



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 949 OF 2017

(Formerly Nairobi HCCC No. 846 of 2004 and ELC 742 of 2014)

EMMANUEL MATHEWS.....PLAINTIFF

VERSUS

JERUSHA NAIMUTIE SHANI.....1ST DEFENDANT

JERUSHA SEMEYAN SHANI.....2ND DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....3RD DEFENDANT

JUDGMENT

By an amended Plaintiff dated the 4th August, 2004 and filed in Court on 5th August, 2004, the Plaintiff prays for judgment against the Defendants for:

a. A permanent injunction do issue against the Defendants restraining them jointly and/ or severally their agents, employees and/or servants from trespassing, alienating, damaging and/ or removing property or otherwise howsoever from interfering with the Plaintiff's plot title no. LTK/ ENKARI – RONGENA/ 243 situate in Kajiado District and that they jointly and/or severally be and are hereby evicted from plot no. LTK/ ENKARI – RONGENA/243 situate in Kajiado District.

b. Costs and interest

The 1st and 2nd Defendants filed their Amended Statement of Defence including a Counterclaim where they denied the averments in the Plaintiff except for the descriptive and jurisdiction of the Court. They contended that the registration of the Plaintiff as owner of land parcel number Loitoktok/ Enkariak Rongena/ 243 hereinafter referred to as the 'suit land' was done illegally, unlawfully, fraudulently and wrongfully. They denied that no statutory notices were issued prior to the sale of land. The suit land was sold after the deceased Melton Shani's demise. Further, the purported sale was done at an undervalue while the application for consent of the Land Control Board was done on 13th September, 2002 and the said consent obtained hurriedly on 17th September, 2002. They averred that the deceased resided on the suit land from 1968 together with them, their children and grandchildren as well as kept livestock. They denied being trespassers on the suit land nor demolished buildings thereon. They explained that as early as 1992, the deceased commenced negotiations with the Kenya Commercial Bank for the repayment of the loan. Further, that he made substantial payment towards the loan and his daughter Abigail paid Kshs. 546,000/=. In the counterclaim they prayed for the Court:

a. To dismiss the Plaintiff's suit with costs.

b. Enter judgment setting aside the sale of Loitoktok/ Enkariak – Rongena/ 243 by the 3rd Defendant to the Plaintiff made on 28th December, 2001 and the subsequent transfer registered on 22nd July, 2004 be nullified, set aside and cancelled and the Title Deed dated 22nd July, 2004 be nullified and be delivered for cancellation.

c. Enter Judgment ordering the Plaintiff to quit, vacate and deliver vacant possession of Loitoktok/ Enkariak – Rongena/243 to the First and Second Defendants within thirty (30) days of the date hereof in default of which eviction orders to issue.

d. Enter Judgement ordering the Third Defendant M/s Kenya Commercial Bank Ltd to give the First and Second Defendants full and detailed account supported by relevant documents showing exact amounts recovered from the auction sale of KAJIADO/ TOROSEI/ 7, such account to be provided within thirty (30) days of the order.

e. Order that the Plaintiff and the Third Defendant do pay the costs of this suit and the costs of the counterclaim to the First and Second Defendants.

The 3rd Defendant filed its Statement of Defence on 2nd August, 2005 where it denied the averments in the 1st and 2nd Defendants Defence and Counterclaim. It contended that the sale of the suit land was done in strict compliance of the existing contract between the relevant parties and in conforming with the requirements of statute. It averred that the 1st and 2nd Defendants deceased husband MELTON OLE SHANI did execute a legal charge of this property Loitoktok/ Enkariak Rongena/ 243 as security for a sum of Kshs. 275,000/= advanced to him by the 3rd Defendant under terms and conditions well known to him. Further, that the deceased defaulted in the repayment to the 3rd Defendant and as at 10th August, 2000, the sum due and owing to it, from the deceased was Kshs. 6, 079,180.30. It confirmed that the 3rd Defendant proceeded to realize its statutory power of sale as conferred under section 74 of the Registered Land Act. It stated that the requisite notice and the Auctioneer's notice of intention to sell the suit land was duly given to the deceased Chargor in the proper manner and the subsequent transactions thereto were all in order as well as above board. It insists the 1st and 2nd Defendants claim for general and special damages against the 3rd Defendant is misplaced and without merit. Further, that the 1st and 2nd Defendants have not raised any cause of action against it and their suit is bad in law. It reiterates that its joinder to the suit is irregular and unlawful. They deny receiving the demand or intention to sue.

The Plaintiff filed a Defence to the 1st and 2nd Defendants' Counterclaim where he denied the allegations therein and insisted they were not entitled to the prayers sought.

The matter proceeded for hearing where the Plaintiff called one witness while the 1st and 2nd Defendants had four witnesses and the 3rd Defendant had two witnesses.

