



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 94 OF 2009**

**JOHN KIRUGHAMIO MAGANGA.....PLAINTIFF**

**V E R S U S**

**1. CONSOLIDATED BANK OF KENYA**

**2. PETER KINYUA MUCENDU T/A KINYUA AUCTIONEERS**

**3. MARY KATIWA MUSAKI.....DEFENDANT**

**J U D G M E N T**

1. By plaint dated the 27/3/2009, the Plaintiff pleads that sometime in May 2007, he charged his property known as **Kilifi/Mtwapa/734**(hereinafter referred to as the suit property) to the 1<sup>st</sup> Defendant to secure the repayment of Kshs. 1,250,000/= payable within a period of three years in monthly installments of kshs 45,000/= inclusive of interest chargeable at the rate of 18% per annum.

2. The Plaintiff contended that he had been diligently servicing the credit facilities and by the end of November 2008 he had an outstanding balance of Kshs. 587,000/=. However, sometime in February 2009, the 1<sup>st</sup> Defendant rejected his monthly installment and on further enquiry, he established that the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant and with the knowledge of the 3<sup>rd</sup> Defendant had irregularly sold the suit property to the 3<sup>rd</sup> Defendant via private treaty.

3. The Plaintiff averred that the purported sale allegedly in exercise of the 1<sup>st</sup> Defendant's right of foreclosure was done in secrecy and in a clandestine manner as he was never notified and/or served with a notification of the attachment and/or proclamation by the 2<sup>nd</sup> Defendant. Consequently, he asserted, the advertisement done in the Kenya times Newspaper on the 25/11/2008 cannot be said to be a notice.

4. The Plaintiff added that the 1<sup>st</sup> Defendant acted in bad faith by appointing the 2<sup>nd</sup> Defendant to sell the suit property before making a formal demand, issuance of the appropriate notices, and the 3<sup>rd</sup> Defendant actively participated in the acts of connivance, and collusion with the 1<sup>st</sup> & 2<sup>nd</sup> Defendants in applying and attending a Land Control Board Meeting long before the auction of the suit property was conducted. Consequently, it was contended that the 3<sup>rd</sup> Defendant is not an innocent purchaser for value without Notice as she participated in fraud and illegality. Therefore, the sale and transfer ought to be declared void.

5. On those pleaded facts, the plaintiffs sought the following orders:

- a) *An order of permanent injunction restraining the Defendants from selling, transferring, developing, evicting and/or dealing with the suit parcel of land known as Kilifi/Mtwapa/734 whatsoever manner.*
- b) *Declaration that the purported sale and transfer is null and void and the title deed issued thereon be nullified.*
- c) *Declaration that the Plaintiff is still the owner of the parcel of land comprising of Kilifi/mtwapa/734.*
- d) *General damages equivalent to monetary value of the suit parcel in the alternative.*
- e) *Costs of the suit.*
- f) *Any other relief as the Court may deem fit to grant.*

6. When served, the 1<sup>st</sup> & 2<sup>nd</sup> Defendants filed a statement of defence dated 14/5/2009 denying all the material allegations in the Plaintiff save for the descriptive paragraphs 1, 2, 3, & 4 thereof and paragraphs 6,7,8,9,21,22 and 23 of the Plaintiff which were admitted. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants state that it was the term of the Legal charge, that if the Plaintiff failed to discharge any of its duties thereunder, the 1<sup>st</sup> Defendant was entitled to exercise its statutory power of sale forthwith without delay and without service of notice on the Plaintiff, other than notice of the immediate exercise of such powers.

7. The 1<sup>ST</sup> Defendant states that the Plaintiff was the author of his own misfortune when he failed to service his facility. Consequently, he was duly notified of the 1<sup>st</sup> Defendant's intention to sell the suit property, requisite procedures were duly followed, and the 1<sup>st</sup> Defendant had the option of selling the suit property by public auction or by private treaty, and since the 3<sup>rd</sup> Defendant was the successful purchaser of the suit property, she was thus entitled to possession of the suit property.

8. On her part, the 3<sup>rd</sup> Defendant filed an amended statement of defence and counterclaim dated 6/1/2016 denying all the allegations in the Plaintiff save for the descriptive paragraphs 4. The 3<sup>rd</sup> Defendant states that she is an innocent purchaser for valuable consideration without notice of any impropriety, at a public auction and that she had neither connived with the 1<sup>st</sup> and 2<sup>nd</sup> Defendant nor attended any Land Control Board meeting in respect of the suit property.

9. The 3<sup>rd</sup> Defendant further stated that after the auction, and upon final payment, the transfer of the suit property to her was undertaken through the firm of **J.J Chesaro & company Advocate** and there was no fraudulent conduct on her part. Further, the 3<sup>rd</sup> Defendant's in her counterclaim prayed that the Plaintiff's suit against her be dismissed with costs and that judgment be entered in her favour against the Plaintiff ordering delivery of vacant possession of the property subject of **Title No.Kilifi/Mtwapa/734** within thirty (30) days.

10. The Plaintiff in his Reply to the 3<sup>rd</sup> Defendant's amended Statement of Defense and Counter-Claim and defense to the counter-claim pleaded that the counterclaim does not disclose a reasonable cause of action as no particulars of claim are provided and that the 3<sup>rd</sup> Defendant obtained its title by fraud and or misrepresentation hence the Court is entitled to cancel the title that the 3<sup>rd</sup> Defendant holds.

