



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 10 OF 2010

SCHOLASTICA NYAGUTHII MUTURIPLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA LTD.....1ST DEFENDANT

EVANSON KAMAU WAITIKI2ND DEFENDANT

JUDGMENT OF THE COURT

Introduction

1. The plaintiff's claim is contained in the Amended Plaint dated **26th April, 2012**. The Amendment also brought on board the second defendant. The plaintiff's case is that she is at all material times to this suit the registered proprietor of **L.R.NO. 14668-Muthithi Gardens, Kiambu Municipality** (*herein the suit property*), which she charged together with **L.R.NO. 14667** as security to the 1st defendant in January, 1998 for a loan of Kshs. 3,000,000, which she was to repay over a period of fifteen (15) years at interest of 26% per annum. The entire amount which was to be paid over the period was Kshs. 7,373,704.65 at monthly installment of Kshs. 66,398.00. Soon thereafter, the plaintiff states that the 1st defendant varied the applicable interest rates and charged rates which were unlawful. After making repayment of Shs. 3,973,306, she realised that the 1st defendant had overcharged her and inflated her loan balance. Problems over the loan soon arose with the 1st defendant bank alleging that the plaintiff was in arrears in the repayment of the loan. This caused the plaintiff to discharge one of the properties being **LR.NO. 14667 Muthithi Gardens** and to sell the same at Kshs. 3,500,000= to repay the said loan. At the time of filing this suit the plaintiff alleges to have repaid a total of Shs. 8,373,306 to the 1st defendant who is still claiming Shs. 7,393,303.15 from the plaintiff which claimed sum is composed of illegal charges, levies and interests.

2. In the midst of this disagreement, the plaintiff claims that the 1st defendant conspired with the 2nd defendant to transfer the plaintiff's property worth over Kshs. 16,000,000 to the 2nd defendant unlawfully without notice to her under a private treaty and at an under value. The plaintiff therefore blames the 1st defendant and makes the following prayers;

a) A Permanent injunction be issued restraining the Defendant/Respondent whether by itself, officers, Directors, servants and/or its agents Messrs Nguru Enterprises or whomsoever is acting on

its behalf from selling, advertising for sale, transferring and/or dealing with L.R. No. 14668-MUTHITHI GARDENS, KIAMBU MUNICIPALITY.

b) An order directing the defendant to execute a discharge and release the plaintiff's L.R. No. 14668- MUTHITHI GARDENS, KIAMBU MUNICIPALITY in default the discharge be executed by the court deputy registrar.

c) An Order directing the Chief Land Registrar to rectify the register by canceling the entries in the register of land regarding L.R. No. 14668- MUTHITHI GARDENS, KIAMBU MUNICIPALITY and to cancel the transfer executed in favour of the 2nd Defendant herein.

d) A declaration that the plaintiff has completed repaying the loan advanced to her by the defendant.

e) Any other or further order this honourable court may deem fit to grant in the circumstances.

f) Cost of the suit

3. The plaintiff's suit is controverted by the 1st defendant vide an Amended Statement of Defence filed herein on **20th February, 2013**, in which the 1st defendant denies the plaintiff's claim in totality. The 1st Defendant denies that the plaintiff has a cause of action, and states further that the plaintiff was advanced a loan of Kshs. 3,000,000 which was to be repaid with interest and other charges for a period of fifteen (15) years, which, if the same were paid without any default, would amount to Shs. 11,951,640.

4. The 1st defendant denied the allegations that it overcharged interests or levied charges and costs which were illegal. The 1st defendant states that they lawfully sold the suit property to the 2nd defendant to recover the outstanding dues exceeding Kshs. 7 million, and that the sale was pursuant to the proper exercise of the bank's statutory power of sale.

5. The 2nd defendant filed his defence on **1st May, 2012** in which he denied in *toto* the plaintiff's allegation while emphasizing that he is the registered proprietor of **LR.NO. 14668 Muthithi Gardens** pursuant to a lawful purchase of the same from the 1st defendant.

6. There were several interlocutory applications and rulings in the suit, all of which were disposed off. Parties complied with pre-trial directions, and filed their Bundle of Documents and Witness Statements which are on record, paving way for the hearing of the suit which commenced on **2nd December, 2013** and was concluded on **18th July, 2016** paving way for this judgment.

The Hearing

7. The Plaintiff called two (2) witnesses. **PW1**, being the plaintiff, testified that she sells shares in stock market as an agent. The plaintiff testified that she took a loan from the 1st defendant, and that she knew 2nd defendant Mr. Waitiki. The Plaintiff took the loan in 1998 of Ksh. 3.0 million, and that she charged two parcels of land - the suit property L.R No. 14668 and LR. No. 14667 both in Kiambu, and that both plots secured the same amount. The charge is at page 8 of the bundle. The loan was to be paid by installment of Shs. 66,398= for a period of sixteen (16) years at rate of interest of 26% variable. The bank was obligated to notify the plaintiff of any variations of interest. (*See clause 5 (i) (ii)*). The Bank never gave the plaintiff any notice of variation of interest, but the Statements reflected charges and penalties which the plaintiff could not understand. (*See page 44 of the Plaintiff's Bundle – is a Bundle of Statements running to page 63*). Each year the amount the plaintiff was repaying as monthly installments was varying. When the plaintiff complained about all these variations which at one time made the loan due at Shs. 10 million, the bank reduced this by Shs. 2.5 million. (*See page 58*). In May, 2000 there were many charges in statement e.g Interest on Capital. These then continued to be levied for succeeding months. These levies were not contractual. This led the plaintiff to fall back on repayment. PW1 testified

that the bank then agreed that the plaintiff sell one of the securities which was an empty land. The plaintiff sold the land at Shs. 3.2 million and paid all of it to the bank. (See page 62- 1.8 million and 1.4 million reflected in the Bank Statements in July, and August, 2008). Besides the Shs. 3.2 million the plaintiff had upto that date paid Shs. 3.9 million. The bank authorized the plaintiff to sell part of the security and re-scheduled the loan. See page 49 of 1st defendant's List of Documents. The amount due was now standing at the 8,500,000 payable by monthly installment of Kshs. 135,000= which was double what the plaintiff was paying earlier. This rescheduling costed the plaintiff Shs. 200,000= paid on 5th December, 2006. From January, 2007 plaintiff started paying the new rates. The Bank also gave her a rebate of Shs. 2,448,618.65 although the plaintiff did not ask for it and that she did not know why it was given. At page 23 is the letter of offer. It indicated that the plaintiff would repay the loan for fifteen (15) years but this period did not appear on the charge. The second property which was the plaintiff's home was sold by the bank in October, 2011 to the 2nd defendant at Shs. 16 million. PW1 testified that this sale was tainted with irregularity, was not advertised, and, that she was not given any notice about its sale or auction. The property was sold at Shs. 16 million but it was worth Shs. 31 million. The buyer proposed to buy at Shs. 16 million. The bank accepted this on face value. The plaintiff was not aware of any other offers. There was no valuation report. In February, 2011 the plaintiff had valued the property through Acumen Valuers Ltd at Shs. 32 million. The Bank sold the plaintiff's property at undervalue and without valuation or Notice to her. After sale the bank took Shs. 13,000,000=. In total the plaintiff testified that the bank took Shs. 22 million, from the plaintiff out of the original loan of Shs. 3 million.

