



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 605 OF 2005

ELIJAH KIPNG'ENO ARAP BII.....PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK.....1<sup>ST</sup> DEFENDANT

GEORGE MBURU MWAI.....2<sup>ND</sup> DEFENDANT

JAYALA INVESTMENTS COMPANY LIMITE.....3<sup>RD</sup> DEFENDANT

JUSTUS ORIMBA OWINO.....4<sup>TH</sup> DEFENDANT

**JUDGMENT**

1. The Plaintiff **ELIJAH KIPNG'ENO ARAP BII** brought this suit by way of the Amended Plaint dated **16<sup>th</sup> February 2016** seeking Judgment against the Defendants jointly and severally for:-

“a. A declaration nullifying the variation of the terms of the credit facilities specified in the credit contract entered between the Plaintiff and the 1<sup>st</sup> Defendant on 20<sup>th</sup> March 1998 and on 23<sup>rd</sup> March 1998 by the 1<sup>st</sup> Defendant on the basis of decisions of 3<sup>rd</sup> parties who were not a party to the said credit contract in relation to LR No. Nairobi/Block 99/122 NEW RUNDA and LR No. Nairobi/Block 32/448 HIGH VIEW PHASE II and other properties charged to and deposited with the Defendant.

b. A declaration that the said sale and/or transfer of LR No. Nairobi/Block 99/122 NEW RUNDA and LR No. Nairobi/Block 32/448 HIGH VIEW PHASE II by the 1<sup>st</sup> Defendant and its agents to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is null and void and should be cancelled from the lands register in the Ministry of Lands.

c. A declaration that the 1<sup>st</sup> Defendant takes responsibility for the credit facilities, the repayment of which it frustrated on the basis of the said illegal and invalid 3<sup>rd</sup> party decisions by making it difficult for the Plaintiff to continue repayment.

d. Mesne profits (lost rental income) for LR No. Nairobi/Block 32/448 HIGH VIEW PHASE II at Kshs. 40,000/- per month with effect from 9<sup>th</sup> February 2007 till the rendering of vacant possession of the suit premises.

e. General damages.

f. Such further or consequential relief as this Honourable Court may deem fit.

g. Costs of this suit.”

2. The suit was opposed by all the Defendants. The 1<sup>st</sup> Defendant **KENYA COMMERCIAL BANK** filed an Amended Statement of Defence dated **19<sup>th</sup> March 2009**. The 2<sup>nd</sup> Defendant **GEORGE MBURU MWAI** also filed an Amended statement of Defence dated **3<sup>rd</sup> March 2016**. The 3<sup>rd</sup> Defendant **JAYALA INVESTMENTS COMPANY LIMITED** and the 4<sup>th</sup> Defendant **JUSTUS ORIMBA OWINO** filed a joint Amended Statement of Defence dated **19<sup>th</sup> February 2016**. The Defendants all denied the allegations made against them by the Plaintiff and urged the Court to dismiss the Plaintiff's suit with costs.

3. The hearing of the suit commenced before this Court on **30<sup>th</sup> April 2019**. The Plaintiff called two (2) witnesses in support of its case, the 1<sup>st</sup> Defendant called one (1) witness whilst the 3<sup>rd</sup> and 4<sup>th</sup> Defendants also called one (1) witness.

### THE EVIDENCE

4. The Plaintiff testified as **PW1** in the matter. He relied entirely upon his Witness Statement dated **9<sup>th</sup> July 2015**. The Plaintiff told the Court that he was a retired Banker and it emerged from the evidence that the Plaintiff was the former General Manager of **Kenya Commercial Bank** (the 1<sup>st</sup> Defendant). The Plaintiff was at all material times the Registered Owner of **LR No. NAIROBI/BLOCK 99/122 NEW RUNDA** (hereinafter '**the Runda Property**') and **LR No. NAIROBI/BLOCK/32/488 HIGH VIEW ESTATE** (hereinafter '**the High View Property**').

5. The Plaintiff in his evidence claimed that in the year **1998** he was unlawfully and unprocedurally removed as General Manager of the Bank. That as General Manager he had access to credit facilities from the Bank at the interest rate of **3% per annum**. The Plaintiff alleged that the 1<sup>st</sup> Defendant Bank acting at the behest of third parties being the Permanent Secretary, Treasury and the Deputy Head of **ICDC** at a meeting held on **23<sup>rd</sup> March 1998 at 10.00am** illegally removed him from office and varied the terms of interest on the credit facilities which had been advanced to the Plaintiff calling in the said credit facilities at a higher interest rate being the Commercial rate of the Bank.

6. The Plaintiff further alleged that the Bank had falsely claimed that his credit facilities were in default and proceeded to sell by public auction his two properties at what the Plaintiff terms a '**stage-managed auction.**' The Plaintiff denies having received the **90 day** Statutory Notice as required **Section 92** of the **Land Act, 2012**.

