is hereby cancelled and the title shall revert to the name of the 2<sup>nd</sup> plaintiff.**
- v. **The defendants shall bear the costs of the suit and the counterclaim.**

Dated, signed and delivered at Nakuru via electronic mail on this 30<sup>th</sup> day of September, 2021

MWANGI NJOROGE

JUDGE, ELC.