



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.84 OF 2008

LOUIS ROGER OUANDJI.....PLAINTIFF

VERSUS

BANK OF INDIA.....1ST DEFENDANT

TRACTOR BELL LIMITED.....2ND DEFENDANT

STEPHEN KARANJA T/A DALALI TRADERS...3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by filing a plaint dated 20th February 2008, and amended on 17th March 2011, seeking for judgment against the Defendants jointly and severally for: -

(a) An injunction restraining the 1st defendant from transferring, alienating, disposing to the 2nd defendant or any other person Land parcel number 330/417; sub division number L.R. No. 330/1290, or any part thereof pending hearing and determination of the suit;

(aa) An injunction restraining the 2nd defendant from transferring, alienating, disposing to the third party or any person Land Reference No.330/1290 (Original number 330/417/1) or any part thereof pending hearing and determination of the suit;

(b) A declaration that no valid statutory notice was served upon the plaintiff by the 1st defendant;

(c) A declaration that the sale of sub division number L.R. Number 330/1290 by the 1st defendant to the 2nd defendant was fraudulent, illegal and thus null and void and the same be set aside;

(d) A declaration that the exercise by the 1st defendant of its statutory power of sale was fraudulent and unlawful and the plaintiff's right of redemption be reinstated and/or is alive;

(dd) A declaration that the entire process of purported sale of the suit property was flawed and hence invalid ab initio;

(e) In the alternative, the 1st defendant be ordered to pay general damages to the plaintiff being the difference between the market value and the selling price or in the further alternative, Kshs. 320,000,000 whichever is higher;

(f) Costs of the suit and interest thereof.

2. The Plaintiff's case is that; the 1st Defendant by an agreement dated 22nd December 2005, agreed to grant him, a credit facility not exceeding;Kshs. 60,000,000, upon the terms and conditions particularized in the agreement.The facility was to be secured by a legal mortgage executed over Land parcel;L.R. No. 330/417 (herein "the suit property"), registered in the Plaintiff's name.

3. The Plaintiff avers that, on 16th April 2007, the 1st Defendant by a letter addressed to him headed "facility letter" reviewed the terms and conditions of the credit facility and purported to capitalize the interest and introduce "penalty interest". Similarly, the 1st Defendant disbursed only a sum Kshs. 50,912,302.80, instead of the agreed sum of;Kshs. 60,000,000.

4. That, on 22nd January 2008, the 1st Defendant purportedly in exercise of its statutory power of sale, advertised in the daily nation newspaper the sale of the suit property. However, the Plaintiff contends that, the advertisement was illegal and unlawful in that:

- a) *The 1st Defendant did not serve a statutory notice and notification of sale as required by the law;*
- b) *The information contained in advertisement did not comply with the mandatory provisions of the Auctioneers Act;*
- c) *The property advertised was plot number 330/417 and the property sold was L.R No. 330/1290 that was not in existence at the time of the sale;*
- d) *The information in the advertisement contradicted the Conditions of Memorandum of sale; and*
- e) *The sale was undertaken in bad faith without reasonable care and regard to the plaintiff's interest as required by the law.*

5. The Plaintiff further avers that, the sale was illegal, null and void in that; the 1st and 3rd Defendant, “absolutely disrespected the title” and evidence of title of property; No. L.R. 330/417 and/or “being the first sale, accepted bids lower than the reserve price of; Kshs. 60,000,000, with the consequence the suit property was sold at an extremely low price of; Kshs 60,500,000, yet the property was valued at more than Kshs 70,000,000.

6. The Plaintiff avers that, in the course of hearing the case, he has discovered and intends to demonstrate that; the 1st, 2nd and 3rd Defendants acted in collusion to fraudulently deprive him of his legal rights over suit property, in that: -

- a) *The 2nd defendant did not pay the 25% deposit at the fall of the hammer contrary to the printed conditions on the memorandum of sale;*
- b) *The legal status of the 2nd defendant is in doubt as a company by a similar name was incorporated on 15th October 2010;*
- c) *The memorandum of sale executed by the 2nd defendant was not properly executed as required by law; as persons who were not directors as at the date of auction purported to attest affixation of the company seal;*
- d) *The 1st and 3rd defendants knowingly concealed the fact that the 2nd defendant did not pay the 25% deposit on the fall of the hammer and filed misleading replying affidavits that misled the plaintiff and the court into believing that; the plaintiff's equity of redemption was extinguished; because a valid sale had been consummated by the 1st defendant on 8th February 2008;*
- e) *The balance of the purchase price was not paid within ninety (90) days as required by the memorandum of sale and was not secured in favour of the 1st defendant in any manner leading to an inference that, the 1st and 3rd defendants were acting in collusion with the object of depriving the plaintiff of the suit premises and not recovery of the amount in default.*

7. Further during the pendency of the suit, an order was issued on 27th July 2009, restraining the 1st Defendant from transferring the suit property but the 2nd Defendant transferred the property to itself. Even then; a search at the Lands Registry reveals that, the property is still not sub divided and is charged to 1st Defendant. Thus the indenture produced by the 2nd Defendant is suspect and is produced for improper motive. The Plaintiff therefore claims a sum of; Kshs 320,000,000, as a result of loss arising from the 1st Defendant's abuse of statutory power, thus depriving him the suit property and the developments thereon.

