



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL SUIT NO. 24 OF 2018

DAVID ISOE AYUBU.....PLAINTIFF

VERUS

I&M BANK LIMITED.....1ST DEFENDANT

JOSEPH GIKONYO

T/A GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

KIPSOSION RERIMOI KIPKORIR.....INTERESTED PARTY

JUDGMENT

1. The plaintiff obtained financial accommodation from the 1st defendant and on 26th September, 2011 the 1st defendant advanced to him a loan of kshs. 7,000,000/= with interest. The plaintiff executed a legal charge over his property parcel No Ngong/Ngong/ 9895 to secure that loan. The plaintiff fell into default and on 30th January 2018, the 1st defendant through the 2nd defendant, sold the property by way of a public auction to the Interested party for Kenya Shillings Twenty three million (Kshs. 23,000,000/=)

2. The plaintiff filed a plaint dated 17th April 2018 in which he and avers that the property was not only sold without notice, but also at less than its market value although it valued at Kenya Shillings Thirty five million (Kshs.35,000,000). The plaintiff states that he is willing to pay the outstanding loan arrears on condition that the 1st defendant renders a true and accurate account after reconciliation of the accounts.

3. The plaintiff pleads that he was never served with the mandatory statutory notices as required by law; that the 2nd defendant failed to value the property before the alleged auction and that the highest bidder never paid the purchase price as was required. He therefore seeks the following reliefs;

a) A permanent injunction to restrain the defendants by themselves, servants, agents and or legal representatives from transferring, alienating, evicting tenants, interfering with possession or occupation or dealing with any other manner with the plaintiff's property namely Ngong/Ngong/ 9895 situated at Ongata Rongai in Kajiado County.

b) An order for cancellation of the sale conducted on 30th January, 2018

c) An order compelling the 1st defendant to render a proper and accurate account in respect of the plaintiff's loan account.

d) General damages.

e) Costs of the suit and interest.

1st and 2nd Defendants' response

4. The 1st and 2nd defendants filed a statement of defence dated 18th December 2018 on 20th December 2018, together with a list of witnesses and a list and bundle of documents. The 1st defendant admitted that the plaintiff charged his property to secure a loan of Kshs. 7,000,000/= and that the loan was guaranteed by Naomi Norah Omolo who executed a letter of guarantee and indemnity dated 23rd August, 2011.

5. The 1st defendant states that the plaintiff failed to service the loan and its advocates issued statutory notices which were served to the

plaintiff through registered mail. The 1st defendant further states that the 4 days notice and notification of sale were also issued by the 2nd defendant and served on the plaintiff by way of registered post. The 1st defendant contends it has always supplied the plaintiff with a statement of account on request.

6. The 1st defendant avers that due to the plaintiff's default in repaying the loan, the property was sold by public auction on 30th January, 2018 to recover the outstanding amount of Kshs, 4,502,858.04. The 1st defendant states that the highest bid was Kshs. 23,000,000 from the interested party which was accepted. According to the 1st defendant, forced sale value was Kshs. 22,500,000 while the market value was Kshs. 30,000,000.

7. The 1st defendant states that the interested party who was the highest bidder was declared the successful bidder and he deposited Kshs. 5,800,000 (25%) of the purchase price with the auctioneers upon the fall of the hammer. On 26th March, 2018, the balance of the purchase price in the sum of Kshs. 17,250,000 was transferred into the plaintiff's account as a refund. The plaintiff accepted the amount and utilized a substantial sum leaving a balance of Kshs. 1,058,780.27. On 19th April 2018, the plaintiff formally handed over the property to the interested party. The 1st defendant denies the plaintiff's claim that he is willing to service the loan given that the property was sold and the balance refunded to him.

8. On the allegation that the property was sold below the market value, the defendants contend that it is not a legal requirement for the chargee to sell the charged land at market value. The only duty imposed on the 1st defendant was to ensure the property was not sold below the reserve price. They assert that the property was sold at Kshs. 23,000,000 while forced sale value was Kshs. 22,500,000 thus the plaintiff's equity of redemption was extinguished.

9. The defendants state that the only recourse available to the plaintiff is damages in the event it is found that the 1st defendant wrongly exercised its statutory power of sale which the 1st defendant denies. The defendants pray that the plaintiff's suit be dismissed with costs.

Interested party's defence

10. The interested party filed a statement of defence dated 4th February 2019 and filed on 4th February, 2019. He avers that he participated in the public auction on 30th January, 2018 and was declared the highest bidder in the auction. He purchased the suit property for Kshs. 23,000,000; deposited Kshs. 5,800,000 with the 2nd defendant upon the fall of the hammer being the 25% and paid the balance after obtaining a loan from the 1st defendant. He states that the plaintiff voluntarily handed over the property to him on 19th April, 2018 and that the suit is materially prejudicial and financially oppressive to him. He prays that the suit be dismissed with costs and that he be awarded general damages and interest at commercial rates from 30th January, 2018.

Plaintiff's evidence

10. The plaintiff, a retired civil servant, testified referring to his witness statement dated 17th April 2018; a list of documents of the same date and a further list of documents dated 26th November 2018. He produced a copy of the title deed, email dated 6th April 2018, official search dated 7th November 2018, valuation report by standard property services dated 27th April 2018 and bank statements for January 2018 to 24th April 2018 as PEX1 to 5.