8. PW1 testified that the monthly repayment she was paying was not fixed but used to vary between Kshs. 91,889.65 to Kshs. 124,884.65. (See pages 40-64 of the plaintiff's Bundle of Documents). PW1 did not receive any notices before these changes were effected in disregard to Clause 5(2) (3) of the Charge documents. She sold one of her properties in 2008 to repay part of the loan. At page 62 of the bundle a total of Shs. 3.5 million was paid after that sale. After the discharge of the property which was sold the bank did not give PW1 any other statutory Notices. PW1 testified that her property was sold at an under value price of Shs. 16,000,000= through a private treaty. The bank accepted an offer of Shs.16,000,000 on 24th August, 2011. There was no auction of the property. There were no bidders. There was also no valuation report. In the amended defence at paragraph 26(b) the defendant states they sold the property by public auction. PW1 testified that that was not true. PW1 had valued the property before the sale on 17th February, 2011 by Acumen Valuers Ltd at Shs. 32,000,000=. The sale price of Shs. 16,000,000= was serious under value that was even disputed by the Lands Office which then put the figure at Shs. 20,000,000=. The plaintiff testified that the price of 16 million was agreed between the 1st and 2nd defendants as there was no valuation. Originally the bank wanted to sell her property by public auction and she was duly given forty five (45) days' notice. The witness is not aware why the bank changed its mind from public auction to private treaty. In their defence the bank states they sold the property pursuant to Redemption Notice dated 28th May, 2008 but the plaintiff denies this allegation. This is not correct. By the time the property was sold in 2011 the Bank did not tell PW1 how much she owed them or how much they expected from her. To date, the plaintiff claims she does not know how much the bank claims from her. PW1 testified that even in their defence the bank is not stating what she owes them or the amount they are recovering from her. There is a reference to Shs. 7,000,000 in paragraph 21 of the defence. PW1 does not know about that sum of money. When the property was sold PW1 was staying in it as it was her home. She testified that she was evicted in 2012 without any notice or court order. She was unlawfully and unfairly evicted.

9. On cross examination by **Mr. Karungo** for the 1st defendant. PW1 testified that she applied for a mortgage from the 1st defendant and created the mortgage over the property. She understood that 1st defendant could sell the property if she failed to make payments under the mortgage agreement. She soon was not able to repay the loan on schedule and requested the bank to re-schedule the accounts by increasing payment period by eight (8) years to fifteen (15) years. These requests were not accepted. She then committed to pay shs. 400,000 under a re-scheduled arrangement, plus auctioneers costs in order to stop the sale of the property.

10. After rescheduling Shs. 2.7 million was taken away from the debt, arising from the banks own error. The witness agreed that the bank indulged her several times but their interest rates were still too high

together with other illegal charges. While accepting that **Fred Gichine** is her son, the plaintiff denies the search at page 69 that he was served with the 45 days' Notice of Redemption, through Post Office Box No. 79563-00200 Nairobi. The plaintiff denied receipt of any such notice or that the said address belonged to her. Her address was 48231 – Nairobi.

11. On cross examination by **Mr. Mbugua** for the 2nd defendant, the plaintiff testified that there was a letter of offer dated 8th August, 2011 from the 1st to 2nd defendants. The same was accepted on 24th August, 2011 by the 2nd defendant. The plaintiff believed there was a collusion between the defendants to sell her property at gross under value. The 2nd defendant was not an innocent purchaser for value. The bank gave the plaintiff a rebate of Shs. 2.7 million but she did not understand it. After paying to the bank 3.2 million the bank did not give her a final statement to show the outstanding claim. After rescheduling the loan the plaintiff was asked to pay Shs. 8,500,000=. The plaintiff agreed that the bank had power to sell the property by private treaty or public auction, but that the property was sold at gross undervalue. The witness denied the allegation that the valuation by Acumen Valuers Ltd was fraudulent. She testified that even the collector of stamp duty undervalued her property at Shs. 20,000,000= as its value was Shs. 32,000,000=.

12. The witness with the leave of court adopted her Bundle of Documents filed herein on 2nd April, 2012 and prayed for the suit to be given to her with costs.

13. The plaintiff's second witness – PW2- was **Daniel Muriuki Kibichu**. He testified that he is a valuer with **Acumen Valuers Ltd**. He prepared and signed the Valuation Report at page 80 of the plaintiff's bundle. He visited the property with his assistant. After visiting it he bought the map for the property. Then he ordered for official search of title. Then he proceeded to ground and conducted an inspection on 16th February, 2012. After that he compiled the Report and concluded it on 27th February, 2012. The date on Report indicates 27th February, 2011. That is a typographical error. The year was 2012. PW2 testified that the Report bears the true worth of the property on that date. He testified that he had wide experience in valuation for 21 years. He had also valued property in that part of Nairobi.

14. He was instructed to do valuation of the property by the plaintiff. The instructions were in or about 12th January, 2012. He did two valuations on the same property. The 1st one was in 2010 while the current one was in 2012. Apart from the error on date the rest of the report is credible and he stood by it. He did not do any comparative valuations with surrounding property. He was instructed to only give the open market value of the property and not other values as rent of the property or related issues.

15. The witness testified that the report is based on instructions of the plaintiff. At that time the client only needed to know the open market value of the property. At page 4 of his Report PW2 indicated the map which he used. It is Folio Registry No. FR 177/25. He testified that he had provided photographs of various positions of the property, and the report is comprehensive. He asked the court to adopt the report.

16. On their part, the 1st defendant called two witnesses. DW1 – **Evenson Njehia Karanja** testified that he is a Valuer with Crystal Valuers. He valued the suit property in Kiambu. He gave it market value of Shs. 20 million and Forced Sale Value of Shs. 15 million, and prepared a report on comparable values and arrived at the same figures. The witness adopted his Witness Statement dated 13th May, 2015.

17. On cross examination by **Mr. Koceyo** for the plaintiff, DW1 testified that he visited the premises but he did not inspect the premises. He also applied for search at the lands office but by the date of submission of the report he had not received the certificate of search. DW1 testified that they were denied access to the property and so he made assumptions based on the previous report.

18. DW2 – **Moses Ndungu** testified that he is the assistant debt manager at the 1st Defendant Bank. He has been with the bank for last 20 years, and he knows the plaintiff. The plaintiff had secured her property to the bank for a loan of Shs. 3,000,000= in February, 1998. She defaulted in the repayment and so the bank sold the subject property for Shs. 16,000,000= in October, 2011. After disbursement of the

proceed there was a balance of Shs. 6.3 million that the bank is ready to release to the plaintiff but which the plaintiff has refused to collect. The bank is still ready to release the money. DW2 adopted the Witness Statement filed on 20th March, 2014 in name of **Patrick Wainaina**.