11. The 3<sup>rd</sup> Defendant in reply to the Plaintiff's Defence to Counterclaim denied all the allegations of fraud attributed to her and averred that she was a purchaser for valuable consideration in an auction without notice, as she came to learn about the suit property when it was advertised for auction in the dailies in exercise of a statutory power of sale by the 1<sup>st</sup> Defendant. It was then asserted that the plaintiff's remedy if any is in damages as against the lender and the auctioneers and not cancellation of the sale and the resultant title.

12. In support of his case, the Plaintiff testified and called **Mr. Christopher SIELE** who was an official of the Bahari Land Control Board and **Mr. Rashid Harun Shake**, a valuer and a land economist. The 1<sup>st</sup> & 2<sup>nd</sup> Defendant, on their part, relied on the evidence of its Recovery Officer **Mr. Billy Stephen Mbindu**, **Ms. Ruth Mutaru** who was the 1<sup>st</sup> Defendant's branch Manager Nairobi, **Nicodemus Mwangangi Mwavu** who is a valuer by profession and **Mr. Peter Kinyua Muchendu** who is an Auctioneer by profession. The 3<sup>rd</sup> Defendant testified and called **Leonard Joseph Wanjogu Mwangi** who was her agent in the auction which took place on the 11/12/2008. All the witness relied on and adopted their respective witness statements as evidence in chief where applicable and then produced the Bundles of Documents filed as exhibits.

### **Evidence led by the parties**

13. The hearing of the suit commenced on the 21/2/2012. On that day, **PW1 John Kirughamio Magaga** testified and stated that as a result of a loan of kshs.1,250,000/= advanced to him by the 1<sup>st</sup> Defendant, a charge dated 25/5/2007 was created over the suit property. PW1 added that he slightly fell in arrears in servicing the loan in December 2008 and January 2009 and that on the 2/2/2009, he went to the 1<sup>st</sup> Defendant bank to pay a sum of kshs.200,000/= only for the said amount to be rejected by the 1<sup>st</sup> Defendant, and he was informed that the suit property had already been sold.

14. PW1 testified and stated that he had never received any notice of non-payment and that there was no indication that there was a problem with his account at the bank and that the late payment was the first ever default. He further stated that on the 3/2/2009 he visited the Kilifi Land Registry, where he established that the suit property had not been transferred to anybody yet. He also established that the suit property had been sold vide memorandum of sale dated 11/12/2008, yet he still had the right to pay the monthly installments by the time of the alleged sale. He alleged to have come across a letter of consent dated 4/12/2008 between one **Mary Katiwa Musaki**, and him, and that the auction was conducted on the 11/12/2008.

15. PW1 maintained that he was still in occupation of the suit property despite several attempts to evict him by the 3<sup>rd</sup> Defendant and that he had development on the suit property to a tune of 40-50 million which deserve protection from the irregular and unlawful sale by the 1<sup>st</sup> defendant and ought to be nullified by this Court.

16. On cross-examination by **Mr. Omondi**, Learned Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants, PW1 confirmed that his postal address was 86854 Mombasa and that he had defaulted severally in the payment of installments, and that on the 25/9/2008 he had written to the 1<sup>st</sup> Defendant bank indicating his intention to clear his outstanding arrears of Kshs. 960,000/= by issuing two cheques of kshs. 480,000/=. However, one of the cheques was dishonoured and by the time the suit property was being sold, he was in arrears in the sum of kshs. 90,000/=.

17. PW1 further confirmed that in the supporting Affidavit sworn on the 27/3/2009, he stated that he was in arrears in the sum kshs.587,000/= when he went to pay the outstanding arrears on the 2/2/2009 and that on the 2/2/2009 while at the bank, he had in his possession 11 post-dated cheques and a sum of kshs.200,000/= in cash, though in his aforementioned supporting Affidavit, there was no mention of him having cash in the amount of Kshs. 200,000/=

18. PW1 when shown the document listed as item 4 on the 1<sup>st</sup> & 2<sup>nd</sup> Defendants' list of document confirmed that the letter dated 28/5/2008 was a statutory notice but the said letter was not served upon him. Further, PW1 when showed item 6 on the same list of documents he confirmed that the letter was dated 21/10/2008 and it emanated from the 2<sup>nd</sup> Defendant and the addressee is **Mwangi K. Maganga** and not him and he did not receive the said notice. Further, PW1 when shown item 1 on the 3<sup>rd</sup> defendant list of documents confirmed that it was a Newspaper advertisement on the 25/11/2008, but he never saw the aforesaid advertisement. Therefore, in his view, the bank did not have the right to sell when it purported to do so.

19. On cross-examination by **Mr. Mogaka**, Learned Counsel for the 3<sup>rd</sup> Defendant. PW1 confirmed that he was aware of the existence of the Kenya times Newspaper and that the suit property was listed in the aforesaid advertisement, his name was reflected on the advertisement, the advertisement was placed by the 2<sup>nd</sup> Defendant, and the auction was scheduled for the 11/12/2008 at the 2<sup>nd</sup> Defendant's premises. He further confirmed that he did not know what happened at the auction since he never attended the said auction.