7. The Plaintiff alleges that the sale of the **Runda Property** to the 2<sup>nd</sup> Defendant and the sale by the Bank of the **Highview Property** to the 4<sup>th</sup> Defendant were based on fraud and that the said sale transactions were both tainted with illegality. The Plaintiff alleges that both properties were sold at gross undervalue. That the auctions were pre-arranged and the buyers pre-selected as the said buyers paid deposits on the properties **before** the auctions took place.

8. Being aggrieved by the sale of his two properties in what the Plaintiff perceived to be a scheme by the Bank to dispossess him of his properties the Plaintiff moved to Court and filed the present suit.

**9. PW2 PROFESSOR GEORGE NGUGI NJUGUNA** told the Court that he was a Lecturer at the **University of Nairobi** and was also a Physical Planner and a Registered Surveyor who was a member of the **Institute of Surveyors of Kenya**. **PW2** told the Court that he is the proprietor of **Liberty Homes Limited** a property valuation company.

**10. PW2** told the Court that he conducted a valuation of both the **Runda** and **Highview** properties following site visits conducted on **21<sup>st</sup> March 2007**. **PW2** produced as an exhibit his Valuation Report dated **26<sup>th</sup> March 2007**. (Annexure at **pages 87-92** of Plaintiff's Additional List of Documents filed on **9<sup>th</sup> July 2015**) which indicated the value of the **Runda Property** to be **Kshs. 6,000,000/-** with a forced sale value of **Kshs. 4,200,000.00** whilst the **Highview Property** was given an open market value of **Kshs. 5,500,000/-** with a forced sale value of **Kshs. 3,850,000/-**. According to **PW2** both properties were disposed by the bank at an undervalue. (see pages **107-114** of Plaintiff's Additional List of Documents).

**11. DW1 FRANCIS KOMEN** told the Court that he was a Recoveries Manager with **Kenya Commercial Bank**. He relied entirely upon his witness statement filed on **9<sup>th</sup> July 2015**. **DW1** confirmed that the Plaintiff was on **3<sup>rd</sup> January 1993** employed by the 1<sup>st</sup> Defendant as the General Manager of the Bank. That on or about **21<sup>st</sup> April 1998**, the Plaintiff was properly, procedurally and lawfully relieved of his duties as General Manager by the Banks Board of Directors. The Plaintiff was thereafter paid all his dues in accordance with the terms and conditions of his employment.

**12. DW1** stated that during his tenure as General Manager, the Plaintiff by virtue of the position had accumulated loans, overdraft and other credit facilities as follows:-

“**Main Account      17234520363      Bal      Dr. Shs. 50,541,357.30**

#### LOANS ACCOUNTS

**House Loan a/c 301010261059      Dr. Shs. 1,572,387.50**

**Commercial Loan 301010261114      Dr. Shs. 11,777,406.35**

**Commercial Loan a/c 2301010261127      Dr. Shs. 15,760,741.40**

**Car Loan a/c 301010261156      Dr. Shs. 4,732,625.70.”**

**13. DW1** testified that the above mentioned credit facilities (advances) were secured by charges over various of the Plaintiff's properties including the **Runda Property** and the **Highview Property**. That at the time of his termination the Plaintiff's accounts were in default to the tune of between **Kshs. 4,000,000/-** to **Kshs. 79,152,086.46**. **DW1** stated that the bank claimed from the Plaintiff a total of **Kshs. 91,339,547.48**. See demand letters dated **20<sup>th</sup> November 2001** and **2<sup>nd</sup> April 2002** annexed at **pages 6 – 11** of the 1<sup>st</sup> Defendant's Bundle of Documents filed on **9<sup>th</sup> July 2015**. The witness told the Court that efforts were made to enable the Plaintiff pay off the outstanding amount

by way of instalments but that these efforts did not bear fruit. (See communication between the parties at **pages 9 – 11** of the 1<sup>st</sup> Defendants Bundle of Documents filed on **9<sup>th</sup> July 2015**). The bank then proceeded to exercise its statutory right of sale in respect of the two properties.

**14. DW1** asserts that the 1<sup>st</sup> Defendant adhered to all the legal requirements in selling the two properties. He states that Statutory Notices were sent by Registered Mail. That the Bank commissioned **Centenary Valuers and Property Consultants** to value the properties. That the said valuers submitted to the Bank their Report dated **17<sup>th</sup> July 2006**.

**15. DW1** went on to state that they engaged **Auctioneers** who on **6<sup>th</sup> December 2006** sent to the Plaintiff the **45 days** notice by way of Registered Post. That the two properties were advertised on **24<sup>th</sup> January 2007** and again on **6<sup>th</sup> February 2007** for an auction scheduled to take place on **9<sup>th</sup> February 2007**. That at said auction the 2<sup>nd</sup> Defendant was declared the highest bidder for the **Runda Property** whilst the **4<sup>th</sup> Defendant** was declared the highest bidder for the **Highview Property**. **DW1** confirms that both buyers paid the required **25%** deposit at the fall of the hammer and that both later cleared the purchase price in full.