8. He reiterated that, the 1st Defendant deprived him of equity of redemption in a manner not contemplated by the law and extended to the buyer unsecured credit in a manner not contemplated by the memorandum of sale. Further, the public auction was unlawful as the 1st Defendant pledged low reserve price for convenience of the 2nd Defendant. That, although he objected to the process of the auction, the 3rd Defendant and the bidders, including the purported buyer did not heed. Subsequently, the 1st and 2nd Defendants colluded to transfer the property while the suit was pending, in breach of the court order.

9. He states that, the 1st Defendant's conduct throughout their relationship amounted to fraud, as the 1st Defendant executed a mortgage without authority; loading loan account with unauthorized and illegal penalty, interest and processing fees and disbursing less amount. Finally, the Plaintiff averred that the 1st Defendant did not have capacity to enter into a contract with him and would raise the same as a preliminary point of law.

10. However, the 1st Defendant filed a statement of defence and counterclaim dated 4th March 2008, and averred that, on 22nd September 2005, the 1st Defendant granted the Plaintiff a loan in the sum of; Kshs 60,000,000 vide a letter of facility dated 1st November 2005. The loan amount was based on the cost estimates submitted by the Plaintiff and it was agreed that, the Plaintiff would arrange and/or finance 40% of the cost of the development/project, amounting to; Kshs 24, 000, 000.

11. The 1st Defendant disbursed a sum of; Kshs 50,912,302.80 but the Plaintiff did not make his contribution. The facility letter of offer was sent to the Plaintiff and he acknowledged receipt thereof. He was therefore aware of the terms and conditions of the loan which was reviewed every year as per the agreement between the parties.

12. Subsequently the Plaintiff defaulted on the repayment of the loan and as at 2nd December 2007, the outstanding amount was; Kshs

63,427,197.05, plus interest at 14.5% p.a. The 1st Defendant served the Plaintiff with the prerequisite notices and advertised the property for sale at the expiry of the notice of redemption. The 1st Defendant denied the alleged particulars of irregularities and/or irregularities in the advertisement and/or sale of the property and maintained that, the sale of L.R. No. 330/1290 was lawful and proper.

13. That, after the sale, the Plaintiff still owed Kshs 2, 927,197.00 plus accrued interest at 14.5% p.a. plus auctioneer's fees of; Kshs 405,027.00. Hence the 1st Defendant's claim in the counter claim is for judgment against the Plaintiff for: -

a) Kshs 2, 927,197.00;

b) Interest at the rate of 14.5% per annum until payment in full;

c) Auctioneer's charges of; Kshs 405,027.00

d) Interest on (c) above at court rates;

e) Costs of the suit.

14. The 2nd Defendant filed a statement of defence dated 28th February 2008 and amended on the 9th May, 2011, denying the Plaintiff's claim. The 2nd Defendant pleaded that, it is a limited liability company incorporated on 19th February 2007 and has proper legal capacity to contract. It denied the allegations that, the sale of the property was illegal, null and void and averred that, any such alleged illegality on the part of the 1st Defendant cannot defeat the sale of the property to it.

15. That, the 25% deposit on the purchase price was paid at the fall of the hammer in terms of the conditions of sale and the balance of the purchase price could not be paid within the ninety (90) days for the reason that, upon the auction taking place, the Plaintiff immediately obtained an order restraining the 1st and 2nd Defendants from dealing with the suit property in any way. Further as a purchaser, it was not concerned to see or enquire whether, due notices had been given or the power of sale was otherwise properly and regularly exercised by the 1st Defendant.

16. That in any event, the 2nd Defendant is not privy to mortgage relationship between the Plaintiff and the 1st Defendant nor is it liable for any alleged fraud in respect thereof on the part of the 1st Defendant. Further, the Plaintiff's remedy for the alleged irregularity and illegality in the sale of the property, if any, lies only in damages as against the 1st Defendant. The 2nd Defendant is an innocent purchaser for value and its title cannot be impeached.

17. Further the Plaintiff has not pleaded any or a reasonable cause of action against the 2nd Defendant neither do the particulars in the amended plaint, call upon the 2nd Defendant to answer any of the Plaintiff's demands. The 2nd Defendant pleaded that it would raise a preliminary point of law that, the Plaintiff's suit against it is bad in law, discloses no or reasonable cause of action, is scandalous, frivolous and vexatious and is otherwise an abuse of the court process. It offends the mandatory requirements of the Civil Procedure Rules 2010 and ought to be struck out and dismissed *in limine* with costs.

18. The 3rd Defendant filed its defence dated 23rd May 2014 and denied the claim against it. It averred that, it received instructions from the 1st Defendant to sell the suit property for non-payment of; Kshs 63, 403, 746 owed by the Plaintiff. It issued the Plaintiff with a notice of redemption and a notification of sale of the mortgaged property. The Plaintiff failed and/or neglected to redeem the property. It then advertised the sale of the property in the daily nation newspaper, and it was sold.

19. The 3rd Defendant denied the allegations and/or the particulars of the alleged illegal and unlawful advertisement or sale of the property. It averred that, the auction was conducted on 8th February 2008 and the Plaintiff was among the bidders who attended the auction. That the 2nd Defendant emerged the highest bidder, paid the requisite 25% deposit and was issued with a certificate of sale. It then handed the matter to the 1st Defendant and its Advocates to complete the sale.