20. PW1 confirmed that when he signed the charge document he was never coerced and he was aware that the 1<sup>st</sup> Defendant had the right to sell the suit property in case he defaulted, and that he was aware that a memorandum of sale was entered into on the 11/12/2008 and he is not aware if the 3<sup>rd</sup> Defendant attended the Land Control Board( LCB)and when shown MFI 6, he confirmed that he did not have any evidence to prove that the 3<sup>rd</sup> Defendant had applied for an LCB consent and that though the document is addressed to him, he had no idea how MFI 6 came about, or who produced it and that the said document was not signed by the chairperson of Bahari Land Control Board.

21. PW1 confirmed that he was given a 7 days' notice to vacate the suit property and that it is the Court that granted him an injunction against the people who came to fence the suit property.

22. PW2 **Christopher Siele** in examination -in-chief testified and stated that he presided over the Bahari Land Control Board as its chairperson and when shown the document dated 4/12/2008, he stated that he had not been posted to Kilifi District by then, and the said document was not signed and did not bear the rubber stamp of DC KILIFI. Consequently, the said document was invalid and it could not be used in any transaction as the chairperson of the Land Control Board had to sign a LCB Consent for it to be valid and authentic.

23. On cross-examination by **Mr. Waweru**, PW2 confirmed that the name indicated on the document as the Applicant is **John K. Maganga**.

24. On cross-examination by **Mr. Mogaka**, PW2 Confirmed that he did not get an opportunity to look at the records for December 2008, as he had not been appointed by then and that the chairperson of the Land Control Board can be either the District Commissioner or the DOI or in the absence of any, the Board can elect one of them to be the chairperson.

25. PW3 **Mr. Rashid Harun Shake** in examination-in-chief testified and stated that he is a qualified valuer and a Land Economist having graduated from the University of Nairobi in 1995, and that at the time of his testimony, he had practiced as a valuer for 18 years. He stated that he received instructions to carry out a valuation on the suit property from the Plaintiff on the 21/7/2010. He proceeded to the suit property and established that the size of the suit property is 4.9Ha equivalent to 12.1082 Acres and he also took into account the developments on the suit property and the use of the use property in arriving at the figure of Kshs. 14,600,000/=. He prepared his report dated 23/7/2010 which he produced it as P.Exh 7. He charged and was paid fees of Kshs. 20,000 inclusive of VAT for the Court attendance .

26. On cross-examination by **Mr. Mogaka**, PW3 confirmed that he had a valuation methodology, but he did not mention any comparable in his report, and he did not have any record of any property within the locality to show the Prices. He confirmed that his report did not show whether he had previously valued any other property in the said region and the value assigned was expected after negotiations and sufficient market evaluation.

27. On cross-examination by **Mr. Kibara**, PW3 confirmed that the report did not show a forced sale value and a market value. Further, PW3 confirmed that the property market is not uniform as it can increase, stagnate or decrease. Therefore, the valuation was relevant for 2010 only.

28. On re-examination by **Mr. Jengo**, PW3 stated that he had not been shown another valuation by another valuer and that page 6 of the report talks of methodology, and therefore there was no need to show the methodology used as the report is a summary of what he did and that in their office, they have

comparative data which they rely on. Further, in this case they also took into account the developments around and proximity to services.

29. On being questioned by the Court on the report, PW3 stated that it would not have been user friendly to show the comparable in the report and had he known that the said information was required by the Court, he would have included the said comparable. The end of his testimony marked the close of the plaintiff's case.

30. DW1 **Billy Stephen Mbindu** adopted his statement filed in Court on the 25/5/2016 as his evidence in Chief together with the bundle of documents dated 4/11/2010. He testified and stated that the Plaintiff was advanced a loan facility of kshs. 1,250,000/= to enable him purchase the suit property. Subsequently, a legal charge was registered over the suit property as security for the loan facility. He added that by a letter dated 17/11/2007, a temporary overdraft of Kshs. 800,000/= was advanced to the Plaintiff which was to be repaid by March 2008.

31. DW1 stated that the Plaintiff failed to service the two facilities and both facilities fell into arrears, which prompted the 1<sup>st</sup> Defendant to commence recovery action. Consequently, a statutory notice was issued on the 28/5/2008 requiring the plaintiff to liquidate the debt which stood at kshs. 1,637,200/= as at the date of the notice. Upon expiry of 90 days, the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to issue 45 days' notice of sale and on the 21/10/2008, the Defendant issued a redemption notice and subsequently caused the sale of the suit property to be advertised in the Kenya Times Newspaper on the 25/11/2008. On the 11/12/2008, the suit property was sold to the 3<sup>Rd</sup> Defendant who was the successful bidder as per the Memorandum of sale dated 11/12/2009.

32. On cross-examination, by **Mr. Mogaka**, and on being shown DExhb1 at page 9, DW1 confirmed that it was a letter to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant's Branch Manager at the time and that the property was to the best of his knowledge sold at a public auction and the proceeds paid to the bank toward settling the Plaintiff's liability to the bank.

33. On cross-examination by **Mr. Jengo**, DW1 confirmed that the letter dated 18/12/2008 was after the sale on 11/12/2008 and was purely for pursuing the completion and that the letter giving instructions to sell was on the 11/10/2008. DW1 further confirmed that he was not aware that the suit property was agricultural land and therefore a consent from the LCB was necessary.

