



**Owino v Barclays Bank of Kenya Limited & another (Commercial Case 360 of 2018)
[2024] KEHC 5896 (KLR) (Commercial and Tax) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 360 OF 2018**

MN MWANGI, J

MAY 15, 2024

BETWEEN

JUDY AWUOR OWINO PLAINTIFF

AND

BARCLAYS BANK OF KENYA LIMITED 1ST DEFENDANT

JACKLINE KURGAT 2ND DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 5th September, 2018 and amended on 10th September, 2018 instituted this suit against the defendants seeking judgment against the defendants as hereunder -
 - i. A declaration that the sale by public auction of Apartment No. 5-75C fourth floor Block 5 erected on L.R. No. 209/6491 (Original Number 209/6491) Kileleshwa, Nairobi by the 1st defendants whether by themselves, their agents and/or servants that took place on 6th September, 2018 was unlawful and therefore null and void;
 - ii. An injunction restraining the 1st and 2nd defendants whether by themselves, their agents and/or servants from registering or completing any conveyance or transfer of any sale concluded at the public auction held on 6th September 2018, taking possession, appointing receivers or administrators or exercising any power of a chargee to lease, let, charge or otherwise howsoever interfere with the applicant's ownership of and title to Apartment No. 5-75C fourth floor Block 5 erected on L.R. No. 209/6491 (Original Number 209/6491) Kileleshwa, Nairobi;
 - iii. An injunction restraining the 1st defendant whether by itself, his agents and/or servants from arbitrarily varying the rate of interest without notice to the plaintiff;
 - iv. Damages;



- v. Costs of this suit;
 - vi. Interest on costs at Court rates; and
 - vii. Any other or further relief as this Honourable Court may deem fit to grant.
2. The plaintiff's case is that it was the registered owner of Apartment No. 5-75C fourth floor Block 5 erected on L.R. No. 209/6491 (Original Number 209/6491) Kileleshwa, Nairobi at the time of institution of this suit. She obtained a loan facility of Kshs. 4,700,000/= from the 1st defendant which facility was secured by a charge over the suit property. She averred that she faithfully made payments towards settlement of the said loan and never received any notices regarding any arrears from the 1st defendant and/or its agents. However, the 1st defendant instructed Regent Auctioneers to auction the suit property which was subsequently advertised, and sold at a public auction held on 6th September, 2018. The said property was sold to the 2nd defendant, the winning bidder at Kshs. 12,000,000/=, whereas it was worth approximately Kshs.20,000,000/=.
 3. It was stated by the plaintiff that the suit property was wrongfully attached and sold since the 1st defendant never issued her with the requisite statutory notices as contemplated under Sections 90 & 96 of the *Land Act*, No. 6 of 2012. Thus, she was not aware of the nature and extent of the default, the amount (if any) that she was required to pay to rectify the default, and the time within which the said payment must be completed. She further stated that Regent Auctioneers who sold the suit property, also never served her directly with the notice of sale contemplated under Rule 15 of the Auctioneers Rules, 1997, as instead, the said notice was served on her tenant who resided on the suit property.
 4. The plaintiff contended that between August 2017 and September 2018, the 1st defendant varied the interest rates upwards without prior notice to her as was required by the charge document. She sought clarification of the same from the 1st defendant's employees severally but to no avail. She asserted that the 1st defendant by selling the suit property subjected her to irreparable loss and damage.
 5. In opposition to the plaintiff's suit, the 1st defendant filed a statement of defence dated 28th November 2018 denying all the averments in the plaintiff's plaint. The 1st defendant averred that it advanced to the plaintiff a loan facility of Kshs. 4,700,000/= secured by a legal charge dated 20th June, 2014 over the suit property. However, the plaintiff defaulted in making her monthly instalments and the amount due to the 1st defendant from her as at 4th May, 2018 was Kshs. 4,491,946.25, which amount has not been settled as at the time of filing the statement of defence. The 1st defendant asserted that the plaintiff was served with the requisite statutory notices dated 24th January, 2018 and 4th May, 2018 via her registered post as indicated in the charge document dated 20th June, 2014, but she did not rectify the default. That consequently, Regent Auctioneers under the instructions of the 1st defendant served the plaintiff with a 45 days' redemption notice and notification of sale informing her that the suit property would be auctioned on 6th September, 2018.
 6. The 1st defendant further averred that the suit property was successfully sold on 6th September, 2018 at a public auction to the 2nd defendant for Kshs. 12,000,000/= and a memorandum of sale was drawn to that effect. It was stated by the 1st defendant that prior to the sale of the suit property, a valuation of the property was done by Sec & M company limited and a report dated 8th January, 2018 prepared, which indicated that the market value of the suit property with special assumption/reserve price as Kshs.12,000,000/=. The 1st defendant asserted that the plaintiff cannot claim that she was in the dark yet there are email correspondences between her and the 1st defendant, and that she even had a representative by the name Irungu Gicheru present during the auction, who having not faulted the auction process is estopped from challenging the propriety thereof.



7. The 1st defendant averred that the interest rates applied to the loan were in accordance with the charge which provided under clause 2(d) that the 1st defendant was not required to seek the plaintiff's consent prior to making any changes in the rate and methods of calculating interest. The 1st defendant stated that in any event, the plaintiff has not denied being indebted to the 1st defendant, hence it should be allowed to proceed and exercise its statutory power of sale.
8. The 2nd defendant on the other hand filed a statement of defence and counter-claim dated 17th December, 2018. In her defence, she denied all the averments in the plaintiff's plaint but admitted that the plaintiff was the registered owner of the suit property. She averred that the sale of the suit property by a public auction held on 6th September, 2018 was advertised in the Nation Newspapers of 20th August, 2018. That on 6th September, 2018, she attended the said auction and her bid of Kshs.12,000,000/= was the highest bid, thus a memorandum of sale was prepared. That upon paying 25% deposit of the purchase price which was equivalent to Kshs.3,000,000/=, she was issued with a certificate for sale. The 2nd defendant further averred that the said auction sale complied with all legal procedures thus it was beyond reproach. She asserted that being a bonafide purchaser for value without notice, she is entitled to vacant possession of the suit property, and has unfettered rights to use the property as she deems fit.
9. The 2nd defendant in her counter-claim averred that towards settlement of the purchase price of the suit property, on 3rd September, 2018 she made a payment of Kshs.1,100,000/= which was followed by a payment of Kshs.7,900,000/= made on 13th September, 2018, thus making full payment of the purchase price. She further averred that it was a term of the agreement that once she made full payment of the purchase price, she would be issued with ownership documents of the suit property, but she is yet to receive the said documents and even access the suit property.
10. The 2nd defendant prays for-
 - a. The plaintiff's suit to be dismissed with costs;
 - b. A declaration that the 2nd defendant/plaintiff in the counter-claim is the rightful owner of Apartment No. 5-75C, fourth floor, Block 5 situate on property known as Nairobi/Block 209/6491;
 - c. The injunction against the 2nd defendant to be lifted;
 - d. The plaintiff in the main suit and 1st defendant to be compelled to facilitate transfer and execute transfer in favour of the 2nd defendant;
 - e. General damages for loss of business at the sum of Kshs.80,000/= per month as from 6th September, 2018 until full possession is granted;
 - f. The plaintiff to bear costs of this suit;
 - g. Interest on (e) & (f) above at Court rates; and
 - h. Any other relief that the Honourable Court may deem fit to grant.
11. The plaintiff filed a reply to the defence and a defence to the 2nd defendant's counter-claim dated 5th February, 2018 where she denied all the averments contained in the 2nd defendant's counter-claim and averred that the 2nd defendant having had the highest bid of Kshs.12,000,000/= which happened to be the reserve price, colluded with the Auctioneer to defeat her interest in the suit property. She further averred that the deposit of 25% of the purchase price being Kshs.3,000,000/= was not paid by the 2nd defendant at the fall of the hammer in breach of the conditions of sale. The plaintiff asserted that the



