REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 882 OF 2003

SAMUEL MWEHIA GITAU.....…..…..…..... PLAINTIFF

VERSUS

ELIJAH KIPNG'ENO ARAP BII....……...…… DEFENDANT

(By the original suit)

AND

ELIHAH KIPNG'ENO ARAP BII…..…….……..…..PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.…….……..1ST DEFENDANT

SAMUEL MWEHIA GITAU..…..……..…..……..2ND DEFENDANT

(By Counterclaim)

JUDGEMENT

The Pleadings

The Plaint

1. According to the amended Plaint filed in this suit, by a charge dated 18th April 1996 the Defendant charged all that property known as land Reference Number 209/9854 Nairobi (hereinafter referred to as "the suit premises") to **Kenya Commercial Bank Ltd** (hereinafter referred to as "the Bank"). On or about 30th December 2002 the Bank in exercise of its Statutory Power of Sale under the Charge advertised the suit premises in the Daily Newspapers for sale by way of Public Auction to be conducted on 17th January 2003 which auction the Plaintiff attended on 17th January 2003 and was the highest bidder at the Auction, but was informed by the auctioneers that the auction sale would not take place, and instead, the Bank would sell the suit premises by private treaty. The Plaintiff was therefore requested to submit a bid for the suit premises in writing.

2. It was pleaded that the Plaintiff submitted a written bid to pay the sum of Kshs. 3,800,000/- for the suit premises which bid the Bank accepted and entered into an Agreement for Sale with the plaintiff dated 20th February 2003 for the sale thereof. According to the Plaintiff upon paying the said sum of Kshs.

3,800,000/- in accordance with the terms of the Agreement, the Bank by a Transfer dated 4th June 2003 transferred its rights and interests in the suit premises to the Plaintiff for a consideration of Kshs. 3,800,000/-. Thereafter, the Plaintiff was legally registered as the owner of the suit premises by the Commissioner of Lands on 18th June 2003.

3. The Plaintiff therefore averred that he is the rightful owner and is legally registered as the proprietor of the suit premises.

4. It was pleaded that on 24th July 2003, the Plaintiff in exercise of his entitlement to possession of the suit premises entered upon the premises to take up possession but was denied entry by the Defendant his servants and/or agents who is in illegal and unlawful possession of the suit premises as a trespasser since the Defendant remains in possession of the suit premises without his consent and authority. The particulars of illegality was given as continued possession of the suit premises in spite of the Transfer and subsequent registration of the Transfer of the suit premises to the Plaintiff herein and refusal to grant vacant possession despite demand and notice of intention to sue.

5. The Plaintiff maintained that the said acts amounted to trespass by the Defendant which trespass is continuing. Consequently, the Plaintiff has been deprived of the use and enjoyment of the said property, and has thereby suffered loss and damage since the Defendant has deliberately stripped the suit premises of various items, thereby causing the Plaintiff substantial loss which the Plaintiff particularised and assigned the value thereof in the total sum of Kshs. 2,890,000.00 which the Plaintiff claimed from the Defendant, damages for trespass and vacant possession of the suit premises. He also sought for costs of the suit.

The Defence and Counterclaim

6. The Defendant, **Elijah Kipngeno Arap Bii**, filed a defence and at the same time made a counterclaim against Kenya Commercial Bank Limited and the Plaintiff herein.

7. According to the Defendant, no statutory notice was served on him hence any sale by public auction was fraudulently conducted. It was further averred that the sale price of Kshs 3,405,000 was inordinately low as compared to the Bank valuation of Kshs 7.6 million in 1997, a value which had appreciated to Kshs 10 million.

8. It was averred that the Bank unlawfully exercised statutory power of sale on the basis of a violation of credit between itself and the Defendant. It was denied that the plaintiff was the highest bidder at the said auction and that in any case there was no public auction conducted since the sale was purported to have been by way of a privately negotiated treaty.

9. The Defendant further denied that he was informed by the auctioneers that the auction would not take place. In support of this averment the Defendant referred to the fact that the plaintiff admitted that the Bank advised the suit property for sale by public auction; the plaintiff admitted that the said public auction took lace and that he attended the same at which he was the highest bidder and bought the suit property and paid Kshs 1,128,971.15 being 25% deposit thereof; that the plaintiff was not asked to submit a bid but got into a fraudulent arrangement for an offer of Kshs 3.8 million which was lower that the Kshs 4,515,884.60 that he had bided for; that the plaintiff offered Kshs 3.8 million to the auctioneers yet auctioneers do not conduct private treaty negotiations; that the purported sale refers to an agreed price of Kshs 3.405 million; that the purported sale was therefore not a privately negotiated agreement for sale but was by way of a fraudulent public auction; that the purported privately negotiated agreement for sale of the suit property was a fraud perpetrated to reduce the auction price and to give the plaintiff more time to raise the required funds; that the bid.

10. The Defendant further averred that there was no conclusive evidence that the requisite Kshs 950,000/= as per the agreement for sale was effectively paid and that further payments were made after the completion date.

11. The Defendant therefore contended that the subsequent transfer and registration of the suit property to the plaintiff was fraudulent and illegal and the claim for rightful ownership unlawful and stands challenged. He therefore asserted that in light of the foregoing, he was under no legal obligation to vacate the premises as he was not a trespasser and does not occupy the suit property illegally. Consequently, no deprivation of the use and enjoyment of the said property has arisen and therefore there is no lawful claim for vacant possession. He therefore denied any claim for loss or damage and prayed that the suit be dismissed with costs.

12. By way of a counterclaim, the Defendant averred that sometimes around 18th April, 1986, it secured land registration number Nairobi 209/9854 and the developments thereon to the Bank for an advance of credit facilities with the Bank.

13. On or about the 17th January, 2003 the Bank in exercising its statutory power of sale, purported to sell the property again to the Plaintiff for a lower price by way of private treaty. The Defendant reiterated that the purported sale by a privately negotiated treaty was a fraud and that any subsequent sale to the plaintiff should be rendered null and void.

14. It was the Defendant's case that if there was any such sale, the Bank conducted the purported auction sale fraudulently and in breach of the laid down provisions of the law since the price was inordinately low and there existed two versions of the sale. The Defendant reiterated that neither the statutory notice nor notification of sale were served hence it was his case that it was unlawful and wrongful for the Bank to have purported to exercise statutory power of sale on the basis of its violation of a credit contract between itself and the Defendant based on an invalid resolution by persons who were not on its Board.

15. It was revealed that on or around 24th July, 2003, in the absence of the Defendant and its caretaker the plaintiff and is agents, M/s Apex Security Guards sought to take over the suit property, damaged property and took away keys to the suit property as well as Kshs 515,000/= which the plaintiff claimed.

16. The Defendant therefore prayed for a declaration that the sale to the Plaintiff was null and void ab initio; special damages; general damages; interests and costs.

Bank's Defence to the Counterclaim

17. In its defence to the counterclaim, the 1st Defendant to the Counterclaim, **Kenya Commercial Bank Limited**, while admitting that the Plaintiff charged his L.R. No. Nairobi 209/9854 to the 1st Defendant on or about 18th April 1986 to secure certain credit advances added that the Plaintiff in the counterclaim created two further Charges in favour of the Bank in respect of the said property on 18th July 1990 and 16th April 1991. The Bank however denied that it sold the suit premises to wit L.R. No. 209/9854 to the Plaintiff at a public auction on 17th January 2003 as alleged or at all and the Plaintiff in the counterclaim is put to strict proof thereof.

18. According to the Bank it regularly sold the suit premises to the Plaintiff by private treaty in lawful exercise of the Chargee's Statutory Power of Sale conferred upon the Bank by the charge and the further charges referred to above by entering into a sale agreement dated 20th February 2003 pursuant to which it transferred the suit premises to the Plaintiff and not pursuant to a sale at a public auction as alleged by the Plaintiff or at all.

19. The Bank therefore denied that it, its agents, its officers and or servants conducted any auction fraudulently or any auction at all for the sale of the suit premises on 17th January 2003 as alleged or at all and in particular denied:

a) That it sold the suit premises at an inordinately low price.

b) That it has two versions of the sale.

c) That it has two versions of the sale price.

d) That the value of the suit property was Kshs.7.6 Million in 1997 and that the current market rate is Kshs.10 Million as alleged or at all.