34. DW1 confirmed that the 2<sup>nd</sup> Defendant was under a duty to serve a 45 days' notice which is mandatory and that the letter dated 21/10/2008 is a notice to the Plaintiff and the addressee is **Mwangi K. Maganga** and the said letter was posted on the 23/10/2008 as evidenced by the certificate of posting. DW3 further confirmed that on the Notification of Sale dated 21/10/2008, the owner of the suit property is indicated to be **Mwangi K. Maganga** and not **John K. Maganga**. Also, the date of the auction was 9/12/2008 at 10:30 but no sale took place and there was no notification setting the sale for the 11/12/2008.

35. In re-examination, DW1 stated that the auctioneer issued a second notice on the 25/10/2008 in the Kenya Times stating that the date of the sale as 11/12/2008 and the letter dated 18/12/2008 to the 2<sup>nd</sup> Defendant was to direct the auctioneer on what advocate to complete the sale of the 11/12/2008, and further that the notice by the auctioneer was to the Plaintiff's postal address as confirmed in the letter of offer and in the certificate of posting.

36. In response to question asked by the Court, DW1 stated that the advertisement in the newspaper and the one in the notification of sale given by the auctioneer are not unanimous on the date of sale.

37. DW2 **Ruth Mutaaru** adopted her statement filed in Court on 25/5/2016 as her evidence in chief. She testified and stated that the Plaintiff indeed received the statutory notice dated 28/5/2008 sent to him by the bank after he had defaulted in repayment of the loan facilities, and that is why he went to the bank to issue two postdated cheques out of which one unfortunately was dishonoured.

38. On cross-examination by **Mr. mogaka**, DW2 confirmed that an injunction was issued after the suit property had been registered in favour of the 3<sup>rd</sup> Defendant, and the plaintiff issued the two cheques on the 17/10/2008 yet the statutory notice was issued on the 28/5/2008 and the dishonoured cheque was dated 31/10/2008. Therefore, the Plaintiff failed to comply with the terms of the notice.

39. On cross-examination by **Mr. Jengo, DW2** confirmed that the 1<sup>st</sup> Defendant had instructed the 2<sup>nd</sup> Defendant when the cheque issued by the Plaintiff was dishonoured, and that the auctioneer issued a 45 days' notification of sale and redemption notice both dated 21/10/2008 addressed to **Mwangi K. Maganga** who is not the Plaintiff, for a sale scheduled for the 9/12/2008.

40. DW2 further confirmed that his letter dated 18/12/2008 was directing the auctioneer to proceed with the sale and not to complete the sale that had taken place. DW2 confirmed that he did not attend the sale by auction, but there was a representative who reported it to him. He confirmed that an advertisement was not a redemption notice and that a redemption notice comes before an advertisement and that the redemption notice and the advertisement do contradict each other on the name and date of sale.

41. On re-examination, DW1 stated that the purpose of the letter dated 18/12/2008 was for the lawyer to conduct the sale and receive the proceeds of sale. However, by the time the letter was written, the auctioneer had already written to say the sale had already taken place by his letter dated 11/10/2008.

42. DW2 confirmed to the Court that the defaulting customer was **John K. Maganga** and not **Mwangi K. Maganga**.

43. DW3 **Nicodemus Mwangangi** a Valuer by profession stated that he is a registered member of ISK and has worked for the Paul Wambua Valuers for the last four years. In respect to the suit property, he stated that he had been instructed by the 1<sup>st</sup> Defendant to carry out inspection of the land and give values thereof. He adopted the reported dated 14/10/2008. DW3 stated that as at the time of his visit, there were no visible developments on the suit property save for two temporary workers quarters, which were ignored. He returned market value of Kshs. 3,650,000/=, Kshs.2,55,000/= for Mortgage value, and a forced sale value of Kshs. 2,150,000/=.He said that the said values were as at that date depressed due to political disturbance. The said property had been valued before in 2007 for the purposes of obtaining the financial facility and the forced sale value as at March 2007 was Kshs. 2,100,000/=.

44. On cross –examination by **Mr. Mogaka, DW3** confirmed that the produced report was the second one on the suit property and as at March 2007 the market value of the property Kshs.3,600,000/= while the mortgage value was Kshs.2,500,000/= and the said values were never contested by anybody.

45. On cross-examination by **Mr. Jengo, DW3** stated that he joined Wambua & company Ltd in 2014 and that it was the 1<sup>st</sup> time he had interacted with the valuation report adding that beyond the report, he could not state whether there was any contest against the said report. He further confirmed that he did not visit the land to make the current report and he was not part of the team that visited the suit property and that he was producing a report made by his employer.

46. DW3 in answer to a question by the Court stated that the report does not say the particular valuer who made it, but the said report is signed by Mr. Paul Wambua who is still with the firm.

47. DW4 **Mr. Peter Kinyua Muchendu** who trades as **Peter Kinyua Auctioneers** adopted his witness statement filed in Court on the 25/5/2016 as his evidence-in- chief. He testified and stated that sometime in 2008, he was instructed by the 1<sup>st</sup> Defendant to conduct a sale in respect of the suit property. On the 21/10/2008, he sent the Plaintiff a redemption notice and subsequently caused the intended sale to be advertised in the Kenya Times Newspaper on the 25/11/2008. When the 1<sup>st</sup> Defendant informed him of the failure by the Plaintiff to liquidate the debt within 45 days, he had no option but to conduct a sale by auction on the 11/12/2008 to the highest bidder one **Mary Katiwa Musaki** at Kshs. 2,150,000/=. A sum Kshs. 500,000/= was paid on the spot as deposit and she undertook to pay the balance of the purchase price on or before 12/1/2009 in accordance with the conditions of sale in the Memorandum of sale.