11. He told the court that the 1st defendant sold his property illegally; that he was given a notice on 11th December 2013 by the 1st respondent's advocate; that they had several meetings with the advocates and repaid the loan in 2014. The plaintiff further testified that the 1st defendant was demanding Kshs. 5,338,897 as at 11th December 2013 and that was when he went to the advocates to seek time to pay but they declined. He stated that by December, 2014, he had paid Kshs. 5,591,265 and kept on asking for a statement of account but it has not been given to date. The plaintiff stated that he did not hear from the 1st respondent but in 2017 it again demanded Kshs. 4 million from him. He again requested for a reconciliation of his account but it has not been given.

12. The plaintiff testified that at the time when the property was sold, he was in discussion with the 1st defendant who assured him that he would be given account reconciliation which was however not done; that by December, 2014 he had paid over Kshs. 10 million despite the fact that he had taken a loan of Kshs. 7 million. He said his claim against the 1st defendant is to return his property since he had repaid the loan. He maintained that he was ready to any outstanding money.

13. He told the court that he has also sued the 2nd defendant because when he was instructed to sell the property, he called him to his office and informed him that he was to sell the property because he had not paid the loan; asked him to sign the notice and advised him to go to the 1st respondent's office to discuss the matter.

14. He testified that when he went to see the 1st defendant he was told that he would be called for a meeting by which time it would have prepared final accounts. He asked the 1st defendant to put off the advertisement but he was told that it would have done so by the time they call him for the meeting. According to the plaintiff, the 2nd respondent had called him on 12th January 2018 but the property was sold on 30th January 2018 before expiry of the 45 days notice.

15. He told the court that he was informed by the 1st respondent's manager through email that money had been deposited into his account after the property had been sold on 30th January 2018 for Kshs, 23,000,000. That was the first time he was informed of the sale.

16. The plaintiff further told the court that as at 6th May 2014, the property was valued Kshs, 33,000,000 in a valuation done jointly between

him and the 1st defendant; that an official search dated 7th November 2018 showed that he was still the owner of the property and the property was charged in favour of the 1st respondent to secure Kshs. 7 million. He also produced a valuation report dated 27th April 2018 which put the market value of the property at Kshs. 45 million and forced sale value at Kshs 33,750,000.

17. The plaintiff again produced a bank statement from the 1st respondent dated 24th April 2019 which showed that on 26th March 2018 an internal transfer payment of Kshs.17,250,000 from the interested party, being the balance of the purchase price but was made more than one month after the sale and that a deposit of Kshs. 1 million was made 5th February 2018 to enable the interested party participate and bid in the auction.

18. He testified that according to the public auction notice issued by the 2nd defendant, one of the conditions of sale was a deposit of 25% to be paid at the fall of the hammer and the balance to be paid within 30 days. A bidding deposit of Kshs. 1 million by bankers cheque was mandatory. The interested party's pay in slips dated 30th January 2018 showed that the 1st respondent received Kshs. 1 million which was supposedly paid into his account and was credited on 5th February 2018.

19. According to the plaintiff the amount was not paid on the due date and another document dated 30th January 2018 a deposit slip for Kshs. 4,800,000 reflected in his account on the same day. He maintained that the amount was not 25% of the purchase price given that 25% of 23 million should have been 5,575,000/-

20. The plaintiff stated that from the interested party's documents, 25% of the purchase price was not paid at the fall of the hammer and the balance was also not paid within 30 days from the date of the auction.

21. In cross examination, the plaintiff admitted that he defaulted in loan repayment; that statutory notices were issued to him in 2013; that he approached the 1st defendant's advocates to give him time to regularize the default and paid the amount. He also stated that on 15th July 2014 he paid Kshs. 685,080/-, Kshs. 825,710/- on 17th JULY 2014 and another Kshs. 439,832/- on the same day. He told the court that he again paid Kshs, 1,640,615/- on 3rd December 2014 and Kshs. 2,000,000/- on 4th December 2014, making the total of Kshs. 5,591,265/- against a loan of Kshs 7,000,000.

22. The plaintiff admitted that as at December, 2014, he was in arrears which he however cleared and that the statutory notice dated 11th December 2013 required him to pay Kshs. 5,338,894.94. He told the court that between November, 2011 and April, 2017 he had deposited Kshs. 403,385; Kshs. 3.2 million between 16th April 2012 and 30th November 2012; Kshs.373,403/-between 5th December 2012 and 12th August 2013; Kshs 318,000/ between 11th October 2013 and 11th May 2014 and Kshs. 5.59 million between July 2014 and 11th March 2015.

23. The plaintiff further told the court that when he took the loan he was not informed of the default charges but was informed about interest. He stated that the letter of offer dated 17th August 2011 showed interest rate and that by 4th December 2014 he had already paid over Kshs. 10 million.

24. He however admitted that he did not pay any other money because he thought he had completed repaying the loan. He told the court that was called by the 2nd defendant on 12th January 2018 and informed that his property would be auctioned; that the notification of sale was dated 20th January 2017 but he never received it although the address is his.

25. He also admitted that he had mentioned a valuation report for 2014 which showed that the value of the property to be Kshs. 33 million as at 16th May 2014 but he did not have the report in court. He stated that his valuer prepared a valuation report dated 27th April 2018 after the property had been sold on 30th January 2019; that he was informed about the sale on 6th February 2018 but that he was not aware whether or not the defendants conducted a valuation before the auction. He admitted that a desk valuation of the property was done and the report dated 21st November 2017 put the market value at Kshs.30 million and forced sale value at Kshs. 22.5 million. He admitted that the 1st defendant had done the property valued before the auction while his valuation was after the auction.