19. On Cross-examination by **Mr. Koceyo** the witness testified that the bank gave the plaintiff Shs. 3,000,000= . By the time they sold the property she had paid a total of Shs. 8.4 million. The bank recovered Shs. 9.6 million from the sale proceeds. In total, the bank recovered Shs. 18,000,000=. DW2 testified that the bank sold the property by Private Treaty instead of public auction as stated in the defence. Initially the bank advertised sale by Public auction but later the plaintiff requested time and so the bank put it off and later advertised it and the 2nd defendant bought it. The bank sold the property after a Statutory Notice at page 67 of Defendant's Bundle. There were further negotiations after which another property belonging to the plaintiff was sold and Shs. 3.4 paid to the defendant. (See page 7 of defendant's bundle where there is a statement to that effect). After those negotiations and payments the bank did not give any other notice before it sold the property. The bank offered to refund the balance of Shs. 6.3 million to the plaintiff after the sale but she refused to take it. The outstanding amount was Shs.7.8 million, by the time the bank received the sale proceeds. The bank also deducted legal fee Shs. 173,200=. The bank also recovered interests on arrears for the month.

20. On his part, the 2nd defendant was his own witness. He gave evidence as DW3. He adopted his Witness Statement filed on 21st May, 2012. DW3 confirmed that he purchased the suit property from the 1st defendant through Private Treaty.

21. DW3 had offered to buy the property at Shs. 16,000,000=. He had earlier visited the property but the plaintiff refused to admit him. He negotiated over the price with 1st defendant. The Bank was reluctant to accept his offer but they finally did. Although the Ministry of Lands put the value of the property at Shs. 20,000,000=, for DW3 16,000,000= was adequate value. The witness testified that he knew about the property when he visited the ground floor of Housing finance company at display room where they displayed available properties for sale, in which this property was displayed. He met two ladies there who sent him to the property. He saw the property and then made his offer. He originally offered Shs. 14,000,000= and later raised it to Shs. 16,000,000=. His figure was based on what he saw. There was no collusion between him and the bank. He did not even know the plaintiff.

Submissions

22. Parties filed submissions. The Plaintiff submitted that her testimony and that of her witnesses reveal that the issues to be resolved are as follows:

- a. In *Duplum rule*
- b. Void or unlawful statutory notice which never existed.
- c. Undervalued property
- d. Balance of proceeds of sale.
- e. Collusion and conspiracy to defraud
- f. Whether the property was sold by Public Auction or Private Treaty.
- g. Damages for unlawful eviction.

In Duplum Rule

23. The Plaintiff testified that as per the Charge document, the expected repayment over a period of 15 years was approximately Kshs. 7,373,704.65 based on the initial rate of interest of 26%. However, this

interest was varied downwards. The Plaintiff testified that from 1998 to 2008, she made repayments of Kshs. 3,973,306.00 towards the repayment of the loan. The Plaintiff testified that the 1st defendant violated the provisions of **Section 39(1)** of the **Central Bank of Kenya (Amendment) Act 2000** as regards the rate of interest charged upon her account and demanding an amount more than double the loan that was advanced. The plaintiff submitted that the effect of the amendment to the **Banking Act section 44A** has been widely interpreted by the Court. The *In Duplum Rule* has as its purpose barring Banks from charging interest on non-performing loans at double the principle amount. The case in point is the Supreme Court of South Africa *Standard Bank of SA Ltd v Oneate Investment (Pty) Ltd 1995(4) SA 510 C* in which the rule was explained thus, "*when due to payment, interest drops below the outstanding capital, interest again begins to run until it once again reaches that amount.*" (it was submitted that this is in consonance with section 44A (3) of the Banking Act which provides that; "*If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraph (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing*"). DW2 testified that by the time of sale of the Plaintiff's property, she had repaid over Ksh. 8,000,000/= and that upon sale, the bank has now received in total a sum of Ksh. 18,000,000/= from the Plaintiff from an original loan of Ksh. 3,000,000/=. The Plaintiff testified that there was no rationale or justification on the interests demanded by the 1st Defendant. When she confronted the 1st Defendant with the information that they were illegally charging interest and levying charges contrary to **Section 44** of the **Banking Act**, the defendant reversed and removed Kshs. 2,448,618.65 from her account on or around March 2007 but without telling her how they arrived at that figure. This was one of the illegal amounts being lumped on the Plaintiff's account without her knowledge. It's not true that the 1st Defendant gave the Plaintiff a rebate as alleged since the Plaintiff never asked for any. This excuse was a mere afterthought and not documented anywhere. The Plaintiff further testified that the 1st Defendant has been charging unconscionable Bank Charges, Commission and unlawful penalty fees on her account as the amount outstanding respecting the loan facility is substantially made up of disputed and unjustified Bank charges, commission, interest and penalties and which the Plaintiff has already paid. The Plaintiff testified and was confirmed by the 1st Defendants witnesses that as at the date of sale, she has paid to the 1st Defendant Kshs. 8,373,306.00 an amount of money which is more than what she was supposed to pay to the 1st Defendant hence she has made entire payments to the 1st Defendant towards the settlement of the loan facility due and owing to the 1st Defendant prior to the date of the sale of her property. It was submitted for the plaintiff that the 1st Defendant breached Banking laws at the expense of a Debtor who had all along acted in good faith and that a Court of Equity should not countenance such a demand.

24. The Plaintiff testified that on or around October 2008 the 1st Defendant discharged one of her property being L.R. No. 14667 Muthithi Gardens, Kiambu Municipality, which she sold and paid to the 1st Defendant all the proceeds amounting to Kshs. 3,500,000.00 This fact was also admitted by the 1st Defendant's DW2 Moses Ndungu.

Void and Unlawful Statutory Notice which never existed

25. The 1st Defendant's DW2 testified that the Plaintiff's property was sold pursuant to the Statutory Notice dated 28th May, 2008. This testimony is also contained in his Witness Statement. The 1st Defendant at paragraph 26B of the Amended Defence also avers that the Plaintiff's property was sold after a redemption notice dated 28th May, 2008.

26. The 1st Defendant in his statement indicated that the Notice is at pages 64-74 of the 1st Defendant's List of Documents. However, the plaintiff submitted that no such notice was served and in all the pleadings and documents produced herein there is no statutory notice dated 28th May, 2008. The Plaintiff has all along stated that no Statutory Notice dated 28th May, 2008 was ever served upon her. The 1st Defendant has not discharged that burden to show that indeed there was the purported Statutory Notice of 28th May, 2008 and that it was actually served.