Evidence of the Plaintiff

PW1 JACOB OITAU NKADAYO stated that the Plaintiff is the registered proprietor of the suit land which he purchased through a public auction on 28th December, 2001 from the 3rd Defendant. He explained that the auction had been advertised in the press by Leisin Business Advisory Consultants on behalf of the 3rd Defendant. Further, that the suit land was initially owned by Melton Ole Shani (deceased) who had charged it to the 3rd Defendant for a loan that he was subsequently unable to pay. PW1 testified that prior to the auction the 3rd Defendant had presented the Plaintiff with a valuation report from messrs Prestige (Management) Valuers in respect to the suit land where the forced sale value had been indicated as Kshs. 2,600,000/=. It was his contention that the Plaintiff was declared the highest bidder in the auction and he executed a Memorandum of Sale with the Auctioneer. Further, that he was issued with a Memorandum of Sale to certify that he purchased the suit land for a total sum of Kshs. 2, 600,000/=. He testified that the Plaintiff obtained Consent of the Land Control Board upon payment of the full purchase price and then the 3rd Defendant transferred the Land to him. Further, that the Plaintiff was issued with a Title Deed on the 22nd July, 2004. He claims thereafter the 3rd Defendant wrote a letter to the 1st and 2nd Defendants to give vacant possession which letter was copied to the Plaintiff. Further, that he is now in partial possession of the suit land. PW1 further testified that there were people occupying the land courtesy of the 1st and 2nd Defendants who were asked to quantify value of their crops, after compensation, they left. It is only the 1st and 2nd Defendants occupying one (1) acre of the land. Further, that the Plaintiff has severally peacefully tried to have the 1st and 2nd Defendants including their agents vacate the suit land but they have refused. The Plaintiff involved the Loitokitok Police Station to persuade the 1st and 2nd Defendants including their agents to leave the suit land but they adamantly refused. Further, the Plaintiff received a letter dated the 28th July, 2004 through one of his agents Joseph Nkadayo, from messrs P. M. Kamaara & Company Advocates indicating that he should not enter the suit land. During cross examination PW1 confirmed representing the Plaintiff during the auction which took place on 28th December, 2001 as he had been given a Power of Attorney on 21st December, 2001 and signed the Memorandum of Sale on 28th December, 2001. Further, that he did an application to the Land Control Board dated the 13th September, 2002 and signed as the Plaintiff. He further confirmed that Consent of the Land Control Board was issued on 17th September, 2002. He contended that there was an advertisement in the Daily Nation before they bought the suit land. Further, that the Notice of Sale is dated the 25th September, 2001. He explained that the auction was undertaken after the demise of the Chargor. He averred that in the Notice of Sale, there is no address, but it was only addressed to the Administrators of the estate of Melton Ole Shani. He did not know if Plaintiff had visited suit land. He further confirmed signing the Transfer of Land Form by Chargee on behalf of the Plaintiff. He confirms that he is cultivating suit land and was threatened. Further, that 1st and 2nd Defendants only reside on one (1) acre. In further cross examination, he confirmed the suit land was valued prior to the auction. He denied colluding with valuers before the auction. He stated that they sought for a 60 days extension from the 3rd Defendant so as to finalize the payment of the purchase price. The Plaintiff produced various documents including: Land Certificate dated the 17th January, 1968; Copy of Official Search dated 11th August, 2000; Power of Attorney by Melton Melita Ole Shani to Abigael Shani dated 13th January, 2001; 45 Days' Notice of Sale dated the 25th September, 2001; Copy of Valuation Report dated the 31st October, 2001; Copy of Notification of Sale served on 10th December, 2001; Power of Attorney by Emmanuel Mathews to Jacob Oitayu Nkadayo dated 21st December, 2001; Copy of Newspaper Advertisements dated 22nd December, 2001 & 10th December, 2001 as well as Certificate of Posting; Copy of Leisin Business Advisory Consultants Auctioneers Licence for 2001; Copy of Deposit Slip for Kshs. 650,000/= and Cheque dated 8th January, 2002; Copy of 3rd Defendant Letter dated 10th January, 2002 to the Plaintiff; Copies of Letters dated the 1st February, 2002, 22nd February, 2002, 9th September, 2002 and 16th September, 2002 from Messrs Keriako Tobiko Advocates; Photographs of Suit land; Copies of Letters dated 18th February, 2002, 1st March, 2002 and 10th September, 2002 from Messrs Oraro & Company Advocates; Copies of Letters dated 3rd April, 2002 and 5th September, 2002 from Kenya Commercial Bank; Copy of Application for Consent of the Land Control Board dated 13th September, 2002; Copy of Receipts number 576 dated 17th September, 2002 from Loitoktok Development Fund; Copy of Letter of Consent from Land Control Board dated 17th September, 2002; Copy of Refund to various occupants of the suit land dated 30th October, 2002; Copy of Title Deed issued on 22nd July, 2004; Copy of Transfer of Charge in Exercise of Power of Sale dated 22nd July, 2004; and Copy of Receipt Number F 416626 dated 22nd July, 2004 as his exhibits.