**16. DW2 JUSTUS ORIMBA OWINO** was the purchaser of the **Highview Property**. **DW4** told the Court that he had been a tenant of the Plaintiff in the said property for about **twenty-five (25) years**. **DW2** relied upon his witness statement dated **18<sup>th</sup> October 2016**. **DW2** stated that the material time he was working with the **United Nations** and was based in **East Timor**. That his daughter and sister-in-law informed him of the auction which was scheduled to take place on **9<sup>th</sup> February 2007**. **DW2** immediately made arrangements to return to **Kenya** in order to participate in the auction. **DW1** stated that he attended the auction at which he emerged as the highest bidder for the **Highview Property**.

**17. DW2** further told the Court that although he purchased the property in question in the year **2007** there was a delay in effecting the transfer of the property. He then instructed his lawyer to have the **Highview Property** registered in the name of **Jayala Investment Company Limited** (the 3<sup>rd</sup> Defendant) which is a Company the 4<sup>th</sup> Defendant had registered in the year **2009**. **DW2** told the Court that he was a Director of the 3<sup>rd</sup> Defendant Company.

**18.** At the close of oral evidence parties were invited to file their written submissions. The Plaintiff filed his written submissions on **28<sup>th</sup> April 2020**, the 1<sup>st</sup> Defendant filed its written submissions dated **3<sup>rd</sup> June 2020** whilst the 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their written submissions dated **14<sup>th</sup> July 2020**.

#### **ANALYSIS AND DETERMINATION**

**19.** I have carefully considered the material placed before the Court, the evidence adduced before the Court as well as the written submissions filed by all the parties. -The Evidence Act, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107 of the Evidence Act Cap 80, Laws of Kenya** provides as follows:-

##### **“Burden of proof**

- 1. Whoever desires any Court to give Judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
- 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

**20.** In my view the following are the issues which arise for determination in this suit.

- i. Whether the 1<sup>st</sup> Defendant unlawfully varied the terms of the Credit Contract between the Plaintiff and the Bank.**
- ii. Whether the sale and transfer of the two properties was illegal null and void.**
- iii. Whether the subject properties were sold at an undervalue.**
- iv. Whether the Plaintiff is entitled to the orders as sought in the Plaintiff dated 16<sup>th</sup> February 2016.**

##### **i. Whether the Credit Contract was unlawfully varied**

**21.** It is common ground that at the material time the Plaintiff was the General Manager of the 1<sup>st</sup> Defendant Bank. The Plaintiff also readily concedes that by virtue of his position as General Manager he was entitled to access credit facilities at a reduced interest rate of **3%** per annum. The Plaintiff contends that upon termination of his services as General Manager (which he insists was done illegally and unprocedurally) the 1<sup>st</sup> Defendant at a meeting held on **23<sup>rd</sup> March 1998** reverted the rates of interest payable on his facilities to the Commercial rate applicable by the Bank.

**22.** The Plaintiff in his evidence confirmed that he had charged the **Runda and Highview Properties** in favour of the Bank in order to secure the advances made to him. A copy of the charge in respect of **LR No. Nairobi/Block 32/448** (**‘the Highview Property’**) appears at **pages 126-147** of the Plaintiffs Additional List of Documents filed on **9<sup>th</sup> July 2015**. The said charge was registered on **16<sup>th</sup> October 1990**. Likewise a copy of the charge dated **24<sup>th</sup> October 1996** in respect of **Title Number Nairobi/Block 92/122** (**‘the Runda Property’**) is

annexed at **pages 150-165** of the Plaintiffs Additional List of Documents. This Charge was registered on **1<sup>st</sup> November 1996**.

23. Once the Plaintiff's services as General Manager had been terminated, there was no basis upon which the Plaintiff could continue to demand that he be charged interest at the rate of **3% per annum** which was the rate reserved for bank employees. Once the Plaintiff had ceased to be an employee of the Bank then any special rates on interest he may have enjoyed as a bank employee would be recalled and any facilities outstanding would attract the normal rates applied to customers of the Bank. It is also pertinent to note that vide a letter dated **21<sup>st</sup> January 1998** the Bank did restate to the Plaintiff the terms of his credit facilities following a revision of the repayment terms and the additional securities that the Plaintiff had offered in respect of the loans. In the said letter (pages **23-24** of Plaintiff's Bundle) it was stated inter alia as follows:-

**“Interest will be charged at 8% p.a on all the above facilities apart from the house loan and the car loan which will attract the rate of 3% p.a.**

**However the Bank reserves the right to change such rate or rates as it may in its sole discretion from time to time decide.**  
**[own emphasis]**

By this letter the Bank reserved to itself the sole discretion to vary interest rates. The Plaintiff raised no objection to this letter. He only raised complaints once his services as General Manager had been terminated.