20. According to the Bank, the suit property was sold at the best available price of Kshs.3,800,000/- by private treaty which sale price was/is low or inordinately low as contended by the Plaintiff hence the counterclaim was denied.

21. It was contended by the Bank that the Plaintiff defaulted in the repayment of the monies advanced to him and secured by the charge, further charge and 2nd further charge and fell into arrears of both the principal and interest and that at the time the suit property was sold by private treaty all the necessary statutory notices had been issued, served upon the Plaintiff and had lapsed.

22. The Bank however pleaded in the alternative and without prejudice that at the time the suit property was sold by private treaty the Plaintiff's account with the 1st Defendant was in arrears of both the principal and interest for more than two months and the Plaintiff was not in law entitled to be issued with any statutory notice before the 1st Defendant could realise the security by sale.

23. The Bank disclosed that Defendant had sued the Bank and claimed damages for alleged wrongful dismissal in HCCC No.324 of 2000 which suit was pending hearing and determination but the Plaintiff's applications for injunction against the sale of the subject property was dismissed by both the High Court and the Court of Appeal.

24. It was therefore the Bank's case that the Defendant was heavily indebted to the Bank and that the suit property was sold and the proceeds thereof applied towards the reduction of the Plaintiff's indebtedness leaving the bulk of the debt still un-settled.

25. The Bank therefore averred that the Defendant's claim against the Bank as outlined in the counterclaim was wholly without merits and misconceived and prayed that the same be dismissed with costs.

Plaintiff's Reply and Defence to the Counterclaim

26. In his reply and defence to the Counterclaim, the Plaintiff reiterated the contents of the plaint and pleaded that the sale herein was proper and lawful, and was not vitiated at all by any elements of fraud. The Plaintiff denied that the property was valued at the sum of Kshs 7.6 million as alleged and denied any irregularity in the Chargee's exercise of its statutory power of sale.

27. It was re-affirmed that the auction sale was indeed advertised but later withdrawn and substituted for sale by private treaty, through which the Plaintiff bid for and bought the said property from the chargee. It was the Plaintiff's case that he did not transact the private treaty sale fraudulently at all, nor with the auctioneers but did so directly with the Chargee through his and Chargee's advocates, and paid the entire agreed price of Kshs. 3.8 million, which was a bid made and agreed to in good faith. The auctioneer was involved only for purposes of receiving the bids.

28. According to the Plaintiff:

a) He did not buy the suit property at a public auction;

b) He did pay Kshs. 1,128,971.15 to his Advocates M/s Oraro & Co. Advocates by cheque which cheque he had prepared in preparation for the auction scheduled for the 17th of January 2003 which did not take place. The Plaintiff however denied that the same was paid to the vendors advocates as 25% of the sale price ;

c) That the Agreement for sale does not refer to a price of Kshs. 3.405 million as the Purchase price, and that at no time did he bid for the suit premises for Kshs. 4,515,884.60.

29. The Plaintiff insisted that the auction scheduled for 17th January 2003 was withdrawn and that the said withdrawal had no impact on the sale by private treaty that followed, and further denied any non-compliance with the terms of agreement for sale. It was his case that he was a *bona fide* purchaser for value of the suit property and the transfer herein was lawful and unimpeachable. According to him, no legal obligation attached to him to inquire into the Chargee's exercise of its power of sale, that he lawfully negotiated the purchase of the suit property and entered into a binding contract thereof, and insisted that the Defendant is a trespasser on the suit property, lacking any legal or equitable right thereto.

30. In his response to the Counterclaim, the Plaintiff reiterated his position and averred hat that there was no legal or factual basis for settling aside the sale and transfer of the suit property to him. He therefore denied in *toto* the particulars of fraud contained in the counterclaim as well as the allegation that the suit property was worth Kshs. 10 million and that the purchase price was inordinately.

31. To him, even if he ever made a bid at the auction, which is denied, the auction was cancelled by the chargee, as it is its discretion to do so and consequently no auction took place. He therefore denied the existence of two (2) versions on the sale price and reiterated that he paid the entire agreed Kshs. 3.8 million for the suit land.

32. It was the Plaintiff's case that the amended counterclaim as drawn was fatally defective for contravening mandatory provisions of the ***Civil Procedure Code*** (sic).

33. It was the Plaintiff's prayer that the Defendant's counterclaim be dismissed with costs.

The Plaintiff's Case

34. In support of his case the Plaintiff prepared and filed his statement which was adopted as part of his examination in chief. According to the said statement, on 30th December 2002 and 13th January 2003 he read advertisements in the *Daily Nation* regarding the sale of LR 209/9854 situated in Nairobi Langata Area Dam Phase 2 by public auction on 17th January, 2003. Pursuant thereto, he attended the said public auction where he was informed by the auctioneer, **Mr. J. M. Gikonyo** of the firm of **Garam Investments** that the sale would not take place and that the property would instead be sold by private treaty and he was therefore requested to submit a bid in writing.

35. According to the Plaintiff, he was informed by the aforesaid auctioneers that the property belonged to one **Elijah Arap Bii**, who had charged the same to the Kenya Commercial Bank. The auctioneers further informed him that Kenya Commercial Bank was selling the property in exercise of its statutory power of sale. In accordance to the request the Plaintiff submitted a bid by a letter dated 23rd January 2003 which bid for Kshs. 3.8 million the bank accepted in writing. He however disclosed that he had previously made a bid for Kshs 3.6 million around the same time.

36. Consequently, the Plaintiff entered into a sale agreement with the bank for the purchase of the aforementioned property for the price of Kshs 3.8 million shillings in a transaction in which he was represented by the firm of **Oraro & Co Advocates** while the Bank was represented by the firm of **Ndungu Njoroge & Kwach Advocates**. He averred that he paid the purchase price through his said firm of **Oraro & Co. Advocates**. Upon completing the payments the property was transferred to him vide a transfer dated 4th June 2003 and the tile passed to him on 18th June, 2003.

37. The Plaintiff however averred that the defendant refused to deliver vacant possession of the property despite several attempts by the Plaintiff to obtain the same compelling the Plaintiff to institute this suit in 2003 seeking vacant possession of the said premises and damages for trespass until possession is delivered up. The plaintiff testified that on the property stands a 4 bedroomed house with a guest wing

with 2 bedrooms and a servant quarters.

38. It was revealed that the Plaintiff's advocates made an application for summary judgment in which a ruling was delivered on 22nd September 2004 and which ruling granted him vacant possession and awarded him general damages for trespass. However upon an appeal to the Court of Appeal, the Court of Appeal allowed the appeal and ordered that the case be tried by another judge.

39. According to the Plaintiff the land had arrears of rents and rates which he was compelled to clear. He therefore sought an order for vacant possession, damages for trespass and loss of income amounting to Kshs 3,985,000/-, costs of repairs as well as the costs of the suit with interest.

40. The Plaintiff denied that he bought the property fraudulently as this was a sale to a willing buyer by a willing seller according to the agreement with the Bank.

41. Referred to the documents mentioning the sale price as Kshs 3.4 million, the Plaintiff said that that was an issue that could only be explained by the Bank as he did pay Kshs 3.8 million as per the copy of his cheque. According to him, before this transaction he did not know the auctioneers.

42. In cross-examination by **Mr Sumba** for the Defendant, the Plaintiff re-affirmed that he attended the auction on 17th January, 2003 but was informed that there was not going to be an auction and that the property would be sold by private treaty. Though there were other people present he was not aware whether they were bidders and was not aware of the reason for the cancellation of the auction. The information for bidding was relayed to everyone present. According to the plaintiff he went to the property, surveyed it and made an offer based on the advice from his expert, a personal friend who deals in properties. He averred that he was not aware of any previous arrangements and that he cleared the sale price before the transfer was effected.

43. According to the Plaintiff he had Kshs 1.1 million in his account with Housing Finance. Asked about Kshs 107,238.85 sent to Oraro & Co, he said that this might have been part of the lawyer's fees. Referred to the valuation report in his bundle, he stated that the property was valued at Kshs 32,500,000/- but stated that he was not an expert and that he commissioned one whose report he agreed with. He admitted that he was called by the Bank to uplift his bid though the Bank did not inform him what it expected. In his evidence he negotiated with the Bank taking into consideration the rates and rents to be paid and his bid of Kshs 3.8 million was accepted after which he started making payments through his advocates.