48. On cross-examination by **Mr. Jengo**, DW4 confirmed that he issued a 45 days' notice dated 21/10/2008 and sent it via registered post to one **Mwangi K. Maganga** on the 23/10/2008. Secondly, he advertised the suit property for sale on the 25/11/2008. In the advertisement, he proposed to sell on the suit property on 2/12/2008. Therefore, between 21/10/2008 to 2/12/2008 is a period of 42 days. He further confirmed that a sale occurred on the 2/12/2008 and he issued a memorandum of sale which says the sale was on the 11/12/2008 and that the notice had a mistake on the real name of the debtor but the registered parcel was collected by the addressee from the post office counter.

49. On cross-examination by **Mr. Mogaka**, DW4 confirmed that the sale by auction was scheduled for the 11/12/2008 and on the same day the suit property was sold and a memorandum of sale issued and the suit property was subsequently transferred to the 3<sup>rd</sup> Defendant.

50. On re-examination, DW4 stated that the letter he sent to the Plaintiff's registered post was never returned.

51. DW5 **Leonard Joseph Wanjogu Mwangi** adopted his statement filed in Court on 21/2/2012 as his evidence in chief. He testified and stated that he was appointed as the 3<sup>rd</sup> Defendant's agent at the public auction held on the 11/12/2008 at the 2<sup>nd</sup> Defendant's premises. He bid on behalf on the 3<sup>rd</sup> Defendant and he was declared the highest at kshs. 2,150,000/= on behalf of the 3<sup>rd</sup> Defendant.

52. On cross-examination by **Mr. Jengo**, DW5 confirmed that he was aware that the suit property was agricultural land, but he is not aware whether consent to transfer was required and/or obtained.

53. DW6 **Mary Katiwa Musaki** adopted her statement filed in Court on 21/2/2012 as her evidence in chief together with a list of documents dated 28/3/2011, which she relied on as her exhibits. She testified and stated that she attended the auction in the company of DW5 who was her lawyer, she was the successful bidder, she paid 25% of the purchase price on the same day, the balance was paid at a later date, a transfer was effected in her name, and a title deed issued on the 16/2/2009, which was after she had already signed the Memorandum of sale and on the 12/1/2009, the auctioneer wrote to the 1<sup>st</sup> Defendant sending the full payment and the transfer was drawn by one **Joyce Chesaro** advocate.

54. On cross-examination by **Mr. Jengo**, DW6 confirmed that the land was agricultural and that she was not aware whether consent was sought and/or obtained from the Land Control Board as she did not handle the transfer personally.

### **Submissions by the parties**

55. The plaintiff's submissions were filed in court on 29/1/2020, the 1<sup>st</sup> & 2<sup>nd</sup> Defendant's submissions were filed on the 3/6/2020, while those by the 3<sup>rd</sup> were filed in court on 8/5/2020. The counsel highlighted those submissions on 18/6/2020 via Microsoft Teams. In those submissions the Plaintiff Counsel **Mr. Jengo** set the stage on the issue of whether the requisite statutory notices were issued and submitted that the 1<sup>st</sup> Defendant was to comply with Section 74 of the Registered land Act(repealed) while the 2<sup>nd</sup> Defendant was to comply with Rule 1(d) and (e)of the Auctioneer Rules 1997before any sale could take place. Since the Plaintiff has denied service of all the notices, the burden of proof was on the 1<sup>st</sup> & 2<sup>nd</sup> Defendants to prove service of the respective notices. Counsel cited the authority of **Mariam Njeri Njau vs. Attorney General (2016)eKLR** where the Court held that when the chargor disputes service, the burden shifts to the chargee to avail evidence of service.

56. **Mr. Jengo** further submitted that it is common ground that the 2<sup>nd</sup> Defendant's witnesses never sent a notice to the Plaintiff before advertising the suit property for sale and the person by the name **Mwangi K. Maganga** is a stranger to the Plaintiff and it is impossible to conclude that a redemption notice was served upon the Plaintiff.

57. On the issue of advertisement, **Mr. Jengo** submitted that a redemption notice having been issued on

the 23/10/2008, the advertisement for sale made on the 25/11/2008 was made 33 days before lapse of the 45 days envisaged under Rule 15 of the Auctioneer's rules 1997. Consequently, that advertisement was a nullity as the advertisement was supposed to be made upon lapse of 45 days which would have been the 7/12/2008. It is Counsel submission that the 2<sup>nd</sup> Defendant was not entitled to sell the property at an auction on the 11/12/2008 as Rule 15 of the Auctioneer's Rules 1997 had not been complied with making the subsequent sale a nullity.

58. **Mr. Jengo** submitted that failure to serve a notice contemplated under the statute is not a mere irregularity or a procedural issue. A violation of the statute must attract consequence or else, the statutes will have no value at all.

59. **Mr. Kibara** Learned Counsel for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants submitted that the 1<sup>st</sup> Defendant right to exercise its power of sale has never been challenged and default is also admitted. Therefore, the Plaintiff was duly served with all the notices by the Bank via his registered postal address as contained in the charge document and it is the statutory notice that prompted the Plaintiff to approach the 1<sup>st</sup> Defendant with two cheque out of which one was dishonoured.

