



**Gitau v HFC & 5 others (Civil Suit 71 of 2018)  
[2024] KEHC 7179 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7179 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 71 OF 2018  
RN NYAKUNDI, J  
JUNE 13, 2024**

**BETWEEN**

**MIRIAM WAMBUI GITAU ..... PLAINTIFF**

**AND**

**HFC ..... 1<sup>ST</sup> DEFENDANT**

**PK KIBERA ..... 2<sup>ND</sup> DEFENDANT**

**CHARLES KARIUKI KAMAU ..... 3<sup>RD</sup> DEFENDANT**

**RK SILA T/A LEGACY AUCTIONEERING SERVICES ..... 4<sup>TH</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The brief facts underlying this suit are that the Plaintiff obtained a loan facility of Kshs. 4,000,000/= from the 1<sup>st</sup> Defendant which was secured by a legal charge dated 2<sup>nd</sup> April, 1997 over the suit property registered in the name of the Plaintiff. The loan was repayable in monthly instalments of Kshs. 93,830/= and it was to attract interest at the rate of 26% per annum. The plaintiff defaulted in payments and the 1<sup>st</sup> Defendant advertised the property for sale in the Daily Nation Newspaper of 7<sup>th</sup> February, 2000 and Standard Newspaper of 17<sup>th</sup> February, 2000. The property was sold at a public auction on 21<sup>st</sup> February, 2000 to the 3<sup>rd</sup> Defendant for the sum of Kshs. 2,250,000. The property was then transferred to the 3<sup>rd</sup> Defendant and registered in his name After the sale of the suit property the same was duly transferred to the 3<sup>rd</sup> Defendant and registered in his name.
2. The plaintiff then instituted the present suit vide a plaint dated 4<sup>th</sup> December 2000 which was amended on 22<sup>nd</sup> August 2016 and further amended on 15<sup>th</sup> April 2022 seeking the following orders;



- a. An order of declaring the sale and eventual transfer of the said property to the 3rd defendant a nullity and void ab initio and for an order directing the 5th defendant to cancel the said fraudulent entry and eviction of the 3rd defendant himself, his servants and/or agents.
- b. The taking of accounts and for an order waiving the 1st. defendant's right to charge interest from the date of default to date in view of the 1st defendant's fraudulent conduct, assessment of damages resulting directly from the fraudulent conduct of the defendants and the unlawful eviction coupled with an award of the current market value of the property as assessed with interests thereon.
- c. An award of mesne profits at a monthly rate of Kshs. 30,000 from the date of eviction being 27th April, 2002 to the date of judgment together with interests.
- d. Costs and interests.

### **Plaintiff's case**

3. The plaintiff contends that she was the proprietor of all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 4/37 which she used as security for a loan from the 1<sup>st</sup> defendant. According to the Plaintiff, the 1<sup>st</sup> defendant purportedly exercised statutory power of sale and the 1<sup>st</sup> to the 4<sup>th</sup> defendants fraudulently had the suit premises transferred to the 3<sup>rd</sup> defendant. It was her evidence that the 2<sup>nd</sup> defendant being an employee of the 1<sup>st</sup> defendant and working in cahoots with the 4<sup>th</sup> defendant un-procedurally sold the plaintiff's land to the 3<sup>rd</sup> defendant who was a brother in-law of the 2<sup>nd</sup> defendant. She urged that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> defendants acted maliciously and fraudulently by selling the plaintiff's parcel of land valued at Kshs. 4,500,000 (Four Million Five Hundred Thousand) in the year 1997 and sold the same for a paltry sum of Kshs. 2,200,000.
4. It is the plaintiff's case that she was not served with the notices of the intended sale. She also testified that the 1<sup>st</sup> defendant failed to issue and serve a valid statutory notice as required by the provisions of the Registered *Land Act*, Cap. 300 (repealed). It was her further testimony that the 3<sup>rd</sup> defendant bought the said parcel of land knowing it to be grossly undervalued and with the intention of defrauding her. The plaintiff complained about the entries in her account with the 1<sup>st</sup> defendant as being erratic and stated that they did not reflect the proper sequence of the transactions. She blamed the 1<sup>st</sup> defendant for acting in breach of the duty of care as it failed to obtain the best price for the land in the circumstances.
5. It was the plaintiff's testimony that no licenced auctioneer was instructed by the chargee to exercise the statutory power of sale. Further, that no valid notification of sale was issued and served by the 4<sup>th</sup> defendant as required by the Auctioneers Rules, 1997. No valid redemption notice was issued and served by the 4<sup>th</sup> defendant and no proper valuation was carried out by the chargee as required by the Auctioneers Rules, 1997. She urged that there was no proper memorandum of sale entered into and concluded and, that there was no valid newspaper advertisement of the property was carried out as required. There was no consent to transfer the property sought as required by section 48 of the Registered *Land Act*, 300 (repealed). Additionally, she contended that the requisite stamp duty was not paid to enable the transfer to be carried out. It was her evidence that the said parcel of land was fraudulently registered in the name of the 3<sup>rd</sup> defendant on 31<sup>st</sup> October 2000. The sale of the said property was done on the 21<sup>st</sup>. February, 2000.
6. The plaintiff contended that the 1<sup>st</sup> defendant varied and charged interest without giving any notice of intended increment as required by the practice trade, customs and contract. The 1<sup>st</sup> defendant levied penal and unlawful charges on her account and increased its rate of banking and levies without