26. The plaintiff again admitted that Kshs.17, 250,000/= was deposited into his account on 26th March 2018 being the balance of the purchase price; that after he received the money, he went to the 1st defendant and was told that his property had been sold. He asked for an account but it was not given to him. He admitted that the balance in his account as at 24th April 2018 was Kshs. 1.144,945.27/- which means he had utilized the money. He told the court that he decided to come to court after the 1st defendant declined to give him a statement of account.

27. Cross examined by the interested party, he admitted that from the valuation done by the 1st defendant before the auction, forced value was Kshs. 22.5 million and market value was Kshs. 23 million; that the deposits were paid in his account; that the public auction was open to the public and that all interested bidders were required to view the property. He admitted that the 1st defendant did not write to inform him that the purchaser did not meet the conditions of sale.

28. He also admitted that the interested party was declared the purchaser during the auction but denied that he handed over the property to him on 19th April 2018. He admitted that he had no claim against the interested party; that when he was served the notification of sale, he never challenged the auction because he was negotiating with the 1st defendant. However, the property was sold before expiry of the 45 days. He stated that he did not attend the auction but his representative was present.

1st defendant's evidence

29. Vincent Barchok, a debt recovery officer with the 1st defendant testified relying on his witness statement dated 6th February 2019 and produced documents filed together with his statement as exhibits DEX 1 – 11. These are: Letter of offer, DEX 1, Charge dated 26th September 2011, DEX 2, Letter of guarantee and indemnity DEX 3, copies of bank statements DEX 4, Statutory notice DEX 5, the 40 days notice DEX 6, Auctioneers notice DEX 7, Valuation report dated 30th January 2018 DEX 8, Memorandum of sale DEX 9, Statement of accounts DEX 10 and Letter dated 19th April 2019 DEX 11.

30. He testified that the suit property was sold because the plaintiff had not repaid the loan fully although he had paid Kshs. 9, 800,000. According to the witness, the property was valued before the sale; the 1st defendant gave instructions to the valuers to conduct a valuation of the property and that the valuer was denied access to the property and the 1st defendant instructed him to prepare a desk top valuation report relying on the information contained in the one made on 16th May, 2014.

31. Regarding the loan, the witness testified that the 1st defendant advanced Kshs. 7 million to the plaintiff which was and disbursed on 11th November, 2011 and the last date of payment was to be the end of 2014. He testified that as at 11th December, 2014, the plaintiff had paid Kshs. 9,893,360.36 against the loan of Kshs. 7,000,000.

32. With respect to the notice for the auction, he testified that the public auction notice had conditions; bidders were required to deposit Kshs. 1,000,000 by bankers cheque in order to participate in the auction; that before the interested party made his bid, he had a bankers cheque for Kshs 1000,000/=; also paid Kshs, 4,800,000 on 30th January, 2018 to the 1st defendant as 25% deposit of the purchase price and the amount reflected on 5th February, 2018. He stated that the successful bidder was to pay 25% of the highest bid at the fall of the hammer either in cash or banker's cheque and Kshs4,800,000/-was deposited on the same day of the auction.

33. On the issue of the bank cheques deposit slips dated 30th January, 2018, he stated that the cheques were issued by the 1st defendant and deposited by them; that the cheque numbers are not indicated and that there was nothing to show the 1st defendant had issued the bankers cheques. He stated that initially the amount was Kshs. 999,999 but was changed to Kshs. 1,000,000/-. He also stated that on 30th January, 2018, the 1st defendant was dealing with the interested party and not 2nd defendant. He explained that a banker's cheque takes about two days to clear depending on the day and time it was deposited and that the cheques for Kshs. 500,000/- should have taken 2 days.

34. In respect of the cheques, he stated that they reflected in the account on 5th February, 2018; that the cheques were for bidding and they were deposited on 30th January 2018 at noon and cleared on 5th February 2020. He stated that he did not know why the cheques took long to clear and reflect in the account. He denied that the documents were fictitious and were prepared for purposes of this case.

35. Regarding the internal transfer done on 30th January, 2018 at noon for Kshs. 4,800,000, he testified that the transfer was immediate and the plaintiff was the beneficiary while the other one of Kshs 1,000,000 the interested party was the beneficiary. He testified that the 2nd defendant was not involved in the internal transfer; that Kshs. 4,800,000 was from Eastleigh Pharmaceuticals Ltd and that according to the documents; Kshs. 5.75 million was not paid at the fall of the harmer.

36. The witness stated referring to the plaintiff's further list of documents filed on 26th November, 2018, that an email was sent to the plaintiff on 6th April, 2018 informing him that the auction was conducted on 30th January, 2018 and the property sold for Kshs. 23,000,000. He confirmed that the 1st defendant received Kshs.1000,000 and 4,800,000 on 30th January, 2018 as deposit. The balance of Kshs. 17,250,000/- was received on 26th March, 2018 but outside the required 30 days.

37. The witness stated that he did not know how many bidders attended the auction or the tenants residing in the property; that according to the valuation report, rental income from the property was Kshs. 168,000 and that the interested party was in possession of the premises. He however did not know when the plaintiff parted with possession and that the 1st defendant was not involved in taking possession. He told the court that the plaintiff was still the registered owner of the property due to an injunction issued on 22nd October, 2018. He denied that the 1st defendant colluded with the interested party to steal the property.

38. In cross examination, the witness stated that the property was valued prior to the sale; that the 1st defendant gave instructions to valuers to do valuation and once a valuation is done by the professional valuer, the 1st defendant accepts the valuation report after going through it.