44. To the plaintiff the completion date was 90 days after the date of the agreement and as per the agreement that date was around 20th May, 2003 though in between there were negotiations leading to variations between him and the Bank. Referred to the letter dated 7th January, 2003 he confirmed that it was indicated that 25% was Kshs 1.128 million while the purchase price was indicated as Kshs 3.405 million by the Bank for the purposes of payment of duty. He however confirmed that there was a letter from him to his advocates enclosing Kshs 1.128 million as part of the said 25% deposit. In his view he meant this to be part of the purchase price of Kshs 3.8 million. To him this was an error.

45. Cross-examined by **Mr Njagi**, learned counsel for the Bank, the plaintiff stated that he never knew any of the officials of the Bank before the transaction and that he was represented by **Oraro & Co. Advocates** in the transaction. In the course of the transaction he was informed by the auctioneer that the property was being sold by the Bank because it had been charged in order to realise the security. He however did not come to know how much the Bank was realising. With respect to the communication to him to uplift the offer, he said he same was made by a telephone call from someone from the Bank. As at 9th July, 2001 the rate due was Kshs 203,769.60 at which date the property was still in the name of the Defendant.

46. In Re-examination by **Mr Ngugi**, learned counsel for the Plaintiff, the Plaintiff restated that the bid did not take place and that his bid was for Kshs 3.8 million and that sale agreement also mentioned Kshs 3.8 million which was the amount paid to the Bank. He confirmed that there was a letter forwarding Kshs

950,000/= being the 25% and a letter forwarding Kshs 2.85 million from his advocates being the balance. In his evidence he only knew of Kshs 3.8 million as the purchase price and not the Ks 3.405 million mentioned in transfer document. To him this was the loan amount and not the amount he paid while the sum of Kshs 1.1 million was payment on account he had with Housing Finance which is the amount he withdrew and forwarded to his advocates.

47. According to him at the time he paid the deposit he had already signed the agreement which agreement required him to pay the deposit before it being signed by the Bank. According to him the explanation for payment outside the completion period was due to the fact he made payments through his advocates so the payments of rents and rates may have led to the extension of the period. He however maintained that everything was done as per the agreement. To him the extension of the period was due to registration formalities.

48. In support of his case the plaintiff called **Herbert Mwangi Kamau**, an employee of **R R Oswald**, who testified that he was a registered valuer by profession who testified as PW2 that he was commissioned by the Plaintiff to carry out valuation of the suit property with a view to advising on the fair nature of the property as at the date of inspection on 28th February, 2012 as well as the fair market rental that would accrue for the periods between July 2003 up to the end of February, 2012.

49. According to PW2, the open market value of the property was Kshs 32,500,000/- as at February, 2012. With respect to rentals, he categorised them in 3 for July 2003 to December, 2006 and assigned rental monthly value of Kshs 30,000.00. For the next 4 years beginning 1st January, 2007 to December, 2010 he assigned the same item Kshs 40,000.00 per month while for the residue of the duration from 1st January, 2011 to February, 2012 he assigned he same Kshs 57,500/= per month. According to his calculations the total sum for the period was Kshs 3,955,000/=.

50. The witness however clarified that he did not get access to the premises during the valuation and applied what he called the default approach by establishing whether it was the actual property and the neighbourhood. In his view even without access to the property they were able to ascertain market value and rental as the property was within the upmarket area. He accordingly prepared his report which he signed and produced the same.

51. According to PW2 the value of Kshs 57,500/= was a comfortable amount to retain todate.

52. In his cross-examination by **Mr Sumba** for the Defendant, the witness explained that the valuation of Kshs 32.5 million included the nominal figure for development since the property was not optimised. According to him, they gave around Kshs 4 million for development while the land would be worth Kshs 28.5 million. He explained that they based their research on historical rentals accruing from similar properties in the neighbourhood from lead Estate Agents and property owners. Further they viewed the house from the outside and relied on their experience and reasonable accommodation. In his evidence the house was double storeyed with servant quarter and he also had background information that it was a 4 bedroomed house.

53. Asked whether he recorded these facts, he said he relied on his inspection and assumed it was a 4 bedroomed house with servant quarters while the rental was based on the tenancy agreement from other houses. In his evidence though the finishing is a consideration, it does not affect the property as what affects the property is the locality. According to him the value of the property should shoot up with time.

Defendant's Case

54. The Defendant testified as DW1. According to him, he was a farmer and a retired banker having worked as the General Manager for Kenya Commercial Bank. He relied on his statement as part of his evidence in chief. After setting out his extensive academic and professional qualifications, the Defendant testified that what prompted him to file the counterclaim was the realisation that the Bank had sold his property LR No. 209/9854 in Dam Estate Phase 2 Area Nairobi along Langatta Road fraudulently. According to him the said sale was based on an allegation that he had defaulted in the repayment of his

credit facilities, an allegation which was entirely false because the Defendant violated and disregarded his credit contract with itself as a lender.

55. The Defendant alleged that the action of the Bank was based on the actions of third parties who were out to impoverish him one of which was the Government of Kenya which made a decision to displace him as the General Manger of the Bank by appointing a **Mr Everest Saina** on 20th March 1998. It was his evidence that he was appointed by the Board in 1973 and was not an appointee of the Government. It was his evidence that he worked till 1998 when his credit terms based on favourable interests rates were removed when his name was removed by the deletion of his name from the staff roll on 20th March, 1998.

56. It was his evidence that the Government then sent imposters appointed by it as Directors and Chairman to the Board and who unlawfully stage-managed the termination of his services at a time when he was update in his repayment.

57. It was the Defendant's evidence that the public auction was carried out without him being served with the necessary statutory notices. The Defendant faulted the pleadings by the Plaintiff and averred that from the same the auction was for a total of Kshs 4.4 million and contended that the Plaintiff delayed the payment outside the stipulated period and had the purchase price reduced. Based on the documents on record the Defendant contended that there must have been another sale for a sum in excess of the said Kshs 4.4 million as opposed to the said Kshs 3.8 million. It was therefore his evidence that there were various versions regarding the sale of the suit property. The Defendant in any event contended that the sum of Kshs 4.4 million was not realistic considering that the property had been valued in October, 1997 in the sum of Kshs 7.6 million on the instructions of the Bank about 5 years earlier.

58. In his Statement averred that he had seen a valuation report dated 23rd October, 1997 on the suit property that was prepared by **Dr George N. Ngugi** a registered valuer, then doing valuation business in the name of **Grassroot Real Estates** in which he put its open market value at Kshs. 7.6 million.

59. He also disclosed that he had also seen a valuation report dated 13th November 2002 on the suit property LR No. 209/9854 that was prepared by **Dr S. ole Keriasek**, a Valuation and Estate Surveyor who is a Registered and Practicing Valuer and is operating business in this regard that is registered as **Keriasek & Co. Ltd**. The said **Dr Keriasek** put the open market value of the suit property at sh. 4.3 million only; put forced sale value at Kshs. 3.4 million only and also recommended a reserve price of Kshs. 3 million only. It was averred that **Dr Keriasek**, being aware that he had given inordinately low values to the suit property, justified his action by indicating that "depressed property market due to the prevailing economic recession" could cause potential buyers to hold off in a sale by Public Auction. The Defendant contended that the value of Kshs. 4.3 million that **Dr Keriasek** assigned to the suit property in 2002 is less than its value of Kshs. 7.6 million in 1997 is also less than the values of similar properties in 2002 that were in the range of sh. 10 million- 14 million. The Defendant averred that the valuation of the suit property by the Plaintiff's valuers, **R.R. Oswald & Co. Ltd**., put the suit property on 28th February 2012 as Kshs. 32.2 million, an increase of Kshs. 27.9 million from sh. 4.3 million, that is, an increase of 648.8% also shows that it was terribly undervalued in 2002 as such percentage increase is not reflected by the growth of the country's economy as shown by the increase of 54.9% in GDP in the period 2002-2012.