2nd defendant is not a bonafide purchaser for value, thus she is not entitled to vacant possession of the suit property. The plaintiff prayed for the 2nd defendant's counter-claim to be dismissed with costs, and for judgment to be entered for her as prayed in the plaint.

12. This case proceeded to hearing, wherein the plaintiff testified as PW1 and called two witnesses in support of her case. The 1st defendant called two witnesses, whereas the 2nd defendant testified on her own behalf as DW3.

THE PLAINTIFF'S CASE.

13. Judy Awuor Owino testified as PW1. Her evidence was that she is the registered owner of the suit property which was charged to the 1st defendant by a charge instrument dated 20th June, 2014 to secure a loan of Kshs. 4,700,000/= disbursed to her on 18th July, 2014. She stated that to facilitate payment of the said loan, she was advised by the 1st defendant to open a loan account No. 2030871319 and current account No. 2028905672, which she did. PW1 indicated that she is based in the United States of America, a fact which is within the 1st defendant's knowledge, and so her communication with the 1st defendant is mostly done through email, WhatsApp messaging and telephone conversation with the 1st defendant's representatives. She further stated that she was never informed in any way whatsoever that her loan had been recalled, and that her apartment was going to be sold so as to recover the said loan. She only learnt on 27th June, 2018 from her tenant that her apartment was going to be sold in a public auction that was to be held on 6th September, 2018.
14. It was stated by PW1 that she was never served with any of the statutory notices contemplated under Sections 90 & 96 of the Land Act and Rule 15 of the Auctioneer's Rules, 1997. PW1 testified that by an email sent on 23rd July 2018, the 1st defendant's Advocate informed her Advocate that her loan was recalled in October 2017, thus the entire loan was in arrears. She explained that the foregoing came as a surprise to her since on 4th September, 2017, one of the 1st defendant's employees by the name Lucy asked her to pay Kshs.56,000/=, which she did on 6th September, 2017. That on 28th September, 2017, the said Lucy asked her via WhatsApp to remember to make payment early the following day, and on 29th September, 2017 she made a payment of Kshs. 79,000/= to the 1st defendant and Lucy acknowledged receipt of the said amount via WhatsApp. It was her evidence that thereafter, she continued paying Kshs.75,000/= as her monthly instalments as from 6th November, 2017 up to the time she found out that the suit property was going to be auctioned.
15. PW1 stated that the demand letter dated 11th January, 2018 that was purportedly emailed and hand delivered to her did not reach her as she was out of the country at the time, thus there was no way it was hand delivered to her. He also stated that the email address used to send her the said demand was not her email address, as the email address the letter was sent to was igowno@gmail.com whereas her email address is igowino@gmail.com. She further asserted that the statutory notices dated 24th January, 2018 and 4th May, 2018 purportedly sent to her via registered post to an address in Nairobi never got to her since she was not in a position to collect them because she was out of the country at that time, a fact which was within the 1st defendant's knowledge. It was stated by PW1 that the Valuation Report relied on by the 1st defendant clearly shows that the Valuer was unable to access the suit property to carry out the said valuation.
16. She contended that page 7 of the said Valuation Report states that the suit property comprises a lounge leading to private balcony, whereas the suit property has no lounge that leads to a private balcony. Further, that the Valuer states that the unit is owner occupied, whereas the suit property is occupied by a tenant, since she resides in the United States. In view of the above, PW1 urged this Court not to rely on the said Valuation Report, but to instead rely on the one prepared by Ultimate Valuers, who



- inspected and valued the suit property on her instructions on 8th February, 2019 and came up with a market value of Kshs. 20,000,000/= and a forced sale value of Kshs.15,000,000/=. PW1 testified that she also instructed Interest Rates Advisory Centre to go through her account statements and find out whether her account was in arrears. Thereafter, IRAC came back with a report that indicated she was not in arrears and that she had overpaid her loan by Kshs.402,349.01.
17. In cross-examination by Mr. Wilson, the learned Counsel for the 1st defendant, PW1 confirmed that the postal address that appears on the charge document is the same one that she used when she applied for the loan, and it belongs to her. She also confirmed that the charge document at page 34 Clause 41 allowed the 1st defendant to send the statutory notices via registered post. PW1 confirmed that the letter dated 21st January, 2018 bearing her postal address was sent to her via registered post on 30th January, 2018 and that the 1st defendant issued her with a 45 days' redemption notice. She also admitted that the letter dated 4th May, 2018 was also sent to her via registered post on 7th May, 2018, and that the 1st defendant issued her with a 40 days' notice. She however stated that she did not receive the said notices despite the fact that the address was correct, since she was no longer living in Kenya.
 18. It was stated by PW1 that she used to make monthly payments of Kshs.75,000/=, which payments were due on every 10th day of the month. She however acknowledged that there were times when she was late with the payments but she always communicated with the 1st defendant. She further stated that sometimes she would be overcharged as reflected in the IRAC Report. PW1 stated that she has a tenant on the suit property who pays Kshs.73,000 per month. She did not produce a lease agreement to that effect. Further, she did not have a certificate of electronic device for the emails and screenshots of WhatsApp communication between herself and Ms. Serem an employee of the 1st defendant.
 19. On being cross-examined by Mr. Muganda, learned Counsel for the 2nd defendant, PW1 confirmed that she was aware of the notification of sale of the suit property, and that it was sold to the 2nd defendant on 6th September, 2018 after it was advertised on 20th August, 2018. She confirmed that there is a receipt indicating that Kshs.12,000,000/= was paid for the suit property. PW1 confirmed that she is still in possession of the suit property and she is still receiving rent from the tenant occupying it.
 20. In re-examination, PW1 testified that she moved to the United States of America in the year 2016 and she informed the 1st defendant, and the said defendant was aware of the same. She indicated that there was no hand delivery of the letters dated 11th January, 2018. She further testified that she was informed by the post office that the notices and/or letters sent to her via registered post went back to the senders. She stated that after she received the Auctioneer's notice, she contacted Lucy, an employee of the 1st defendant who informed her that the matter had been transferred to someone else. She further stated that they communicated throughout, up to September 2018, and Lucy told her what to pay and she continued paying. PW1 asserted that she still owns the property and she is still paying for it.
 21. Mr. Wilfred A. Onono testified as PW2. His evidence was that he was the Managing Consultant at IRAC who prepared a report dated 10th February, 2018 based on statements from the bank (1st defendant). From his report, he concluded that the plaintiff borrowed Kshs.4,200,000/= from the 1st defendant and that by June 2018, she had paid Kshs.3,400,000/=: and as at 21st June, 2018, there was an overcharge of Kshs. 256,983/=.
 22. During cross-examination by Mr. Wilson, learned Counsel for the 1st defendant, PW2 testified that the re-calculated overcharge is Kshs.402,349/= and contended that the Report at pages 105 to 113 can be expunged. He confirmed that he was aware that the plaintiff had defaulted, but the arrears were factored in his re-calculations. PW2 stated that from the year 2014, they applied a rate of 29.5% on the arrears. He confirmed that the plaintiff was still in arrears.