authority from the Central Bank of Kenya or the Minister of Finance. Further, she alleged that there was a breach of the in duplum rule. As a result of the defendants' actions she suffered immense loss as the suit property which was the security for the loan was not able to clear the loan leaving a huge balance due to accrued interests. It was her evidence that she was evicted from the land without a court order/decreed on the 27<sup>th</sup> day of April, 2002 and had to find an alternative place to stay where she has had to pay Kshs. 30,000 as monthly rent. Her property was valued at Kshs. 7,130,000 as at the year, 1999 and as at May, 2015 it had appreciated to Kshs. 31,900,000. The evidence of the Valuer from City Valuers Limited instructed by the plaintiff based on the valuation report was that in his considered opinion the property was in the year 1999 valued at Kshs. 7,130,000. He formed the opinion that in the year 2015 when he was carrying out the valuation the property free of encumbrance was valued at sh. 31,900,000. The Accountant who prepared a report gave evidence and in his opinion the debt became non - performing on 1<sup>st</sup> July, 1997. By then, the principal sum owing was sh. 4,000,000. It is the Plaintiff's case that the loan agreement between the parties ought to have obeyed the law for it to be legally binding.

7. Learned counsel for the plaintiff submitted that the applicable law at the time of the exercise of the statutory power of sale was the Registered Land Act, Cap. 300 (repealed). The first consideration is when the power of sale arose on the part of the 1<sup>st</sup> defendant. Counsel urged that the charge instrument in this matter did not specify the date of repayment of the loan. The charge contained in the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant's list of documents filed on 17<sup>th</sup> March, 2023 at clause 2 is blank hence silent as to the date. Accordingly, the 1<sup>st</sup> defendant was required to give a 3 months demand to the plaintiff as per section 65 (2) of the Registered Land Act, Cap. 300 (repealed). Counsel maintained that the 1<sup>st</sup> defendant did not prove that the said notice was served as required by section 153 of the Registered Land Act, Cap. 300 (repealed). The 3 demand letters in the list of documents by the 1<sup>st</sup> defendant do not have evidence of a certificate of postage and in any event, even if they were deemed to have been served, the 1<sup>st</sup> demand by the 1<sup>st</sup> defendant in its list of documents is dated the 24<sup>th</sup> October 1997 which gave a 14 days' notice. The second letter is dated 18<sup>th</sup> November 1997 and it gave a 1 month notice as it required payments with interest not later than 18<sup>th</sup> December, 1997. The third letter is dated the 23<sup>rd</sup> February 1997 and it gave the plaintiff 10 days to pay. Counsel invited the court to find that the power of sale never arose in this matter, citing the case of Susan K. Baur & Another v Shashikant Shamji Shah & 2 Others. (2017) eKLR in support of this submission.
8. It is the plaintiff's case that the 1<sup>st</sup> defendant was then bound to comply with section 74 of the Registered Land Act, Cap. 300 (repealed). It was bound to issue and serve a compliant statutory notice. In this matter the letter dated the 12<sup>th</sup> June 1998 is the purported notice as tendered in evidence by the 1<sup>st</sup> defendant. The certificate of postage accompanying it does not show who the sender of the notice was. The name of J. K. N. Kamunyori & Company Advocates who allegedly issued the notice does not feature in the certificate of posting. The notice was also defective and a nullity as it was to take effect at the expiry of 3 months from date of the letter as opposed from the date of service which in this matter it is not clear as the certificate of posting is not clear. Counsel cited Sections 74 (1) and (2) of the Registered Land Act, Cap. 300 (repealed) and the case of Trust Bank Ltd v Eros Chemists Limited & Another (2000) eKLR in support of this submission.
9. Counsel for the plaintiff reiterated that a redemption notice was also not duly served as required by rule 15 (d) of the Auctioneers Rules, 1997. Further, that in exercising the power of sale the chargee was required to undertake a valuation of the property at least not more than a year before the sale which was not done in this matter. Urging that this voided the sale of the property, he cited the case of Livingstone Mwangi Gichora v Family Finance Building Society. (2002) eKLR in support of this submission. Counsel urged that the absence of a valuation is confirmed by the failure of the 4<sup>th</sup> defendant to comply