Evidence of the Defendants

DW1 JERUSHA NAIMUTIE SHANI testified that her late husband Melton Ole Shani was the registered proprietor of the suit land upon which he erected a stone house, cowshed, water pump stations and other irrigation structures. She confirmed that her family had been in continuous occupation of the suit land since 1968 and still reside thereon. Further, that their children and workers reside on structures on the suit land. It was her testimony that based on the Forensic Examiners Report, the Plaintiff who purchased the suit land is a fictitious person. She denied seeing the Plaintiff on the suit land nor the Attorney Jacob Oitayu Nkadayo on the suit land. She admitted in cross examination that a Notice was sent in 1991 indicating suit land would be sold after three months. She confirmed that her son Daniel Ole Shani severally wrote to the Bank to reschedule the sale of suit land. Further, that Abigail did not finish repaying the loan. She further admitted registering a caution against the suit land. She further averred that family is not paying loan in respect to the Torosei land.

DW2 Emmanuel Karisa Kenga who was the document examiner confirmed that he received instructions from Messrs Solonka & Company Advocates to examine certain documents. It was his testimony that the signatures in the Power of Attorney and the Plaintiff as well as Memorandum of Sale purportedly belonging to the Plaintiff were varied.

DW3 Abigail Shani confirmed that she held a power of Attorney dated 13th January, 2001 from her father who was the Chargor herein. She testified that she paid Kshs. 546,025 on 2nd December 1993 and after that she did not know if any amount had been paid towards the loan but there had been a balance left. She admitted that the suit land had been charged but her mother resided thereon. She denied receiving the notices in 2001 but admitted negotiating with the 3rd Defendant to reschedule the loan repayment. Further, the 3rd Defendant agreed to reduce the loan to Kshs. 2.4 million but they ceased to pursue the said process as the chargor had died. She testified that she received information that the 3rd Defendant wanted to dispose of the land. She explained that the Notice dated the 25th September, 2001 was issued by Leisin Business Advisory Consultants whom she knew but she never saw it. Further Notification of Sale dated the 10th December, 2001 was not addressed to any of them. She however admitted that Major Shani who signed the notice was her brother. Further, that Nkadayo family were cultivating the suit land. She insists the Auction conducted in 2001 was flawed but had no complaint with the Notices previously sent to her father prior to his demise.

DW4 Daniel Ole Shani admitted sending letters to the 3rd Defendant to reschedule sale of suit land. He insists the notices dated 25th September, 2001 and Sale on 28th December, 2001 was not proper. Further, that the sale of suit land was done unprocedurally. He admits that there is a timber house on the suit land constructed by Jackson Nkadayo. He claimed his family was not given time to save the suit land. Further, he learnt that the Torosei land which had also been charged to the 3rd Defendant had not been sold. He admitted knowledge of notice dated the 11th February, 1990 and that he wrote a letter dated the 31st January, 1993 to the 3rd Defendant where he appealed to them not to sell suit land. Further, he wrote a letter dated 3rd February, 1992 pleading with 3rd Defendant to postpone auction for two weeks. He confirmed Box 9 Loitoktok was his mother's address and that they had not done any contra valuation. He also did not dispute previous notices issued to their father.

DW5 Mr. Komen was a witness for the 3rd Defendant. He confirmed that the auction of suit land was done procedurally after requisite notices were issued and the Plaintiff emerged the highest bidder. Further, that they had not sold the Torosei land which had also been charged to the 3rd Defendant. He explained that valuation of the suit land was done before the auction was conducted on 28th December, 2001.

DW6 Mr. Leisin from Leisin Business Advisory Consultants who was the auctioneer who conducted the auction of suit land confirmed issuing Notice of Sale dated the 25th September 2001 directed to Abigail Shani whom he knew personally. He contended that the said Notice which was for a period of 45 days was served personally to Major Shani. Further, Notification of Sale was also served upon Major Shani who was Abigail's brother. He further advertised the suit land for sale on 10th December, 2001. He testified that the persons from Oloitoktok and Jacob Nkadayo, Major Shani and KCB Managers attended the auction. He prepared a Memorandum of Sale after that. It was his testimony that he knew Abigail Shani very well, prepared the Loan Reschedulement Proposal on her behalf as he was assisting the family save their 500 acres land and stick to the 70 acres. He insisted he colluded with Shani and not the Bank nor the Highest bidder. In cross examination he said Notice of Sale was issued under Rule 15 (b) of the Auctioneer's Rules of 1997 and Section 74 of the Registered Land Act. Further, that there were five bidders during the auction but did not have a report in court.