23. The Court asked PW2 to state the amount in arrears since it was not indicated in the Report. He referred the Court to page 14 and stated that as at 21st June, 2018 the amount in arrears was Kshs.441,560.09 and as at 17th September, 2018 the amount in arrears was Kshs.540,206.68.
24. In re-examination PW2 stated that he applied the rate of 29.5% on arrears since the letter of offer provided for an excess rate of 29.5%.
25. Mr. Edwin Mutwiri testified as PW3. His evidence was that his Valuation Report of Apartment No. No. 5/75C gives a value of Kshs.20,000,000/= and forced sale value of Kshs.15,000,000/=. He stated that there were discrepancies in the 1st defendant's report as to the description, as the suit property has no balcony.
26. In cross-examination by Mr. Wilson, learned Counsel for the 1st defendant, PW3 stated that he inspected the suit property on 18th February, 2019. He indicated that they do not put comparables, and that is why there was nothing to show comparables in his report. He further indicated that he saw the 1st defendant's Valuation Report which was prepared on 8th January, 2018 after an inspection that was done on 5th January, 2018, a year earlier than his report.

THE 1ST DEFENDANT'S CASE.

27. Mr. Samuel Njuguna testified as DW1. He stated that he is an employee of the 1st defendant, where he works in the capacity of a Legal Manager, Recoveries. He testified that the plaintiff defaulted in her loan repayment obligations and that thereafter on diverse dates, the 1st defendant issued her with demand letters with a view to her regularizing her account but she failed to remit the outstanding payment towards the loan prompting the 1st defendant to instruct its Advocates on record to activate the realization process. DW1 further testified that as at 4th May, 2018, the plaintiff's debt to the 1st defendant was Kshs.4,491,946.25 which has not been settled to date. He stated that the 1st defendant is within its rights to exercise its statutory power of sale over the suit property.
28. It was stated by DW1 that the 1st defendant duly issued the plaintiff with the requisite statutory notices in compliance with Sections 90(2) and 96 of the *Land Act*, 2012 via registered post, but the plaintiff still remained in arrears of the debt owed. Further, that the interest rate applied to the loan was in accordance with Clause 2(d) of the Charge which also provided that the 1st defendant was not required to seek the plaintiff's consent prior to any change in the rate and method of calculating interest. He stated that in any event, a dispute on interest or the amount owed is not a sufficient ground to prevent a Chargee from exercising its statutory power of sale. DW1 asserted that the plaintiff's postal address as indicated in the charge document is the same one that appears on the statutory notice. He testified that the 1st defendant also communicated to the plaintiff through email.
29. It was DW1's evidence that vide a letter dated 26th June, 2018, Regent Auctioneers served the plaintiff with the 45 days' Redemption Notice and Notification of Sale on the 1st defendant's instructions informing her that the suit property would be auctioned on 6th September, 2018. That subsequently, the property was advertised and sold in an auction held on the said date to the 2nd defendant at Kshs.12,000,000/= and a Memorandum of Sale was drawn to that effect. DW1 adduced evidence that the 2nd defendant has since paid the 1st defendant the said sum of Kshs.12,000,000/= and the balance after deduction of the valuation cost, legal costs and the Auctioneer's costs has been debited to the plaintiff's account. He confirmed that the suit property was valued before it was sold and the Valuation Report gave its market value as Kshs.12,000,000/=.



30. In cross-examination by Mr. Ogada, learned Counsel for the plaintiff, DW1 testified that the plaintiff defaulted in making periodic payments of Kshs. 75,573/= in the year 2017. He confirmed that staff of the 1st defendant were in communication with the plaintiff through email and WhatsApp, but they did not communicate to her that she was in default. He referred to a letter dated 11th January, 2018 addressed to the plaintiff by the 1st defendant's Advocates on record and stated that the letter was sent to the plaintiff via her email address and it was also delivered to her by hand delivery. DW1 stated that the said letter demanded the plaintiff to make immediate payment of Kshs.4,435,124.00 within seven (7) days. He confirmed that he was aware that the plaintiff was living in the United States of America and it was hard to hand deliver a letter to someone living in the United States of America.
31. DW1 stated that an email was sent by John Kang'ethe to the plaintiff vide an email address igowno@gmail.com communicating issuance of a statutory notice, however the plaintiff's email address is igowino@gmail.com. He further stated that the 1st defendant sent statutory notices to the plaintiff's last known address which recalled the entire loan. He confirmed that once a letter is not collected at the postal address it is sent to, it is returned to sender. DW1 stated that the statutory notices sent to the plaintiff were not sent back to the 1st defendant. DW1 testified that according to the charge document, a 30 days' notice was required to be given to the borrower of changes in interest rates, but he had no document to show that the plaintiff received such notices. He asserted that the redemption notice was served on the plaintiff by registered mail to her Kenyan address and was also affixed on the door of her house.
32. During cross-examination by Mr. Muganda, learned Counsel for the 2nd defendant, DW1 stated that as at 7th September, 2018, there was no Court order stopping the sale of the suit property. He further stated that the auction was conducted successfully and was witnessed by Mr. Irungu Gacheru, a representative of the 1st defendant. He confirmed that the 2nd defendant paid the full purchase price being Kshs.12,000,000/= and a Certificate of Sale was issued. He asserted that the said money has been applied to the facility owed and is no longer available. DW1 confirmed that DW2 has neither taken possession of the suit property nor her money.
33. In re-examination, he stated that as per the charge document, once a notice is sent by registered post, it is deemed as adequate service. In any event, the charge document did not provide for email as a mode of service of notices. In addition, there was no communication that the plaintiff's postal address had changed. DW1 contended that the plaintiff had not denied being in default and there was no claim for variance of interest rates in the amended plaint. He also stated that Clause 2(e) of the charge documents provides that the rate that appears on the loan statement is the correct rate.
34. Mr. Humphrey Kaburu Michael testified as DW2. He stated that he is a Valuation Surveyor and his work entails valuation of different properties and preparation of reports on the same.
35. In cross-examination by Mr. Ogada, learned Counsel for the plaintiff, DW2 indicated that his Valuation Report is dated 5th January, 2018 in relation to apartment No. C5-75 of a development in Kileleshwa on the 5th floor. He testified that he conducted the said valuation on 5th January, 2018 by procuring the land registration number, search, certificates and maps which helped him identify the property. He then visited the property, did the inspection of the neighborhood, the development and then the specific apartment. He further averred that he got into the property where he found the House Manager who allowed him to take photographs that are seen at page 6 of his report, to show the development and interior of the apartment. He stated that he did not get the property owner during his visit and there was a small room that he did not gain access to.