60. The Defendant proceeded to tabulate the Gross Domestic Product at market prices and averred that in the year 2002 there was no recession as shown by the increase in GDP capital from Sh. 967,838 million in the year 2000 to Sh. 1,025,918 million in the year 2001 and Sh. 1,038,764 in the year 2002. According to the Defendant, in the said period, from the year 2000 to the year 2002, there was no property price fall; and in his opinion given the growth of Kenya's economy particularly as from the year 2001, the value of the suit property would have appreciated from a value of Kshs. 7.6 million in October 1997 to about Kshs. 12 million in October 2002. In the Defendant's view, the reason as to why **Dr Keriasek** put the said inordinately low values and reserve price for the suit property was not the alleged recession and depression but was, to the contrary, to enable the Plaintiff to benefit by buying the suit property at a throwaway price to a great disadvantage of the Defendant. Indeed, he averred, the suit property was sold for an obviously unrealistic price of Kshs. 3.8 million. The Defendant contended that the situation of an

economy of a country as to whether, over a period of specified years, there was a growth or a recession is indicated by the trend of the country's Gross Domestic Product in the specified period which is defined as the value of the total output actually produced in the whole economy over some period, usually a year.

61. The Defendant averred that the allegation by **Dr Keriasek** in his said valuation report on the suit property that there was an economic recession in Kenya when he valued the suit property in the year 2002 and that property prices were depressed is false as shown by the above noted trend of Kenya's GDP over the period 1995 to 2013 and by the GDP growth rate in the years 1997 – 2002 and the trend of exchange rate in the period 1990-2007 which shows that the economy reflected a big growth in the year 2001 and continued to grow in the years 2002 up to 2009 as shown by the increase in GDP; and by the trend of growth rate of GDP and by the upward trend of the exchange rate. It was averred that the trend of GDP growth rate during the years 1997 – 2002 shows that there was no economic recession in the country in the years 2001 and 2002 when the suit property was valued during which the trend of exchange rate also reflects the trend of property prices and that the following exchange rate graph, shows that the Kenya Shilling lost to the US Dollar during the period 1990 to the year 2007.

62. In the Defendant's case the general implication is that:-

a) In the period when a country's currency is losing to the US Dollar, inflation and interest rates are increasing and staying high, as the case was in the years 1990 – 2007, inclusive of the year 2002, when the suit property was valued by **Dr Keriasek** and;

b) That property values do not fall in such a situation but, to the contrary, their values increase because they become scarce. The number of additional housing units are curtailed by prohibitive construction costs and also because in such situations, people with financial means seek to invest in tangible, permanent and secure assets.

63. According to the Defendant, the observation about trend of value of houses in Kenya is in tandem with Global House Price Index that covers several years including the said year 2002 which trend in the prices of houses and apartments in Nairobi as updated on 8thSeptember 2011 shows that strong price trend was discernible in the price of houses and apartments in Nairobi; the prices were broadly similar to prices in 2010. Further, house prices in the years 1995 to the year 2013 would have also reflected increases because of the overall increases in GDP, high interest rates and depressed exchange rate of Kenya Shilling to the US Dollar.

64. It was the Defendant's position that the open market value of the suit property of sh. 4.3 million, the forced sale value of sh. 3.4 million and the reserve price of sh. 3 million assigned to the suit property in the year 2002 by **Dr Keriasek**, were a deliberate gross undervaluation of the suit property for the benefit of the Plaintiff and his valuation report is, therefore, without doubt a fraudulent and false document.

65. According to the Defendant the auction sale was discontinued as a result of the failure by the Plaintiff to pay the sum bided hence the private arrangement. As the sale was fraudulent, the Defendant urged the Court to cancel the sale and revert the property to him. He also claimed damages to the vandalism of the suit property. In his evidence he was not only up-to-date in his repayments but was ahead of the schedule.

66. In cross-examination by **Mr Njagi** for the Bank, the Defendant stated that at the time he was the Bank's General Manager he had been in the banking industry for 25 year. He admitted that he offered his suit property as security to the Bank. He admitted that he was appointed to the position of the General Manager by the Board which could fire him subject to following the procedures. According to him he had no contract with the Government and that he gave his property as security because he was borrowing. In his evidence he had various facilities such as overdraft, house loan, commercial loan, car loan and share loans.

67. The Defendant however denied that he was in default as he was paying his facilities in accordance with his arrangement with the Bank. The Defendant insisted that as at the time of leaving the Bank his account was regular.

68. Referred to the valuation report by **Grassroots Real Estate**, the Defendant admitted that the instructions were issued by him though he could not remember whether there was a letter of instructions. He disclosed that the Bank Branch instructed the said valuer through him and that he was the one who paid for the valuation as the Bank does not pay for the same. He averred that he did not personally know the valuer. He however testified that prior to 2002 he could not remember whether attempts were made to realise the property.

69. Referred to the bundle of documents the Defendant admitted that there was a letter from **Ndungu Njoroge & Kwach Advocates** communicating the cancellation of the sale to his advocate. He insisted that he never received any notification of sale though he admitted that he used P. O. Box 22333 Nairobi as his address. He however contended that he did not open his postal box following hi prosecution for 3 months.

70. In answer to further question the Defendant admitted that there was a scheduled sale in 2001 in respect of the suit property and that there were bidders including **Nicholas Sumba**, his advocate on record who bided for the sum of Kshs 3.5 million though at that time he did not know **Mr Sumba**.

71. In cross examination by **Mr Ngugi** for the Plaintiff, the Defendant reiterated that he left the Bank as a result of pressure from third parties but conceded that the plaintiff was not a party to the same. He admitted that before the finalisation of the sale there was a letter from his lawyers stating that the sale was stopped which according to him was a lie. He insisted that he never received any statutory notice of sale but instructed his lawyers based on newspaper advertisement. He however admitted that he rarely checked his mail. He disclosed that he used to have a caretaker/gardener. He said that he was unaware that the notice was posted on the property.

72. The Defendant disclosed that the name of his wife as **Julie Bii** who was working and is still working with the **Kenya Commercial Bank** but who denied having been served with the notice. The Defendant reiterated that the sale had at least 4 versions. Referred to the letters in the bundle he admitted that on 15th July, 2013, the last day, the balance. The Defendant admitted that he had attended an auction once and that the terms of the auction was 25% payable at the fall of the hammer. He however admitted that it is possible to bid for lower figure than the one indicated in the cheque carried by the bidder. The Defendant agreed that the total loan was Kshs 3.5 million and was charged for the same amount. In his evidence the sale agreement allows for extension of time for completion and on the face value of the cheque the Bank received Kshs 3.8million.

73. According to the Defendant the basis of his contention that his property was undervalued was the valuation report prepared by **Prof Ngugi**. He stated that he could not be categorical that there was no charge in 1997. He stated that he had no letter of instructions from the Bank to the said valuer and said that he was not objecting to the valuation carried out by **Oswald** for the sum of Kshs 32 million in 1992 since in his view it looked alright and he had no reason to dispute it. He however insisted that the valuation could not jump by 400% in 10 years unless the earlier one was an undervalue.

74. The Defendant disclosed that after his termination, there was immediate default resulting from lack of a contract. According to him the Bank charged more than the 8% contractual sum though he did not have evidence to that effect. He agreed that several attempts had been made by the plaintiff to have him evicted but was ordered not to do so.

75. In re-examination by Mr Sumba, the Defendant reiterated that at the time of his termination his facilities were up todate and ahead of schedule. He revealed that the valuation by Grassroots was undertaken because he wanted additional loans or a review of his facilities. He insisted that the instructions to the valuer emanated from the Bank in which he was employed and a borrower and that it is the General Manger who gives instructions through the owner of the property and in this case the instructions were given by the Bank and he was the General Manager. He denied that he manipulated the value for ulterior motives. In his view the valuation could not have moved from 4 million to 32 million and that his advocate was trying to defend the default by the buyer. To him payment outside was not permitted in the agreement and that the same was window-dressing.

76. Apart from the Defendant's evidence, the Defendant called **Professor George Njuguna Ngugi**, a valuer by training and a professor at the University of Nairobi, Urban and Regional Planning Department and NEMA lead expert as DW2 who similarly filed a statement which he relied on as part of his evidence in chief. Apart from his extensive academic and professional qualifications, he stated that he was a registered Valuer and Physical Planner.