- with rule 15 (b) of the Auctioneers Rules, 1997. The fact that the property was sold at half the price it had been acquired was a clear breach of the duty of the chargee in exercising the statutory power of sale in good-faith as required by section 77 (1) of the Registered Land Act. Cap. 300 (repealed)
10. The notification of sale was required to be served personally by the auctioneer upon the chargor or an adult member of the family or where they cannot be found a certificate to that of effect signed. The affidavit of service of Gikaria A. Kimaru deposes to the fact that he met the son of the plaintiff who signed the notification of sale. However, the signed notification has not been attached as an exhibit to the affidavit.
  11. As regards, whether the 3<sup>rd</sup> defendant could be deemed to be a purchaser for value, counsel urged that he fails the test as the initial sale of the property arose from an exercise of the power of sale by the 1<sup>st</sup> and 4<sup>th</sup> defendants which was void ab initio. Counsel cited the case of *D N M v Ma K & 4 others* (2014) eKLR in support of this submission.
  12. The terms of sale as advertised in the newspapers required the highest bidder to deposit 25% of the purchase price by cash or banker's cheque at the fall of the hammer and the balance was to be paid within 90 days from the date of sale to the chargee's advocates. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not tender evidence of payment of the 25% deposit at the fall of the hammer. They also did not tender evidence of payment of the balance of the purchase price within 90 days from the date of sale. These were facts within their knowledge and they were supposed to lead evidence on the same based on section 112 of the Evidence Act. Cap. 80. Counsel submitted that the available evidence from the bank statement in respect of the plaintiffs account showed that the 3<sup>rd</sup> defendant failed to comply with all the conditions of sale as to payments. The statement indicates that the payments of sh. 220,000, sh. 500,000 and sh. 500,000 were made in the month of September, 2000. In fact, no evidence of payment of the full purchase price was made which was sh. 2,250,000. The 3<sup>rd</sup> defendant could not be deemed to be a purchaser as rule 17 (4) of the Auctioneers Rules 1997 was not complied with. Counsel cited the case of *Maina Wanjigi & Another v Bank of Africa Kenya Ltd & 2 Others* (2015) eKLR in support of this submission.
  13. It is the Plaintiff's case that the 3<sup>rd</sup> defendant could not be deemed to be a purchaser for value and have his title protected by the law as any dealings by way of conveyancing of the property required that the consent of the lessor to have been sought and granted before his registration as the proprietor in tandem with section 48 of the Registered Land Act, Cap. 300 (repealed). In this matter the 3<sup>rd</sup> defendant became registered as the proprietor on 31<sup>st</sup> October, 2000 while the consent was granted on the 1<sup>st</sup> November, 2000 in accordance with the letter by the District Land Officer acting on behalf of the Commissioner of Lands. The 5<sup>th</sup> defendant did not establish in its evidence that the conditions to dispense with consent under the proviso of section 48 existed in this matter. Further, the 3<sup>rd</sup> defendant paid stamp duty on 23<sup>rd</sup> November 2000, which was long after he was registered as the proprietor. The 3<sup>rd</sup> defendant failed to produce the memorandum of sale concluded after the public auction was conducted to confirm the terms of the contract concluded. The 3<sup>rd</sup> defendant fails the conditions of a purchaser for value without notice of defect of title.
  14. It is the plaintiff's case that the sale having been a nullity, no right accrued to the purchaser and the chargee to remove the plaintiff from occupation of her land. There was no evidence of a valid bid having been accepted at an auction since no memorandum of sale was produced as having been concluded on the alleged date of the auction. The auction report would not amount to a memorandum of sale as it was not signed by the purchaser and the auctioneer. It was not also duly attested to. Counsel urged that the right to recover possession of the land under section 77 (2) of the Registered Land Act, Cap. 300 (repealed) never accrued as no valid bid was accepted and the auctioneer in this matter did not give



evidence of any such acceptance. Counsel maintained that the forceful ejection of the plaintiff from occupancy of her property was illegal and unlawful.

15. Counsel submitted that the evidence of the accountant is unchallenged in this matter. He noted that interest of sh. 71,232 was charged on 1<sup>st</sup> June, 1997 which was even before the stipulated date of 1<sup>st</sup> July, 1997. By end of December, 1997 the lender had levied sh. 759,303.50 instead of sh. 600,678.85. Monthly penalties had been imposed and a default charge was being imposed while they were never part of the letter of offer. The sale price of the property was at sh. 2,250,000 which was at 1/2 the price it had been acquired by the plaintiff 4 years earlier. On 2<sup>nd</sup> January, 2000 the charge debt appreciated from sh. 4,174,047.06 Kshs. 4,258,808.31 within a period of hours being a charge of sh. 84,761.25 which would translate to a charge of 2% per day and 741 % per annum. The loan moved by 59.64% within a period of one year. Counsel invited the court to find that the chargee was in clear breach of section 44 of the Banking Act, Cap. 488 which obligated it not to increase its rate of banking or other charges save with the approval of the Minister. He cited the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (2017) eKLR in support of this submission.
16. Counsel for the plaintiff urged that the plaintiff has established her case to the required standard of proof and prayed the court to grant the orders as prayed.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant's Case**