27. The Plaintiff submitted that her property was sold without a Statutory Notice contrary to the provisions of Law. Even if there was such a Notice on the alleged date, it would be void since it would have been in May, 2008 yet at this time, both properties were existing in one Charge. Later in October, 2008, L.R NO. 14667 was discharged and all funds paid to the loan renegotiated and new terms agreed upon. The 1st purported Notice therefore would be invalid if it existed and the 1st Defendant was required to issue a fresh Notice after October, 2008 which was not done. The Plaintiff testified that the amount claimed by the 1st Defendant relates to illegal interests, Commissions, Bank Charges and Penalty charges which were not provided for in the Charge document and the Letter of Offer and which sums the plaintiff requested the 1st defendant to account for but to no avail. The purported Statutory Notice is therefore null and void. The Plaintiff testified that the amount being claimed by the 1st Defendant had been wholly settled by the plaintiff as per the terms of the Charge Document and the Letter of Offer and the 1st Defendant disposed of the plaintiff's property unlawfully. The plaintiff cited the case of **Livingstone Gichora –vs- Family Finance Building Society HCC 1480 of 2001** which relied on the Court of Appeal Civil Appeal No 145 of 1995 **Nyagilo Ochieng & Another vs Fanuel B Ochieng & 2 Others** [unreported] where their Lordships observed at page 4 that:

“Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent...it would have been a very simple exercise for the Bank to produce a slip or slips showing proof of posting of the registered letter or letters containing the statutory notice or notices... In the absence of proof of posting we are constrained to hold that the sale by auction was void”.

28. The Plaintiff submitted that there is no lawful Statutory Notice in force duly served upon her since the Statutory Notice that was served upon her was on 18th May 2008 which has since been spent and overtaken by events because she has made all the payments that were due and the repayments were severally rescheduled and varied thus altering the initial contract.

Undervalued property

29. The plaintiff cited the case of **Mbuthia vs. Jimba Credit Finance Corporation and Another [1986-1989] EA 340; [1988] KLR 1** where the Court of Appeal held:

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

30. The Plaintiff submitted that there was no basis to warrant the Sale of her property worth approximately Kshs. 32,000,000/= which the 1st Defendant purported to sell to settle a loan of Kshs. 3,000,000/= of which the Plaintiff has completed repaying. The Plaintiff testified that she conducted a valuation of the property in 2011 which returned a value of Ksh. 32,000,000/=. The undervaluation itself is evidence of fraud.

31. The 1st Defendant's Valuation report was done by Crystal Valuers Limited on the same year, 2011. The report relied upon a previous valuation done in 2009. The report also indicated that they did not visit the site of the property. The report did not indicate the presence of a Charge on the property as an encumbrance. The Valuers also admitted to not conducting an official search to determine title details and came up with an open market value of Ksh. 20,000,000.(See pages 4- 10 of the report in the 1st Defendants Further list of documents). The Plaintiff testified that the 1st Defendant conspired with the 2nd Defendant to transfer the Plaintiff's property at Ksh. 16,000,000/= to the 2nd Defendant which is a great devaluation of the Property. Further, upon registration, the Registrar noticed the devaluation and indicated above the Transfer instrument that the property ought to have been sold at Ksh. 20,000,000/=. The plaintiff submitted that it is clear from the documents produced by the 1st and 2nd Defendants that the price of 16,000,000/= was fixed through collusion. The 2nd Defendant testified that he wrote a letter on 8th August, 2011 seeking to buy the property at Ksh. 16,000,000/=. The 1st Defendant accepted the offer

two weeks later without any question or stating the price higher than that figure. It's as if the price had been fixed earlier. It was submitted that this was an indication of fraud between the 1st and 2nd defendants.

Balance of proceeds of sale

32. The plaintiff submitted that she was never informed by the 1st defendant that there was Kshs. 6,000,000= balance of the purchase price waiting for her to collect from the 1st defendant. This matter only came out in evidence. It's an afterthought as the 1st Defendant has never informed the Plaintiff of any balance from the illegal sale.

Collusion and conspiracy to defraud

33. The plaintiff cited the case of *Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd And Another [1979] KLR 76; [1976-80] 1 KLR 1168* where it was held that *allegations of fraud must be strictly proved and that although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.* The plaintiff's case is that she has proved the existence of fraud and conspiracy between the defendants.

Whether property was sold by Public Auction or Private Treaty

34. The plaintiff relied on the 1st defendant's pleading at its Amended Defence paragraph 26B where it asserted that the property was sold by Public Auction. As the law demands in a Public Auction, bidders must be present. 1st Defendant claimed in its Defence that it had sold the property via public auction but failed to produce any relevant documentation as proof of the same such as notice of auction, list of bidders, amounts bid and a duly executed memorandum of sale. However, upon confrontation the 1st Defendant DW2 later claimed in a witness statement sworn on its behalf that the property was sold to the 2nd Defendant via private treaty. It was submitted that the 1st Defendant cannot run away from its Defence which was never amended even though it was contradicted by its own witness. The Plaintiff testified that the alleged transfer of the property to the 2nd Defendant without notice to her and by private treaty was unlawful and illegal and that the 1st Defendant is bound by its statements made in the Defence. The Court therefore does not know whether the property was sold by Public Auction as per the Defence or Private Treaty as per the 1st Defendant's Witness Statement. It was submitted that the sale is ultimately void and shrouded with mystery and opaque. It can only be declared null and void. The Defendants have further failed to produce any documentation on any transactions that led to the Transfer. The plaintiff submitted that the aforesaid facts are a clear indication of meeting the threshold of being more than a balance of probability and the Plaintiff has established collusion and a conspiracy to defraud by the Defendants.

Damages for unlawful eviction

35. The Plaintiff submitted that she was evicted from the suit property without a valid Order. She therefore claims damages for unlawful eviction. The Defendants never produced any Court Order authorizing the eviction of the Plaintiff. Further, the Plaintiff testified that the actions of the Defendants are all in bad faith and warrant the grant of the Plaintiff's prayers. The plaintiff submitted that she had proved her case on a balance of probability and was entitled to the orders as prayed in the plaint.

36. The 1st defendant in its submission revisited the history of the suit and submitted that the entire suit is opposed on several grounds by the 1st Defendant in a Defence filed on 10th February 2010. The gist of the 1st Defendant's opposition is that the Plaintiff has no cause of action against the 1st Defendant having admitted on several occasions that she was indebted to the 1st Defendant, and as such the Amended Plaintiff is incompetent and should be struck out.

37. Giving a brief background, the 1st defendant submitted that on 9th January, 1998, the 1st Defendant advanced a loan to the Plaintiff totaling to Kshs. 3,000,000.00 subject to interest rate of 26% per annum. Clause 5 of the Charge provided that the interest payable on all money secured by the Charge was variable at the instance of the 1st Defendant.

38. The charge was drawn as a continuing security with monthly loan installments of Kshs 66,398.00 secured over the property L.R Nos. 14667 and 14668 Muthithi Gardens, Kiambu Municipality.