77. The witness testified that he conducted a valuation in respect of the suit property on 23rd October, 1997 and denied that as at that time he was not qualified. In his evidence the Bank must have carried out background search on him before the instructions were given. The witness averred that the documents purporting that he was not a registered valuer as at the time of the valuation were totally erroneous. In his evidence the Gazette Notice relied upon was selective since the same starts from letter "K" thus his name was omitted and there was no continuation. He stated that when he saw the allegation he set the record straight by resorting to the Valuers Registration Board for the purpose which Board through its Registrar on 23rd October, 2014 stated that for the years in question he had a practising certificate. He said that the names are Gazetted by the Government Printer based on information from the Board.

78. According to his report the suit property had an open market value of Kshs 7,600,000.00 in respect of both the land and the improvements in 1997. Referred to the report of **Keriasek and Company**, the witness confirmed that the open market value was given as Kshs 3,250,000/= five years after improvements while the land was valued at Kshs 850000/= totalling Kshs 4,3000,000/= for land and improvements thus showing a devaluation of 50%. With respect to the report of Oswald dated 28th February, 2012 the value was given as Kshs 32,5000,000/=. According to the witness the value of property in Kenya has never depreciated and in this instance between 1997 and 2012 the value of the suit property ought to have appreciated by between 8-10 million. He therefore agreed with the valuation given by Oswald as reflecting the economic reality. Therefore while respecting **Dr Keriasek** as his teacher, the witness disagreed with his opinion since the market sales for the year 2002 in the area showed an upward trend. He was therefore of the view that by the time **Dr Keriasek** carried out his valuation, the property could have been valued in the sum of Kshs 15 million which was in conformity with Oswald's view since between 1997 and 2012 the value could have shot to approximately Kshs 32 million.

79. The witness disclosed that when he did his valuation, there were two maisonettes with a servant quarters and that it is the same house that is still in existence todate.

80. To him, Kenya Commercial Bank Ltd wrongly devalued the suit property L.R. No.209/9854 Nairobi of the defendant, **Elijah Kipng'eno Arap Bii** in November 2002 before selling it to **Mr. Samuel Mwehia Gitau**, the plaintiff herein in January/February 2002.

81. According to him, the said property has been a subject of the following three valuations and also assessment by professional property valuers.

> i) Valuation report by **Grassroots Real Estates Ltd** dated 23rd October 1997 putting the value of the suit property at Kshs.7,600,000/= which valuation report can be found in pages 24-27 of the defendant's list of documents dated 3rd May 2012.
>
> ii) Valuation report by **Keriasek and Company Ltd** dated 13th November 2002 putting the value of the suit property at Kshs.4,300,000/= which valuation report can be found in the 1st defendant's (in the counterclaim) supplementary list and bundle of documents dated 29th January 2013.
>
> iii) Valuation report by **R.R.Oswald Ltd** in the year 2012 putting the value of the suit premises at Kshs.32,500,000/= which valuation report can be found in the plaintiff's supplementary list of documents dated 2nd May 2012.

82. The witness averred that the devaluation of the suit property by the bank appointed valuer in 2002 was not justified on the basis of the real value of the suit property considering the property value trends at that particular time. To him, the property was grossly undervalued by the Kenya Commercial Bank appointed

valuer in 2002 as evident when compared with the realistic 1997 and 2012 valuations by the same Kenya Commercial Bank and the plaintiff respectively hence the sale price of Kshs.3.8 million or any other sale price in this range was, therefore, guided by an unrealistic, fraudulent valuation in 2002.

83. The witness confirmed that the country's (Kenya) economic growth was on a positive trajectory in 2002 as evidenced from data in key government indicators at the time. Values of property in Nairobi also showed a positive trend as empirically evidenced by data from reputable property trend analysis. The indication that value of the subject property plummeted in 2002 was a deliberate attempt to undervalue the property to suit the then buyer of the property who is the plaintiff herein. The said valuation was misleading, fraudulent and unprofessional to say the least.

84. It was however its view that following the trend of appreciation of properties, the plaintiff's valuer (Messrs R.R. Oswald) arrived at the correct estimate of the subject property value (i.e. Kshs.32,500,000/=) in the year 2012. The said 2012 valuation served to suit the plaintiff's purpose for sale, if at all, of the same property valued at Kshs.4,300,000/= in 2002. To him this clearly confirms that the valuation arrived at in 2002 was wrongly crafted to suit the plaintiff's desire to buy the property at a throw away price and later sell it to reap massive gains by virtue of the acceptable, realistic valuation in 2012.

85. To the witness, the projections from the valuation in 1997 to 2012 are predictable and accurate in that the 1997 valuation was Kshs.7,600,000/=, 2002 valuation should have been approximately Kshs.16,000,000/=, 2007 should have been approximately Kshs.24,000,000/= and 2012 approximately Kshs.32,500,000/= as per the valuation of **R.R. Oswald Ltd** which means there was going to be a five (5) yearly value appreciation of approximately Kshs.8 million or thereabout for the suit premises which fact is supported by the plaintiff's own appointed valuer in 2012 (R.R. Oswald Ltd).

86. In support of his evidence the witness relied on a document titled **"salient features home owners and investors look for/land value trends by Liberty Homes Ltd**".

87. In cross-examination by **Mr Njage** for the Bank, DW2 stated that he was carrying out business in the name of Grassroots Real Estate, a business name registered in 1991, when he got his professional certificate. He admitted that their profession is regulated and that every year they are required to renew their practising certificate at a fee of Kshs 2500/- annually. He stated that upon seeing the allegations that he had no certificate he tried the secure the subject Gazette Notice for 1997 but did not get t. He confirmed that his name did not appear in the said Gazette Notice as well as the addendum.

88. The witness admitted that he had not paid for the years 1992 to 1997 since he was out of the country for his doctorate and came back around 1997 and his subscription was received on 27th October, 1997. He however issued the valuation report on 23rd October, 1997. To him his subscription was received during the process of compiling the report. However the Board did not backdate his licence but simply updated the same after payments were made and issued the practising certificate in May after he made an application for reinstatement. In his evidence the difference was only 3 days.

89. Referred to his report, he stated that he had indicated that the instructions were given by the Bank through the Defendant on 23rd October, 1997. In his evidence the date of the report is the date one receives instructions. He disclosed that he was not aware of the dispute between the Defendant and the Bank but revealed that he did not have the letter of instructions. He was however paid Kshs 25,000/= for the report which money was remitted to his account held at KCB. He however denied that the instructions came from the Defendant since he was dealing with the officers and not individuals.

90. In his evidence he said that he went to the property at Nairobi Dam Estate which is 5 minutes from the City Centre and did physical inspection. At that time, the property was in a clean state but was not occupied though there was a watchman. He disclosed that he did not accompany **Dr Keriasek** when the latter carried out his valuation though he admitted that vandalism can diminish the value of the property but not the land. He admitted that there was an election in December, 1997 and he conducted his valuation 2 months before the election. He however insisted that the value of the land would remain

constant and averred that **Dr Keriasek** also did his valuation in an election year.

91. Cross-examined by **Mr Ngugi** for the Plaintiff the witness stated that he was away between 1991 and 1997 when he was doing his post-doctoral studies ad that he came back in 1997 after June. In 1992 he admitted that he was out of the country and applied for regularisation in June when he came back and this was granted. Referred to the ***Valuers Act***, section 8, he stated that publication of the list of registered valuers is a *prima facie* evidence of registration. He conceded that he did not have a Gazette Notice evidencing his name. He said that he worked for the Bank for 3-5 years after he obtained his certificate in 1991. However when he was away he was not working for the Bank between 1991 and 1997 and that during the said period he could not have been allowed to practice. Though he was in the Bank's panel he had no evidence to prove this. He however admitted that the panels are reviewed from time to time.

92. According to the witness the instructions from the Bank were issued from the Credit Department of the Bank and that the Defendant was the overall boss of the Bank. He stated that he received the instructions from the Defendant as the institutional head in the morning and went to the land department, carried a search and prepared the report. Whereas he admitted that it is usual to attach the photographs and the search, his report did not have these attachments.

93. The witness disclosed that there are seven methods for carrying out valuation and in this case the purpose was to ascertain the market value for mortgage purposes. The method used by him was comparable mode by which one compares the value of other properties in the area though it is not necessary to attach the comparables. He disclosed that his report compared with that of Oswald shows that evert 5 years the property appreciates by between Kshs 8-10 million depending on the site.