17. Learned counsel for the defendants filed submissions dated 16<sup>th</sup> October 2023. Counsel urged that it is not in dispute that the loan advanced to the Plaintiff was in arrears at the time the 1<sup>st</sup> Defendant started the process of recovery. The Plaintiff admitted during cross examination that she did not pay a single instalment after the loan was disbursed to her. The bank statements produced in the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants' list of documents confirm that the loan advanced to the Plaintiff therefore fell into arrears within the first month after disbursement.
18. Counsel submitted that it was an express term of the Charge instrument that in the event of default, the suit property would be sold to recover the amount due at the time of default. Under Clause 8 of the Charge, it was expressly stated that if the Chargor defaulted in payment of the principal sum or of any interest or other periodical payment for one month then the Chargee would serve the Chargor notice in writing to pay the money owing or to perform the agreement. If the Chargor does not comply with the notice within three months of the date of service of the notice, then the Chargee could sell the charged property.
19. The 1<sup>st</sup> Defendant's witness testified that the Bank issued the Plaintiff with demand letters dated 24<sup>th</sup> October, 1997, 18<sup>th</sup> November, 1997 and 23<sup>rd</sup> February, 1998 notifying her of her default and asking her to remedy the same. The 1<sup>st</sup> Defendant also issued the Plaintiff with a three months' notice dated 12<sup>th</sup> June, 1998 as required by Section 74 of the Registered Land Act (now repealed). The 90 days' notice was served to the Plaintiff through the postal address provided in the Charge instrument as confirmed by the certificate of postage produced at page 32 of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants' List of Documents. Contrary to the allegations by the Plaintiff that the charge instrument did not specify the date of repayment of the loan, clause 2 of the charge indicated that the first instalment was required one month after the principal was advanced.
20. Counsel urged that the Plaintiff understood her obligations under the charge instrument and she appended her signature confirm that she understood the terms therein and agreed to be bound by them. Parties were therefore in a valid agreement and it followed that they would follow the general rule that parties should be bound to their bargains as held in *Areva T and D India Limited vs Priority*



Electrical Engineers & Another [2012] eKLR. Counsel also cited the case of Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) eKLR in support of this submission.

21. It is the defendant's case that a Chargee's statutory power of sale arises once there is default and not after notice has been issued to the Chargor as the Plaintiff alleges. Counsel cited the case of Wesley Kibagendi Jason v ECO Bank Ltd & another [2020] eKLR in support of this submission. Further, the defendant's urged that the plaintiff fell in default within the first month after the loan was disbursed. Additionally, the Plaintiff cannot claim not to have been served with the 90 days' notice yet the same was sent through the postal address she provided. Counsel invited the court to note that at page 31 of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' List of Documents, it indicated that the Plaintiff visited the 1<sup>st</sup> Defendant's offices on 30<sup>th</sup> June, 1998 where she explained that she was involved in an accident after getting the mortgage. This was after the notice had been issued and it confirms that the Plaintiff received the notice and thereafter visited the 1<sup>st</sup> Defendant's offices to plead her case.
22. Further to issuing the 90 days' notice, the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> and 4<sup>th</sup> Defendants to carry out the sale of the suit property and a 45 days' redemption notice dated 3<sup>rd</sup> December, 1999 was issued to the Plaintiff. The same was sent on 6<sup>th</sup> December, 1999 as confirmed by the certificate of postage produced at page 34 of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' List of Documents. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants also issued the notification of sale as confirmed by the affidavit of service produced at page 36 of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' List of Documents. In the said affidavit of service, the deponent swore that he served the notification of sale and the 45 days' redemption notice upon an adult member of the Plaintiff's family on 21<sup>st</sup> December, 1999. The Plaintiff did not produce any evidence to support the claim that the person upon whom service was effected was not an adult. The Plaintiff merely claimed that the recipient of the documents was a minor at the time without proof. Counsel maintained that the 1<sup>st</sup> Defendant complied with the provisions of the law on issuance of notices prior to sale of the suit property. The notices issue also provided details of the Plaintiff's default and what she was required to do to rectify the default.
23. Counsel submitted that by the Plaintiff's own admission, she defaulted in repayment of the loan advanced to her which led to the 1<sup>st</sup> Defendant exercising its statutory power of sale to recover the amount owed. The exercise of its rights in recovery was justified as the Plaintiff willingly provided the property as security under the charge documents. It is the defendant's case that courts have long held that a charger who offers property as security to secure financial obligation ought to know that the property will be sold in the event of default to recover the amounts due. He cited the case of Maithya V. Housing Finance co. of Kenya & Another [2003] t EA133 at 139 quoted in Samo Security Limited & another SBM Bank Kenya Limited (Formerly Chase Bank Kenya Limited) [2021] eKLR in support of this submission.
24. After the successful sale of the suit property, the 3<sup>rd</sup> Defendant had no option but to evict the Plaintiff from the land and she was a trespasser. The Plaintiff's interest in the suit property was extinguished upon the fall of the hammer and she ceased to have any claim over the suit property. The Plaintiff's only claim if she was aggrieved with the manner in which the auction was conducted lay in an award for damages for the loss of her property and not for eviction. Counsel invited the court to note that the Plaintiff admitted in cross examination that she resided on the suit property and she used the same as a children's home. The Plaintiff also confirmed that the suit property was not used for commercial purposes. Based on the foregoing, the Plaintiff's claim for mesne profits cannot issue. Mesne profits were defined in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR where the court held:



Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved.