39. On or about 18th February 1998, the 1st Defendant through a letter to the Plaintiff increased the monthly loan repayments to Kshs. 70,731.00/= from the previous Kshs. 66,398.00/=.

40. The Plaintiff breached the Terms and Conditions of the loan and the Charge by failing to make regular payment of the monthly installments and the interest thereon. As at 1st February 2010, the total payments due from the Plaintiff to the 1st Defendant was a sum of Kshs. 7,082,728.80/=.

41. Through a series of letters the Plaintiff acknowledged being indebted to the 1st Defendant and sought the indulgence and accommodation of the 1st Defendant, and which on numerous occasions were yielded to.

42. The Plaintiff's promises to service the loan regularly amounted to empty promises which prompted the 1st Defendant to move to recover the debt by invoking section 69 of the repealed Indian Transfer of Property Act and issuing a three (3) months Statutory Notice to the Plaintiff. The Plaintiff was further granted more indulgence by 3 further notices on diverse dates but failed to regularize the loan payments.

43. After the expiry of the Notices, the 1st Defendant moved to exercise its statutory power of sale and sold the suit property to the 2nd Defendant under whose name the suit property is currently registered.

44. The 1st defendant submitted that there is no question as to the indebtedness of the Plaintiff to the 1st Defendant which she has on not less than ten occasions admitted to in a series of letters to the Plaintiff. (*Refer to pages 21 – 35 of the 1st Defendant's List of Documents*).

45. Despite the Plaintiff's frequent default in servicing her loan account, the 1st Defendant agreed to reschedule the loan facility to extend the loan payment period. This extension was not enough for the Plaintiff as she continued defaulting in servicing her loan account.

46. The Interest Rates Centre Advisory report commissioned by the Plaintiff also revealed as much that the Plaintiff was indebted to the 1st Defendant to the tune of Kshs. 3,585,092.61 as at 1st August 2008, though this figure is vehemently disputed by the 1st Defendant as a gross under-calculation.

Calculation of Interest on the Debt

47. The 1st defendant submitted that the report prepared by the Interest Rates Advisory Centre, and filed by the Plaintiff, showing that the amount outstanding as Kshs 3,585,092.61 is grossly incorrect and is based on misconception of the true facts of this case and law applicable. It was submitted that the report focused on the years 1998 to 2008 and omitted the last two years, being 2009 and 2010. It also omits charges like ledger fees, insurance premiums contrary to the contract between the parties. The 1st defendant submitted that such advertent omissions are indicative of the partisanship and the non-objectivity of the report. The firm of accountants who prepared the report were hired, retained and or paid by the Plaintiff. The 1st defendant submitted that the Report is stated to have been prepared based on **Section 39 of the Central Bank of Kenya Act** which granted the Minister of finance power to regulate the interest rate regime. This is in blatant ignorance of the fact that the control of the interest rate regime came to an end in 1991 when Gazette Notice No. 3348 of 23.07.1991 revoked Gazette Notice No. 1617 of 2.04.1990.

48. The defence cited *Emukule J. in National Bank of Kenya Ltd vs. Cadon Investments & Doris Choge-HCCC 2105 of 2000* cited with approval in *Paul Hudson Kamau vs. Housing Finance Limited [2008] eKLR* which is an unchallenged authority for this position of law. The Honourable Justice stated that:

‘This Gazette Notice freed interests rates from control or fixation by the Minister for Finance under the said Sections 39, 40 and 41 of the Central bank of Kenya Act Further, and perhaps more fundamental on the question of interest rates, any notion or idea of control was removed by the repeal of the said sections by the Central Bank of Kenya Amendment Act 1996 (No. 9 of 1996) Section 17 of which said:-

‘17 the Principle Act is amended by repealing Sections 39, 40 and 41.’

He continued:

“It is thus clear that even before the repeal of those Sections, and effective from 23.07.1991 (the date of the publication of Gazette notice Number 3348 of 1991), interest rates had been freed from control or regulation by the minister through the Central Bank of Kenya, although the residual power to do so was maintained under sections 39, 40 and 41 of the Central Bank of Kenya Act, until those Sections were repealed by the said Central Bank of Kenya (Amendment) Act, 1996 (No. 9 of 1996).”

49. The 1st defendant submitted that the interest rates indicated in the Interest Rates Advisory Centre’s report is grossly misconceived and incorrect as it is based on provisions of law that have been repealed and as such the entire report by the Interest Rates Advisory Centre has no relevance to the case before us.

Exercise of the 1st Defendant’s Statutory Power of Sale

50. The 1st defendant referred to its bundle of documents, and submitted that the plaintiff was served with all statutory notices, these being:

- (a) 3 Months Statutory Notice dated 28th May 2001 (See page 64 of the 1st Defendant’s list of documents)
- (b) 3 Months Statutory Notice dated 10th May 2004 (See page 65 of the 1st Defendant’s list of documents)
- (c) 3 Months Statutory Notice dated 25th February 2008 (See page 67 of the 1st Defendant’s list of documents)
- (d) 45 days Redemption Notice certificate dated 29th May 2008 (See page 72-74 of the 1st Defendant’s list of documents)

51. All the Statutory Notices and the Redemption Notice were served via the registered post of the Plaintiff as exhibited in the certificates of posting registered article. (See page 66, 68 and 71 of the 1st Defendant’s list of documents). The 1st defendant urged the court to take notice that the Plaintiff’s address being, P.O Box 79563 – 00200 Nairobi, to which all notices were sent to, is same postal address used in all correspondences by the 1st Defendant to the Plaintiff and which the Plaintiff always responded to. Therefore, the Plaintiff’s claim that she was never served with notices is utterly preposterous. It is the position at law that service by registered post is sufficient to prove that a notice or demand was properly addressed and served.

Sale by Treaty

52. On sale by treaty the 1st defendant submitted that a chargee is at liberty to realize its security either by way of public auction or by private treaty subject only to adherence of any procedure set out in law. A realization of a security by a chargee through either of these two channels cannot give rise to insinuations of fraud on the part of the chargee without cogent proof. Nothing at law binds a chargee to stick to only one mode of realization. The intimation of fraud by the Plaintiff just because the 1st Defendant exercised his power of sale to dispose of the suit property by way of private treaty is a red herring when viewed through the prism of a chargee's right to choose the mode of realization of security and in the absence of cogent proof of implication in fraud. In any event, it was submitted, the 1st Defendant's initial attempt to sell the suit property by public auction was halted at the Plaintiff's request which the 1st Defendant agreed to.

Forced Sale Value of the Property

53. The plaintiff submitted that the sale by private treaty to the 2nd Defendant was carried out pursuant to a valuation done on the suit property by the 1st Defendant. Indeed, the 1st Defendant's expert opinion by Chrystal Valuers gave the suit property an open market value of Kshs. 20 million which position was corroborated by the Land's Office valuation which gave a similar figure of Kshs. 20 million. In stark contrast, the Plaintiff's expert opinion valuation gave the suit property a figure of 32 million.