The 1st and 2nd Defendants produced various documents as exhibits including Copy of Land Certificate issued on 17th January, 1968; copy of letter from Kenya Commercial Bank to Melton Ole Shani dated 15th September, 1988; copy of letter from Dan Ole Shani to Kenya Commercial Bank dated 31st January 1992; copy of letter from Dan Ole Shani to Kenya Commercial Bank dated 3rd February, 1992; copy of letter from Kenya Commercial Bank to Melton Ole Shani dated 5th February, 1992; copy of letter from Dan Ole Shani to Kenya Commercial Bank dated 18th February, 1992; copy of letter from Dan Ole Shani to Kenya Commercial Bank dated 24th July, 1992; copy of Agreement for Sale dated 24th July, 1992; copy of Application for Consent from Land Control Board dated 13th August, 1992; copy of letter of Consent from Land Control Board dated 25th August, 1992; Copy of letter from Oraro & Rachier Advocates to Melton Ole Shani dated 9th November, 1992; copy of letter from Melton Ole Shani to the Kenya Commercial Bank dated 20th November, 1992; Copy of letter from J.O. Maranga & Co, Advocates to Esmail & Esmail Advocates dated 2nd May, 1993; Copy of Notification of Sale from Kenya Shield Auctioneers dated 31st May, 1993; Copy of letter from Melton Ole Shani to Kenya Shield Auctioneers dated 9th June, 1993; Copy of Newspaper Advertisement of Public Auction Sale dated 15th June, 1993; Copy of letter from Kenya Shield Auctioneers to Oraro & Rachier Advocates dated 16th June, 1993; Copy of letter from Melton Ole Shani to Kenya Commercial Bank dated 23rd July, 1993; Copy of Inward Draft from Credital Italiano – Roma to Kenya Commercial Bank dated 11th December, 1993; Copy of Payment Notification for Ksh. 546, 025.45 by Abigail Shani to Kenya Commercial Bank dated 2nd December, 1993; Copy of letter from Esmail & Esmail & Co. Advocates dated 25th April, 1995; Copy of Letter from Kenta Moitalel & Co. Advocates to Oraro & Rachier Advocates dated 10th September, 1996; Copy of Auctioneers Licence Cals A granted to Leisin Business Advisory Consultants dated 9th April, 2001; Copy of Letter from Hon. G. M. Parpai to Leisin Business Advisory Consultants dated 26th April, 2001; Copy of Notice of Sale addressed to Abigail Shani dated 25th September, 2001; Copy of Report and Valuation of L.R No. Loitoktok/ Enkariak – Rongena/ 243 dated 31st October, 2001; Copy of Notice of Sale dated 10th December, 2001; Copy of Notification of Sale dated 28th December, 2001; Copy of Memorandum of Sale dated 28th December, 2001; Copy of Kenya Commercial Bank Ltd Bankers Cheque for Kshs. 650, 000/= dated 8th January, 2002; Copy of letter from

Kenya Commercial Bank to Emmanuel Mathews dated 10th January, 2002; Copy of letter from Keriako Tobiko Advocates to Oraro & Co. Advocates dated 1st February, 2002; Copy of letter from Oraro & Co. Advocates to Keriako Tobiko & Co. Advocates dated 18th February, 2002; Copy of letter from Keriako Tobiko Advocates to Oraro & Co. Advocates dated 22nd February, 2002; Copy of letter from Oraro & Co. Advocates to Keriako Tobiko & Co. Advocates dated 1st March, 2002; Copy of Certificate of Death dated 26th March, 2002; Copy of letter from Keriako Tobiko Advocates to Kenya Commercial Bank dated 28th March, 2002; Copy of letter from the Kenya Commercial Bank to Keriako Tobiko Advocates dated 3rd April, 2002; Copy of Kajiado Land Dispute Tribunal receipt dated 4th April, 2002; Copy of Kajiado Land Dispute Tribunal Notice of Hearing dated 17th April, 2002; Copy of letter from Kenya Commercial Bank to Oraro & Co. Advocates dated 5th September, 2002; Copy of Letter from Keriako Tobiko Advocates to Oraro & Co. Advocates dated 9th September, 2002; Copy of letter from Oraro & Co. Advocates to Keriako Tobiko & Co. Advocates dated 10th September. 2002; Copy of letter of consent from Land Control Board dated 17th September, 2002; Copy of application for Official Search for KAJIADO/TOROSEI/7 dated 1st August 2003; Copy of Certificate of Search for KAJIADO/TOROSEI/ 7 dated 1st August, 2003; Copy of application for Official Search for KAJIADO/TOROSEI/7 dated 1st August 2003/ Copy of Certificate of Search for LOITOKTOK/ENKARIAK-RONGENA/243 dated 1st August 2003; Copy of Petition for Letters of Administration Intestate dated 2nd December, 2003. Copy of Transfer of Chargee in exercise of power of sale registered on 22nd July, 2004; Copy of Title Deed issued to Emmanuel Mathews on 22nd July, 2004; Copy of letter from P.M. Kaamara & Associates to Joseph Nkadayo dated 28th July, 2004; Copy of letter from Abigail N. Shani to Kenya Commercial Bank dated 26th August, 2004; Copy of Court Order issued by Lady Justice Aluoch on 1st August, 2004; Copy of Grant of Letters of Administration Intestate issued on 2nd December, 2004; Copy of Application for Official Search for KAJIADO/TOROSEI/7 dated 23rd February, 2011; Copy of Application for Official Search for LOITOKTOK/ENKARIAK-RONGENA/243 dated 23rd February, 2011 and Certified copy of KCB Bank Statement in respect of loan account number 301182797011.