20. The 3rd Defendant denied the sale was illegal, null and void and/or it acted in collusion with the 1st and 2nd Defendants to fraudulently deprive the Plaintiff of his legal rights over suit property, nor in a manner calculated to clog the right of the Plaintiff to redeem the suit property. That it acted as the 1st Defendant's agent and acted as per the instruction given and followed the laid down procedure to sell the property.

21. The 3rd Defendant averred that it was not served with a demand notice of any intention to sue and in any event, the Plaintiff is not entitled to the prayers sought as the suit does not raise any reasonable cause of action against it. The claim against it is thus frivolous, vexatious and an abuse of the court process.

22. The case proceeded to a full hearing at the close of the pleadings, whereupon the Plaintiff testified in support of his case. He relied on his statement dated 24th October 2012 and a list of documents dated 9th November 2014. He stated that, he is a lawyer by profession and retired after engagement with, Shelter Afrique.

23. He reiterated the averments in his pleadings and conceded that, he indeed, applied for a loan facility from the 1st Defendant and was granted the same and he mortgaged the suit property as aforesaid. That the 1st Defendant later sold the property through an auction. He acknowledged that, he attended the auction, but reiterated that, the 1st Defendant did not exercise its statutory power of sale properly for the

reasons stated in the pleadings. Therefore, he seeks inter alia, a sum of Kshs 300,000,000, as damages and loss of revenue from the initial sixteen (16) apartments later increased to 18 apartments plus basement.

24. In cross examination by the 1st Defendant he acknowledged that, he took a loan for; Kshs 60,000,000 and that at one time he could not repay the loan. That at the time of the sale, the bank was claiming a sum of Kshs 68,000,000. He further admitted that, he applied for the sub-division of the property and obtained approval for two plots; 330/1290 and 330/1291. The residential house was on Plot no 330/1291.

25. On cross examination by the 2nd Defendant, he admitted that the bank disbursed Kshs 50.5 million. He also admitted signing the mortgage document but under duress as he was told to sign it before he could get any money. He did not know it was fraudulent. He confirmed that, he was aware the bank advertised the property for sale and attended the auction. That the bids were made but he did not know if the Auctioneer accepted them.

26. On cross examination by the 3rd Defendant, he stated that, he complained that LR 330/1290 was not in existence, vide a letter dated 2nd August 2005. The deed plan from the surveyor makes reference to; LR 330/417 which was to be subdivided. He claimed that, the property L.R. No. 330/1290 was not a subject of the sale.

27. However, he admitted that, he was served with the redemption notice and he acknowledged it by signing thereto but denied having been served with the notification of sale. He conceded that, he did not complain to the Auctioneers' Licence Board against the 3rd Defendant. In re-examination he stated that, he was paying for the loan and had offered to sell the property by private treaty to a buyer who offered Kshs 70,000,000 but this was rejected.

28. The 1st Defendant's case was supported by the evidence of its Assistant Manager Peterson Chege Kamande, who relied on his statement dated on 12th November 2018 and the list of documents filed therewith. He literally reiterated the averments in the defence and counter claim. However, in a nutshell he testified that; the Plaintiff requested for a loan facility from the 1st Defendant and the request was accepted vide their letter of 1st November 2005.

29. The loan was secured by the suit property vide a mortgage dated 31st December 2005 and registered on 10th February 2006, through presentation number 567 Volume N 73 Folio 239/13 File 13274. The Plaintiff defaulted on the loan repayment and as at 31st July 2007, the outstanding amount was; Kshs 60,510,686.70 plus interest. On 22nd August 2007, the 1st Defendant issued the Plaintiff with a statutory notice to sell the property. Due to continued default, the 1st Defendant instructed the 3rd Defendant to issue the Plaintiff with redemption notice pursuant to Rule 15s (d) of the Auctioneers Rules.

30. At the expiry of the notice period, the outstanding balance was; Kshs 63,403,746.35. Subsequently, on 22nd January 2008, the 1st Defendant through the 3rd Defendant issued a notice of sale of the suit property by public auction. By an agreement between the Plaintiff and the 1st Defendant, it was agreed that the 1st Defendant would only proceed with the sale of sub-division of the suit property; L.R No 330/1290 and not the remainder of the suit property L.R. No 330/1291, where the Plaintiff resides and register a charge over the suit property L.R No 330/1291; for the balance of the amount outstanding.

31. The witness stated that, the Plaintiff attended the auction and was issued the conditions of sale. The property L.R No 330/1290; was sold to the 2nd Defendant as the highest bidder. After the sale of the property on the 9th February 2008, the Plaintiff wrote to the 1st Defendant, to cancel the sale, requesting for time to come up with a better option.

32. The witness testified that, the sub division of the mortgaged property commenced in the year 2004, wherein the sub division plan numbers; 261009 and 261010, copy of the official payment, registration of deed plans and receipt number 3639824 were submitted to the Ministry of Lands on 29th September 2004 and the approval was given by the Commissioner of Lands vide their letter dated 22nd December 2005 for the subdivision of L.R 330/419. The Commissioner of Lands' letter dated 26th June 2006, requested the Plaintiff to surrender existing documents in exchange of the new title deed upon the payment of Kshs 2,520,000. The Plaintiff complied and paid the money vide letter dated 22nd July 2006 for the surrender of the old title and grant of the new titles.