94. On re-examination by **Mr Sumba**, the witness stated that he was in the panel of KCB and had undertaken a number of valuations on instructions of the Bank though he was unsure when he stopped working for the Bank. According to him he received instructions from the Bank through the Defendant though he was unaware of any dispute between the Defendant and the Bank. DW2 stated that his certificate for 1997 was issued on 14th May, 1997.

95. The Defendant also called **Nathaniel Kipruto Arap Ngok**, an economist as DW3. According to him there was a time in 200 when the prices of properties fell as the economy went down for short time but stated that property market is a special market governed by demand and material costs. He however stated that at no time have the prices of property depreciated and that by 2001 the economy was back to normal and since then property prices have remained high due to shortage of housing.

96. In cross-examination by **Mr Njage**, for the Bank, the witness admitted that he was not a valuer. He however admitted having viewed the suit property from the outside and was of the view that it was a three bedroomed house several years ago. According to him there was someone residing therein though he did not know who it was. In his evidence the house was a good house and his reason for visiting the house was due an alleged vandalism. He admitted that vandalism cannot bring the value of a property down by millions unless the house itself is brought down. According to him the value of the house ought to have been Kshs 7 million in 1997.

97. Cross-examined by **Mr Ngugi**, the witness while conceding that he was not a valuer stated that he did some research in housing policy though not on property. He however admitted that he had no reason to doubt the reports of **Prof. Ngugi** and **Dr Keriasek** though wondered why the valuation would come down. He reiterated that he just looked at the house from the outside and that his analysis was after 1997. He disclosed that the Defendant was his friend and hi former student in High School. He admitted that he was paid Kshs 10,000.00 by the Defendant to do research though he was not paid to give evidence.

<u>The Case for Kenya Commercial Bank</u>

98. The 1st Defendant to the counterclaim, **Kenya Commercial Bank**, called as DW4 **Dr Clement Sironka Ole Keriasek**, a Registered/Licenced Valuer, duly qualified in land economics and working for **Keriasek & Company Limited**, company engaged in land valuation and survey, estate management and

consultancy. In his evidence he had worked for the Bank for 30 years both in Nairobi and upcountry.

99. According to the statement, sometime late in 2002, the Bank instructed **Keriasek & Company Limited**, to inspect a property known as L.R. No. 209/9854(I.R. NO. 39221, Dam II Estate, Nairobi Area, with a view to know its current value, forced sale value and recommend reserve price for mortgage purposes. According to him, he visited the property 4 times during which time the property was unoccupied. However since the property had perimeter wall he could see it from outside. He also interviewed 10 neighbours randomly who knew the property well as well as masons, houseboy who had been visiting the property since the servant, he was told, used to come at night. From the foregoing he confirmed that the property was three bedroomed storey building with a servant quarter. The impression he formed was that the house had not been occupied for some time and its window panes were broken and the general impression was that the house was abandoned as the grass were not trimmed. At that time the Dam Estate was not well developed hence there was insecurity. According to him, this was the time of Goldenberg scandal which affected the property prices downwards from 199 to 2004 during which period the banks were unable to easily sell properties. He also considered that the country was at the eve of elections when there is usually apathy on the part of buyers. Accordingly he concluded that the value of the property was Kshs 4.3 million with the plot being Kshs 850,000.00 and improvements being Kshs 3,450,000.00. So the current open market value was placed at Kshs 4.3 million arrived at through comparable valuation method. His forced sale value was Kshs 3.4 million being 20-25% of the open market value with the reserve price being Kshs 3 million.

100. Accordingly, the witness prepared a Valuation Report dated 13th November 2002 following the inspection of the property for appraisal on 30th October 2002. According to him, the title was charged to the Bank for Kshs. 700,000/- on 22nd April 1986. It was further charged to the Bank for Kshs.1,800,000/- on 18th July, 1990 and another further charge to the Bank for Kshs. 905,000/- on 16th April, 1991 as per Registry Inspection done at Ardhi House, Nairobi on 31st October, 2002.

101. According to him, the property had Land rates arrears of Kshs. 248,236/- while the developments on the property comprised a three (3) bedroomed house and domestic servants' quarters constructed thereon. Having considered the foregoing the suit property was valued at Kshs.4,300,000/- only, as the current open market value as at then. As for the forced sale value, it amounted to Kshs. 3,400,000/- only and Kshs. 3,000,000/- for recommended reserve price. According to the witness, these values at the time were low considering the continuous property trends that interact with market factors/ forces. At the time of conducting the valuations, the Goldenberg debacle caused property prices to plummet between 1999 and 2004.

102. With respect to **Prof Ngugi's** report, the witness noted that the factors considered in coming at his opinion were not stated, including whether he compared the other properties. According to the witness when a valuer falls into arrears he I supposed to pay the same before being issued with an interim certificate. Thereafter he pays for the practising certificate for January of that year to 31st December. According to the witness **Prof Ngugi** only had the interim certificate showing he had paid the arrears hence his valuation was not valid legally since one must have a practising certificate.

103. The witness averred that he had given reasons and facts he considered in arriving at his opinion and considered the overlapping factors in arriving at his opinion that Kshs 4.3 million was fair at that time. According to him **Prof Ngugi's** valuation of Kshs 6.5 million could not attract any bid at that time since it was theoretical and could not be realised. He reiterated that **Prof Ngugi** was not registered as a Registered and Practicing Valuer for 1997 when he signed the valuation report as his names were missing in the two Kenya Gazette publications of that year being, 4th July and 2nd August 1997 as required by ***Valuers Act***, Cap 532 Laws of Kenya. Based on legal advice, he averred that the said report submitted by **Mr. George Njuguna Ngugi** cannot be said to be valid, as he had not satisfied the requirements needed to be considered a valuer.

104. Cross-examined by **Mr Ngugi**, the witness disclosed that at the time of his valuation, he did not know the plaintiff and only saw him in Curt. Similarly apart from hearing about the Defendant, he did not

know him.

105. On cross-examination by **Mr Sumba**, the witness stated that he never accessed the house but saw it. He stated that there are times when borrowers are hostile and in those circumstances they must do their best based on international standards. He stated that in research there is sampling and it is not necessary that he access the house when the circumstances do not allow such.

106. The witness stated that house was in sound structural condition based on the inquiries from the masons who knew the arrangements of the rooms and he did valuation through comparison method based on his experience within the same or similar Estates. In his evidence insecurity affects the value of the property which he considered among other factors though he did not incorporate all these in his report since there is a standard way of preparing a report. In his evidence whereas the Goldenberg scandal was in 1997, it took two years for the properties to absorb its effect which continued till 2004. He therefore testified that **Prof Ngugi's** report could not have been affected by the said scandal which raised the value of the properties before they tumbled.

107. In his evidence they do not base their valuations on other reports which in any case he was unaware of. He was specific that he was unaware of the valuation of **R R Oswald**. According to him valuation is valid at the material time depending on prevailing circumstances. Referred to the Gazette Notices, the witness averred that **Prof Ngugi's** name appeared in 2002 and not in 1997 during the period he carried out the valuation.

108. In Re-Examination by **Mr Njage**, the witness affirmed that the Gazette Notice No. 3436 indicated the valuers registered as at 4th July, 1997.

109. The Bank also called **Francis Komen,** its Recovery Manager, who testified as DW2 in the counterclaim. According to him, the Defendant who was the Bank's General Manager procured, apart from staff facilities, various facilities over time secured by 7 properties taken as collateral one of which was the suit property. On or about 18th April 1986 **Elijah K. Arap Bii**, the Defendant charged his property L.R. No. 209/9854 to Kenya Commercial Bank the 1st Defendant herein, to secure certain credit advances. The Defendant thereafter created two further charges in favour of the Bank in respect of the said property on 18th July 1990 and 16th April 1991.