39. The witness told the court that the valuers were denied access to the property but the 1st defendant accepted desk top valuation which made reference to the report made on 16th May 2014 because the 1st defendant instructed him to prepare a desk top report based on the previous valuation report made on 16th May 2014.

40. The witness further stated that according to the letter of offer dated 17th August 2011, the amount advanced was Kshs 7 million which was to be repaid in 36 months; that the funds were disbursed on 11th November 2011 and the last date of payment was to be end of 2014 if the plaintiff paid as scheduled. The witness admitted that as at 11th December 2014, the plaintiff had paid 9,893,360.36 against a loan of Kshs. 7 million advanced but he was not paying regularly.

41. The witness again admitted that the notice for public auction required a bidder to deposit kshs. 1,000,000 by bankers cheque to allow one to bid in the auction. He stated that before the interested party participated in the auction, he had a bankers cheque; that on 30th January 2018 kshs, 4,800,000 was paid to the 1st defendant being deposit by Eastleigh Pharmaceuticals Ltd which was 25% of kshs. 23,000,000 purchase price.

42. He admitted that Kshs. 1,000,000 reflected in the account on 5th February 2018; that 25% of Kshs. 23,000,000 is Kshs. 5, 750,000; that

the successful bidder was to pay 25% of the highest bid at the fall of the hammer by cash or bankers cheque and that the amount of Kshs. 4,800,000/- was deposited on 30th January 2018 the same day of the auction.

43. The witness admitted that the banks cheque deposit slips were dated 30th January 2018 but the cheque Numbers were not indicated and that there was nothing to show the bank that had issued the banker's cheque. He again admitted that initially the amount was 999,999 but was changed to Kshs. 1,000,000/-; that at the time, 30th January 2018, the 1st respondent was dealing with the interested party and not the auctioneer and that a bankers cheque takes about 2 days to clear depending on the day and time it was deposited. He stated that the amount reflected in the account on 5th February 2018 while the cheques were deposited on 30th January 2018 at noon. He denied that the documents were fictitious.

44. The witness admitted that there was no document showing that Kshs. 5.75 million was paid at the fall of the harmer or that the 1st defendant informed the plaintiff that his property had been sold. He however told the court that he sent an email to the plaintiff on 6th April 2018 informing him that the property had been sold on 30th January 2018 for Kshs 23 million; that he also confirmed in the email that the 1st defendant received Kshs. 4,800,000 and Kshs. 1 million as deposit and that the balance of Kshs. 17,250,000/- was received on 26th March 2018. He stated that he did not know how many bidders attended the auction or how many tenants are in the property sold.

45. The witness however stated that according the valuation report, rental income from the building is Kshs. 168,000 and that the interested party was in possession of the premises. He also stated that he did not know when the plaintiff parted with possession and that the 1st defendant was not involved in assisting the interested party in taking possession. He stated that the plaintiff is still the registered owner of the property due to an injunction issued on 22nd October 2018. He denied that the 1st defendant colluded with the interested party to steal the property.

46. Cross examined by the interested party, the witness admitted that the interested party was involved in the public auction on 30th January 2018; that Kshs. 1,000,000 was split into two cheques; that the balance of the purchase price was paid by the interested party as the highest bidder; that the interested party is in possession and that Kshs. 4.8 million and Kshs. 1 million make 5.8 million which is more than 5.75million (25%).

47. In reexamination, the witness told the court that the valuer conducted a desk top valuation because he was denied access to the property; that the plaintiff was not paying the loan regularly; had defaulted at some point and the outstanding debt had not been paid fully as at time of the auction. He stated that the 1st defendant recovered its money of about Kshs. 4 million and paid the balance of Kshs. 17.5 million to the plaintiff on 26th March 2018 which he utilized and that he never raised a complaint at the time the property was sold and the balance deposited into his account.

Interested party's evidence

48. The interested party, a director of Easleigh Pharmaceuticals Ltd, testified relying on his witness statement dated 4th February 2019 and the documents which he produced as DEX 12 – 17. These were Public Auction notice DEX 12. Particulars of property DEX 13, Memorandum of sale DEX 14, Certificate of sale DEX 15, Bankers Cheque requisition for Kshs. 1,000,000 DEX 16, and requisition for Kshs. 4.8 million DEX 17.

49. He told the court that he attended the auction and bid; that he obtained bankers cheques for Kshs. 1 million of 500,000/- each from the 1st defendant where he has an account; that the cheques were in favour of the 1st defendant and that he handed the cheques to the 2nd defendant before going to the auction.

50. He told the court that he was declared the highest bidder and paid the 25% which was Kshs. 5.75 million. According to the Interested party, he paid Kshs. 4.8 million since I had already paid Kshs. 1 million to participate in the auction and that the money was acknowledged by the 1st defendant. He was then given documents by the 2nd defendant including Memorandum of sale and certificate of sale. He cleared the purchase price in respect of the property and his agent took possession on his behalf on 19th April 2018. The transfer was however stopped by the court. He told the court that he had no issue with the plaintiff over the property. He also denied colluding with the 1st defendant to take the property.

51. In cross examination, the interested party told the court that he had no problem with the plaintiff but wanted him to pay general damages. Shown the notification of sale, the interested party told the court that he got it from the 1st defendant but he could not remember the date; that he attended the auction and that the sale of the property was in the public knowledge. He also told the court that he came to know the 1st defendant's witness after the suit had been filed.