2ND DEFENDANT'S CASE

36. Jackline Chepchirchir Kurgat testified as DW3. Her evidence was that she learnt that the suit property would be sold in a public auction scheduled for 6th September, 2018 vide an advertisement through a Daily Nation newspaper of 20th August, 2018. She testified that she participated in the said auction and her bid of Kshs.12,000,000/= emerged as the highest bid. She expressed the view that the auction sale was fair, transparent and was conducted in conformity with all legal provisions underpinning auction sales for immovable property. DW3 stated that Mr. Irungu Gacheru, a representative of the plaintiff was at the auction and raised no questions or objection in relation to the manner in which the whole process was conducted.
37. It was stated by DW3 that a Memorandum of Sale was then drawn and she was required to pay a deposit of Kshs.3,000,000/= which she did. That the balance of Kshs.7,900,000/= was to be paid within ninety (90) days of the auction, and it was paid on 13th September, 2018, and that Kshs.1,100,000/= had been paid on 3rd September, 2018. She further stated that she was supposed to be issued with ownership documents and assume vacant possession of the suit property once she completed payment of the purchase price for the said property, but to date she has neither received the said documents nor has she been able to access the said property.
38. DW3 asserted that she is the bona fide purchaser for value of the suit property without notice of any defects in title, thus her interest in the suit property cannot be defeated by the Chargor who long extinguished her right of redemption. DW3's evidence was that she bought the suit property so that she could rent it out at a monthly rent of Kshs.80,000/=. She sought compensation for the rent not collected as from 6th September, 2018.
39. During cross-examination by Mr. Ogada, learned Counsel for the plaintiff, DW3 stated that she paid Kshs.1,100,000/= on 13th September, 2018 through National Bank of Kenya and Kshs.7,900,000/= through Faulu Bank of Kenya. She further stated that the 1st defendant's Advocates on record drew the Memorandum of Sale on 6th September, 2018.
40. In cross-examination by Ms Muthee, learned Counsel for the 2nd defendant, she stated that the auction sale complied with all legal requirements thus it was beyond reproach.
41. In re-examination she indicated that she has never gained access to the suit property.
42. After closure of the defendants' case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 22nd August, 2023 by the law firm of Prof. Migai Akech & Associates Advocates, the 1st defendant's submissions were filed on 1st November, 2023 by the law firm of Muriu, Mungai & Company Advocates, and the 2nd defendant's submissions were filed by the law firm of Sagana, Biriq & Company Advocates on 26th September, 2023.
43. Mr. Ogada, learned Counsel for the plaintiff stated that it is noteworthy that the initial demand letter sent to the plaintiff was sent through an incorrect email address and it is the plaintiff's position that she was never served with the statutory notices as required under Sections 90 and 96(2) of the *Land Act*, to allow her make good on any default while exercising her equitable right of redemption. To buttress this submission, Counsel relied on the cases of David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR, Isaiah Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another [2020] eKLR, and David Limo Bundotich v Housing Finance Company of Kenya Limited [2022] eKLR.
44. He further submitted that in as much as the 1st defendant stated that the said statutory notices were served on the plaintiff through the postal address provided in the Charge dated 20th June, 2014, at



the time of sending the alleged notices, the 1st defendant was fully aware that the plaintiff was not physically present within the territorial jurisdiction of Kenya as she was a resident of the United States, thus she could not receive any registered mail sent through her post office address. Counsel contended that it is not disputed that the said notices were not served on the plaintiff through her known email and/or WhatsApp. He relied on the Canadian case of *Biogen Idec MA v The Attorney General of Canada* 2016 FC 517 (CanLII) and invited this Court to take judicial notice that pursuant to the provisions of Section 59 as read with Section 60(m) & (o) of the *Evidence Act*, the procedure in regard to registered mail or post have a universal character as part of harmonized practice under the auspices of the Universal Postal Union in its Postal Parcels Manual, and the practices in regard to registered post are of sufficient local notoriety.

45. He submitted that Kenya being a State Party to the Universal Postal Union, one of the oldest treaty regimes in the world, the Court should take judicial notice of the fact that as regards registered mail, one has to produce an identity card to be able to have possession (as aspect of delivery) of the postal item. He contended that in this case, the plaintiff could not have received the notices sent to her by the 1st defendant by way of registered mail, therefore she was unable to exercise her equitable right of redemption. The above notwithstanding, Counsel argued that the impugned statutory notice does not meet the substantive requirements set out under Section 90(2) of the *Land Act* since it fails to adequately inform the plaintiff of the extent of default in so far as periodic payments are concerned. He asserted that failure to serve the notice on the plaintiff amounts to an irredeemable illegality.
46. Mr. Ogada relied on the provisions of Rule 15 of the Auctioneers Rules, 1997 and submitted that from the affidavit of Mr. Siloya, the Process Server who served the notice contemplated thereunder, service of the said notice was not done in compliance with the provisions therein. Counsel contended that the said affidavit does not offer any explanation as to why the provisions of Rule 15 of the Auctioneers Rules, 1997 were not complied with. He further submitted that failure to notify the plaintiff of the Auctioneer's intentions by notice as required under Rule 15 of the Auctioneer's Rules, 1997 impugns the procedure that ought to be used in exercising the statutory power of sale. Counsel contended that the 1st defendant failed to comply with the provisions of Clause 2(d) of the Charge document which required the 1st defendant to issue the plaintiff with at least thirty (30) days' notice prior to any change in the interest rate or rates payable as confirmed by Mr. Samuel Njuguna (DW1).
47. Mr. Ogada argued that PW2 an expert witness testified to the serious anomalies in regard to the interest rates levied by the 1st defendant, thus overcharging the plaintiff by Kshs.402,349.00. Counsel stated that the testimony was not controverted by any of the 1st defendant's witnesses hence it remains unopposed. He stated that failure to notify the plaintiff of variation of the interest rates levied amounts to a breach of a fiduciary duty since the 1st defendant charged interest that was oppressive and unconscionable, which amounted to bad faith on the part of the 1st defendant. Mr. Ogada stated that in light of the discrepancies shown by PW2, the default penalty charges/or interest remain irregular, illegal, unlawful and wrongful and were done without regard to the provisions of Section 44 of the *Banking Act*. He asserted that the said interest should not be claimed from the plaintiff.
48. Mr. Ogada stated that the 2nd defendant cannot rely on the doctrine of an innocent purchaser without value for the reason that the title passed to her is predicated on pertinent illegality. He relied on the Supreme Court of Kenya case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] eKLR and stated that the plaintiff has highlighted how the auction that led to the sale of the suit property was conducted without a statutory notice being issued and in any case, without the Auctioneer's notice being served as required by law. In submitting that a title that is obtained through an illegal or an unprocedural process cannot confer valid title, Counsel referred to the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR.