25. The 3<sup>rd</sup> Defendant entered into possession of the suit property after a legal process of the 1<sup>st</sup> Defendant's statutory power of sale. The 3<sup>rd</sup> Defendant cannot therefore be said to have been a trespasser in so far as the suit property is concerned. Similarly, no profits have been earned by the 3<sup>rd</sup> Defendant since he acquired the suit property as he indicated during cross examination that the property is residential property. The Plaintiff was also not using the premises for commercial purposes and therefore no loss has been occasioned to her as a result of her eviction. The Plaintiff's eviction from the suit property was therefore lawful and she is not entitled to mesne profits as she claims.
26. It is the defendant's case that it was a term of clause 6 of the charge instrument that interest could be revised by the 1<sup>st</sup> Defendant albeit with notice to the Plaintiff. Pursuant to this, the 1<sup>st</sup> Defendant issued the Plaintiff with a letter dated 20<sup>th</sup> December, 1999 informing her that interest rates on the loan had been increased due to an increase in interest rates in the money market at the time. The letter also informed the Plaintiff that due to her default the loan would attract a default interest of 1.5% per month. This was also communicated to the Plaintiff in a letter dated 1st May, 1999. Both letters were sent to the Plaintiff through the postal address she provided in the loan documents. Counsel cited the case of *Emrre Global Investors Ltd v Housing Finance Company of Kenya Ltd & 2 others* [2014] eKLR in support of this submission.
27. It is the defendant's case that the evidence of the Plaintiff that she did not receive the letters is not credible as she also denied receiving the statutory notices which were sent to her address yet she visited the 1<sup>st</sup> Defendant seeking accommodation after receipt of the 90 days' notice. The 1<sup>st</sup> Defendant did not levy illegal interest as alleged by the Plaintiff and the forensic audit report she relied on in her evidence was not objective and it should be taken with caution. The 1<sup>st</sup> Defendant produced the Plaintiff's bank statements for the period from 1997 to 2004. These statements were not faulted by the Plaintiff or the forensic auditor. It is trite law that the entries in a banker's book prima facie evidence of the transactions therein. Counsel cited the case of *Ecobank Kenya Limited v Liberty Graphics Kenya Limited & 3 others* [2021] eKLR.
28. It is the defendant's case that the evidence of the Plaintiff and PW3 that the 1<sup>st</sup> Defendant offended the provisions of the Section 44 of the *Banking Act* on the in duplum rule fails as the said provision came into effect in 2006 yet the audited accounts were for a time before the law came into force. It is trite that the law does not apply retrogressively and therefore, the plaintiff cannot invoke the in duplum rule in this case. Further, the interest levied on the Plaintiff's account by the 1<sup>st</sup> Defendant was contractual and the Plaintiff was notified prior to the increase in the interest on her loan.
29. The Plaintiff owed the 1<sup>st</sup> Defendant a duty under the Letter of offer to repay the loan amount in regular instalments and admitted that she failed to meet this obligation. Therefore, her account fell into arrears necessitating the Defendant's actions to recover the loan amount through the contractually provided remedies. Counsel urged the court dismiss the suit with costs.

### **3<sup>rd</sup> Defendant's Case**

30. Learned counsel for the 3<sup>rd</sup> defendant filed submissions dated 8<sup>th</sup> November 2023. It is the 3<sup>rd</sup> defendant's case that the relationship between the plaintiff and the 1<sup>st</sup> Defendant was contractual in nature. The 1<sup>st</sup> Defendant advanced monies to the plaintiff on the understanding that it would be repaid as agreed and recorded in the charge. The plaintiff had the liberty to redeem her property



by paying back the monies advanced either in lumpsum or in instalments as agreed. In the event of default, then the 1st Defendant reserved the right to realize the charged property by way of a public auction. Evidence placed before the court indicates that the chargor never paid a single instalment and default and breach happened the very first month after acquisition. Notices were issued as required and dispatched by registered post but they did not enlist any reaction. Section 74 (2) (b) accrued and the 1st Defendant was within its statutory right to exercise the right to sell.