110. It was averred that the Defendant defaulted in the repayment of the monies advanced to him and secured by the charge, further charge and second further charge thereby falling into arrears of both the Principal amount and the Interest thereon accrued. It was revealed that the Defendant exceeded his limit as a result of cheques which were issued by the Defendant but which were dishonoured hence the account was overdrawn. It was disclosed that the Defendant would fill in a voucher for the sums but as his account was overdrawn due to insufficiency of funds, the cheques would not be honoured. Despite being notified severally of the fact, a fact he did not dispute, the Defendant requested that the facility be converted into a term loan. The witness therefore disputed the contention that there was a credit arrangement as what was referred to as a credit arrangement was an offer letter for the benefit of the Defendant. At that time the Defendant had been given Kshs 4 million which had shot up to Kshs 28 million which was only the overdraft. It was revealed that by this time the Defendant was the general Manager and could access his statements.

111. According to the witness once there was a default they demanded the payment and the requisite notices were issued by the advocates, **Ndungu Njorge & Kwach** addressed to the Defendant at P. O. Box 22333, Nairobi by registered post and that the said address was the address that was given and used by the Defendant hence he cannot contest service. Apart from that there was hand delivery of the notices. The witness revealed hat in 2001 there was an attempt to sell the property and the highest bid was Kshs 3.5 million from Nicholas Sumba Advocate which was within the recommended price. Although the same was accepted, the 25% deposit was not paid. The second bid was Kshs 3.1 million which was below the recommended price while the last bid was Kshs 3 million. Accordingly the property was not sold.

112. It was revealed that due to frustrations arising from injunctions, the Bank sought advice from its

lawyers as a result of which valuations were carried out which returned the market value of Kshs 4.3 million with forced value of Kshs 3.4 million and reserve price of Kshs 3 million. Consequently on 3rd December, 2002 the Bank advertised the sale by way of public auction but as a result of a stay obtained by the Defendant the auction did not proceed based on the advice from the Bank's lawyers and the Defendant's advocates were informed of the cancellation of the auction.

113. However after seeking advice from the lawyers, the Bank was advised that it could sell the property by private treaty as the outstanding amount at that time was Kshs 90 million for the entire liability. Consequently the property was sold to the Plaintiff through private treaty following scouting by Garam Auctioneers. However the first offer of Kshs 3.5 million was rejected and the offer was enhanced to Kshs 3.8 million. The witness averred that the Bank could not sell the property at a lower price than the one in the valuation. The witness accordingly was of the view that the valuation was correctly undertaken as the report by Grassroots Real Estate was not brought to the attention of the Bank as the same was done by the customer himself. The witness however was of the view that the valuation by Grassroots was grossly overstated. The witness averred that despite being regularly issued with the statements, the Defendant did not complain. However the Bank decoded to write off Kshs 71 million but the Defendant did not honour the arrangement till he left employment. It was revealed that all the properties were sold and Kshs 17.5 million was realised therefrom.

114. According to the statement, the Defendant was a General Manager of the Bank until his services were terminated in March 1998. However, the accounts he had with the Bank became irregular even before the termination of his services mainly due to the encashment of vouchers and cheques at various branches of the bank which eventually ended up being debited to the main account at Moi Avenue. It was revealed that the Defendant's terminal benefits amounting to Kshs. 3,370,757.65/- were applied in the reduction of the overdraft on 26th June 1998 and that following the Plaintiffs failure to repay his debts amounting to 90,398,000/- recovery of the said debt was placed with the banks lawyers on 28th May 1999.

115. It was disclosed that the Defendant has filed many suits in court whenever the bank attempted to auction his property though the bank has been able to successfully sell the following properties:

DATE	**PROPERTY (L.R. NO.)**	**AMOUNT RELAIZED (Kshs)**	**SALE PROCESS**
11-01-2000	631/1204 Kericho	850,000/-	Auction
28-09-2001	631/710 Kericho	1,525,125/-	Auction
28-09-2001	Kericho/Kabianga/1824	1,300,000/-	Auction
06-01-2003	209/6252 Nairobi	3,750,000/-	Private Treaty
23-01-2003	209/9854	3,800,000/-	Private Treaty

09-02-2007	Nairobi/Block/122	3,100,000/-	Auction
09-02-2007	Nairobi/Block/448	3,200,000/-	Auction
	Total Amount Realized	**17,525,125/-**	

116. It was however contended that the Property known as L.R. No. 209/9854 was thereafter sold by way of Private Treaty in order to realize the debt secured by the Defendant and that at the time the property was sold by way of private treaty, all the necessary legal prerequisites were adhered to. In any event, it was averred that after the lapse of two months, the Plaintiff's debt being in arrears on both the Principal amount and the Interest, the Bank was not by law expected to issue any further Notice or at all to the Defendant before realizing the security by sale. Accordingly, the Suit Property was sold at the best available price of Kshs. 3,800,000/- to the Plaintiff in lawful exercise of the Chargee's Statutory Power of Sale conferred upon the Bank by the charge and further charges, by entering into a sale agreement dated 20th February 2003. Subsequent to the aforementioned sale agreement, the Bank thereafter transferred the suit property to the Plaintiff by way of Transfer by Chargee dated 4th June 2003.

117. According to the Bank, the Defendant still remains heavily indebted to the Bank despite the suit property having been sold and the proceeds thereof applied towards the reduction of the Plaintiff's indebtedness leaving the bulk of debt still unsettled.

118. According to the Bank, the Defendant's claim against the Bank is wholly without merit and misconceived and that the purported Credit Agreement is no more than a letter of comfort/a proposal which was engineered by the customer using his influence at a time when his employment contract's termination was imminent. It was asserted that the Defendant's huge debt has never been fully repaid and the bank had to do an internal adjustment (write off) so as to reflect the real position of the inevitable un-recoverability. The Bank therefore prayed that the Defendant's claim should be dismissed with costs.

119. In cross examination by **Mr Ngugi**, the witness reiterated that 7 properties were sold and that apart from the suit property no other property was sold to the plaintiff. To his knowledge however only the subject property had issues with respect to possession. He however contended that the sale was above board and that the full purchase price for the suit property was received and a receipt was issued to the defendant for the same.

120. In cross-examination by **Mr Sumba**, the witness testified that the Defendant defaulted in January, 1998 and that the Bank has not realised the monies advanced to the Defendant. According to the witness when the Defendant was still with the Bank the problem was in respect of the overdraft as the other facilities were up todate. However by July 1997 the overdraft had risen to Kshs 28 million and at the date of the letter in 1998 it stood at Kshs 48 million. It was reiterated that after the sale of the properties the Bank wrote off Kshs 71,988,267.00.

121. It was stated that the Notice was served by registered post on 20th November, 2001 and the sale was called off after the Bank's advocates noted the irregularities in the process. Accordingly the sale was conducted on 20th January, 2003 by private treaty and not 2002 as indicated by the lawyer.

122. The witness however confirmed that the Defendant's advocate on record also bided in 2001 though he clarified that there was nothing wrong with that. According to him the sale by private treaty was due to

frustrations. Referred to the sale agreement the witness noted that the same mentioned Kshs 4.3 million. The witness however confirmed that the issue of termination of the Defendant's employment is the subject of another case.

123. In re-examination by **Mr Njagi**, the witness stated that the decision to terminate the Defendant was made by the Board. According to him the 2nd charge was in 1991 way before the Grassroot's valuation which was in 1998. It was however his evidence that the Defendant did not even abide by the covenant to pay the rates. At that time both the principal and interest was outstanding as the amount overdrawn was Kshs 42 million which he promised to liquidate by instalments of Kshs 500,000/- per month which promise the Defendant did not fulfil. He reaffirmed that the statutory notices were sent through registered post and normal post. He however asserted that the Bank had the power to sale the property by private treaty.

Plaintiff's Submissions

124. It was submitted on behalf of the Plaintiff that the dispute in this matter relates to Land Reference number 209/9854 a leasehold property comprising of 0.1122 of a hectare with a dwelling house erected therein ('hereinafter '***the suit property')*.** The suit property is registered under the ***Registration of Titles Act*** (Cap 281 Laws of Kenya) and that the current registered proprietor of the property is the Plaintiff, while the previous registered owner is the defendant.