49. Ms. Muthee, learned Counsel for the 1st defendant relied on the case of *Giella v Cassman Brown* [1973] EA. 358 where the principles to be considered before a Court can grant an injunction were set out. She also relied on the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR, where the Court of Appeal defined what constitutes a prima facie case and submitted that the plaintiff has not proved and/or established a prima facie case against the defendants. She cited the Court of Appeal case of *Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others* [1996] eKLR, and submitted that it is trite law that when a plaintiff disputes service of statutory notices, the burden shifts to the 1st defendant to prove that service was actually effected by presenting a certificate of posting, and thereafter, there is a presumption that the statutory notice was in fact served.
50. She referred to clause 41 of the Charge and stated that the three months' notice dated 24th January, 2018 and the 40 days' notice dated 4th May, 2018 were addressed and sent to the plaintiff's postal addresses provided for in the Charge dated 20th June, 2014. She further stated that annexed to the said letters are certificates of postage confirming the plaintiff was the addressee. Counsel relied on the case of *Ooko v Barclays Bank of Kenya Ltd* [2002] eKLR and asserted that since the plaintiff did not deny that the address used to send her the statutory notices was hers, the 1st defendant had proved on a prima facie basis that she was duly served with all the requisite notices, in line with the terms and conditions of the Charge. Counsel further relied on the decisions in *Ethics & Anti-Corruption Commission & 3 others v African Safari Club Limited 2 others* [2013] eKLR and *Elizabeth Wambui Njuguna vs Housing Finance Co. of Kenya Ltd* [2006] eKLR and argued that the plaintiff did not adduce any evidence from the Postmaster General confirming that the statutory notices were indeed not delivered to her.
51. Ms Muthee cited the provisions of Section 3(5) of the *Interpretation and General Provisions Act* and the case of *Moses Kibiego Yator v Eco Bank Kenya Limited* [2014] eKLR and stated that if at all there was any change in the postal address, the plaintiff had the duty of informing the 1st defendant, which was not done in this case. She submitted that the plaintiff in her plaint did not plead the extent to which the interest rates were varied upwards by the 1st defendant, and what sum she seeks from the Court as a result of the said variance. Ms Muthee submitted that it is trite law that parties are bound by their pleadings, and as such, evidence which tends to be at variance with the pleadings is for rejection. She cited the Supreme Court case of *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR and the Court of Appeal case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR and urged this Court to reject the plaintiff's submissions in regard to the sum of Kshs.402,349.00 allegedly overcharged by the 1st defendant, and the variance of interest by the 1st defendant being in contravention of Section 44 of the *Banking Act*.
52. Counsel for the 1st defendant stated that the plaintiff's testimony was that during the issuance of the notices, she was resident in the USA and wondered how personal service upon her or an adult member of her family was supposed to be effected. Counsel stated that in any event, the said notice was also posted to the plaintiff through registered post. She relied on the email sent by the plaintiff to the 1st defendant on 5th July, 2018 and pointed out that the plaintiff admitted to having received the redemption notice, hence she was now taking advantage of Rule 15 of the Auctioneers Rules to try and defeat the 1st defendant's exercise of its statutory power of sale. She referred to the case of *Erick O. Odindo v National Bank of Kenya Limited & 2 Others* [2008] eKLR, and argued that affixing of the redemption notice on the door of the suit property does not invalidate service. In addition, non-compliance with the provisions of Rule 15 of the Auctioneers Rules would not invalidate a sale as was held by the Court in the case of *John Mwenja Ngumba v Kenya Commercial Bank Limited & another* [2006] eKLR which quoted with approval the case of *Kiran Ramji Kotedia v Trust Bank Ltd HCCC No.1319 of 1999 (UR)*.



53. Ms Muthee cited the decisions in *Zum Zum Investment Limited v Habib Bank Limited* [2014] eKLR and *Ongori v Housing Finance of Kenya Limited & another* [2022] eKLR and urged this Court to find there was no evidence on record presented by the plaintiff to prove that the sale of the suit property by the 1st defendant at Kshs.12,000,000/= by the 1st defendant did not obtain the best price. She relied on the cases of *Sokono Ene Yonko v Moses Shonko & 3 others* [2019] eKLR and *HFC Limited v Peter Musau Kituku* [2022] eKLR. She cited Section 99 of the *Land Act* and submitted that the 1st defendant is capable of refunding the plaintiff the value of the suit property, and in the premise, the balance of convenience tilts in favour of the 1st defendant.
54. Ms Muthee referred to the case of *Lawrence Mukiri v Attorney General & 4 others* [2013] eKLR, where the Court defined who is a bona fide purchaser for value and contended that the law and the Mortgage Agreement between the plaintiff and the 1st defendant allowed for sale of the suit property through public auction, and the plaintiff was duly served with all the statutory notices via her registered postal address as provided for in the charge. Counsel stated that the 2nd defendant paid the entire purchase price for the suit property, and the plaintiff had not demonstrated and/or proved that there was any fraud in the sale of the said property from the 1st defendant to the 2nd defendant, thus the 2nd defendant is a bona fide purchaser for value.
55. Mr. Muganda, learned Counsel for the 2nd defendant cited the provisions of Section 99(1) of the *Land Act* and the Black's Law Dictionary 8th Edition definition of a bona fide purchaser and submitted that the 2nd defendant is a bonafide purchaser of the suit property for value without notice of any defects in title and her interest in the property cannot be defeated by the plaintiff herein who long extinguished her right of redemption. He further submitted that no fault has been associated with the 2nd defendant in regard to the auction. He stated that the limited conditions inviting the power of the Court to set aside an auction have not been pleaded to prejudice the rights of the 2nd defendant in terms of Section 99(3) of the *Land Act*. It was stated by Counsel that pursuant to the provisions of Section 99(2) of the *Land Act*, the 2nd defendant had no obligation to inquire into details with respect to the charged property and/or any default. He asserted that the plaintiff has not pleaded any fault or even sought a prayer against the 2nd defendant.
56. Mr. Muganda cited Section 99(4) of the *Land Act* and the case of *Nationwide Finance Co. Ltd v Meek Industries Ltd* [2005] eKLR and stated that once an auction is done whether unauthorized or otherwise, the only remedy available is damages, and that the said remedy is only available against the person exercising that power of sale. He referred to the case of *Abdi Adan Hussein & 2 others v Attorney General & 2 others* [2017] eKLR and stated that the plaintiff herein had a representative present at the auction, who raised no questions or objections in relation to the manner in which the whole process was conducted. He posited that for the said reason, the plaintiff lost her right of redemption by virtue of the auction sale and the 2nd defendant having purchased the suit property as the said auction is an innocent bonafide purchaser for value without notice of any fraud or impropriety, who is entitled to vacant possession of the property and the prayers sought in the counter-claim.
57. Counsel cited the case of *Bomet Beer Distributors v Kenya Commercial Bank* [2005] eKLR and argued that upon the fall of the hammer, a valid contract was concluded as between the 1st & 2nd defendants which can only be rescinded and or set aside upon proof of fraud, but the plaintiff herein has not specifically pleaded, proved and or demonstrated any fraud committed during the auction, thus the prayers sought in her amended plaint cannot be granted.