The 3rd Defendant also produce the following documents as exhibits: copy of the further charge made on 4th May, 1978; A copy of the Certificate of Search dated 5th May, 1978.; A copy letter of offer/acceptance dated 15th September 1988 from the 3rd Defendant to the late Melton Ole Shani; A copy of statutory Notice issued by Oraro and Rachier Advocates dated 11th February 1991; copy evidencing postage addressed to the late Melton Ole Shani number 000417; copy of statutory notice issued by Oraro and Rachier Advocates dated 11th February 1991; copy evidencing postage addressed to the late Melton Ole Shani No. 02414; copy of letter dated 31st January 1992 from Dan Ole Shani to the administrator of the 3rd Defendant; copy of letter dated 3rd February 1992 from Dan Ole Shani to the branch manager of the 3rd defendant; copy of letter from the 3rd defendant to Melton Ole Shani dated 5th February 1992; copy of letter dated 15th February 1992 from Dani Ole Shani to the branch manager of the 3rd defendant; copy of letter dated 13th May 1992 from the 3rd defendant to Dan Ole Shani; copy of application for consent of land control board dated 13th August 1992; copy of letter of consent dated 13th August 1992; copy of letter from the firm of J.O. Maranga & Co. Advocates copied to Melton Ole Shani and dated 2nd May 1993; copy of bank payment voucher paid by a Abigail Shani of Ksh. 546, 025.45 dated 2nd December, 1993; copy of letter dated 25th April 1995 from Esmail and Esmail Advocates to the late Melton Ole Shani; copy of letter dated 9th July 1996 from the 3rd defendant to the late Melton Ole Shani; copy of letter dated 10th September 1996 from Kenta Moitalel & Co. Advocates to Oraro & Co. Advocates; copy of letter dated 9th November, 1996 from Oraro & Co. Advocates to Kenta Moitalel & Co. Advocates; copy of demand letter by Oraro & Co. Advocates to the late Melton Ole Shani dated 14th March, 1999; copy of letter dated 30th April, 1999 from Oraro & Co. Advocates to Watts Enterprises dated 30th April 1999; copy of letter dated 17th May, 1999 by Watts Enterprises to the Late Melton Ole Shani; copy of the letter by Leisin Business Advisory Consultants enclosing a loan reschedulement proposal and received by 3rd defendant on 29th March, 2001; copy of loan reschedulement proposal by Leisin Business Advisory Consultants (undated); copy of the power of attorney by Melton Melita Ole Shani to Abigail Naneu Shani dated 13th January 2001; copy of the report and valuation by Prestige Management Valuers dated 31st October, 2001; copy of the Notification of sale by Leisin Business Advisory Consultants (undated); copy of the Notice of Sale by Leisin Business Advisory Consultants (undated); copy of particulars of property on parcel No. LOITOKTOK/ENKARIAK-RONGENA/243; copy of memorandum on parcel No. LOITOKTOK/ENKARIAK-RONGENA/243; copy of letter dated 4th January 2002 from Oraro & Co. Advocates to the plaintiff; copy of the letter dated 4th January 2002 for Oraro & Co. Advocates to the Administrators of the Estate of the Late Melton Ole Shani; copy of the transfer of Chargee in exercise of power of sale to the plaintiff (undated); copy of letter dated 10th January, 2002 from the 3rd defendant to the plaintiff; copy of letter dated 5th September, 2002 from the 3rd defendant to the Oraro & Co. Advocates; copy of letter dated 9th September, 2002 from Keriako Tobiko Esq Advocates to Oraro & Co. Advocates; copy of letter dated 10th September 2002 from Oraro & Co. Adocates to Keriako Tobiko Esq Advocates; copy of letter dated 11th September 2002 from the 3rd defendant Credit Administrator to Senior Legal Officer; Legal Department; copy of statement of account of the late Melton Ole Shani as at 18th December 2002; and copy of letter dated 2nd April, 2003 from the 3rd defendant Credit Administrator to the Debt Recovery Unit.

All the parties filed their respective submissions which I have considered.