52. The interested party further told the court that he met the plaintiff before the auction when he went to view the property and that he met many other people who had also come to view the property; that he got bankers cheques from the 1st defendant but he did not have copies; that the auction was conducted between 11 and 12 noon and that there were many people who attended the auction. He however said he did not know how many people wanted to buy the property.

53. According to the interested party, he made a first bid of Kshs. 22.8 million which the 1st defendant's representative rejected but his second bid of Kshs. 23 million was the highest bid and was accepted. He admitted that according to the conditions of sale, failure to pay the balance would lead to forfeiture of the deposit paid.

54. Referred to DEX 16, requisition for bankers cheque for Kshs. 1,000,000, the interested party told the court that he went to the bank at Sarit Centre at 10 a.m. and the requisition was stamped at 10.a.m. Regarding the requisition of Kshs. 4.8 million, he told the court that he is a

director of Eastleigh Pharmaceuticals Ltd together with his young brother Andre Kipsosion; that he obtained a loan of Kshs. 17 million from the 1st defendant to pay the balance of the purchase price; gave a guarantee and charged the same property to secure the loan.

55. He admitted that the balance was paid outside the 30 days but denied offering to buy the property from the plaintiff. He testified that the property was handed over to his agents in April, 2018. He also denied that police officers assisted in forcibly taking possession or that his caretaker had been summoned to Ongata Rongai Police Station to record a statement.

Plaintiff's submissions

56. Mr. Ondabu, learned counsel for the plaintiff, submitted highlighting their written submissions dated 13th July 2020 and filed on 20th July, 2020, that the mandatory notices under section 90(2) and 96(2) of the Land Act and Rule 15 of the Auctioneers Rules, 1997 were never issued to the plaintiff prior to the alleged auction held on 30th January, 2018. He submitted that this position should be taken to be true given that the 2nd defendant auctioneer did not testify to prove that notices were issued and served on the plaintiff. He relied on *Moses Kibiego Yator v Eco Bank Kenya Limited* [2014] eKLR and *Olkasasi Limited v Equity Bank Limited* [2015] eKLR.

57. Counsel took issue with the notice issued on 1st April 2014 stating that it is an improper notice and is in breach of section 96(2) of the Act. He argued that a notice should be in a prescribed form as demanded of the chargee and the auctioneer instructed to realize the security. He relied on *Palmy Co. Ltd v Consolidated Bank Of Kenya Limited* [2014] eKLR

58. Counsel submitted that the plaintiff was advanced a loan of Kshs. 7,000,000 on 28th December 2011 at an interest rate of 15% per annum; that as at 11th December, 2014 the plaintiff had paid the principal amount and interest of Kshs. 9,893,360.33, thus he had paid the entire loan amount of Kshs. 7,000,000 plus interest of Kshs. 2,893,360.33 within a period of 36 months provided for in the charge instrument dated 26th December, 2011.

59. He further submitted that the 1st defendant was obligated under section 44 (A) of the Banking Act to render a proper and accurate account before realizing the security. He argued that at no point did the plaintiff's loan become nonperforming and no evidence was tendered by the 1st defendant to the contrary.

60. Mr. Ondabu maintained that the interested party took possession of the plaintiff's property on 19th April, 2018 with a monthly rental income of Kshs. 240,000 undisputed; that between 1st May, 2018 and 1st July, 2020 the interested party received rent for twenty-six months which translates to Kshs. 6,240,000. He urged the court to order that an account in respect of the rental income be rendered.

61. On whether the property was valued before the alleged auction as required by rule 11(b) (x) of the Auctioneers Rules 1997 and section 97(2) of the Land Act, he submitted that only a desk top valuation was conducted for the property. He argued that the purported Desk top Valuation is not a valuation within the meaning of Rule 11(b) (x) of the auctioneer's rules. He argued that the valuer did not go to the property to ascertain its precise status.

62. According to counsel, the 1st defendant valued the suit property at Kshs. 33,000,000 but seven years later the property was devalued at Kshs. 30,000,000 in the desk top valuation. He submitted that the plaintiff's valuation report shows that the current market value of the property was Kshs. 45,000,000 and forced sale value Kshs. 33,750,000. He relied on *David Gitome Kuhiguka v Equity bank Ltd* [2013] eKLR.

63. Mr. Ondabu again submitted that the property was never advertised for sale in a public auction in any of the newspapers, a mandatory requirement under rule 16(2) of the Auctioneers Rules but was instead sold by way of private treaty. He argued that the interested party was unable to explain how he learnt about the sale of the property in the absence of a newspaper advertisement. He faulted the 2nd defendant for failing to testify and be cross-examined.

64. He also faulted the 2nd defendant for issuing a memorandum of sale to the interested party when no purchase price was paid in full within 30 days as required in the conditions of sale. According to counsel, the interested party stated that he applied for a loan from the 1st defendant which was utilized to pay the balance of the purchase price and it was approved on 17th March, 2018 after the 30 days from the date of auction on 30th January, 2018.

65. He submitted that the interested party and the 2nd defendant failed to adduce evidence to prove that a bankers cheque of Kshs. 1,000,000 was presented to the 2nd defendant on 30th January, 2018 to obtain a bidding number in tandem with the conditions of sale under rule 16(1) (a) and (b) of the auctioneer rules. He argued that an application for transfer of funds by the interested party was not a bankers cheque and that the bankers cheque was to be in the name of the 2nd defendant and not the interested party.