60. **Mr. Kibara** further submitted that the 45-days redemption notice was served upon the Plaintiff by registered post and a certificate of posting was produced to that effect. However, the Plaintiff was misnamed by inadvertence of a typographical error but the sale by public auction conducted on the 11/12/2008 was regular. Counsel cited the case of **Balvinder Pal Singh s/o Surjiit Singh & another v Equity Bank Limited [2015] eKLR** where the Court held that misnaming of the 2<sup>nd</sup> Plaintiff was a minor mistake that can be excused as it is not a fundamental wrong and the same should be ignored.

61. On the issue of undervaluation, **Mr. Kibara** submitted that the Plaintiff did not discharge his burden of proof as he did not avail evidence to show that the value arrived at by the 1<sup>st</sup> Defendant was not the best reasonable price reasonably obtained at the time.

62. Counsel submitted that the damages for trespass are not awardable since the Plaintiff obtained an injunction and has been in physical possession of the suit property all along.

63. **Mr. Mogaka** Learned Counsel for the 3<sup>rd</sup> Defendant adopted the submissions filed on behalf of the 3<sup>rd</sup> Defendant on the 8/5/2020. Counsel submitted that the 3<sup>rd</sup> Defendant is a purchaser for value without notice, at a public auction and that the obligation to issue any notice was upon the 1<sup>st</sup> & 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant had no duty to inquire into the rights of the chargee to sell. Counsel cited the case **David Katana Ngomba v Shah Grewal Kaka (2014) eKLR** in support of his submission.

64. Counsel further submitted that there is nowhere under **Section 74 and 77 of the RLA, Cap 300(repealed)** where a sale conducted without issuance of statutory notices is to be deemed void. To the contrary, Section 77(3) of the RLA(repealed) sanctified a sale once the transfer is effected in the prescribed and the remedy of an aggrieved or injured chargor is limited to damages only.

65. On the fault of fraud, collusion and connivance on the part of the Defendants, **Mr. Mogaka** submitted that fraud is a serious issue which requires a very high standard of proof certainly above mere balance of probabilities and the said allegations of fraud must be pleaded and be strictly proved. It is not allowable to leave fraud to be inferred from the facts as was done by the plaintiff. Counsel cited paragraph 14 of the authority of **Nancy Khahoya v Expert Credit limited & another [2015] eKLR**.

### **Issues, Analyses and Determination**

66. The dispute here as pleaded and on the evidence led, the issues can only be those fourteen as proposed by the parties vide the Statement of Agreed Issues dated 31/3/2010. I do agree that these issues are sufficient to dispose of the suit between the parties. From the fourteen issues, I have regrouped, rephrased and isolated the following issues as falling for determination by the court.

1. *Whether the 1<sup>st</sup> Defendant served the alleged statutory notice dated 28/5/2008?*
2. *Whether a redemption notice was served upon the Plaintiff by the 2<sup>nd</sup> defendant?*
3. *If any or all the two above be answered in the affirmative, what is the fate of the consequent sale of the suit property?*
4. *Whether the 3<sup>rd</sup> Defendant is entitled to vacant possession as prayed in her counter-claim?*
5. *Whether the Plaintiff is entitled to general damages equivalent to monetary value of the suit parcel, in the alternative.*

**Whether the 1st & 2<sup>nd</sup> Defendants served the statutory notices?**

67. It is common ground that the Plaintiff was advanced a loan facility of kshs. 1,250,000/= to enable him purchase the suit property and subsequently a legal charge was registered over the suit property as security for the loan facility. Further, by the letter dated 17/11/2007, a temporary overdraft of kshs. 800,000/= was advanced to the Plaintiff which was to be repaid by March 2008. The Plaintiff failed to service the two facilities and both facilities fell into arrears, which prompted the 1<sup>st</sup> Defendant to commence recovery action after a postdated cheque in the sum of Kshs.480, 000/= issued by the Plaintiff was dishonoured. Under the prevailing law at that time, the 1<sup>st</sup> defendant had its obligations set out in law on the steps to take before it could advertise the security for sale under its statutory underpinned contractual power of sale.

68. Section 74 of the Registered Land Act (RLA) Cap 300 provides at subsections (1) and (2) thereof as follows:

***“74 (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 charger fails to comply, within three months of the date of service, with a further notice served on him under that sub section”*** (emphasis provided)

69. In the case at hand, the 1<sup>st</sup> Defendant through DW2 **Ruth Mutaaru** testified and stated that a statutory notice was issued in the letter dated 28/5/2008 to the Plaintiff and served by way of registered post to the postal address provided by the Plaintiff in the charge document dated 25/5/2007. Further, the 1<sup>st</sup> Defendant states it is as a result of the receipt of the statutory notice that the Plaintiff visited the bank and gave two post-dated cheques out of which one was unfortunately dishonoured. On the part of the Plaintiff, he states that he never received any statutory notice and all along, he thought he had a good relationship with the 1<sup>st</sup> Defendant, which relationship broke on the 2/2/2009 when the 1<sup>st</sup> Defendant refused to accept a sum of kshs. 200,000/= from him and insisted that the suit property had already been sold.