33. The witness reiterated that, the 1st Defendant's claim against the Plaintiff is for Kshs 2, 927, 197.00; being the amount due and unpaid plus interest at 14.5% per annum and other bank charges until the debt is realized plus Auctioneers charges of Kshs 405,027.00, interest thereon and costs of the suit. In cross examination by the Plaintiff, he confirmed that, the property charged was; LR 331/471 but maintained that the fact that part of it was to be sold was given on the auction date. The payment of; Kshs 905,000, was made on 13th February 2008 vide three (3) Bankers cheques.

34. He stated that, a valuation had been done before the sale and denied frustrating the Plaintiff's effort to sell the property by private treaty sale. He was not aware of anyone who wanted to take over the loan. That the last payment for the property was made in March 2010. Further, the subdivided property has been transferred to the 2nd Defendant as evidenced by the transfer of conveyance.

35. On being cross examined by the 2nd Defendant, he confirmed that the land sold is part of the land charged to the 1st Defendant and it is the Plaintiff who applied for the sub-division. He confirmed that the 2nd Defendant was the highest bidder and paid the balance directly to the bank.

36. In re-examination he maintained that, there are letters that show that the Plaintiff is the one who took steps towards sub-division. The loan was not fully repaid and the balance was Kshs 2.9 million plus the interest payable at the rate of 13.5% or 14.4% per annum.

37. The 2nd Defendant's case was supported by the evidence its director Jamal Wambugu who relied on his statement dated and filed on 3rd November 2014 and his bundle of documents filed on the same date. The evidence was similar to the averments in the statement of defence, save to add that, he learnt of the property through an advertised in the daily nation of 22nd January 2008 and identified its physical location of the property.

38. In cross examination by the Plaintiff, he confirmed the property advertised was LR 330/417. That he attended the auction and bought the property, LR 330/1290. He paid Kshs 500,000 as deposit in the morning before the auction, so as to qualify to participate in the auction, although he was not given a receipt.

39. He stated that, the 2nd Defendant was declared the highest bidder and paid the 25% at the fall of the hammer and issued a cheque for the balance of the amount directly to the bank before the registration of the documents. He further stated that he was aware of the company called Tractor Bell Limited.

40. In re-examination, he stated that the property advertised to be sold was one with developed apartments and that is what he bought. He also stated that the auction was on Friday afternoon and the bank called and said they wanted a bankers cheque which he replaced with three cheques on Monday. He denied interaction interacted with the bank before the sale.

41. The 3rd Defendant's witness Stephen Karanja relied on his statement filed in court on 3rd November 2016 and documents filed on the same date, which was similar to his statement of defence. In cross examination he stated that, he did not disclose the reserve price and that as an auctioneer, he was not aware of any complaints against him. He stated that the property described for sale was land with sixteen (16) apartments and that is the property sold. He maintained that the 2nd Defendant was the highest bidder who had paid an initial deposit of; Kshs 500,000 and paid Kshs 14,600,000 after the auction.

42. In cross examination by the Plaintiff, he stated that he was to be paid Kshs 905,000 as commission and that he retained Kshs 500,000 paid directly to the account before the auction, in accordance with clause 3 of the Public Auction conditions of sale that required bidders to make a deposit of Kshs 500,000. That, the 2nd Defendant highest bidder delivered the cheque which he sent to the bank but the bank insisted the buyer to provide bankers' cheque. He too stated that, the sale was on Friday 8th February 2008, and the cheques issued are dated 12th February 2008.

43. He stated further that, he got a valuation report and advertised one part of the property with the apartments as the bank informed him it was selling only one part of the property. That, he clearly described the suit property. He stated further that, his fees was Kshs 905,000 and he was not aware why the bank was claiming less money. In re-examination, he stated that the 2nd Defendant paid the initial deposit of Kshs 500,000 and that there was no complaint that the 2nd Defendant bought the wrong property.

44. At the conclusion of the hearing of the case, the parties filed their final submissions, which I have taken into account. In considering the entire evidence produced, I find that the following broad issues have arisen for determination; -

- a) *Whether the Plaintiff and 1st Defendant entered into any agreement and if so, what were the terms and conditions thereof;*
- b) *Whether each party performed its respective contractual obligation; If not, which party, (if any) breached the terms of the agreement;*
- c) *Whether the 1st defendant exercised its the statutory power of sale legally and/or unlawfully;*
- d) *Whether the plaintiff and/or the 1st defendant has proved his or its case and /or is entitled to the reliefs sought; and*
- e) *Who will bear the costs of the suit?*

45. I shall consider the first and the second issues together. In that regard the Plaintiff has produced documents which show that; on the 20th June 2002, an indenture conveyance was executed between one, Peter Kanya and the Plaintiff; over property L.R No.330/417 (Original number 33/27/1/4) Nairobi, basically conferring the legal interest in the property to the Plaintiff.

46. By a letter dated 12th September 2005, the Plaintiff applied for a bridging finance of; Kshs 60,000,000 from the 1st Defendant to complete the construction work on the suit property. The letter indicates that; the facility was a short term loan repayable within an expected maximum period of 24 months; (including 12 months' grace period), from the date of disbursement of the loan.