ANALYSIS AND DETERMINATION.

58. I have considered and analyzed the evidence adduced alongside the pleadings filed, together with the written submissions by Counsel for the parties. The issues that arise for determination are: -
- i. Whether the 1st defendant served the plaintiff with all the requisite statutory notices;
 - ii. Whether the 1st defendant notified the plaintiff of any change in the rate of applicable interest;
 - iii. Whether the suit property was sold at an undervalue; and
 - iv. Whether the 2nd defendant is a bonafide purchaser for value without any notice of any defects in title.

Whether the 1st defendant served the plaintiff with all the requisite statutory notices.

59. The plaintiff's case is that the 1st defendant did not serve her with the requisite notices as contemplated under Sections 90 & 96 of the Land Act, and Rule 15 of the Auctioneers Rules, and as such, the sale of the suit property to the 2nd defendant was void since the plaintiff's equitable right of redemption had not yet been extinguished by the time the suit property was being sold to the 2nd defendant. The 1st defendant on the other hand submitted that the plaintiff was served with all the requisite statutory notices via her last known postal address which is indicated in the Charge document dated 20th June, 2014. Section 90 of the Land Act provides that –

- “(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.
- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters –
- a. the nature and extent of the default by the chargor;
 - b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
 - c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;
 - d. 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 this section in accordance with the procedures provided for in this sub-part; and



e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may...

60. Section 96(2) of the Land Act on the other hand provides that –

“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 the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

61. The 1st defendant contended that the plaintiff defaulted in making her monthly instalments and that the amount due to the 1st defendant from her as at 4th May, 2018 was Kshs.4,491,946.25, which amount has not been settled to date. The defendant stated that it was for that reason that the plaintiff was served with the ninety days’ statutory notice dated 24th January, 2018. In cross-examination by Counsel for the 1st defendant, the plaintiff acknowledged that there were times that she was late when making her monthly repayments to the 1st defendant but she would always communicate with the 1st defendant. Further, she testified that normally she would make monthly repayments of Kshs.75,000/= to the 1st defendant on or before the 10th day of every month. I however note that the plaintiff testified that in the month of September 2017, she made a payment of Kshs.56,000/= on 6th September, 2017 and another one of Kshs.79,000/= on 29th September, 2017.

62. Cumulatively in the month of September 2017 the plaintiff paid the defendant a total of Kshs.135,000/=. Despite making a payment that was over and above what she was supposed to pay to the 1st defendant on a monthly basis, the plaintiff did not offer any explanation as to why that was the case. She then went ahead to state that she continued paying Kshs.75,000/= as her monthly instalment as from 6th November 2017 but does not explain and/or state whether she made payments for the month of October 2017. This therefore gives credence to the 1st defendant’s assertion that the plaintiff started defaulting in making her monthly instalments to the 1st defendant in October 2017.

63. It is noteworthy that PW2 who was an expert witness from IRAC called by the plaintiff upon cross-examination by Counsel for the 1st defendant stated that he was aware the plaintiff had defaulted and was due in arrears. He further stated that as at 21st June, 2018, the amount in arrears was Kshs.441,560.09 and as at 17th September, 2018 the amount in arrears was Kshs.540,206.68. In light of the foregoing, I am persuaded that the plaintiff was in arrears and/or had defaulted in making her monthly instalments to the 1st defendant, thus the 1st defendant was within its rights to invoke the provisions of Section 90 of the Land Act. It is however my considered view that the demand letter dated 11th January, 2018 written to the plaintiff by the 1st defendant’s Advocates on record never reached the plaintiff since it is not disputed that at the time it is alleged to have been hand delivered to her, she was not in Kenya as she was residing in the United States of America, and the email address it was sent to, was not hers.

64. DW1 testified that as a result of the plaintiff’s persistent default, the 1st defendant issued her with a statutory notice dated 24th January, 2018. On perusal of the said letter annexed to the 1st defendant’s bundle of documents dated 28th November, 2018, I note that it clearly communicates to the plaintiff the nature of the default, the extent of the default, the nature of compliance that is expected of her, the period of compliance, and the consequences of not complying. The said letter indicates that the



- plaintiff was expected to pay the 1st defendant Kshs. 4,435,124.5 within ninety days from the date of the said letter, that was on or before 24th April, 2018 failure to which the 1st defendant would initiate the process of realization of the securities. I am therefore satisfied that the letter dated 24th January, 2018 was for all intents and purposes a statutory notice under Section 90 of the [Land Act](#).
65. It was submitted that upon the lapse of the ninety days, by a letter dated 4th May, 2018, the 1st defendant sent to the plaintiff a statutory notice as contemplated under Section 96(2) of the [Land Act](#). On perusal of the said letter, I note that it referred to the letter dated 24th January, 2018 and it notified the plaintiff that unless the sum of Kshs.4,491,946.25 was paid within 40 days of the said letter, the suit property would be sold by way of public auction. In the circumstances, I am persuaded that the said letter was for all intents and purposes a statutory notice under Section 96(2) of the [Land Act](#). DW1 stated that the aforementioned letters were sent to the plaintiff through her postal address as captured in the Charge. and he produced certificates of postage in support of his evidence.
66. PW1 contended that since the 1st defendant was aware that she resides in the United States of America, it ought to have served the said notice to her via her email address and/or WhatsApp, since all other communications with the 1st defendant have also been through the said platforms. On the plaintiff being cross-examined, by Counsel for the 1st defendant, she confirmed that Clause 41 of the Charge dated 20th June, 2014 allowed the 1st defendant to send statutory notices via registered post. On perusal of Clause 41 of the Charge dated 20th June, 2014, I note that it provides that notices or demands shall be deemed to have been properly served if delivered by hand or sent by registered post, telex or fax to the borrower's registered office or at any of the principal places of business in Kenya, or the last known place of abode of the Chargor.
67. It is worth noting that the plaintiff admitted that the postal address that appears at the said statutory notices is hers. Therefore, in the absence of any other agreement to the contrary, the 1st defendant made no mistake and acted in accordance with Clause 41 of the Charge document when it sent the plaintiff the aforementioned statutory notices via registered post. Since the post office box number she had given to the 1st defendant was open and active, and the plaintiff had not issued any instructions to the 1st defendant not to send any demands and/or notices to the said postal address, the plaintiff had the duty to ensure that she had someone regularly checking her postal box to confirm whether there were any letters addressed to her that should be brought to her attention.
68. The plaintiff asserted that since she was out of the country, she did not receive the aforesaid notices. It is now well settled that a certificate of posting is prima facie evidence of service of a statutory notice on a borrower. That being so, this Court finds that once the 1st defendant provided certificates of posting as proof of service, it discharged its burden of proof. The evidential burden of proof therefore shifted to the plaintiff to demonstrate that she did not receive the said notices. The said legal burden is provided for in Sections 107, 108 & 109 of the [Evidence Act](#). Other than stating that the post office informed her that the notices were returned to the senders due to non-collection, the plaintiff was expected to tender in evidence from the Post Master General and/or call him as a witness to confirm that indeed the notices were returned to the senders due to non-collection. To this end, I am guided by the Court's holding in the case of Ethics & Anti-Corruption Commission & 3 others v African Safari Club Limited & 2 others (supra) where the Court when faced with a similar issue held that -