24. The Plaintiff told the Court that he has filed a suit at the **Employment and Labour Relations Court** challenging his dismissal as General Manager. However the Plaintiff was unable to tell this Court when or if that matter had been resolved by the **ELRC**. The 1<sup>st</sup> Defendant informed the Court that the Plaintiff's suit at the **ELRC** had been dismissed for want of prosecution. Under cross examination the Plaintiff admitted that he was unaware that his suit had been dismissed for non-prosecution. The Plaintiff admitted that he had not followed up in order to establish the status of the suit he had filed at the **ELRC**. As it is there has been no finding by a Court of competent jurisdiction that the Plaintiff's dismissal as General Manager was unlawful. Therefore the Plaintiffs allegations that his dismissal was unfair and illegal remain just that – mere allegations. In the circumstances the variation by the Bank of the interest payable on the Plaintiffs credit facilities cannot be said to have been unlawful and I so find.

#### **ii. Whether sale of the subject properties was illegal null and void**

25. The Plaintiff has claimed that the sale and transfer of the subject properties to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants was tainted with fraud and seeks that the Court nullify the said transactions. The particulars of alleged fraud were set out in paragraph 11 of the Amended Plaint dated **16<sup>th</sup> February 2016** as follows:-

**“(a) The purchase prices of Kshs. 3,100,000/- and 3,200,000/- of the two properties were throw away prices that were inordinately low and a fraud against the Plaintiff for reasons that the actual value of the two properties are Kshs. 6 million for L.R. No. NAIROBI BLOCK/99/122 NEW RUNDA and Kshs. 5.5 Million for L.R. No. NAIROBI/BLOCK/32/448 HIGH VIEW PHASE II.**

**(b) There was no auction conducted but all that took place on the purported date of auction 19/2/2007 was an arrangement already made between the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants together with their agents.**

**(c) Further payments were made after the completion date rendering the transactions an illegality and a fraud.**

**(d) The purported sale of the suit properties to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants was an assistance to them by the 1<sup>st</sup> Defendant in that the transfer of the suit property to the 2<sup>nd</sup> Defendant was effected when he had not paid for it so as to enable him to use the property to obtain a loan advancement from Barclays Bank of Kenya Limited to pay to the 1<sup>st</sup> Defendant purportedly in purchase of L.R. No. NAIROBI/BLOCK 99/122 NEW RUNDA that had already been transferred to him on 27<sup>th</sup> July 2007 when he was supposed to have paid the balance of the auction price within thirty (30) days as from 9/2/2007. There was therefore no auction on 9<sup>th</sup> February 2007.**

**(e) The 4<sup>th</sup> Defendant had been a tenant of the Plaintiff for over ten (10) years and the 1<sup>st</sup> Defendant conspired with him to get L.R. No. NAIROBI/BLOCK/32/448 HIGH VIEW PHASE II transferred to him fraudulently while the purported auction was non-existent as shown by the fact that he paid the purported sale price in June 2007 when he was supposed to have paid the same in accordance with the agreement (within thirty (30) days from the auction date of 9/2/07).**

**(f) The 1<sup>st</sup> and 4<sup>th</sup> Defendant also conspired to transfer L.R. No. NAIROBI/BLOCK 32/448 HIGHVIEW PHASE II to the 3<sup>rd</sup> Defendant whereas the 1<sup>st</sup> Defendant had no contractual relationship with the 3<sup>rd</sup> Defendant which also did not participate in the auction sale and never paid for it.**

**(g) The 2<sup>nd</sup> Defendant first offered a purchase price of Kshs. 4 million for L. R. No. NAIROBI/BLOCK 99/122 NEW RUNDA and paid Kshs. 400,000/- as 10% deposit but later conspired with the 1<sup>st</sup> Defendant to get the price reduced to 3.1 million.**

**(h) The 1<sup>st</sup> Defendant's valuation of NAIROBI/BLOCK 99/122 NEW RUNDA was Kshs. 5.5 million in 1997 and it cannot therefore be that almost ten (10) years thereafter i.e as at 18<sup>th</sup> July 2006 the valuation by the 1<sup>st</sup> Defendant can now be 3.5**

**million a justification for the sale price of Kshs. 3.1 million.”**

On its part the 1<sup>st</sup> Defendant denied that the said Auctions at which the two properties were sold were fraudulent at all.

26. Fraud is a quasi criminal charge and it must not only be specifically pleaded but requires proof on a standard which though below reasonable doubt is above the usual standards in Civil proceedings, that is on a balance of probabilities. In **CENTRAL BANK OF KENYA LIMITED –VS- TRUST BANK LIMITED & 4 OTHERS [1996]eKLR**, the Court of Appeal observed that:-

**“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case. In this case, to succeed in the claim for fraud, the Appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the Court would make a finding.”**

27. In **URMILA w/o MAHENDRA SHAH –VS- BARCLAYS BANK INTERNATIONAL LTD & ANOTHER [1979]eKLR**, the Court of Appeal took the view that the onus to prove fraud in a matter lies upon the party who alleges it. Similarly in cases where fraud is alleged, it is not enough to leave it to the Court to simply infer fraud from the facts. In **VIJAY MORJARIA –VS- NANSINGH MADHUSINGH DARBAR & ANOTHER [2000]eKLR, Tunoi JA** (as he then was) stated as follows:-

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [own emphasis]**

The Plaintiff claims that the banks statutory right of sale had not crystallized.