47. It further indicates that, the Plaintiff would offer security by creating a first charge over the suit property, together with all the developments and improvements thereon in favour of the 1st Defendant. The 1st Defendant accepted the request to advance the loan vide a letter dated 30th September 2005, subject to the Plaintiff executing a charge over the suit property as aforesaid and "personal guarantees of the promoters". It was further agreed that; the funds would be released in stages as per the level of construction, disbursement and paid directly to the contractor to the possible extent of construction.

48. On 1st November 2005, the 1st Defendant issued the Plaintiff with a facility letter; detailing the terms and conditions upon which the security was granted. Subsequently on 31st December 2005, the parties executed a mortgage instrument over the suit property effectively conferring upon the 1st Defendant a legal interest therein. There is no dispute that the funds were subsequently disbursed save for the amount.

49. From the aforesaid chronology of events, it is clear that;the Plaintiff and the 1st Defendant entered into a contractual relationship of debtor/creditor respectively and/or a security contract, on the terms and conditions stated in the facility letter.

50. I shall now deal with issue that relates to the performance of the contract. In this regard, I note that, the Plaintiff avers at paragraph 7 of the amended plaint that, the 1st Defendant only disbursed a sum of;Kshs 50,912,302.80 instead of Kshs 60,000,000, contrary to the agreement between the parties, thus breaching the contract. The 1st Defendant on its part conceded that, it disbursed a sumof; Kshs 50,912,302.80 but explains that, it was because the Plaintiff was unable to arrange or contributehis contribution of; approximately 40% from his own sources, to the project. Further, the Plaintiff breached the contract by failing to service the sum advanced and fell in arrears. That, even after the sale of the suit property, the Plaintiff still owes a sum of money which is the subject of the counter claim.

51. I have considered the evidence in relation to the subject issue and find that,indeed the 1st Defendant did not disburse the entire sum of,Kshs 60,000,000, but the contractual documents indicate that, the loan sum was supposed to be disbursed in stages. Further, the 1st Defendant has produced a letter dated 30th July 2007, written by the firm of; KittonyMainaKaranja& Co. Advocates; on its behalf, in which it is stated inter alia that; the Plaintiff did not avail his contribution of approximately Kshs 40,000,000, into the project. Even then, the Plaintiff did not reply to the 1st Defendant's defence and counter claim, to rebut the averments that, he did not honour the promise, to avail his own 40% contribution. In that case then, the Plaintiff cannot argue that; the 1st Defendant breached the contract by not disbursing the entire contractual sum.

52. The letter referred to above states that; due to the failure to inject into the project his contribution, development had stopped and the bank's interest was jeopardised. Further it states that, the Plaintiff had not taken any concrete steps to finalise the project. That; the Plaintiff had failed to service monthly interest and as that 30th June 2007, the Plaintiff's account was showing a debit of;Kshs 59,774,400. As per the letter, interest to the extent of approximate sum of; Ksh 10,000,000 had not been paid and the Plaintiff's account was grossly out of order. The Plaintiff was given 15 days to regularise the account, failure of which the 1st Defendant would redeem the entire outstanding amount.

53. That letter was followed by a letter dated 22nd August 2007, copies of which are producedby both the parties. The 1st Defendant indicates therein that, the Plaintiff was in breach of the loan agreement as he had refused, neglected and/or otherwise failed to make the scheduled repayments on account of the loan facility. This served as a demand letter for repayment of the outstanding sum of;Kshs 60,510,686, together with accrued interest.

54. It is clear from the aforesaid letters that, the Plaintiff did not service the loan facility given regularly and did not rebut the evidence to that effect. It is therefore clearthat, thePlaintiff was in breach of the contract due to non-payment of the sum advanced as scheduled and/or as the instalments fell due.

55. Having established that the Plaintiff breached the contract, the next issue to determine is the right that accrued to the 1st Defendant.I note from the mortgage document at clause (1) that, the Plaintiff as a Mortgagor covenanted and agreed to pay the sum advanced plus the interest and all other charges as and when they fell due. The same clause 7 thereof provides that; the mortgage debt and interest secured shall become immediately payable without demand and the statutory power of sale of the Mortgagee, shall become forthwith exercisable without any further or other notice, if the Mortgagor commits inter alia; a breach of any of the covenants and agreements (including covenants and agreements for the payment of the mortgage debt or the interest thereon), on the part of the Mortgagor contained in the mortgage or implied. Clause 7 (b) provides that the provisions of section 69 and 69 G both inclusive of the Transfer of Property Act of India (Repealed) would apply.

56. The provisions of section 69 A of Transfer of Property Act of India (Repealed) 1882, applicable at the time in issue provides that: -

“69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the Mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon”.

57. Pursuant to the aforesaid provisions, the 1st Defendant by a letter dated 22nd August 2007, issued the Plaintiff with a statutory notice requiring him to pay the outstanding sum stated therein, within three (3) months of the date of the letter together with interest, failure of which the 1st Defendant would proceed to recover the outstanding sum.