54. The difference between two valuations of the open market value of the suit property, being Kshs. 10 million, is what breeds the Plaintiff's insinuations of fraud, specifically that the property was sold at a grossly undervalued price.

55. A further report was commissioned by the 1st Defendant to ascertain the comparable sales value of property within the same locality of the suit property. The report by Chrystal Valuers sampled five properties within the same locality as the suit property yielded open market values ranging from Kshs. 10,000,000/= to Kshs. 21,446,600/=. It was submitted that the open market value of the suit property at Kshs. 20 million is within the acceptable range bearing in the sale value of comparable properties in the locality of the suit property.

56. The 1st defendant submitted that even though the mortgage was governed by the repealed Indian Transfer of Property Act, its successor the **Land Act, No. 6 of 2012** of the laws of Kenya offers some useful guidance on how the court should approach this issue. **Section 97(3)** of the **Land Act** on the duties of a chargee when exercising its power of sale provides that:

“If the price at which the charged land is sold is twenty-five percent or below the market value at which comparable interests in land of the same character and quality are being sold in the open air market-

a. There shall be a rebuttable presumption that the charge is in breach of the duty imposed by subsection 1 (above)”

57. It was submitted that a calculation of what amounts to 25% of the open market value (Kshs. 20 Million) of the suit property as indicated by the government valuer is Kshs. 15 Million. The forced sale value of the suit property to the 2nd Defendant was Kshs. 16 Million, which is a markedly higher value than the statutory threshold under section 97(3) of the Land Act. As such, the 1st Defendant exercised its duty in exercising its power of diligently and allegations of fraud as purported by the Plaintiff are totally misconceived and misplaced.

Proof of Fraud

58. The 1st defendant submitted that it is a principle of law that the party who alleges must prove. The Plaintiff's allegations that the sale by private treaty to the 2nd Defendant and the valuation of the suit property were marred by fraud bears examining whether the Plaintiff has met the high legal threshold for

proving fraud. The 1st defendant cited the case of *Urmila w/o Mahendra Shah vs. Barclays Bank International Ltd & another (1979) eKLR*, where the Court of Appeal stated that the onus to prove fraud in a matter is on the party who alleges fraud. In the premises, the defendants submitted that the Plaintiff has not shown any evidence of fraud on the part of the 1st Defendant to warrant cancellation of the sale of the suit property to the 2nd Defendant. In that regard, the 1st Defendant submitted that an Order cannot issue to the Chief Lands Registrar to cancel the entry in the register of the suit property in favour of the 2nd Defendant in the absence of proof of fraud.

Discrepancy on the amount due not a ground for issuing injunction

59. The 1st Defendant submitted that a permanent injunction cannot be granted to restrain the 1st Defendant from exercising its statutory rights based on the purported discrepancy on the exact amount owing. This prayer cannot succeed on such grounds. In *Habib Bank AG Zurich v. Pop in Kenya Limited & Others Court of Appeal Case No. 147 of 1989*, it was stated:

“In the ultimate analysis, this is a suit brought by the chargors to restrain a charge from exercising its statutory power of sale under the charges executed by them as security for moneys advanced to them and receipt of which they have unequivocally acknowledged. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the Mortgage.”

60. A similar position was echoed in the Court of Appeal case of *Joseph Waudi v National Bank of Kenya Civil Appeal No. 77 of 2004 at page 3*, in which the court stated the following:

“It is trite law that a court will not restrain a mortgagee from exercising its statutory power of sale because the amount due is in dispute or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however if mortgagor pays the amount claimed into court”

61. The 1st defendant submitted that as default of the Plaintiff in servicing the mortgage has been proved, it cannot be rightly said that the 1st Defendant did not have a proper basis to exercise its power of sale under the mortgage.

62. The 2nd Defendant on his part, submitted that he is the rightful owner of the property. The 2nd Defendant cited the holding in *Peter Kamau Ikigu v Barclays Bank of Kenya Ltd & another [2013] eKLR*, where the High Court of Kenya at Nairobi held that the purchaser in a transaction such as this pursuant to the exercise of statutory right of sale, in the present suit being the 2nd Defendant, has title that may not be impeached. To further support this position, the 2nd Defendant relies on **section 23(1) of the RTA**, which states as follows:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

63. The 2nd Defendant submitted that the entry in his favour on the title of the subject property, should be taken by this Court as conclusive evidence that he is the absolute and indefeasible owner. His title is not subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. There is no evidence sufficient (or at all) to prove that there was any fraud or misrepresentation on the part of the 1st Defendant or 2nd Defendant. It therefore follows, that the 2nd Defendant’s title may not be challenged. He is the rightful owner of the property.

64. The sale by private treaty by the 1st Defendant to the 2nd Defendant was legal, and according to the 1st Defendant's statutory power of sale. The 2nd Defendant is protected by law, and his right to the property is not impeachable. **Section 69(B)(2)** of the **ITPA**, states:

“(2) Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

65. Having established that the protection applies to the 2nd Defendant, following **section 69(B) (2)** of the **ITPA**, it was submitted that he is not answerable for the use of the Kshs 16 million he paid for the charged land. Secondly, he has no business knowing about how the Kshs 16 million was used by the 1st Defendant. Thirdly, and most importantly, he had no obligation to look into the necessity, process or regularity of the sale process. Following this provision, the 2nd Defendant submitted that he is not answerable, nor is he liable, for the claims by the Plaintiff that the sale process was not necessary. Further, he is not answerable, nor is he liable, for the claims by the Plaintiff that the sale process was irregular. It was not of the 2nd Defendant's concern whether the statutory notices were issued according to the law or not. The 2nd Defendant is therefore not liable for any such claims by the Plaintiff, and is innocent to any alleged irregularity.

66. The 2nd Defendant's position is that there was a default by the Plaintiff, which made the sale necessary. The 2nd Defendant was convinced that notice was duly served by the 1st Defendant, on the Plaintiff. The 2nd Defendant's position is that the sale was therefore necessary, proper and regular. However, even if it was not necessary, proper and regular, the law would still protect the 2nd Defendant. However, the protection would not have extended to a situation of fraud, misrepresentation or other dishonest conduct on the part of the charge if the 2nd Defendant had notice of this. Reiterating that the 2nd Defendant did not know of any impropriety of the transaction, and submitting that in any case the Plaintiff has failed to show any such fraud, misrepresentation or other dishonest conduct on the part of the 1st Defendant, the 2nd Defendant submitted that he was an innocent purchaser, and is therefore protected by law.

67. It was submitted for the 2nd defendant that a person who successfully proves that there is fraud in the exercise of the statutory power of sale should seek damages from the person exercising the power. This is stipulated at **section 24** of the **RTA**

“24. Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription...”