31. It is the 3<sup>rd</sup> defendant's case that once the Power of Sale has accrued and the notices contemplated by Section 74(1) and (2) of the RLA Cap 300 have been issued and the right of redemption contemplated by Section 72(1) of the RLA has been forfeited, the act contemplates a sale. Such sale is governed by Section 77(1) Notices contemplated by Section 74(1) of the Registered Land Act, Cap 300. It emerges from this proceeding both from the testimonies and the documents produced that the chargee, M/s HFC Limited chose to exercise its statutory power of sale which had occurred by default on the part of the Plaintiff chargor. The accrual of the power of sale which was documented in the charge instrument and registered at the Land Registry meant that Section 77 of the repealed Cap 300 - Registered Land Act.
32. The chargee's appointed the 4<sup>th</sup> defendant, licenced auctioneer, who triggered the notice of sale in terms of the act. The third defendant put in his bid and was declared the highest bidder, paid the purchase price and had the property - leasehold interest transferred to him by 5<sup>th</sup> defendant. Section 77(3) of Cap 300 Registered Land Act then came into force to insulate the conveyance commenced by the 1<sup>st</sup> Defendant through its agent the licenced Auctioneer and the 4<sup>th</sup> Defendant herein. That process was statutory and once completed and a transfer registered by the 5<sup>th</sup> Defendant, it has the effect of extinguishing the chargors right over such property. To further insulate the sale and transfer the act precludes any person who is aggrieved by the exercise to only one remedy of;-  

“ Any person suffering any damage by an irregular exercise of the power of sale shall have his/ her remedy in damages only against the person exercising the power”
33. Counsel urged that Subsection 4 of the same Act (RLA) states that upon registration of the transfer, the interest of the chargor as described therein SHALL pass and vest in the transferee free and discharged from all liability on account of the charge, or on account any other encumbrance to which the charge has priority.
34. It is the 3<sup>rd</sup> Defendant's case that the power to sale created over the suit land by the charge instrument accrued, the right of redemption was waived when the default notice, notification of sale and the advertisement in Daily Newspapers with nationwide circulation were made and a sale concluded in a public auction culminating in the issuance of a certificate of lease vesting the suit property to him. He acquired a good title which is sacrosanct.
35. Counsel urged that the issuance of notices to redeem and finally the exercise of the chargee's right of sale, which in their view had accrued and was properly exercised, the Plaintiff who never paid a single instalment of the secured sum, cannot succeed least of all against a purchaser like the 3<sup>rd</sup> Defendant or the Land Registrar who is sued for exercising her statutory power to processing registration where a forced sale has taken place. Even the chargee, 1<sup>st</sup> Defendant is insulated of any liability arising from its exercise of its power of sale. The Plaintiff has complained about the manner in which possession of the suit property was wrestled form her. The 3<sup>rd</sup> Defendant moved into the suit property upon being registered as proprietor through purchase in a public auction. In any case an attempt to restore her to the suit premises was dealt with by Justice A.G.A Etyang. Once the property was sold and transfer effected she became a trespasser and a candidate for prosecution on the offence of false detainer. If the



court were to question the sale and the exercise of that power, then, that would have been a justiciable issue between the plaintiff and the 1<sup>st</sup> defendant.

36. The defendant invoked the provisions of Section 27 of the Civil Procedure in asking the court to penalize the plaintiff for dragging to court the 3<sup>rd</sup> Defendant to court. Had she been guided properly she should have only sued for damages against the 1st Defendant with whom they had a binding contract. Counsel urged the court to dismiss the suit with costs.

### **Analysis & Determination**

37. Upon considering the pleadings, testimonies and submissions tendered, the following issues arise for determination;
- i. Whether the statutory power of sale was illegal and if so;
  - ii. Whether the plaintiff is entitled to the orders sought

### **Whether the statutory power of sale was illegal**

38. Statutory power of sale is a relief that is available to a chargor when a chargee defaults on payments of a loan where a property had been charged as security for said loan. It is governed by the Land Act which gives the timelines and procedures to be adhered to when exercising statutory power of sale. Section 90(1) of the Land Act, 2012 provides that:

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 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.

Section 96(1) of the Land Act provides that:

Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

39. It is not in dispute that the plaintiff signed the charge agreement dated 2<sup>nd</sup> April 1997. She obtained a loan of Kshs. 4,000,000/- with the property known as ELDORET MUNICIPALITY BLOCK 4/37 as security. The same was to be repaid in instalments of Kshs. 93,830/- to be paid monthly at 26% interest. The plaintiff did not provide evidence that she had been paying the loan and it is evident that she defaulted.
40. The 1<sup>st</sup> respondent wrote to the plaintiff on 24<sup>th</sup> October 1997, 18<sup>th</sup> December 1997 and 23<sup>rd</sup> February 1998 notifying her that the account was in arrears. At the time of the transactions, the applicable law was the Registered Land Act which has since been repealed. Under the act, statutory power of sale was governed by section 74 which stated the chargee's remedies. It stated that;

- (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.



(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only -

(a) where the chargor is bound to repay the same;

(b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor;

Provided that -

(i) in the case specified in paragraph (a) -

(a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and

(b) no action shall be commenced until a notice served in accordance with subsection (1) has expired;

(ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b), notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.