58. It does appear that, the Plaintiff did not comply with the statutory notice, whereupon the 1st Defendant instructed the 3rd Defendant to issue the prerequisite notices to commence the realisation of security. The 3rd Defendant has produced two notices; a forty-five (45) days' redemption notice and a notification of sale, dated 7th December 2007, issued pursuant to;Rule 15(d) and (b) of the Auctioneers Rules 1997 respectively. It suffices to note that, both notices were served upon the Plaintiff who acknowledged receipt thereof by signing.

59. The evidence of service upon the Plaintiff of these notices and acknowledgement thereof, negates the averments by the Plaintiff at paragraph 9 of his amended plaint, that no statutory notice and/or notification of sale was served upon him. Further during cross examination by the 3rd Defendant, the Plaintiff admitted that, he was served with both notices. Therefore, the Plaintiff cannot fault the sale of the property

due to want of service of the notices.

60. The other issue the Plaintiff has raised relates to the advertisement of the property for sale. He avers that, the property advertised was L.R. No, 330/417 and the property sold was L.R. No. 330/1290, which in any case, was not in existence at the time of the alleged sale. However, to rebut that allegation, the 3rd Defendant has produced a copy of the advertisement carried out in the Daily Nation newspaper of 22nd January 2008. The property advertised for the sale described therein is; L.R No. 330/417, scheduled to be sold on 8th February 2008 at 10.30 a.m.

61. The advertisement gave material particulars of the property as follows: -

- a) *The area: 0.16 Ha(0.445 Acres)*
- b) *Tenure: registered in the name of Louis Roger Ouandji*
- c) *The land: developed with two blocks having a total of 16 flats.*
- d) *Completion: building estimated to be 75% complete.*

62. The 3rd Defendant issued a further notice dated; 8th February 2008, to all the bidders, it was clarified that; although the advertisement was made in relation to the entire block of the property known as; L.R. No 330/417, the 1st Defendant had decided to auction only that part of the property where 16 flats were erected. The sub-division portion is identified as; L.R, No. 330/1290. and the proposed sub-division had been approved but not yet registered. The 3rd Defendant enclosed therein, a deed plan of the proposed sub-division for perusal by the bidders and emphasised that, the bidders would only bid for the said property that is, L.R. No 330/1290, which had a reserve price of; Kshs 60,000,000. I also note from the schedule of the seven(7) bidders that, the Plaintiff attended the auction.

63. The Plaintiff has taken up the issue of which property was mortgaged and the property that was sold. The Plaintiff took strong issue with it. Therefore, it is important at this stage to examine the evidence that relates to the same. The evidence from the several documents produced and the Plaintiff's own testimony confirms that, (at the risk of repeating what is already stated herein), the sub-division of the property; L.R.No. 330/417, commenced in the year 2004. The sub-division plan numbers; 261009 and 261010, a copy of official payment registration of deed plans and receipt number 3639824, were submitted to the Ministry of Land on 29th September 2004.

64. The Ministry of Lands gave its sub-division scheme plan with the provisional approval vide a letter dated 29th September 2004. The Planning Department thereof, approved the sub-division vide the letter dated; 22nd December 2005, having given a provisional approval vide their letter of 13th April 2004. The approval was given by the Commissioner of Lands vide letter dated 22nd December 2005, for the sub-division of L.R No.330/417 and by letter dated 26th June 2006, the Commissioner of Lands, requested the Plaintiff to surrender existing documents in exchange of the new title deeds upon the payment of; Kshs 2,500.00. The Plaintiff complied and paid the money vide his letter dated 22nd July 2006; for the surrender of the old title and grant of the new titles.

65. In addition, it is noteworthy that, the Plaintiff has produced letters from; Bridge waters Investment Limited dated 6th May 2008 and Ahmednasir Abdikadir Co Advocates, dated 3rd September 2008, in which the subject suit property is described as; L.R NO 330/1290, being a subdivision of L.R No. 330/417. Similarly, when the Plaintiff was cross examined by the 3rd Defendant, the Plaintiff admitted that, he forwarded the deed plan for the property; L.R No 330/417; for subdivision vide his letter of 2nd August 2005.

66. It is therefore evident that; the Plaintiff facilitated the subject sub-division of the suit property. Even then as aforesaid, he attended the auction and was issued with the conditions of sale and details of the property to be sold which was described as; L.R No 330/1290. He raised no objection thereto. Further the 1st Defendant stated that, the Plaintiff and the 1st Defendant agreed that; the 1st Defendant would only proceed with the sale L.R No 330/1290 and the remainder L.R. No. 330/1291, where the Plaintiff was residing would remain and a charge registered against it for the balance of the outstanding amount. The Plaintiff did not rebut this evidence.

67. From the evidence aforesaid, it is clear that, the property was properly advertised and clearly described and the 2nd Defendant understood in no uncertain terms the property it was bidding for. The Plaintiff's argument to the contrary is an afterthought and less than candid. The argument fails to impugn the advertisement and by extension the sale.