“I do therefore reject the submission that Altam was not served with those notices simply because its directors were out of Kenya. It matters not whether KCB knew or did not know that those Directors were out of the country. Clause 33 of the charge instrument provides that service or demand of payment is deemed as served if served upon Altam's Directors, secretary or if delivered by hand or registered post to the chargor that is Altam. On whether



or not service of those notices were served on Altam when served by Registered Post, I respond that KCB annexed copies of the three months and forty days notices sent to Altam by registered post. There was also annexed a Certificate of Posting in respect of each one. Once KCB provided copies of those notices and Certificate of Posting the burden of proof shifted to Altam to disapprove service... The Plaintiff ought to have brought evidence to show that the letter sent by Defendant was not received by her and this could have been confirmed by the post master general. The Court's finding therefore on prima facie basis, on the evidence presented before me at this interlocutory stage is that the Plaintiff was served with the statutory notice."

69. On the issue of whether or not the plaintiff was served with the 45 days' Redemption Notice, I am of the considered view that the service of the said notice was duly effected vide a letter and notification of sale both dated 26th June, 2018. Rule 15 of the Auctioneers Rules provides that –

“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.”

70. From the record, it is apparent that the plaintiff does not dispute service of the 45 days' redemption notice but challenges the modes of service. The plaintiff contended that the Redemption Notice ought to have been served to her personally or to an adult member of her family. On perusal of the affidavit of service sworn by Mr. Michael Siloya found at page 79 of the 1st defendant's bundle of documents, the deponent therein deposed that there was no one on the suit property on whom the Notice would have been served, thus he elected to affix the said Notice on the outer door of the premises. During cross-examination, the plaintiff confirmed that her tenant who lives in the suit property notified her of the Redemption Notice on 27th June, 2018. Considering that the suit property was advertised for sale by public auction on 20th August, 2018 and thereafter sold in a public auction held on 6th September 2018, that gave the plaintiff sufficient notice of the intended sale. The plaintiff cannot therefore claim that she was not served with a 45 days' Redemption Notice.

71. DW1 asserted that the Redemption Notice and the Notification of Sale dated 26th June, 2018 were also served on the plaintiff by registered post as provided for under Clause 41 of the Charge document. In support of the said evidence, DW1 produced a certificate of posting. The above notwithstanding, failure to serve and/or issue a Redemption Notice on its own does not invalidate and/or impugn the



auction for the sale of the suit property. This was the holding by the Court in Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited [2002] eKLR where it was held that -

“The property in issue is a block of flats in Nairobi West. The property was knocked down at a public auction. If there was any irregularity in the conduct of the auction the applicant would be entitled for damages against the auctioneer pursuant to section 26 of the Auctioneers Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action”.

72. Further, in Erick O. Odindo v National Bank of Kenya Limited & 2 others (supra) it was held as follows -

“The requirements of Rule 15 of the Auctioneers Rules are obviously mere statutory procedures precedent to the lawful exercise of power of sale by the chargee, non-compliance of which is a mere irregularity which would not ordinarily invalidate an auction sale.”

73. In this instance, in the absence of any evidence to the contrary, I am persuaded that the plaintiff was duly served with all the requisite statutory notices, save for the first notice as this Court has earlier in this ruling found that the Notice was sent to the wrong email address and the plaintiff could not have been served personally in Kenya as contended by the 1st defendant, when she was actually in the United States of America.

Whether the 1st defendant notified the plaintiff of any change in the rate of applicable interest.

74. Counsel for the plaintiff contended that the 1st defendant failed to comply with the provisions of Clause 2(d) of the Charge document which required the 1st defendant to issue the plaintiff with at least thirty days' notice prior to any change in the rate or rates payable as confirmed by Mr. Samuel Njuguna (DW1). Mr. Ogada submitted that PW2 testified to the serious anomalies in regard to the interest rates levied by the 1st defendant, thus overcharging the plaintiff by Kshs. 402,349.00. He further submitted that failure to notify the plaintiff of variation on interest rates levied amounts to a breach of fiduciary duty on the part of the 1st defendant, thus the default penalty interest remains unlawful and done without regard to the provisions of Section 44 of the Banking Act.

75. Ms. Muthee on the other hand submitted that parties are bound by their pleadings. She argued that the plaintiff in her plaint has not pleaded to what extent the interest rates were varied upwards by the 1st defendant and the amount she seeks from the Court as a result of the said variance. Counsel stated that any evidence tendered and/or that was led but tends to be at variance with the pleadings is for rejection.

76. From the plaint, it is not clear to what extent and/or by what margin the said interest rates were varied upwards. It is however clear that the plaintiff in the amended plaint does not challenge the said varied interests on grounds that the 1st defendant was first required to seek the approval/sanction of the Cabinet Secretary before increasing its interest rates as provided for under Section 44 of the Banking Act. It is also noteworthy that the plaintiff has not sought any reliefs in regard to the said variation of interest rates.