Analysis and Determination

Upon consideration of the Plaintiff, Defence including Counterclaim as well as witnesses' testimonies, exhibits and submissions, the following are the issues for determination:

- Whether the Chargor or his family were served with the requisite notices before the Chargee exercised its statutory power of sale.
- Whether the Auction was properly undertaken.
- Whether the Plaintiff acquired a good title.
- Whether the 1st and 2nd Defendants are entitled to the Orders sought in the Counterclaim.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff

As to whether the Chargor or his family were served with the requisite notices before the Chargee exercised its statutory power of sale. The 1st and 2nd Defendants contended that the sale of the suit land was unprocedural as they were not served with the statutory notices before it was auctioned. They submitted that the 3rd Defendant failed to issue the 90 days statutory notice and the mandatory 45 days notice to the administrators of the deceased estate prior to the sale of the suit land by public auction. To buttress this averment they relied on various

decisions including **Michael Gitere & Another V Kenya Commercial Bank Limited (2018) eKLR**; **Gitau Muiruri V Standard Chartered Bank (K) Limited (2005) eKLR**; **Stephen Odabiah Kariuki Njoroge V Euro Bank Ltd, Registrar of Land, Peter Musango & Christine Muhoro (2001) eKLR**; **Stephen Boro Gitiha V Nicholas Ruthiru Gatoto & 2 others (2017) eKLR**; **Leah Mweru Waigwa V National Bank of Kenya Ltd (2015) eKLR**; **Elizabeth Wambui Njuguna V Housing Finance Co. of Kenya Limited (2006) eKLR**; **Jane Wairimu Ngure (Suing as administratrix of the Estate of Peter Ngure – (deceased) V National Bank of Kenya Limited & 2 others (2019) eKLR**; **Albert Mario Corderio & Another V Vishram Shamji (2015) eKLR**; and **Nationwide Finance Co. Ltd Vs Meck Industries Ltd & Michael Gerald Kimani (2001) eKLR**. The Plaintiff in his submissions contended that the Auctioneer proceeded as provided in Rules 15 and 16 of the Auctioneers Rules as he served the Notification of Sale, the Advertisement and Notice of Sale. The 3rd Defendant submitted that it issued all the requisite statutory notices. Further, that the Registered Land Act (repealed) did not provide for a format of the Notice. It relied on **DNM Vs Ma K & 4 Others (2014) eKLR**; **Executive Curtains and Furnishings Limited V Family Finance Building Society (2007) eKLR** and **Zipporah Mwangi Njenga v Housing Finance Limited & Another (2014) eKLR** to buttress its arguments.

On the issuance of statutory notices, section 74 of the Registered Land Act (Repealed) which was the law in place when the suit land was sold through a public auction stipulated that :'**(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be. (2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may - (a) appoint a receiver of the income of the charged property; or (b) sell the charged property: Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.'**

From the evidence of the 1st and 2nd Defendants, I note DW3 and DW4 were all aware that the deceased Melton Ole Shani had charged the suit land and Kajiado/ Torosei/ 7 with the 3rd Defendant to secure a loan. They both confirmed that the deceased had not repaid the full loan and did not. dispute the previous notices which were issued to their father in his lifetime. I note on 11th February, 1991, the 3rd Defendant issued a notice which excerpt I replicate hereunder: '**Take notice that unless we receive the said sum of Kshs. 375, 966. 75 together with accumulated interest thereon within three (3) months of the date hereof, our mandatory instructions are to make arrangements for the sale by public auction of immovable property namely:- Loitoktok/ Enkariak/ Rongena/ 243.** There was a Certificate of Posting produced as an exhibit confirming this notice was sent to P.O. Box 16 Kajiado. After issuance of the said Notice, DW4 wrote several letters dated 31st January, 1992, 3rd February, 1992 and 18th February, 1992 respectively to the 3rd Defendant imploring it to suspend the intended auction of the suit land to enable them repay the outstanding loan. The said correspondence were exchanged but no payment was made as evident in the Bank Statement which was produced as an exhibit. It is only in December, 1993 when DW3 made a payment of Kshs. 546,025. 45/=. From the contents of the 3rd Defendant's letters including the ones from their lawyers, it continued to inform the deceased of his default and urged him to repay the loan or else it would proceed to realize the security. The deceased family sought to sell the suit land by private treaty, subdivide the land and sell but all this did not materialize despite indulgence from the 3rd Defendant. I note vide a letter dated the 14th March, 1999 from the 3rd Defendant's advocates Messrs Oraro & Company, the Chargor was informed that he had been granted adequate time to redeem the suit land and needed to repay the outstanding loan within 14 days. Further, on 17th May, 1999, Watts Enterprises who were licensed Auctioneers issued Notification of Sale to the Chargor via registered mail which indicated the outstanding loan to be Kshs. 6, 079, 181.30. DW3 after being issued with a Power of Attorney even presented a Loan Reschedule Proposal prepared on her behalf by Leisin Business Advisory which was received by the 3rd Defendant on 29th March, 2001 before the Chargor's demise. To my mind, all this point to the fact that the 3rd Defendant's statutory power of sale had indeed crystallized as the Chargor despite being indulged by the Bank had failed to repay the loan so as to redeem the suit land. The 3rd Defendant further proceeded to hire the services of Messrs Prestige Management Valuers who valued the suit land and presented a report dated 31st October, 2001 before the intended auction. The 1st and 2nd Defendants' main contention was that the statutory notices should have been re issued prior to the auction undertaken on 28th December, 2001. Both DW5 and DW6 insisted all the requisite notices were issued before the suit land was sold to the Plaintiff. DW6 who was the auctioneer testified that he issued a Notice of Sale dated the 25th September 2001 directed to Abigail Shani whom he knew personally as he had assisted her prepare a Loan Reschedule Plan which was presented to the 3rd Defendant. As per the evidence of DW6, he issued a 45 days redemption notice dated 25th September, 2001 through Leisin Business Advisory Consultants which was received by Major Shani (now deceased), a brother to Abigail Shani who held a Power of Attorney on behalf of their father. The said notice stated that a public auction of the suit property was scheduled on 28th December, 2001. He was categorical that he also served the Notification of Sale dated 10th December, 2001 upon Major Shani. He confirmed that he sent the Notice to an address P.O. Box 9 Loitoktok which belonged to the 1st Defendant and the Certificate of Posting was produced as an exhibit. The 1st Defendant as DW1 had denied knowledge of the said address but DW4 admitted that it was the mother's (DW1's) address. DW6 stated that he obtained the said address from the Caution which DW1 had registered against the suit land. I note the suit land was advertised for sale in the Newspaper dated the 10th December, 2001. It is ironical that despite the auction being severally postponed at the behest of the Chargor's family and the 3rd Defendant even accepting to reduce the amount of the loan, the said loan was not repaid culminating in the sale of the suit land. In cross examination DW6 said Notice of Sale was issued under Rule 15 (b) of the Auctioneer's Rules of 1997 and Section 74 of the Registered Land Act.