68. The other issue raised by the Plaintiff relates to the 25% deposit payable at the conclusion of the sale. It is the Plaintiff's case that the same was not paid immediately and that this material fact was hidden from him. He avers that the concealment of that fact amounts to fraud and/or collusion among the Defendants to defraud him. The 3rd Defendant has however, produced a memorandum of sale dated 8th February 2008, which shows that, the 2nd Defendant was declared the highest bidder and purchaser of the auctioned property, for a sum of Kshs 60,500,00.00. The 2nd Defendant had deposited Kshs 500,000 with the 3rd Defendant and a sum of Kshs 14,625,500 was payable to make up the 25% sum. The 2nd and 3rd Defendants testified that, the said sum was paid after the auction, and in support thereof, produced Cheque No. 000120 dated 8th February 2020, drawn on the account of; Njama Wambuguin the sum of; Kshs 14,625,000 in favour of the 1st Defendant as evidence of payment. The three bankers' cheques details are as follows: -

- a) *Cheque No 912893-----Kshs 3,500,000*
- b) *Cheque No 107229-----Kshs 7, 000,000*

c) Cheque No 031387-----Kshs 4,125,000

Total-----Kshs 14,625,000

69. However, it is noteworthy that all the three (3) bankers' cheques are dated the 12th February 2008, whereas the auction was on 8th February, 2008. The 3rd Defendant testified and the 2nd Defendant confirmed that, after the auction, the 2nd Defendant on 8th February, 2008, issued a personal cheque in favour of the 1st Defendant. However, the 1st Defendant requested that, it be substituted with a banker's cheque, hence the issuance of the subsequent bankers' cheques on 12th February, 2008. It also suffices to note that, the auction was held on the Friday of 8th February 2008 and the replacement of the cheques was done on Tuesday 12th February 2008.

70. On 13th February 2008, the 3rd Defendant wrote to KitonyMainaKaranja& Co. Advocates, confirming that they had received the three cheques and were holding a deposit of Kshs 500,000. The 3rd Defendant further testified that, subsequently he issued a certificate of sale confirming the sale transaction was concluded. It is on the basis of this evidence that I find the allegation by the Plaintiff that, the 2nd Defendant did not pay the 25% sum on the auction date, not merited.

71. The Plaintiff also argues that; the 1st Defendant clogged his right of redemption. In fact, after the sale of the property, the following day; on the 9th February 2008, the Plaintiff wrote to the 1st Defendant to cancel the sale, requesting for time to come up with a better offer within a month from 9th February 2008. He stated that, if the offer would not be forthcoming, then the bank would be at liberty to dispose of the property, without reverting back to him. The 1st Defendant does not seem to have responded to that letter.

72. Subsequently, the Plaintiff's Advocates; NjoraWaweru& Associates, wrote to 1st Defendant's Advocates, vide a letter of 5th September 2008, to the effect that, the Plaintiff was desirous of redeeming his property, by paying the outstanding loan amount as, he had the funds. This letter was written after a period of; seven (7) months after the auction of the property. It is noteworthy that, the right of redemption accrued upon receipt of the statutory notice and was not exercised.

73. The Plaintiff also alleges that, the Defendants colluded to defraud him and makes reference to paragraphs 8 to 15 of the amended plaint. Those paragraphs detail the particulars of irregularity relating to; advertisement of the property, the conduct of the sale, undervaluation of the property and the misrepresentation by the 1st Defendant. However, the 1st Defendant submitted that, the Plaintiff has not proved beyond reasonable doubt, that there was fraud in the sale of the property by auction. That, the late payment of the purchase price does not constitute fraud. I have already dealt with these issues raised by the Plaintiff and generally I find no evidence to prove fraud and/or collusion between the Defendants.

74. The other issue raised by the Plaintiff is that, the property was sold at an under value. The Plaintiff submitted that, the value of the property was Kshs 170, 000, 000 but was sold at a low value of Kshs 60,500,000. That, the 1st Defendant intentionally placed the reserve price at; Kshs 60,000,000 to assist the 2nd Defendant pay a low value. However, I note from the documents produced by the Plaintiff that, there is a valuation report at page 47 prepared by Milligan International Limited dated 5th September 2007 which placed the Forced Value Sale at Ksh 55,000,000, with 75% completed project.

75. There is a second valuation report at page 64 of the Plaintiff's documents prepared by NnamdiMaende& Associates Co. Limited dated 1st August 2008, which shows the Forced Sale Value of the suit property at Kshs 58, 000,000. The same is at 75% completed project. The recommended reserve price is; Kshs 60,000,000. The property was sold on 8th February, 2008 at Kshs 60,500,000. In my considered opinion the price obtained was within the range of forced sale value in both valuations. The Plaintiff has not produced proof that, the property was valued at Kshs 170,000,000. I therefore hold that in the given circumstances the property was not sold at an under value.

76. The other issue raised relates to locus standi of the 2nd Defendant to bid for the property. The Plaintiff has produced documents to show that, the company was incorporated after the sale. However, I note that the person who bid for the property is named as NjamiWambugu on behalf of the company. In my considered opinion, the issue of locus standi will affect the subsequent transfer of the property as between the transferor and transferee and it will not per se invalidate an otherwise valid sale. The moment the chargor is unable to exercise the right of redemption and a right accrues to the chargee to sell the property, that right confers on the chargee "a power of attorney" so to say, to act as an agent of the chargor, to sell and pass a clean title to a bona fide purchaser for value. In any case this issue was dealt with by the Court of Appeal.

77. However, before I conclude this judgement it suffices to note the history and/or the chronology of the events in this matter which was otherwise straight forward but has taken over ten (10) years to conclude. Indeed, it has generated volumes and volumes of documents. The Plaintiff filed the suit vide a plaint dated 20th February 2008 simultaneously with a chamber summons application, seeking basically an injunction order to restrain the Defendants from disposing of the suit property and freezing the loan account. The application was heard and a ruling delivered on 13th November 2008, where the court found the application was lacking in merit and dismissed it.