28. The fact of the matter is that the Bank did hold valid charges over the **Highview** and **Runda** Properties. Although the Plaintiff claims that the allegation that he was in default of his credit facilities was false he has not adduced any evidence to prove that he had paid off all the outstanding amounts. Nothing would have been easier than for the Plaintiff to table in Court credit advices indicating that the entire sum claimed by the Bank had been paid. Further under cross examination the Plaintiff admits:-

**“After I left the Bank I did attempt to re-negotiate my facilities but the Bank officials were adamant and would not accommodate me. I wrote various letters to the Bank seeking an amicable settlement.”**

29. Further on cross-examination the Plaintiff says:-

**“I had a temporary overdraft which I was using for my personal affairs. It is true that I owed the Bank a sum of Kshs. 42,326,450/-. I was undertaking to pay off the amount by installments of Kshs. 500,000/-. I was not able to do so due to my problems with the Bank ....”**

30. Therefore the fact is that the Plaintiff was in default and the bank’s right of sale had crystallized as proved by the various letters of demand sent to the Plaintiff. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants were merely parties who took notice of public advertisement for sale of the said properties, registered their interest and attended the auctions to try their luck. As it turned out the 2<sup>nd</sup> and 4<sup>th</sup> Defendants emerged as the highest bidders and purchased the two properties from the Bank.

31. In challenging the exercise by the bank of its statutory right of sale, the Plaintiff alleges that he was not served with the **90** day notice as required by **Section 90** of the **Land Act 2012**. The onus lies on the chargee (in this case the 1<sup>st</sup> Defendant) to satisfy the Court that the **90** days Statutory Notice was in fact served upon the Plaintiff.

32. The Plaintiff admits that his address was **P.O. Box 22333-00400, Nairobi** and that this was the address at which he regularly received all communication sent to him by the Bank. The evidence of the Bank is that they sent by way of Registered Post Statutory Notices dated **20<sup>th</sup> November 2001** and **2<sup>nd</sup> April 2002** to the Plaintiff. The 1<sup>st</sup> Defendant produced copies of Certificates of Posting indicating the letters bearing Serial numbers **0019, 0020, 0021** and **0022** were all sent to the Plaintiff via Registered Post on **27<sup>th</sup> November 2001**. (Annexure at pages **8** and **11** of 1<sup>st</sup> Defendants Bundle). The Statutory Notice in question bore Serial Number **0019-0022, 0050** and **0054**.

33. The Plaintiff however denies having received the Statutory Notices sent to him by the 1<sup>st</sup> Defendant by Registered Mail on this address. The Plaintiff in support of his contention that he did not receive the said Notices produced a letter dated **22<sup>nd</sup> March 2006** to himself from a **MR. J. K. KENDUIYWO** the **Head Postmaster, Tom Mboya Street Branch** of the Post Office which letter indicated that the Registered Letter Serial Nos. **0020, 0021, 0022** and **2334** were all returned to sender on **2<sup>nd</sup> January 2002**. (Annexure **EKAB ‘5’** at page 55 of Plaintiff’s List of Documents).

34. However the 1<sup>st</sup> Defendant was able to adduce evidence (vide Certificates of Posting) to show that letters bearing Serial Numbers **0050, 0052, 0053** and **0054** which were also addressed to **P.O. Box 22333-00400** on **3<sup>rd</sup> April 2002** (Annexure at page **11** of 1<sup>st</sup> Defendant’s Bundle of Documents), were all apparently received by the Plaintiff. The obvious question that arises then is why is it that some letters posted using same address are received by the Plaintiff whilst others sent using the very same address are returned to sender. Did the Addressee fail to go to the Post Office to collect his mail or did the staff at the Post Office place the mail in the wrong Post Office Box. Indeed under cross-examination the Plaintiff confirms that **P.O. Box 22333 Nairobi** is his correct address which he himself supplied to the

Bank. he goes on to state that:-

**“The [Statutory] Notices were addressed to by genuine address. I do not pick up my mail regularly ....”**

Could the failure of the Post Office to deliver the notices to the Plaintiff have occurred due to the Plaintiff's failure to pick up his mail regularly? The only person who would have been able to clear up this mystery would be **Mr. Kenduiywo** the Post-Master General. Unfortunately the Plaintiff did not see fit to call him as a witness.