68. The 2nd Defendant's position is that the sale was authorized, proper, and followed a regular process. However, even if there was any such blemish to the sale process, first, the ITPA does not indicate any

action against the purchaser in such an event. Secondly, the action is limited to an action for damages. On both heads, the Plaintiff's claim fails, to the extent that she seeks to regain ownership of the property. Any order of the court purporting to support such a claim would be in contravention of the RTA and section 69(B)(2) of the ITPA. The Plaintiff's claim must therefore fail.

The Determination

69. I have carefully considered the pleadings and submissions of the parties in this matter, and having done that, I have reconciled the issues for determination by this court as follows;

- i. Whether the plaintiff admitted debt.
- ii. Whether the 1st defendant issued a valid Statutory Notice before sale.
- iii. Whether the suit property was undervalued.
- iv. Whether there was collusion and conspiracy between the 1st and 2nd defendants to defraud the plaintiff
- v. Whether property was sold by Public Auction or by Private Treaty.
- vi. Whether interests were properly calculated, and the applicability of *In Duplum Rule*.
- vii. Whether sale to the 2nd Defendant was valid.

Whether the plaintiff admitted debt

70. This court makes references to pages 21-35 of the 1st Defendant's List of Documents. There are various correspondences that clearly indicate that the mortgage debt was at various times admitted by the plaintiff. This admission of debt has not been expressly denied by the plaintiff. The plaintiff's only claim is that the said debt was contributed to by illegal levies of interests and other charges, and that when every account is finally considered, that debt was fully paid and that the plaintiff's suit property was unlawfully sold pursuant to a debt fully repaid pursuant to *In Duplum Rule*. I shall return to the issue of *In Duplum Rule* later on in this judgment. At this stage, however, it is the finding of this court that the mortgage debt was constantly brought within the knowledge of the plaintiff who in various letters acknowledged the same as due. That alone, however, did not absolve the 1st defendant from properly administering accounts and levying the correct interests and charges.

Whether the 1st defendant issued a valid Statutory Notice

71. The 1st defendant's witness DW2 testified that the suit property was sold pursuant to the Statutory Notice dated 28th May, 2008. This testimony is also found at paragraph 19(a) of the 1st defendant amended defence. However, the plaintiff submitted that this notice was neither served upon the plaintiff nor received by the plaintiff.

72. The plaintiff further submitted that in any event the said notice even if it was served would be of no effect since at the time it was served both properties L.R. NO. 14668 and 14667 were co-existing in the charge. It was only later in October, 2008 that LR.NO. 14667 was discharged. That notice would be invalid if it existed and that afresh notice would have been necessary.

73. On their part the 1st defendant submitted that at least four (4) Statutory Notices were served as seen at pages 64-74 of the 1st defendant List of Documents.

74. It is the finding of this court that valid Statutory Notices were served as shown in the 1st defendant's

List aforesaid, and that the allegations that no valid Statutory Notices were served is not correct. Further, the address of service was that which was provided by the plaintiff. Service was confirmed vide certificate of postings displayed at pages 66, 68 and 71 of the said defendant's Lists of documents. Further these notices were interspersed with many indulgences given to the plaintiff. The plaintiff was evidently aware of these notices. She is now only disclaiming them out of convenience.

Whether the suit property was undervalued and whether there was conspiracy to defraud the plaintiff

75. I have carefully considered the plaintiff's submissions that the suit property whose value was Shs. 32 million pursuant to a valuation procured by the plaintiff, was sold at gross under value. The 1st defendant valued the property at Shs. 20 million, and sold it to the 2nd defendant at Shs. 16 million. It is to be noted that the valuation carried out by the 1st defendant was specifically to give value of the property for the purpose of sale, while the one carried out by the plaintiff was to provide a general market value of the property at the relevant time. Despite these values appearing widely varied, it is the view of this court that the variation is reasonable. This is so because a neutral valuer that is, the government land valuer, valued the same property at 20 million. Indeed, this was the value given to the property by the 1st defendant's valuer, which also provided a forced sale value at Shs. 16 million. This court finds that the Sale of the suit property of Shs. 16 million was not a Sale undervaluation. Further, I accept the submissions of the 1st defendant that even though the mortgage was governed by the repealed Indian Transfer of Property Act, its successor the **Land Act, No. 6 of 2012** of the laws of Kenya offers some useful guidance on how the court should approach this issue. **Section 97(3)** of the **Land Act** on the duties of a chargee when exercising its power of sale provides that:

“If the price at which the charged land is sold is twenty-five percent or below the market value at which comparable interests in land of the same character and quality are being sold in the open air market-

a. There shall be a rebuttable presumption that the charge is in breach of the duty imposed by subsection 1 (above)”

76. A calculation of what amounts to 25% of the open market value (Kshs. 20 Million) of the suit property as indicated by the government valuer is Kshs. 15 Million. The forced sale value of the suit property to the 2nd Defendant was Kshs. 16 Million, which is a higher value than the statutory threshold under section 97(3) of the Land Act. As such, the 1st Defendant did not exercise its powers of sale arbitrarily in arriving at the sale value.

77. Accordingly, this court finds that all allegations of collusion or fraud between the 1st and 2nd defendants are unfounded and lack basis. There are further allegations of collusion and fraud between the defendants to defraud the plaintiff. These allegations are cited because the suit property was sold by Private Treaty and not by Public Auction. In answer to these I refer to the evidence of the 2nd defendant, which this court finds credible and believable, that he saw the property as advertised in the 1st floor of the 1st defendant's premises. He then followed up as an Interested Party, made an offer to buy the same at Shs. 14 million, which was rejected causing him to offer Shs. 16 million. I have not found any evidence of collusion or fraud. In any event a person who alleges collusion and fraud must prove these allegations to the satisfaction of the court. Apart from making these allegations there was no attempt at all to prove them. The issue as to whether the property was sold by Public Auction or Private Treaty is also not relevant. What is relevant to this court is that parties must be candid even when they contest issues in court. It is well documented in this Judgment that the plaintiff variously defaulted in her obligations to repay the loan. In her own testimony the plaintiff stated that she was aware that if she failed to repay the loan her property would be sold. She also testified that she had defaulted many times and that the 1st defendant was magnanimous to her on several occasions. In fact one time when the property was to be sold by Public Auction, the same had to be stopped to enable the plaintiff reorganize herself, which also allowed her to get a buyer for the property. She failed, causing the 1st defendant to resort to sale by

Private Treaty, a mode which was provided for under the charge. It is therefore the finding of this court that the sale of the suit property by Private Treaty was lawful and in order, and that no collusion or fraud between the defendants was established to have preceded the sale.