70. At this juncture, this Court is called upon to determine whether the statutory notice dated 28/5/2008

was served upon the Plaintiff. That determination must be grounded upon evidence when applied to the law. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

***“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

71. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”***

72. In **Moses Kibiego Yator vs Eco Bank Kenya Limited [2014] eKLR** where Munyao J stated as follows:-

**“... but I am unable to see the certificate of postage of the Postal Code via which the letter was sent. It could be very well that it was sent to the wrong postal address and benefit of such doubt must be given to the Plaintiff. In instances where a chargor alleges that he did not receive the statutory notices, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served...”**

73. Similarly in **Nicholas Ruthiru Gatoto v Ndarugu Merchants & 2 others [2014] eKLR** which finding was upheld by the Court of Appeal in **Stephen Boro Gitaha v Nicholas Ruthiru Gatoto & 2 others [2017] eKLR**, it was held as follows:

**“34...It was his testimony that a notice had been posted to the Plaintiff’s address. However, he did not produce a certificate of posting or any documentary evidence to show that the Statutory Notice was indeed served on the Plaintiff. See: Ochieng and Another vs Ochieng and Others, Civil Appeal No. 148 of 1995 EALR[1995-98] at pg 260. In the circumstances, it is plain that the Plaintiff was not served in terms of section 153 of the Registered Land Act (Cap. 300).**

**35 It is trite law that non-service of a statutory notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor’s equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit property amounts to an illegality.”**

74. From the foregoing and being guided by the Court of Appeal in **Stephen Boro Gitaha v Nicholas Ruthiru Gatoto & 2 others(supra)** and Ochieng’s case cited in it with approval, the failure by the 1<sup>st</sup> Defendant to exhibit a certificate of posting or any documentary evidence to show that the statutory notice dated 28/5/2008 was indeed served on the Plaintiff meant that the statutory notice dated 28/5/2008 was not proved to have been served upon the plaintiff. Therefore, the evidential burden on the 1<sup>st</sup> Defendant shoulders was not discharged.

75. Non-service of a Statutory Notice is a fundamental breach of the provision of Section 74(1) of the RLA which derogates from the chargor’s equity of redemption and consequently, the 1<sup>ST</sup> Defendant’s power of sale does not crystalize and any Act done by the 1<sup>st</sup> Defendant to dispose the suit property amount to an illegality and thus unenforceable.

76. I say unenforceable because the unshakeable grounded position of the law is that the court by its

stature and innate and intrinsic nature never renders succor to violation of the law and what is done contrary to the law must be viewed to be against the collective interest of the society subject to the law. When the court ignores the enforcement of the law on the terms of the statute enacted by the legislature, it can only attract for itself rogue and contra public policy and common good of the polity. It shall have fertilised the ground for governance outside the rule of law and invited anarchy to prevail. It is a demand of the rule of law that courts discourage contra-statute actions and conduct and therefore anything done contrary to the law cannot be enforced. In this case therefore having found that the 1<sup>st</sup> defendant failed to prove that it met its statutory duty to serve a notice mandated by law, a sale conducted and concluded in furtherance of such failure must itself be identified and recognized for being contra-statute and must be set aside and cancelled.

77. In **Stephen Boro Gitaha v Nicholas Ruthiru Gatoto & 2 others**(supra) the Court of Appeal in underscoring the value and effect of service of the statutory notice held as follows:

***“The case at hand is on all fours with that decision in (Ochieng and Another vs Ochieng and Others, Civil Appeal No. 148 of 1995 EALR(supra)) and the conclusions the learned Judge arrived at were therefore correct in law. Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title. The learned Judge was right to find and hold that innocence of Gitaha’s purchase was not curative of the fundamental defect in the title due to the absence of the requisite notice.*”**

78. The Court of Appeal’s decision in **OCHIENG & ANOR vs. OCHIENG & OTHERS**,( in which I had the privilege of appearing for the appellant) , cited with approval in **Gitaha’s case** (supra) the court emphasised that the need for service was not a trivial irregularity but a fundamental and deviation therefrom was fatal as the subsequent sale would be rendered ‘*unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title*’.

79. There was a second aspect of an illegality which equally does a fatal blow to the sale and transfer. It regards the need for the consent of the Land Control Board’s Consent. Both sides agree that the transaction was subject to the Land Control Act but there was no consent from the relevant board sought and obtained before the transfer was effected. That would again fly in the face of prohibition imposed by section 6 Land Control as repeatedly interpreted by the superior courts in this country to the effect that such a dealing is void for all purposes.

80. I am duly guided and bound by these decisions and I find that the sale to the 3<sup>rd</sup> defendant was grounded upon false and null foundation and it must now be allowed to crumble. Let it stand cancelled and with it goes the 3<sup>rd</sup> defendant’s title premised upon.

81. Having found that the 1<sup>st</sup> Defendant failed to prove service on the Plaintiff of the three months’ statutory notice as required under Section 74(1) of the RLA, which was and remains the cornerstone of exercise of the power of sale by a chargee, any subsequent notices issued and actions taken in furtherance of the 1<sup>st</sup> Defendant’s exercise of its Statutory Power of Sale were therefore invalid and could not confer any right on any of the Defendant to proceed as such. Therefore, the issuance of the redemption notice and notification of sale and the advertisement, even if properly issued and served, were all void, null and of no beneficial legal consequences. Consequently, the issue of whether the aforementioned notices were regular is rendered academic.