66. He also submitted that the interested party never paid 25% of the purchase price at the fall of the hammer in accordance to the conditions of sale, thus this was a case of insider trading by a lender; that the sum of Kshs. 4,800,000 was from the 1st defendant and that it was intended to defeat the plaintiff's right of equity of redemption. He also argued that the interested party was unable to raise the balance of the purchase price within 30 days and colluded with the 1st defendant to deposit a sum of Kshs 17,250,000 into the plaintiff's account under the guise of advancing a loan even when the property is still registered in the name of the plaintiff.

Defendants' submissions

67. The defendants filed written submissions dated 1st April 2020. They submitted that there was no dispute that he plaintiff obtained a loan

from the 1st defendant; that there was default in loan repayment and that he entered into negotiations with the 1st defendant on repayment of the loan but he did not clear the loan.

68. According to the defendants, the plaintiff defaulted In loan repayment and requisite notices were served on him but he did not rectify the default. At the time the property was auctioned, the plaintiff was still in default of Kshs. 4,502,858.04.

69. The defendants further submitted that prior to the sale, the property was valued; that the property was auctioned for Kshs. 23 million to the interested party who was declared the highest bidder during the auction and a memorandum of sale signed. It was submitted that contrary to the plaintiff's contention that the interested party did not pay the deposit at the fall of the hammer, the interested party paid Kshs. 5,800,000 being the 25% of the purchase price of 23 million, first, Kshs. 1,000,000 for the bid and then Kshs. 4,800,000. The balance was then paid and after the bank recouped its money, the balance of Kshs. 17,250,000 was deposited into the plaintiff's account which he then utilized.

70. The 1st defendant submitted that it was entitled to exercise its statutory power of sale since the plaintiff had defaulted after issuing statutory notices. it relied on *First choice Store Ltd v EcoBank Kena Ltd* [2017] eKLR (par 44). It was again submitted that the 1st defendant had demonstrated that the notices were served and relied on *Livingstone Gichora v Family Finance Building Society* (HCC NO. 1480 of 2001). The defendants argued that he plaintiff did not adduce evidence to controvert their evidence that notices had been served. They relied on *Nyangilo Ochieng & another v Fanuel B Ochieng & 2 others* [1996] eKLR.

71. On whether the property was sold at the best price, the defendants submitted in the affirmative. They argued that the property was sold at the best price reasonably obtainable. They also argued that during the hearing, the plaintiff produced a valuation report dated 17th April 2018 which put the market value at Kshs. 45 million and forced sale value of Kshs. 33,750,000 against the 1st respondent's report dated 21st November 2017 with market value of Kshs. 30,000,000 and forced sale value of Kshs. 22,500,000.

72. Defendants submitted that the plaintiff's report was not proof that the property had been undervalued. They relied on *Zum Zum Investments Ltd v Habib Bank Ltd* [2014] eKLR for the argument that the plaintiff must satisfactorily demonstrate why the valuation report they relied on in disposing of the property did not give the best price obtainable at the material time. And as to why a desktop valuation was done, the defendants argued that the 1st defendant had been denied access to the property and therefore the valuer had no option but to prepare a desktop report using information from an earlier report.

73. On whether the sale complied with conditions of sale, the defendants again submitted in the affirmative; that 25% deposit was paid and also the balance. They argued that late payment of the balance cannot invalidate the sale since the plaintiff's equity of redemption was extinguished at the fall of the hammer and upon the interested party being declared the highest bidder. They relied on decision in *Mbutia v Jimba Credit Finance Corporation & another* [1988] eKLR that redemption was lost on the fall of the hammer at the auction sale.

Interested Party's submissions

74. The court has not been able to trace the interested party's submission despite all effort.

Determination

75. I have considered the pleading, the evidence; submissions and the authorities relied on by parties. The issues that arise for determination are; whether statutory notices were not served; whether the property as valued prior to the auction; whether the sale was advertised and whether the interested party complied with conditions of sale.

Whether statutory notices were served

76. The plaintiff argued that statutory notices were not served as required by sections 90(1) and 96(2) of the Land Act and the Auctioneers Rules prior to the auction. His case was that that the notice issued on 1st April 2014 was improper and was in breach of section 96(2) of the Act. According to the plaintiff, the notice was not in prescribed form. He also argued that he had repaid the principal amount and interest within the period of 36 months as was required under the charge and there was no outstanding amount to necessitate invocation of the statutory power of sale.

77. The plaintiff also argued that the 1st defendant was required by section 44 (A) of the Banking Act to render a proper and accurate account to him before realizing the security; that at no time did the loan become nonperforming; that the property was not valued prior to the auction as required by section 97(2) of the Act and rule 11(b) (x) of the Auctioneers Rules and that the property was not advertised for sale in any of the newspapers which is a mandatory requirement under rule 16(2) of the Auctioneers Rules.

78. The defendants contended that the plaintiff was in default; that they complied with the law; issued statutory notices and valued the property before the sale. It was also contended that plaintiff was aware of the auction.

79. I have considered the parties' contestations over the above issue the evidence and perused the record. The plaintiff argued that statutory notices were not served. The 1st defendant held the view that the notices were served. The plaintiff admitted in his evidence and submissions that a notice was issued on 1st April 2014. His case was however that the notice did not comply with section 96(2) of the Land Act. Section 96(2) provides that:

“(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed

form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

80. Section 90(1) provides that if a chargor is in default of any obligation and fails to pay interest or any other periodic payment due under a charge or perform or observe any covenant, express or implied in a charge, and continues to be in default for one month, the chargee may serve a notice in writing on the chargor requiring him to pay the money owing, or to perform and observe the terms of the agreement.