35. Secondly the Statutory Notices sent to the Plaintiff bore Serial Numbers **0019-0022, 0050 and 0054** (see page **8-9** of 1<sup>st</sup> Defendant's Bundle). There is no indication that these registered letters were **not** delivered to the Plaintiff. The bank has therefore satisfactorily proved that statutory notices were in fact posted to the Plaintiff. In my view letters sent by Registered Post to an address which the Plaintiff concedes is his correct address at which address other letters sent to the Plaintiff have been duly received, are deemed to have been properly sent to the Plaintiff. I therefore find and hold that the 1<sup>st</sup> Defendant did properly serve the Plaintiff with the requisite Statutory Notices.

36. The Plaintiff has alleged that the suit properties were both sold at a gross undervalue. In **MBUTHIA –VS – JIMBA CREDIT FINANCE CORPORATION [1988]I KLR** the Court held that:-

**“A sale made at a fraudulent undervalue will be set aside. But the Court will not set aside a sale merely on the ground that it is disadvantageous, unless the price is so low as to be in itself an evidence of fraud.”**

37. **Section 97** of the **Land Act** sets out the duty of care owed by a charge to a charger as follows:-

**“(1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.**

**(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”**

38. In interpreting **Section 97(2)** of the **Land Act**, **Gikonyo, J**, in **KOILEKEN OLE KIPOLONKA ORUMOS –VS- MELLECH ENGINEERING & CONSTRUCTION LIMITED & 2 OTHERS (2011)eKLR** held as follows:-

**“...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under Section 97(2) of the Land Act is statutory and obligatory. It is not left to the whims of the chargee and its agents especially the auctioneers”.**

39. The **Highview Property** was sold to the 4<sup>th</sup> Defendant at a Public Auction for **Kshs. 3,200,000/-** whilst the **Runda Property** was sold to the 2<sup>nd</sup> Defendant also by way of a Public Auction for **Kshs. 3,100,000/-**. In challenging the prices at which the two properties were sold the Plaintiff referred to a valuation it had commissioned from **LIBERTY HOMES LIMITED**. **PW2 Professor George Ngugi Njuguna** the proprietor of **Liberty Homes Ltd** produced the Valuation Report dated **24<sup>th</sup> March 2007** which he had prepared in respect of the two properties. (see **pages 107-112**) of the Plaintiffs Additional List of Documents filed on **9<sup>th</sup> July 2015**). In that Report **Liberty Homes** returned the following values in the two properties:-

**“Runda property**

**Open market value Kshs. 6,000,000/-**

**Forced sale value Kshs. 4,200,000/-**

**Highview property**

**Open market value Kshs. 5,500,000/-**

**Land value Kshs. 1,500,000/-**

**Improvement Kshs. 4,000,000/-**

**Forced sale value of Kshs. 3,850,000/-“**

40. On the other hand the 1<sup>st</sup> Defendant relied on the valuations which it had itself commissioned on **17<sup>th</sup> July 2006** from **CENTENARY VALUERS AND PROPERTY CONSULTANTS** (see **page 93 – 106** of the Plaintiffs Additional List of Documents). In their report dated **18<sup>th</sup> July 2006** **Centenary Valuers** returned the following valuations:-

**“Runda Property**

**Open market value Kshs. 3.5 million**

**Mortgage value Kshs. 3,100,000/-**

**Forced sale value Kshs. 2,800,000/-**

**Recommended reserve price Kshs. 2,400,000/-**

**Highview Property**

**Open market value Kshs. 3.6 million**

**Value of land Kshs. 1,000,000/-**

**Improvements Kshs. 2,600,000/-**

**Mortgage value Kshs. 3,200,000/-**

**Forced sale value Kshs. 2,900,000/-**

**Recommended reserve price Kshs. 2,500,000/-”**

41. It is pertinent to note that **Liberty Valuers** was commissioned by the Plaintiff about **two (2) months after** the suit properties had already been sold to the 2<sup>nd</sup> and 4<sup>th</sup> Defendants by way of public auction. Further it is important to note that the sale by the Bank in exercise of its statutory right of sale was a **“forced sale”** and did not allow for the luxury of awaiting the highest offer possible. The fact that the auctions did not secure prices pleasing to the Plaintiff does not mean that the property was sold at an undervalue. In **MBUTHIA –VS- JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988]eKLR** the Court of Appeal held as follows:-

**“... surely the true market value of property is not determined by either the subjective view-point of a mortgagor or his chosen valuers. It is difficult to think of a better and more reliable method of determining the true and fair market value of property than by a sale at a public auction.”**

The duty of the 1<sup>st</sup> Defendant was to obtain the best possible price taking into account the prevailing market conditions and the fact that this was a forced sale. I am satisfied that the Bank did fulfil its duty of care in this respect.

42. **PW2** disputed the accuracy of the values returned by **Centenary Valuers**. However **PW2** did concede that it was possible for two valuers to arrive at different values for the same property. In my opinion the difference arrived at by the two valuers in the forced sale values being a difference of **Kshs. 950,000/-** for the **Highview Property** and **Kshs. 1,400,000/-** for the **Runda Property** was not so extreme as to raise any suspicion. The differences were reasonable even taking into account international practice allowance for a deviation of plus or minus 20% as stated by **PW2**.