Interests and In Duplum Rule

78. The *In Duplum Rule* or principle is now captured under **Section 44 A** of the **Banking Act**. This section seeks to protect borrowers whose loans have become non-performing from excessive interests charged by the bank, and states that a lender cannot recover more than twice the amount loaned for loans who have become non-performing. In this case it is important to note that the initial loan of Shs. 3,000,000= was to be repaid within eight (8) years which was subsequently extended to fifteen (15) years, and the entire amount to be repaid was about Shs. 7,373,704.65 at an interest of 26% per annum if the plaintiff had adhered to the loan terms. The plaintiff did not adhere to the loan terms, and has to date paid a total sum, which is not disputed by the 1st defendant, of Shs. 18,000,000=. It is clear that the bank herein merely treated the plaintiff as a cash cow, which it milked to the extent of even denying the calf the milk. It can never be justified in any society, that one borrows Shs. 3,000,000= pays 18,000,000= and the bank still is not satisfied. In this particular case, there were two securities offered for the loan. One was sold earlier in the relationship to repay the same loan, which was not fully paid, and pursuant to further default by the plaintiff, the second security was sold which is now the subject of these proceedings. It is clear that the 1st defendant has employed different regimes of interest rates ranging from 26% per annum to 34% per annum. It is also clear that at one time the 1st defendant did not keep proper records of account, and the improper records impacted the plaintiff's account to the extent that the 1st defendant without explanation and without being requested by the plaintiff, wrote off amounts varying from Shs. 2,478,618.65 to 2,700,000=. This is huge amount of money considering that the loan was for Shs. 3,000,000=. If the 1st defendant cannot explain why it would grant such a rebate, then it is also arguable that the 1st defendant did not keep reliable accounts from which it could with certainty know what the plaintiff owed to it. It is therefore true that the amount alleged to be due by the 1st defendant is as a result of guesswork. A court of law cannot determine issues of accounts based on guesswork, and any bank which fails to keep proper records of account cannot make a calculable claim against a customer. Banks must keep proper records of account. It is on the basis of such records that a claim for or against a bank can be determined. Since between the bank and the borrower it is the bank who is obligated to keep proper records and to avail statements of account, a bank which cannot avail proper records of account will be disqualified from making any claims against a borrower and would be hard put to discharge any such claims by a borrower.

79. In this case the court is clear, that unlawful regimes of interests have been charged on the plaintiff's account. Else, which bank, the way we know them in Kenya, can purport to write off a whopping Shs. 2,478,618.65 against an initial loan of Shs. 3,000,000=? When did banks in Kenya become charitable enough for the 1st defendant bank to do that? The only inference is that the 1st defendant bank deliberately kept improper accounts record, and were mitigating their negligence when they purported to write off the said amount. This brings me to **Section 44A** of the **Banking Act**.

“(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following—

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and

then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) In this section—

(a) “debtor” includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;

(b) “loan” includes any advance, credit facility, guarantee or any other liability incurred on behalf of any person; and

(c) a loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans become non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following—

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor”

80. The issue to determine is therefore this, at the time S. 44A of the Banking Act came into force on 1st May 2007, the loan herein was already non-performing. Under the said section the bank was obligated to give notice to the plaintiff of this fact of non-performance, and calculate the sums due to the bank pursuant to that Section. The bank did not do this. In fact, the bank could not do this because the bank had kept no records of account all along as this court has already found out in this Judgment. Here was a bank running away from the core obligation of keeping valid records. From the documents provided by the bank it cannot be determined how much was owed to the bank by the plaintiff on 1st May 2007 when Section 44 A of the Banking Act came into force. But even if some records could be concocted by the 1st defendant bank, those records would still amount to guesswork because the bank has to date never explained why they wrote off a huge amount of over Kshs, 2,500,000 when the plaintiff had not asked for such waiver. The manner in which the plaintiff’s account was run by the bank invites no confidence to this court that the 1st defendant bank can provide a believable accounts record the basis of calculating the amounts which may be due to the 1st defendant bank pursuant to the said Section 44A of the Banking Act. The benefit of the confusion arising from the way the bank kept the account records can only accrue to the plaintiff herein. Even so, such benefit is not given without justification. Here is the justification:

81. The plaintiff borrowed Shs. 3,000,000= from the 1st defendant bank. By the time the plaintiff’s suit property was sold in 2011, the plaintiff had repaid a total of Shs. 8.4 million. From the said sale of the plaintiff’s property the bank took Shs. 9.6 million and has been keeping the balance of Shs. 6.3 million for the plaintiff who has rejected the same. By the time Section 44A came into force the plaintiff had evidently paid more than 3 times the original loan amount. So, even if the 1st defendant bank has not kept proper records of account to enable this court to determine how much, if any, they were owed on 1st May 2007, it is clear to this court that the plaintiff had more than repaid what was due to the 1st defendant bank.

82. That being the finding of this court, it is a further finding that the 1st defendant bank had no right to auction the plaintiff's property in the year 2011, and that the said auction was unlawful, irregular and invalid subject only to the rights of the 2nd defendant being an innocent purchaser for value. It is the finding of this court that the entire sum of Kshs. 16,000,000= which was realized by the 1st defendant bank pursuant to the said sale shall be refunded to the plaintiff with interests thereon at the interest rate established in the charge instrument of 26% per annum. The plaintiff will also be paid the costs of this suit by the 1st defendant.

Whether the sale of the suit property to the 2nd defendant was valid

83. The last issue I raised is whether or not the sale of the suit property to the 2nd defendant was valid. I reiterate the findings of this court that there was no collusion or fraud between the defendants to sell the suit property. The 2nd defendant was merely an innocent purchaser for value. He participated in a full proof process, and he had no obligation to establish the correctness of the legal relationship between the plaintiff and the 1st defendant. This court accepts as the whole truth the submissions of the 2nd defendant in this suit.

84. In the case of *Peter Kamau Ikigu v Barclays Bank of Kenya Ltd & another [2013] eKLR*, the High Court of Kenya at Nairobi held that the purchaser in a transaction such as this pursuant to the exercise of statutory right of sale, in the present suit being the 2nd Defendant, has title that may not be impeached. Further support this position, the 2nd Defendant relies on **section 23(1) of the RTA**, states as follows:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

85. Further, **Section 69(B)(2)** of the ITPA, states:

“(2) Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

86. It is the finding of this court that the sale of the suit property to the 2nd defendant was valid and lawful.

Final orders

87. Pursuant to the foregoing it is the finding of this court that the plaintiff has proved its case on a balance of probability and Judgment is hereby entered for the plaintiff against the 1st defendant, and further orders for the 2nd defendant as follows:-

(a) It is hereby declared that the plaintiff has completed repaying the loan advanced to her by

the 1st defendant.

(b) The 1st defendant shall refund the entire purchase price of Shs.16,000,000/= paid for the suit property to the plaintiff with interest thereon at 26% p.a. with effect from the date of auction in 2011 to the date of this Judgment.

(c) The sums due in (b) above shall attract interest at court rates from the date of this Judgment until the decree is fully settled.

(d) The costs of this suit shall be paid by the 1st defendant.

(e) It is the finding of this court that the 2nd defendant's interest in the suit property is valid, and that the 2nd defendant is the legal and duly registered owner of the suit property.

(f) The 2nd defendant's costs shall be paid by the 1st defendant.

That is the Judgment of the court.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2017

LADY JUSTICE G. NZIOKA

JUDGE