41. It is settled law that answering questions in reference to this suit a mortgage and a charge created out of the relationship between the plaintiff and the first defendant as provided for in evidence when registered had the effect of a security. That in case of a default by the plaintiff to repay the loan with the agreed terms with the 1<sup>st</sup> defendant the principal sum and the interest were secured by the security offered by the plaintiff. The evidence from the first defendant is respectively very clear that the plaintiff defaulted and continued to default from meeting our obligations for such other period of time triggering the purpose and the power of statutory power of sale.

42. The first defendant without a doubt issued the notice in writing for the plaintiff to pay the loan due and owing together with interest and to perform such other covenants as created in the loan agreement. This was not a decision made by the defendant bank at the spur of the moment but there were a series of inquiries and concerns on the propriety and regularity of her loan repayment. Despite the assertions by the plaintiff that the statutory power of sale was irregularly exercised there are highlights



from documentary evidence that the plaintiff had experienced financial difficulties in meeting her part of the bargaining to resolve and alleviate the default in repaying the loan and other payments towards their arrears. The principles in Halsbury Laws of England, 4<sup>th</sup> ed. Reissues which explains the duty of a mortgagee, reads as follows: “

Duty of mortgagee on exercise of power of sale: a mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be to the mortgagor, He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent. He can decide if and when to sell on the basis of his own interests. He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. This duty is owed to the mortgagor, subsequent mortgagees and a surety but not to others such as beneficiaries under a trust of the mortgaged property. The duty cannot be replaced or supplemented by liability in negligence. It can however be excluded by agreement. If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale or if it would be inequitable as between the mortgagor and the purchasers for the sale to be set aside. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it. “

43. One of the key complaints at this point of key litigation was the genesis of the power of sale, the obligations to be exercised by the auctioneer who is the 4<sup>th</sup> defendant in effecting the various instruments on proclamation and such action to be taken to have the property sold at a competitive price in the public auction. The authority to execute the power of sale was invested with the 4<sup>th</sup> defendants under instructions from the 1<sup>st</sup> defendant bank. Whether or not the appropriate test in the execution in the power of sale by the mortgagee is the true market value of the property or that all reasonable steps were taken to secure the best price of the property as a matter of evidence. This is the issue which the learned authors in the above principles attempted to settle inline with the applicable law under the repealed Registered *land Act* of Kenya cap 300. In the persuasive jurisprudence in *Moses Dreckett v Rapid Vulcanizing Company Limited* (1988) 25 JLR he stated as follows:

“it is clear that though Lord Templeman stated that an auction does not necessarily prove the validity of a transaction, he is not to be understood as saying that an auction at which there are competitive bids by persons who have no foreknowledge of information improperly given by mortgagee which could reduce the level of the bids will not be accepted as valid and will not provide cogent evidence that the mortgage has taken reasonable steps to obtain the true market value of the property by and through the medium of the auction itself. In this regard the view of Salmon L.J in *Cuckmee Brick Co.* (Supra) at p.643 is most apposite. He said.

Nor in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an action, even though the auction is badly attended and the bidding is exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. Thus Salmon L. J was saying that consistent with the principles which he later enunciated at pg 646 which has been sated earlier in this judgement, an auction which has not been manipulated by the mortgagee to obtain the true market value of the mortgaged property on the date on which he decides to seek. The view expressed by Salmon LJ (supra) negatives any obligation on the mortgagee to fix or have fixed, any reserve price



(in circumstances where he does not bid at the auction) because he has the right to accept the highest bid even if it was below what was ascertained true market value. Equally the mortgagee is not obliged to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price when the sale is by auction. He can properly rely on the independent competitive biddings at the auction to obtain the true market value and even if this not obtained through poor attendance at the auction and or exceptionally low bids he is not on that account per se liable to his mortgagor for breach of any duty to take reasonable precaution to obtain the true market value. To the contrary the mortgagee could say that he had taken reasonable steps to protect the mortgagor by having an auction which has been conducted without any impropriety.

44. . The greatest complaint in this claim was that the statutory power of sale exercised by the 1<sup>st</sup> defendant and subsequent instruction issued to the 4<sup>th</sup> defendant was tainted with illegality, fraud, misrepresentation, and impropriety calling for this court to annul and revoke the sale and have the title revert to the plaintiff. The effect of any sale arising out of the mortgagor and mortgagee covenants has been litigated before our courts and the law is kind of settled in Section 69 (b) (2) TPA it provides that:

- 2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-
  - (a) that no case had arisen to authorize the sale; or
  - (b) that due notice was not given; or
  - (c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person dignified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The court in *Gabriel Ndungu Githua V National Bank of Kenya & 2 Others* (2009 eKLR) held that:

The only remedy available to the plaintiff, if he was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regard whether the plaintiff's equity of redemption is still in existence, I need not look further than to cite with approval the decision of Nyamu J (as he was then) in Nairobi HCCC No.9 of 2003 *Ze Yu Yang vs Nova Industrial Products Ltd* (unreported) where at page 9 of his ruling he held as follows:

“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with celebrated case of *GEORGE MBUTHIA & JUMBA CREDIT CORPORATION CIVIL APPEAL 111 OF 1986*. In that case the decision of Chief Justice Apaloo at pg. 5 clearly states that the equity of redemption is extinguished by a valid contract under S.60 of the Transfer of Property Act...”