43. Furthermore the mere fact that two valuers have arrived at different valuations for the two properties does not amount to proof that the sale by auction was fraudulent. In **ZUM ZUM INVESTMENT LIMITED –VS- HABIB BANK LIMITED [2014]eKLR** that:-

**“Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time .... 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 .... The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale....”** [own emphasis]

44. Neither the Plaintiff nor **PW2** have alleged much less proved that the valuers commissioned by the bank were unqualified or incompetent in any way. The valuations by **Centenary** were conducted in **July 2006** whereas the Auction took place in **February 2007**. The valuations were conducted roughly six (6) months before the sale of the two properties. Therefore I find no evidence that the 1<sup>st</sup> Defendant breached its statutory duty of care.

45. The Plaintiff also took issue with the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants paid deposits prior to the date of the Auction. It was conceded that by the 4<sup>th</sup> Defendant that he paid to **Keysian Auctioneers** the sum of **Kshs. 300,000/-** which he was told was a deposit to enable him participate in the Auction. **DW2** stated that this deposit of **Kshs. 300,000/-** registration fee was later factored into the purchase price. The Plaintiff cited this to be evidence / proof that the sales to the two buyers had been pre-arranged in advance. However under cross-examination the Plaintiff admitted that he was aware of the practice of requiring interested potential buyers to pay a security deposit prior to an auction as a sign of commitment. Here again I find no proof of fraud.

46. The Plaintiff also took issue with the fact that the Bank extended the timelines for payment of the balance of the purchase price for the

2<sup>nd</sup> and 4<sup>th</sup> Defendant. The Plaintiff contends that the 60 day extension granted to the 4<sup>th</sup> Defendant to clear the balance of the payment due on the **Highview Property** was granted in collusion with Bank staff. However the Plaintiff has not availed any evidence of collusion by the 4<sup>th</sup> Defendant and any staff member of the Bank. What is the name of the Officer with whom the 4<sup>th</sup> Defendant colluded what was the manner of the alleged collusion. The Plaintiff provides no answers to these crucial questions. **DW1** in conceding that such extensions were indeed given explained that this was provided for in the Agreements between the Bank and the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.

47. The 4<sup>th</sup> Defendant confirmed to the Court that he required for an extension of time within which to pay the balance of the purchase price. **Clause 6** of the Conditions of Sale between the Bank and the 3<sup>rd</sup> Defendant provided as follows:- ('see **page 48** of 3<sup>rd</sup> and 4<sup>th</sup> Defendants Bundle filed on **18<sup>th</sup> October 2016**').

**“... PROVIDED ALWAYS THAT in the event that the chargee shall in its sole and absolute discretion and without prejudice to the generality of the foregoing but not otherwise howsoever extend the period for completion and payment of the balance of the purchase money ....” [own emphasis]**

Thus it is manifest that as per the contract the Bank had the sole discretion to extend the period for completion of payment of purchase price. The Banks decision to exercise this discretion in favour of the buyers is not evidence of fraud and/or collusion.

48. The Plaintiff complained that the **Highview Property** was registered to the 3<sup>rd</sup> Defendant Company as proprietor yet said Company had been registered in the year **2009 two (2) years after** the auction which took place in the year **2007**. The 4<sup>th</sup> Defendant told the Court that he is a Director of the 3<sup>rd</sup> Defendant Company. The 4<sup>th</sup> Defendant explained that he participated in the auction and purchased the **Highview Property** after emerging as the highest bidder. That he paid the deposit of **Kshs. 800,000/-** at the fall of the hammer as evidenced by the letter dated **23<sup>rd</sup> February 2007** at page **82** of 1<sup>st</sup> Defendants Bundle. **DW3** explained that since the transfer took some time he elected to have the **Highview Property** transferred to the Company which he had incorporated on **2<sup>nd</sup> September 2009**. According to the copy of the official search dated **20<sup>th</sup> August 2015** (Annexure at page **74** of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants Bundle filed on **18<sup>th</sup> October 2016**) the 3<sup>rd</sup> Defendant Company **Jayala Investments Company Limited** was registered as proprietor of the suit property on **8<sup>th</sup> December 2010** and **not** in the year **2007** as claimed by the Plaintiff. In the circumstances I find nothing illegal or suspicious in the transfer by the 4<sup>th</sup> Defendant of the **Highview Property** to the 3<sup>rd</sup> Defendant.

49. In the premises based upon the foregoing I find no evidence of fraud in the manner in which the 1<sup>st</sup> Defendant exercised its statutory right of sale. The 2<sup>nd</sup> and 4<sup>th</sup> Defendant both urge the Court to dismiss the Plaintiff's suit against them and assert that they are both bona fide purchasers for value.