82. In this matter the 3<sup>rd</sup> defendant has admirably argued and urged that the to consider other decisions of the Court of Appeal which have downplayed the need for service in favour of protecting the interests of a purchaser for value with lots of premium being laid on the absence of nullity effect being enacted under Section 74 and that under Section 77(3) of RLA the remedy of an aggrieved chargor lies in damages only

and not otherwise. I respectfully disagree with Mr Mogaka on those otherwise convincing submissions but I take it that he challenged me to decide whether or not there is a contradictory position on this point from the court of appeal. He cited to court the decision **Nancy K Amadiva vs Expert Credit Ltd (2015)eklr** as being a move away from that in **ochieng's case (supra)**. My reading of the two decision demonstrate to me no contradiction at all. In Ochieng's case the court was reiterating the need for all to comply with the law and underscoring the fact that one cannot sidestep a statutory provision and yet seek to get applauded by the court for its transgression against the law impacting as it were on the right to property. The court was saying in other word that one should not be allowed to keep a benefit obtained contrary to the dictates of the law. On the other hand, Amadiva's case was decided on the merits for lack of proof of fraud and defects in the charge. I hear the court appeal to underscore the fact that the failure by the auctioneer to comply with the law was indeed weighty but it refrained from making an adverse finding because the auctioneer had not been sued. At paragraph 27 the court said:

**“Had the auctioneer been party to the suit perhaps we would have considered the matter differently and arrived at a different conclusion”**

83. I hear the court, even in Amadiva's case to say that fidelity to the law is key but refrains from making appropriate orders because of the equally important legal requirement that none should be condemned unheard. In this matter however there seems to have been a jinx with documentations in deed. Beyond the unsigned and dubious Consent of the Land Control Board to transfer, the date advertised for sale, the date of actual sale and the Memorandum of sale leaves it open for a guess on when the sale took place. It is a case in which it is just difficult to look at the auctioneer with any favourable mind when one has to maintain neutrality and fairness.

84. It is my opinion and understanding upon reading the decisions of the court of appeal in this area I get the learning that the law remains that the court will not countenance failure to comply with the law nor reward a party for own violation of a statute by allowing a perverter of the law to keep a benefit thereby obtained. This court has all along held it strongly that to depart from this path would defeat the very purpose of a justice system based on the rule of law<sup>[1]</sup>.

### **Whether the 3<sup>rd</sup> Defendant is entitled to vacant possession as prayed in her counter claim**

85. The plaintiff accuses the 3<sup>rd</sup> defendant of fraud which being a serious charge, it is trite law that it must be pleaded and strictly proved to the standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the Court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.

86. The Plaintiff has not presented to the Court any documents to support fraud. The production and reliance on the copy of an LCB consent that was neither dated nor signed and was disowned the Plaintiff and the Defendants' witnesses and the Plaintiff was the strongest evidence in this regard. That would ipso facto raise doubt as to the propriety of the transfer I have already held to have been invalid. I would rather leave it to so rest without the need to declare a commission of a fraud. There was then the allegation of the suit property having been sold via private treaty which I find was not proved.

87. Even though I make finding that the 3<sup>rd</sup> Defendants had not committed any wrong towards the sale and was thus an innocent purchaser for value without notice, the transfer is void as it was and remains based on a violation of a mandatory statutory dictate. Therefore, the prayer for vacant possession of the suit property as contained in the 3<sup>rd</sup> Defendant's counterclaim fails. In coming to this conclusion, I have been guided by the position of the law that what is done contrary to the law is bad and never receives succor of the law and definitely not the court.

88. On the prayer (d) on general damages *equivalent to monetary value of the suit parcel in the alternative*, the same could only be due for consideration had the court upheld the sale. Now that the property has reverted to the Plaintiff, that prayer being the equivalent of the value of the suit properties, and made in the alternative, is not awardable unless one was to be out to duplicate the benefit to the

plaintiff.

89. The remedy available to the 3rd Defendant against the 1<sup>st</sup> Defendant Bank will be to obtain a refund of the price paid for the suit property. However, that issue was not laid before this Court as the 3<sup>rd</sup> Defendant did not make any claims against the 1<sup>st</sup> Defendant Bank in these proceedings.

### **Rendition and Final Orders**

90. Judgment be and hereby entered for the Plaintiff against the defendants jointly as follows: -

- a) A declaration is hereby issued declaring that the transfer of the property by the 1<sup>st</sup> Defendant to the 3rd Defendant was unlawful and a nullity;**
- b) An order is hereby issued directing the rectification of the register relating to the property by canceling the registration of the transfer in favour of the 3<sup>rd</sup> Defendant.**
- c) For the avoidance of doubt, having set aside the sale, the rights and obligations under the legal charge are hereby restored and the rectification of the register shall include the restoration of that charge.**
- d) The Plaintiff has the option to redeem the said property in terms of the said Charge.**
- e) The Plaintiff's costs for this suit shall be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant while the 3<sup>rd</sup> Defendant shall bear her own costs.**

Signed, dated and delivered at Mombasa this 3<sup>rd</sup> day of July 2020.

**P J O OTIENO**

**JUDGE**

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**[1] Disney Insurance Brokers Ltd v Mombasa County Government [2018] eKLR**