I wish to make reference to Rule 15 of the Auctioneers Rules, 1997 which provides as follows:-

‘Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

a. record the court warrant or letter of instruction in the register;

b. prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;

c. locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

d. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

e. on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.'

In the case of **Mbuthia v Jimba Credit Finance Corporation & another**[1988] eKLR, the Court of Appeal held that there was no need of reissuance of a fresh notice once one was issued although the auction was postponed.

Further, in **Executive Curtains and Furnishings Limited vs Family Finance Building Society** [2007] eKLR, Warsame J (as he then was) said as follows" **I am not aware of any law requiring the Defendant to repeat or re-issue the statutory notice once it is issued and served upon the borrower...**"

While in the case of Moses Kibiego Yator V Eco Bank Limited (2014) eKLR on the issue of service of notice, the Court stated that:'It will be seen from the above, that the Notification of Sale needs to give the chargor 45 days to redeem the property. The same ought to be served on the registered owner or an adult member of his family residing or working with him or where the person refuses to sign such notification, the auctioneer needs to sign a certificate to that effect.'

Yet in the case of **Albert Mario Cordeiro & another v Vishram Shamji** [2015] eKLR the Court held that:'

'The relevant provision on service is Rule 15(c) of the Auctioneers Rules which requires the auctioneer to locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect.'

Based on the facts as presented including associating myself with the decisions cited above as well as the provisions of the Registered Land Act (repealed) plus the Auctioneers Rules, I find that the 1st and 2nd Defendants were indeed served with the requisite notices before the suit land was sold and are not being candid. Further, since the provisions of the repealed Registered Land Act did not prescribe the format of the notice, I find that the notice issued by the 3rd Defendant through its lawyers was hence valid and there was further no need to re issue a fresh one. I also find that Auctioneer adhered to the Auctioneers' Rules by sending a Notice by Registered Post to the last known family address as well as serving Major Shani (now deceased) who was an adult member of the Chargor's family.

As to whether the auction was properly undertaken. DW3 and DW4 contended that the auction of the suit land was unprocedural as the family members were not present. DW4 insisted the suit land was undervalued but did not produce a report to the contrary. I note the suit land was advertised for sale in the newspaper on 10th December, 2001 prior to the Sale. It was DW6's testimony that persons from Oloitoktok, Jacob Nkadayo, Major Shani and KCB Managers attended the auction. He said the auction was undertaken in his office at Shankardass House, and the Plaintiff was the highest bidder. He confirmed that the Plaintiff paid Kshs. 650,000/= to the 3rd Defendant after which he prepared a Memorandum of Sale. DW5 who was from the 3rd Defendant confirmed the auction had been above board. On cross examination DW6 denied colluding with the Plaintiff who bidded Kshs. 2.6 million. I note before the auction, the Chargor's family never attempted to stop it. Further, after the auction they never sued the 3rd Defendant to set it aside until the commencement of this suit when they lodged their counterclaim. In the case of **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Ors (2005)** eKLR Kimaru J held as follows: **"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages."**

Based on the facts before me, and in associating myself with the decision cited above, I find that the auction was properly undertaken and if the Chargor's family were aggrieved with it, then they had a recourse to seek for damages.