50. There was nothing to put the 2<sup>nd</sup> or 4<sup>th</sup> Defendant on their guard regarding the auctions. They had no reason to doubt that the bank was lawfully exercising its statutory right of sale. **Black's Law Dictionary, 9<sup>th</sup> Edition** has defined an **Innocent Purchaser for Value Without Notice** as:-

**“... one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or airmities, claims, or equities against the seller's title; one who has in good faith paid valuable considerations for property without notice of prior adverse claims ...”**

51. In **KATENDE –VS- HARIDAR & COMPANY LIMITED [2008]2 E.A. 173** the Court of Appeal in Uganda held as follows:-

**“... for the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:-**

- a. he holds a Certificate of Title;**
- b. he purchased the property in good faith;**
- c. he had no knowledge of the fraud;**
- d. he purchased for valuable consideration;**
- e. the vendors had apparent valid Title;**
- f. he purchased without notice of any fraud;**
- g. he was not party to any fraud ...” [own emphasis]**

52. I find that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants are now the lawfully registered proprietors of the **Highview** and **Runda Properties**. There is no evidence of fraud on their part in the acquisition of said properties. I find and hold that the 2<sup>nd</sup> and 4<sup>th</sup> Defendants are both innocent purchasers for value. The Plaintiff has only dragged them into this suit in pursuance of his vendetta against the Bank.

53. Courts have severally held that the chargor's equity of redemption is extinguished following the auction. This was the position adopted in the case of **KAMULU ACADEMY LIMITED & ANOTHER –VS- BRITISH AMERICAN INSURANCE (K) LTD & 2 OTHERS [2018]eKLR** it was held:-

**“The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not...in the case of *Mbuthia Vs Jimba Credit Finance Corporation and another [1986-1989]1EA 340(CAK)* considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second Respondent. The Court of Appeal held:- A sale destroys the equity of redemption in the mortgaged property...The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgage from completing by conveyance a contract to sell the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith...This means that the mortgagor's right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act. In the case of *Ze Yu Vs Yang Nova Industrial Produce Ltd [2003] 1 EA 362 (CCK)*, Justice Nyamu (as he then was) held as follows: -**

**“The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power.” [own emphasis]**

54. Therefore if the Plaintiff had any issue with the manner in which the auction had been conducted his remedy lay in damages as per **Section 99(4)** of the **Land Act** which provides as follows:-

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

55. In the case of **SIMON NJOROGI MBURU –VS- CONSOLIDATED BANK OF KENYA [2015]eKLR** Hon. Justice Havelock (as he then was) in interpreting **Section 99** stated:-

**“That Section (99) now statutorily encompasses the right of the chargor prejudiced by unauthorized improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff's remedy lies in this case. In this regard, the plaintiff would do well to note the powers of the Court in respect of remedies and reliefs sought out in under Section 104 of the Land Act, 2012 .....**

**What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages ...” [own emphasis]**

### **iii. Is the Plaintiff entitled to prayers sought in the Plaintiff?**

56. Based on my analysis of the Plaintiffs suit I find that it has been demonstrated on a balance of probability that the Plaintiff was truly indebted to the 1<sup>st</sup> Defendant Bank. I further find that the 1<sup>st</sup> Defendant Bank was perfectly entitled to vary the rates of interest applied to the Plaintiffs credit facilities once he ceased to be a bank employee. Further I find that the Plaintiff has failed to prove any fraud in the manner in which the Bank exercised its statutory right of sale. Both the **Runda** and **Highview** properties were sold **above** the recommended reserve prices quoted by **Centenary Valuers**. Therefore the Titles currently being held by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not impeachable as both were in my finding innocent purchasers for value as the Plaintiffs right of redemption was extinguished upon the sale by auction of the two (2) properties.

57. In the case of **JOYCE WAIRIMU KARANJA –VS- JAMES MBURU NGURE & 3 OTHERS [2018]eKLR** it was held that:-

**“... there is little reason to be labour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise of the statutory power of sale is immunized from suit under Section 99 of the Land Act. Thirdly, a mortgagor's equity of redemption is extinguished upon the fall of the hammer in a public auction.” [own emphasis]**

Based on the above finding that the two properties were lawfully acquired by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants, the Plaintiffs claim for **‘mesne profits’** against the 3<sup>rd</sup> Defendant has no basis.

58. General damages are only payable where there has been shown to be a breach of contract or where liability has been proved as against the Defendant. In this matter I have found that no liability and/or breach attaches to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> or 4<sup>th</sup> Defendants. As such the Plaintiff is **not** entitled to general damages.

59. Based on the above I find no merit in the Plaintiffs suit. The same is dismissed in its entirety. Costs are awarded to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants.

**DATED IN NAIROBI THIS 12<sup>TH</sup> DAY OF MARCH, 2021**

.....

**MAUREEN A. ODERO**

**JUDGE**