77. Parties are bound by their pleadings and any evidence however strong that tends to be at variance with the pleadings must be disregarded. The Supreme of Kenya in the case of Raila Amolo Odinga & another v IEBC & 2 others (supra) held as hereunder in regard to this proposition –

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

78. Having not pleaded to what extent and/or by what margin the interest rates applicable to the plaintiff's loan were varied upwards, and that the said interest rates ought to have first been sanctioned by the Cabinet Secretary before being applied as provided for under Section 44 of the *Banking Act*, and noting that the plaintiff has not sought any reliefs in regard to the said variation of interests, I am of the considered view that the evidence of PW2 in respect of the sum of Kshs.402,349.00, allegedly overcharged by the 1st defendant, and the plaintiff's submissions that the variance of interest by the 1st defendant is in contravention of Section 44 of the *Banking Act* are for rejection. This is because the said allegations were not presented to the 1st defendant thus giving it an opportunity to refute them and/or respond to them.
79. On perusal of the amended plaint, I note that at paragraph 13 the plaintiff claims that between August 2017 to June 2018, the 1st defendant varied the interest rates upwards without prior notice to the plaintiff as provided for under the Charge. Clause 2(d) of the Charge dated 20th June 2014, provides the following–

“The bank shall not be require to seek the consent of the chargor or any principal debtor (as the case may be) prior to any change in the rate and method of calculating the interest so payable ... provided however that the bank shall give the chargor or other such principal debtor at least thirty (30) days' notice prior to any change in the rate or rates of interest payable.”

80. In as much as the 1st defendant does not dispute that it varied the applicable interest rates upwards, it has not tendered any evidence to show compliance with the provisions of Clause 2(d) of the charge dated 20th June, 2014. To the Contrary, DW1 in cross-examination by Counsel for the plaintiff confirmed that he had no evidence and/or documentation to demonstrate compliance by the 1st defendant prior to the variation of applicable interest rates upwards.
81. In the premise, this Court finds that the 1st defendant failed to notify the plaintiff of any change in the rate of applicable interest a provided for under Clause 2(d) of the charge dated 20th June, 2014. As a result, the varied interest cannot be claimed from the plaintiff. The above notwithstanding, PW2 an expert witness from IRAC testified that despite his re-calculation, he confirmed that the plaintiff had defaulted and her arrears were due. The said finding does not however negate this Court's earlier finding that the plaintiff had defaulted in her monthly repayment instalments thus the 1st defendant was within its rights to invoke the provisions of Section 90 of the *Land Act*.



Whether the suit property was sold at an undervalue.

82. The plaintiff stated that she caused a valuation exercise of the suit property to be carried out sometime in February 2019, which exercise led to a Valuation Report dated 12th February, 2019 by Ultimate Valuers which indicated that the open market value of the suit property as at that time was Kshs.20,000,000/= and its forced sale value was Kshs.15,000,000/=. The 1st defendant also produced in Court a Valuation Report of the suit property dated 5th January, 2018 which provided that the suit property's open market value at the time was Kshs. 16,000,000/=:, the market value with special assumption/reserve price was Kshs. 12,000,000/=:, and the insurance value was Kshs.16,500,000/=:.
83. The plaintiff and PW3 urged this Court not to rely on the 1st defendant's Valuation Report since under the description of the property, it is indicated that the property had a lounge that leads to a balcony, which description was not a true representation of the suit property. During cross-examination by Counsel for the plaintiff, DW2 who produced the 1st defendant's Valuation Report testified that there was a small room which he did not gain access to. Ms. Muthee in her submissions stated that the small room is what the Valuer assumed was the balcony. This Court notes that other than challenging whether or not the suit property had a balcony, the plaintiff did not disown the photos contained in the 1st defendant's Valuation Report which are said to be of the interior of the suit property. For this reason, I am satisfied that DW2, a Valuer from Sec & M Company Limited carried out a valuation exercise of the suit property.
84. Under the provisions of Section 97 of the Land Act, the 1st defendant was under a duty while exercising its power of sale to ensure that the best achievable price was realized when selling the suit property. In *Zum Zum Investment Limited versus Habib Bank Limited (supra)* the Court held the following-
- “It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time.”
85. Other than the fact the suit property has no balcony, the only other difference between the plaintiff's and the 1st defendant's Valuation Reports is that they were done at different times, with the 1st defendant's valuation having been done a year earlier than the plaintiff's. Further, PW3 did not lead any evidence that would discredit the 1st defendant's Valuation Report or suggest that it did not give and/or capture the best price obtainable for the suit property at the material time. In the absence of evidence that the 1st defendant's Valuation Report did not give the best price obtainable for the suit property at the material time, I am not persuaded that the suit property was sold at an undervalue.

Whether the 2nd defendant is a bonafide purchaser for value without any notice of any defects in title.

86. It is noteworthy that no evidence has been tendered to suggest that the auction of 6th September, 2018 in which the suit property was sold to the 2nd defendant was conducted in an unfair manner and/or had any irregularities. Further, it is not disputed that the 2nd defendant's offered the highest bid at the said auction. She paid 25% of the purchase price at the fall of the hammer, which is equivalent to Kshs.3,000,000/=:, a Memorandum of Sale was then prepared. She then paid the balance purchase price within the prescribed timelines and was thereafter issued with a Certificate of Sale. It is my finding therefore that the 2nd defendant is a bonafide purchaser for value without notice of any defects in title of the suit property.



87. In the counter-claim, the 2nd defendant stated that she bought the suit property as an investment opportunity but has never been granted vacant possession and/or allowed access to it since she completed payment of the full purchase price, a fact which is not disputed. As a result, she has not been able to recoup any benefits as expected. For the said reason, she prayed for compensation for the loss suffered. I agree with the 2nd defendant that she is entitled to some form of compensation since she was denied the benefit of enjoying her property since September 2018 as a result of the status quo orders issued in this suit, whereas the plaintiff has been collecting rent over the years at the rate of Kshs.73,000/= on a monthly basis from a property that belongs to the 2nd defendant.
88. Having found that the 2nd defendant is the bonafide purchaser of the suit property since September 2018 when she bought it, she is entitled to the rent collected by the plaintiff for the said period.
89. In the end, this Court finds that the plaintiff's suit is partly successful, whereas the 2nd defendant's counter-claim is merited. Section 27 of the *Civil Procedure Act* provides that costs follow the event. In view of the foregoing, I find that the plaintiff shall bear the costs of the main suit and the counter-claim.
90. In the circumstances, I make the following orders-
- i. The plaintiff's suit is hereby dismissed;
 - ii. The plaintiff and the 1st defendant are hereby compelled to carry out an accounting exercise to determine the difference between the original interest that was to be applied between August 2017 to June 2018 and the varied interest that was actually applied, and reimburse the plaintiff the difference;
 - iii. A declaration is hereby issued that the 2nd defendant is the rightful owner of Apartment No. 5-75C, fourth floor, Block 5 situate on the property known as Nairobi/Block 209/6491;
 - iv. The plaintiff and the 1st defendant are hereby compelled to facilitate transfer of the suit property in favour of the 2nd defendant;
 - v. The plaintiff is hereby compelled to compensate the 2nd defendant the sum of Kshs.4,964,000/= in general damages being the total rent collected by her from the suit property as from September 2018 to April 2024;
 - vi. Costs of the main suit and the counter-claim shall be borne by the plaintiff;
 - vii. Interest is awarded to the 2nd defendant in paragraphs (iv) & (v) above at Court rates.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Oganda for the plaintiff

Ms Kinyua h/b for Ms Muthee for the 1st defendant

Mr. Muganda for the 2nd defendant.

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