As to whether the Plaintiff acquired a good title.

The 1st and 2nd Defendants insisted the Plaintiff did not acquire a good title as he failed to pay the full purchase price within the requisite period and obtain consent of the Land Control Board within six months after the auction. The Plaintiff however insisted that he acquired a good title from the 3rd Defendant. I note at the auction, the Plaintiff was declared the highest bidder after offering Kshs. 2.6 million. Further a Memorandum of Sale was issued indicating the Plaintiff had paid Kshs. 650,000/= and required to pay the balance before 5th February, 2002. It is trite that at the fall of hammer the Chargor's equity of redemption is extinguished. Further, the Chargee after that can vary the terms of payment with the purchaser. From the correspondence furnished by the Plaintiff between the firm of Keriako Tobiko & Oraro & Company Advocates representing the bank, it emerges that the 3rd Defendant had extended time allowing the Plaintiff to pay the balance of the purchase price. On the issue of the Land Control Board, the 3rd Defendant was granted a consent to transfer to the Plaintiff on 17th September, 2002 with the Transfer by Chargee Form being registered on 22nd July, 2004. After the auction, I note as per the averments of PW1, DW1 and DW3, the Plaintiff is already in occupation of the suit land except for a small portion consisting of the homestead. In the case of **Ngobit Estate Ltd Vs Carnegie , Civil Appeal No. 57 of 1981**, it was held that: **' what constituted a controlled transaction within the meaning of the Land Control Act aforesaid was the Transfer by Chargee form to the Plaintiff that was lodged with the Board within 6 months of its being executed by the Chargee and issued to the Plaintiff.'**

Further in the Court of Appeal decision of **Willy Kimutai Kitilit v Michael Kibet** [2018] eKLR, it held that:

‘The Land Control Act does not, unlike Section 3 (3) of the Law of Contract Act and Section 38 (2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.....Thus, since the current Constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board.’

I associate myself with these two decisions and in applying them to the current circumstances, insofar as the Plaintiff obtained the Consent of the Land Control Board in September, 2002 and later obtained his title, but having taken occupation of the suit land, the 1st and 2nd Defendants claim that this should invalidate his title cannot stand. The 1st and 2nd Defendants have not proved that the Plaintiff obtained his title illegally. It is against the foregoing that I find that the Plaintiff indeed acquired a good title to the suit land.

As to whether the 1st and 2nd Defendants are entitled to the Orders sought in the Counterclaim. I note the 1st and 2nd Defendants sought for dismissal of the Plaintiff’s suit; nullification and setting aside of the auction and subsequent transfer of suit land and for Plaintiff to deliver vacant possession of the portion he occupies, as well as for 3rd Defendant to provide a detailed statement of account for the sale of Kajiado/ Torosei/7. As I have held above that the auction was properly done, I will decline to make an order of setting it aside. Since the Plaintiff legally acquired the suit land and the 1st and 2nd Defendants failing to prove he had obtained it through fraud or misrepresentation, and in relying on section 143 of the repealed Registered Land Act which is replicated in section 80 of the Land Registration Act, I find that they have failed to prove the grounds that would warrant cancellation of the Plaintiff’s title. I hence find that the 1st and 2nd Defendants are not entitled to the orders of vacant possession as against the Plaintiff who is the registered proprietor of the suit land. On the issue of accounts, I note the land parcel number Kajiado/ Torosei/ 7 has not yet been sold as per the evidence of DW5 and hence will not make an order to that effect. It is against the foregoing that I find the 1st and 2nd Defendants did not prove their case in the Counterclaim and proceed to dismiss it with costs to the Plaintiff and the 3rd Defendant.

In the circumstance, I find that the Plaintiff has proved his case on a balance of probability and will enter judgement for him against the 1st and 2nd Defendants. I will proceed to make the following final orders:

1. A permanent injunction do and is hereby issued against the 1st and 2nd Defendants restraining them jointly and/ or severally their agents, employees and/or servants from trespassing, alienating, damaging and/ or removing property or otherwise howsoever from interfering with the Plaintiff’s plot title no. LTK/ ENKARIAK – RONGENA/ 243 and that they jointly and/or severally be and are hereby directed to grant vacant possession from plot no. LTK/ ENKARIAK – RONGENA/243 after 90 days from the date hereof failure of which eviction to issue.

2. Costs of the suit is awarded to the Plaintiff and the 3rd Defendant to be borne by the 1st and 2nd Defendants.

Dated Signed and Delivered via email this 21st Day of May, 2020

CHRISTINE OCHIENG

JUDGE