81. Section 90(2) requires that the notice to be served should adequately inform the chargor the nature and extent of the default; the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the default must have been rectified. The notice should also inform the borrower consequences that will follow if he fails to comply with the notice.

82. I have perused the exhibits produced by the 1st defendant in particular the notice dated 11th December 2011 issued under section 90(1) of the Land Act and sent to the plaintiff by registered mail. It informed him that he was in default of Kshs. 838,897.94. The plaintiff was required to regularise the default within three months otherwise the 1st defendant would exercise its statutory power of sale and realize the security. The letter was copied to Naomi Norah Omolo and there is a certificate of posting.

83. There is another letter dated 1st April 2014 again addressed to the plaintiff by registered mail which the plaintiff admitted to have received. This was a forty days' notice issued under section 96 (3)(h) of the land Act requiring the plaintiff to redeem the property. There is again a posting certificate even though the plaintiff does not dispute service of the notice. There are also notices issued by the 2nd defendant to the plaintiff for the sale of the property.

84. In a nutshell, there is evidence that the defendants complied with the law and served the relevant notices to the plaintiff before the 1st defendant exercised its statutory power of sale. In that regard, therefore, I find and hold that proper notices were issued and served on the plaintiff before the defendants took the action of selling the property by public auction.

Whether the property was valued prior to the sale

85. The plaintiff argued that the property was not valued before the auction in violation of the law. The defendants on their part argued that valuation was conducted and that because the plaintiff denied the valuer access to property, a desk top valuation was conducted before the property was sold.

86. I have considered arguments on this issue and perused evidence on record. There is a valuation report done prior to the sale and the plaintiff admits that it was a desktop valuation report. DW1 testified that the 1st defendant authorised the valuer to conduct a desk top valuation because the plaintiff denied them. The plaintiff did not make any comment on the 1st defendant's contention that he denied valuers access to the property.

87. Section 97(1) and (2) of the Land Act provide:

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

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

88. The section only requires the chargee to have the property valued by a professional valuer. It does not say a desk top valuation can or cannot be done in respect of a property. The law placed on the 1st defendant a duty of care to the plaintiff and ensure that sale of the property obtains the best price possible and that is why valuation of the property before sale is required as a matter of law.

89. From the evidence and exhibits, a pre-sale valuation was conducted which put the market value of the property at Kshs 23 million and forced sale value at Kshs. 22.5 million. The property was sold at Kshs. 23 million which was the market price according to the pre-sale valuation report. The plaintiff argued that the price was below market value since the market value was about Kshs. 45 million while forced sale value was Kshs. 33 million.

90. The plaintiff denied valuers access to the property. He cannot turn around and blame the 1st defendant for under valuing the property. Whereas the law placed a duty of care on the 1st defendant, the plaintiff prevented its valuer to access the property in order to conduct physical inspection and valuation of the property. He must not be allowed to rely on his own actions to blame the 1st defendant. Pre-valuing the property was for the benefit of the plaintiff and having denied the valuer access to the property, he is estopped from complaining that a desk valuation was used when selling the property during exercising its statutory power of sale. I do not agree with the plaintiff's argument that the property was not valued prior to auction.

Whether the property was advertised prior to the sale

91. The plaintiff further argued that the property was not advertised before the auction as required by the auctioneer's rules. According to him, he was called by the 2nd defendant and given a notice for auction that was to take place on 30th January 2018 and advised to go to the 1st defendant to discuss the matter. He went to the 1st defendant's offices where he asked for a reconciliation of accounts. Although the 1st defendant promised to give him reconciled accounts, this was not to be. He also argued that the 2nd defendant sold the property before the 45 days were over.

92. As already seen, section 96(2) of the Act requires that a notice of not less than forty days be served before the chargee can exercise statutory power of sale and such sale cannot take place until the days have lapsed. The Act does not require that the auction be advertised. The plaintiff has however relied on rule 16(2) of the Auctioneers Rules to argue that advertisement of the auction is mandatory.

93. Rule 15(e) states that upon receipt of a court warrant or letter of instruction the auctioneer should in the case of immovable property and on expiry of the period of notice without payment, arrange sale of the property not earlier than fourteen days after the first newspaper advertisement. The rule requires the auctioneer to prepare notification and forty five days notice and serve them on the owner of the chargor. On expiry of the forty five days notice, the auctioneer is to sell the property not earlier than fourteen days after the first newspaper advertisement. The reading of the rule is clear that sale of immovable property by way of public auction should be advertised in a newspaper.

94. Rule 16 on advertisement, goes on to provide that an advertisement by an auctioneer shall, in addition to any other matter required by the court, contain the date, time and place of the proposed sale; the conditions of sale or where they may be obtained and the time for viewing the property to be sold. Rule 16 (2) states that advertisement should be through newspapers except in the case of perishable goods and livestock. The essence of advertising the auction is possibly to popularise it and attract as many prospective bidders as possible.

95. The plaintiff argued that the auction sale was not advertised in the newspapers as required by law. The 1st defendant's witness did not address this issue in his testimony. The 2nd defendant, the auctioneer, did not testify and therefore this issue was not responded to by the defendants. The interested party was also not able to tell how he came to know that the property was to be sold by public auction, only stating that he got the notice from the auctioneer on a date he could not remember.

96. I have perused the record, and in particular, the exhibits produced by both sides. Neither party produced a copy of the newspaper advertisement to show that the auction was advertised as required by rules 15 and 16 of the Rules. It is for that reason that the plaintiff argued that the auction was not done as required by law. The 2nd defendant did not testify and therefore it was not clear whether or not the auction was advertised.