78. The Plaintiff was dissatisfied with the decision of the High court and appealed to the Court of Appeal vide Civil Application No. Nairobi 315 of 2008, seeking for a temporary order to restrain the 1st Defendant from selling the suit property pending the hearing of an appeal lodged against the order of the High court. Upon hearing the application, the Court of Appeal, found the application had no merit and dismissed it on 10th July 2009, holding that, the intended appeal would not be rendered nugatory, if the injunction was not issued as the Applicant would in any case be compensated in damages.

79. Thereafter, the Plaintiff filed another chamber summons application dated 15th July 2009, in the High court seeking for an injunction order to restrain the 2nd Defendant from transferring the suit property and from evicting him, on ground of discovery of new materials. The court held that the new found material did not warrant an injunction to be granted and the new material would not have changed the minds of

the High court and the Court of Appeal. The court dismissed the application on 12th March 2009.

80. It does appear that the Plaintiff would not let go of the auctioned property, as there is evidence of alleged attack by the Plaintiff on the 2nd Defendant's servants, wherein the Plaintiff was charged in Kibera Chief Magistrate vide Criminal Case No. 6089 of 2012, Republic vs Louis Rodgers Ouandji

81. From all the rulings delivered in this matter, it is evident that, the Plaintiff has fought to restrain the disposal of the suit property without success. In fact, it suffices to note that, some of the issues raised herein were indeed dealt with to finality by the Court of Appeal. In particular, the court addressed the following issues: -

- a) *Propriety of execution of the mortgage deed and/or the validity thereof;*
- b) *The legal status of the purchaser;*
- c) *The claim that the purchase price was made in advance by the purchaser;*
- d) *The property that was mortgaged and that which was sold;*
- e) *Whether there was a valid exercise of the bank's statutory power of sale.*

82. In the light of these findings, the court cannot entertain those issues herein and even if it did, it cannot arrive at a decision contradictory to the findings of the Court of Appeal. Indeed, in my considered view, the courts that dealt with the applications referred to herein made very sound decisions.

83. The final issue to consider is whether Plaintiff has adduced adequate and/or sufficient evidence to warrant the grant of the orders sought. The Plaintiff is seeking for an injunction order to restrain the 1st Defendant from transferring, alienating, or disposing of the suit property to the 2nd Defendant and in the same vein, an injunction order to restrain the 2nd Defendant from transferring, alienating, disposing the property to the third party. However, both prayers were sought for pending the hearing and determination of the suit and are spent.

84. The Plaintiff was further seeking for an order of declaration that: no valid statutory notice was served upon the him by the 1st Defendant; the sale of sub division number L.R. Number 330/1290 by the 1st Defendant to the 2nd Defendant was fraudulent, illegal and thus null and void and the same be set aside; the exercise by the 1st Defendant of its statutory power of sale was fraudulent and unlawful and his right of redemption be reinstated and/or is alive; the entire process of purported sale of the suit property was flawed and hence invalid ab initio. Having found that, the 1st Defendant exercised its statutory power of sale properly, none of these prayers can be granted.

85. The plaintiff sought in the alternative prayer that, the 1st Defendant be ordered to pay him general damages being the difference between the market value and the selling price or in the further alternative, Kshs. 320,000,000 whichever is higher. The Plaintiff did not adduce evidence to support the alleged loss. The claim being a claim for special damages required strict proof. It therefore fails.

86. The upshot is that, the Plaintiff has not proved his case on the required standard of the balance of probabilities and I therefore dismiss it in its entirety.

87. I shall now consider the counter claim. I have considered the documents produced and I find that, the 1st Defendant has produced a statement of account for account number [...] in the names of; Louis Rodger Ouandji and Rosette Ouandji from 22nd December 2005 to allegedly 27th February, 2008. However, I note the statement produced at pages 3 of its bundle of documents shows, the last entry of 31st December, 2007 with a debit balance of; Ksh. 63 427,197.05. The statement therefore does not show the status of the account between the 31st December, 2007 to the date of appropriation of proceeds of sale. The 1st Defendant statement merely shows undated entry showing a "closing balance at February 8, 2008" of Kshs 65, 435, 030.85 in debit, then a credit balance of Kshs 2, 007, 833. 80 and finally a figure of; Kshs, 63 427,197.05. These figure were not explained at all. All that the 1st Defendant's witness merely stated in his statement at paragraph 18 is that; the Plaintiff owes the sum claimed plus interest at 14.55 plus the Auctioneer's fees claimed. The Auctioneer claim is not even proved by any evidence of an invoice from the Auctioneer of payment thereof. I therefore find the counter claim not proved and I dismiss it.

88. In view of the fact that none of the parties have succeeded in their respective claims each party to bear its costs.

89. Those then are the orders of the court.

Dated, delivered and signed on this 13th day of July, 2020.

GRACE L NZIOKA

JUDGE

In the presence of: -

Mr Nzioka for the Plaintiff

Mrs Kinyanjui for the 1st Defendant

Mr Njenga for the 2nd Defendant

No Appearance for the 3rd Defendant

Robert Court Assistant