45. The 1<sup>st</sup> respondent issued a notice in accordance to section 74, giving three months' notice to the plaintiff to settle her arrears vide a letter dated 12<sup>th</sup> June 1998. The same was sent by registered post and the respondent provided the certificate of postage as evidence that the same was sent to the plaintiff.



46. From the reminders to pay the arrears and the fact that the plaintiff went to renegotiate the payment of the same, it is clear that she received the notices. The 4<sup>th</sup> defendant then issued a notice to the plaintiff, dated 3<sup>rd</sup> December 1999 giving her 45 days to settle the arrears failure to which the property would be sold. The defendants then served the plaintiff with a notification of sale and provided the certificate of postage as evidence of the same. Upon the failure of the plaintiff to settle the arrears, the defendants advertised the property for sale in the dailies after which the auction was conducted and the property duly sold.
47. I have considered the process of statutory power of sale and it is my considered view that the 1<sup>st</sup> defendant exercised the same in accordance with the law. The upshot of the foregoing is that the statutory power of sale was properly exercised.
48. Whereas the plaintiff raised the issue of the in-duplum rule, the same came into force in 2006 which was well after the plaintiff took a charge on the suit property. Therefore, the same is not applicable to the present suit. It follows that the court cannot delve into the issue of mesne profits as the statutory power of sale was conducted in accordance with the law.
49. Generally speaking, on matters of mortgagee and mortgagor contracts any property offered as security for a loan from the bank may it be matrimonial home or spiritual house of worship is not precluded from the risk of being sold by the bank if the borrower like the plaintiff in this case defaults in making the necessary payments to secure the debt received and acknowledged as a loan or overdraft. There is no sentimental or spiritual value of any immovable property offered as security to legitimise the money borrowed for use by the borrower in the form of a loan.
50. In this case all the allegations that the plaintiff was unaware of the transactions or that he was surprised by the advertisement of her property by the 4<sup>th</sup> defendant for purposes of sale were never discharged on a balance of probabilities. The timelines set out in the *Land Act* on the statutory power of sale, the intended sale and service of the statutory notices were all complied with as stipulated in the act. The courts have recognised that a mortgagee in this case the 1<sup>st</sup> defendant bank is not a trustee for the sale transactions which may arise after the plaintiff defaulted in repaying the loan. Unlike a trustee who acts on behalf of others and is liable for negligence acts, a mortgagee has a substantial interest in the property being sold.
51. The exacting statutory power of sale is given to the mortgagee for purposes of realizing its security in the event the loan repayment falls due and no steps are taken to regularise the arrears and continuum of keeping the payment on schedule. On the other hand it is now well settled in law that it's the duty of a mortgagee like in the instant case the 1<sup>st</sup> defendant bank when realizing the mortgaged property by sale offered as security by the plaintiff to behave in conducting such realization of the proceeds of sale as a reasonable man would have in the realization of his or her own property. The criticism levelled at the mortgagee by the plaintiff on the auction, sufficient time for advertising and the notice of sale remain ultimately unproven by the plaintiff. What the law frowns about is in the realm of the mortgagee acting recklessly or wilfully sacrifices the interests of the mortgagor herein in the plaintiff to occasion prejudice or injustice.
52. It is not in dispute that the law provides that the advertisement for sale of the mortgaged property is necessary. In my opinion the object of a sale in a Public Auction is to secure a fair price for the property offered by means of competitive bids between the probable purchasers. The auctioneer in that case is mandated to go for the best price from the bids received from the public. On the other hand the object of giving public notice of a sale by auction whether by advertisement or posters is to bring the subject of the sale to the notice of the public to invite probable purchasers and to induce such competitive bids



for the property likely to secure fair price. There is no evidence that such a duty was not carried out diligently by the 4<sup>th</sup> defendant. One of the main issues raised by the plaintiff was that the 1<sup>st</sup> defendant bank should be held liable for the negligence of its agents one of them being the 4<sup>th</sup> defendant. However, the above discussions and the authorities cited in this area are conclusive that a burden of proof vested with the plaintiff has not been discharged to hold the defendants jointly and severally liable for the issues raised in the plaint by the plaintiff to grant any of the reliefs in her favour.

45. In the premises, the suit is hereby dismissed in its entirety with costs to the defendants.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

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**R. NYAKUNDI**

**JUDGE**

wakigamwa@yahoo.com,

allanrimui@yahoo.com

deniswabwire@gmail.com

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