97. The question that arises is whether failure to advertise the property prior to the auction as required by rule 15 of the Auctioneers Rules vitiated the auction. Courts have held this omission to be a mere irregularity that does not invalidate a sale conducted through a public auction. In ***Eric Odindo v National Bank of Kenya Limited & 2 Others* [2008] eKLR**, the court stated:

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

98. Similarly, in ***Jacob Ochieng Muganda v Housing Finance Company of Kenya Limited* (HCCC No. 1436 of 1999, Ringera J, (as he then was), held that irregularity on the part of the auctioneer could not invalidate a sale and the remedy of a person who can prove that he has been damnified by the irregularity would be damages against the auctioneer as per section 26 of the Auctioneers Act.**

99. On appeal, in ***Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited* [2002] eKLR**, the Court of Appeal agreed with the position stating:

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

100. The plaintiff's property was sold in a public auction. The plaintiff has not shown that he suffered loss or damage due the way the auction was conducted and how that was the case. For instance, he has not shown that the property would have fetched far more than it did. He stated that he conducted valuation after the sale which put the market value at more than the value given in the pre-auction valuation report. His valuation report was done after the sale and that did not mean the valuation report before auction was wrong or that the property could have been sold at the value in his report.

101. The defendants' duty was to ensure that the property fetched the best price possible. According to the defendants forced sale value of the property was Kshs. 22.5 million and the property was sold for Kshs.23 million. The plaintiff did not adduce evidence to show that the property could have fetched higher than the amount it was sold. Moreover, the plaintiff confirmed in cross examination, that his agent attended the auction but there was no allegation of any irregularity or impropriety on the part of the 2nd respondent during the auction. On that basis, I am not persuaded that failure to advertise the auction caused the plaintiff any loss or damage.

Whether the deposit or balance of was paid

102. The plaintiff again argued that the interested party neither paid the 25% deposit at the fall of the hammer nor the balance of the purchase price within thirty days after the auction. He faulted the 2nd defendant for issuing a memorandum and certificate of sale to the interested party when no deposit or balance of purchase price had been paid within the timelines required. In his view, the sale was an insider trading and his property was sold to the interested party through private treaty instead of public auction.

103. The 1st defendant contended that the interested party as the highest bidder paid the 25% deposit at the fall of the hammer and paid the balance of the purchase price. The 1st defendant also denied the plaintiff's claim that the sale was an insider trading or that the property was sold by way of private treaty.

104. I have considered the evidence and arguments by parties as well as perused the record. From evidence by the 1st defendant and the interested party, the interested party was declared the highest bidder at the auction. He paid a deposit of Kshs. 4,800,000/= by bank transfer on the same day. He had paid Kshs 1,000,000 for bidding which put the amount at Kshs 5,800,000/= well above 25% (Kshs. 5,750,000/=) of the highest bid of Kshs 23,000,000/=. This was clear from the deposit slips produced as exhibits.

105. The plaintiff made a lot of heavy weather on the fact that the deposit slips did not show bankers cheque numbers. The fact that the deposit slips did not contain bankers cheque numbers could not on its own lead to a conclusion that no payment was made. Both the 1st defendant and interested party also produced bankers cheque requisitions to prove that the interested party obtained cheques for payment. The arguments put forward by the plaintiff to explain away the fact that the interested party did pay the deposit is not persuasive.

106. Regarding payment of the balance of the purchase price, the plaintiff argued that the interested party did not pay the balance of the purchase price within thirty (30) days after he was declared the highest bidder. He maintained that the interested party colluded with the 1st defendant to deposit a sum of Kshs 17,250,000 into his account under the guise of advancing a loan to the interested party.

107. The 1st defendant and interested party admitted that the money was not paid within thirty days but was paid soon after. According to the interested party, he applied for a loan from the 1st defendant to pay for the balance of the purchase price. The loan was approved on 17th March, 2018 and was paid two weeks outside the thirty (30) days period. The delay was attributed to the time taken to process the loan.

108. I have considered respective parties positions on this issue. There is no denial that the interested party paid the balance of the purchase price outside the thirty (3) days period. The reason for this was because the interested party was getting a loan from the 1st defendant to finance the balance of the purchase price. This was done and the balance paid about two weeks outside the thirty days period.

109. In my respectful view, this was not a material default that could invalidate the sale. The 1st respondent and the interested party entered into a contract when the memorandum of sale was signed. It was aware that the interested party was getting a loan from her and indeed accommodated him. Processing a loan could not obviously take less than thirty days and, therefore, I do not agree with the plaintiff that failure to pay the balance within the thirty days period could vitiate the sale so long as the 1st interested party was processing to finance the balance of sale and the 1st defendant was willing to accommodate him. The property having been knocked down at the fall of the hammer during the auction, the plaintiff's equity of redemption was extinguished and failure to pay the balance of the purchase price within time could not revert the property to him.

110. I must also point out here, that the plaintiff received the balance of the purchase price in his account and confirmed in cross examination that he utilized the money. He could not spend the money and then turn around to complain that the sale of the property had not been properly done. Having utilized the money, he is estopped from complaining that the sale was not lawful or properly conducted.

111. In the end, having considered the evidence and the law, the conclusion I come to is, that this suit is not sustainable. It is dismissed with costs to the 1st defendant and interested party.

Dated Signed and Delivered at Kajjado this 2nd day of December 2020.

E C MWITA

JUDGE