125. By a charge dated 18th of April 1986, and Two Further charges dated 18th July 1990 and 16th April 1991, the Defendant charged the property to Kenya Commercial Bank Limited – the 2nd Defendant in the counterclaim herein (hereinafter '***the Bank'***) to secure a sum of **Kshs. 3,405,000** together with other monies. The Defendant subsequently defaulted in the repayment of the loan, and the bank gave statutory notice of intention to realise the security under its statutory power of sale conferred by the ***Transfer of Property Act***. On 20th February 2003, the Plaintiff by way of private treaty, entered into an agreement for sale with the bank to buy the suit property for a consideration of Kshs. 3, 800,000.00. By a transfer dated the 4th June, 2003 the bank transferred the suit property to the Plaintiff and on 18th June, 2003 the Plaintiff was registered as proprietor. Thereafter, the Defendant refused to grant the Plaintiff possession and it was this refusal that provoked this suit in which the Plaintiff is seeking vacant possession and General Damages for trespass until possession is delivered up.

126. On its part, the Defendant filed an amended Defence and Counter-claim where he sought to impugn the sale on grounds of fraud and illegality in the process of sale to which the bank filed a defence to the counterclaim where it confirmed the sale to the Plaintiff by way of Private treaty for a sum of Kshs. 3,800,000.

127. It was submitted that the statutory power of sale was exercised without any malice, deceit or fraud. Since the It sale and transfer of the suit property was concluded, and the property is now registered in the name of the Plaintiff as from 18th June 2003, the Plaintiff relied on section 2, of the ***Registration of Titles Act*** (RTA). The plaintiff further relied on section 23 of the RTA where it is stated that a certificate of title issued by a registrar is conclusive proof that the person named herein is the ' absolute and indefeasible owner' whose title is not 'subject to challenge except on grounds of Fraud and misrepresentation to which he is proven to be a party'. In this respect the Plaintiff relied on **Jandu vs. Kirpal & Another (1975) EA 225**), at pg. 231 in which the elements of fraud are outlined as a proven knowledge, the existence of an unregistered interest and knowingly and wrongfully defeats. Reliance was also sought in section 75 of the RTA that preserves the court's jurisdiction for cases of 'actual fraud' as well as ***Black's Law Dictionary*** **1990.**

128. It was therefore submitted that that both the Common Law definition of 'actual fraud' and the Statutory Definition of fraud have the common golden thread of 'a positive intention' to deprive, inducing another to Act and concealment and that looking at the facts and evidence in the case herein the same are inadequate to prove either statutory, or actual fraud. It was further contended that the Burden of Proof in fraud case has been set very high, hence it is not enough to simply infer fraud from the facts and the

Plaintiff relied on **Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR** in which **Tunoi JA** (as he then was) stated that:

> **"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."**

129. According to the Plaintiff as fraud is a serious obligation, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by the Court of appeal in **Central Bank of Kenya Limited vs. Trust Bank Limited & 4 Others [1996] eKLR** as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:

> **"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."**

130. To the Plaintiff, in the present case the above exposition of the law played itself out. On whether the sale and transfer of the suit property to the Plaintiff was undertaken as a result of collusion, fraudulently, irregularly, unlawfully and is null and void, the Defendants evidence was based on the allegation that the pre-planned Auction was cancelled, and in his mind there were several versions of the sale price and that the completion period for the sale seems to have been extended. In the Plaintiff's view, there was, however, no direct evidence on the allegations of collusion, fraud, irregularity or illegality. With respect to the fact that the Auction was cancelled, it was admitted by the Defendant that there was nothing prima facie wrong with that. To the Plaintiff, the allegations of the Defendant, especially the cancellation of the Auction, although casting doubt on the actions of the bank do not rise to the level of fraud. He relied on **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. This standard, it was submitted, has not been met in the present case.

131. With respect to the allegation of underpayment, it was submitted that the Defendant defaulted in payment of the monies advanced to him; that proper statutory notices were served upon him and no action was taken by him; that a valuation on the suit property was commissioned and a valuation report prepared by the Bank's Valuer **Dr. Keriasek** for Kshs. 3.4 million; that the suit property was sold by Private treaty for Kshs. 3.8 million; that DW-2 the Defendant's Valuer confirmed that **Dr. Keriasek**, who was the Bank's Valuer herein is an expert Valuer; that DW-2 was not commissioned to do the valuation report by for or on behalf of the Bank; and that DW-2 was not licensed to practise at the time of conducting the valuation. It was therefore submitted that on a balance of probability, and with the evidence on record, credit worthy valuation that should be considered by this Honourable court is of Kshs. 3.4 million of 2002 done by the Bank's valuer, **Dr. Keriasek**. More so, this valuation had used the comparison mode of valuation which entails use of empirical data, and hence a more realistic valuation. The Plaintiff relied on **Peter Kamau Ilia vs. Barclays Bank of Kenya & Manor (HCCC No. 719 of 2003 eKLR** and **Eccon Construction and Engineering Ltd vs. Giro Commercial Bank Ltd and Another [2003] 2 EA 426**. The Plaintiff reiterated that it was noteworthy that the suit property had been used to secure advancements of Kshs. 3,405,000, the reserve price was Kshs. 3.4 million Based on a current valuation in 2002, and the property was sold by private treaty for Kshs. 3.8 million.

132.132. The Plaintiff further submitted that he was an innocent purchaser for value and was not party to the fraud and relied on **Captain Patrick Kanyagia and Another vs. Damaris Wangeci and Others**, **David Katana Ngomba vs. Shafi Grewal Kaka [2014] eKLR, Priscilla Krobought Grant vs. Kenya Commercial Finance Company Ltd and Others Civil Appeal No.227 of 1995 (unreported),** where the court held that *there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the*

mortgagee to sell.

133. It was the Plaintiff's case that in the present case, the Defendant had not demonstrated that the Plaintiff had any notice of irregular exercise of the statutory power of sale by the Bank or indeed there was any such irregular exercise of the statutory power of sale. As per the testimony of the Plaintiff and the Bank, the Plaintiff's action to purchase, was solely based on the advertisement for sale placed in the newspaper. When the Auction was cancelled, he was requested to place a private bid, he placed a bid of Kshs.3.6 million, which bid he was requested to improve which he did to Kshs. 3.8 million, which improved bid was accepted. It was therefore submitted that the present case does not fall within the instance of a sale that can be impugned.

134. On the issue whether there is any lawful claim for vacant possession, it was submitted that having proven that: (i) the sale of the suit property was not fraudulent, (ii) the Defendant was indeed in default, (iii) the Bank's statutory of sale was properly exercised and (iv) the Bank having acknowledged receipt of full purchase price offered at the time, then the proper remedy for the Plaintiff is vacant possession. If the Defendant feels damnified by the actions of the bank, his only remedy would be in damages as against the Bank. The Plaintiff reiterated that he was a *bona fide* purchaser for value and relied on section 69B of the ***Indian Transfer of Property Act*** (hereinafter ITPA).

135. It was submitted that the Defendant his lost his Right of Redemption the moment the suit property was transferred and registered in the Plaintiff's name and that the allegation that the contract was completed after the agreed completion time would not amount to fraud. In this respect the Plaintiff relied on **Bloodstock Ltd vs. Emerton [1967] 3 All ER 321 page 329, Mbuthia vs. Jimba Credit Finance Corporation & Another (1988) Civil Appeal No.111 of 1986, Peter Kamau Ikigu vs. Barclays Bank of Kenya Ltd & Another [2013] eKLR** and the opinion of **W.V.H. Rogers, MA** in his book **Winfield and Jolowicz on Tort** pg 363.

136. He further relied on **Corbett vs. Halifax PLC at page 196** and **Tse Kwong Lam vs. Wong Chit Sen & Others (The Weekly Law reports Vol. 3 at Pg. 1349** and urged the Court to be guided by this two authorities from jurisdictions with similar laws as persuasive guidance.

137. Dealing with the issue whether the plaintiff is entitled to damages for trespass until possession is given up and if so how much, the Plaintiff submitted that the Plaintiff purchased and was registered as a proprietor of the proprietor of this property on the 18th of June 2003. Since then to date he has never enjoyed his proprietary interest over the property. He has neither lived in the property, nor enjoyed rental income from the same. He has not enjoyed a return on his investment. The defendant's refusal to render up possession to the property made him a trespasser against whom damages should accrue. He submitted that the correct and reasonable measure of damages would be the lost rental income and relied on this Court's decision in **Peter Kamau Ikigu vs. Barclays Bank of Kenya & Anor. [2013] eKLR.** He also relied on the opinion of **W.V.H. Rogers, MA** in his book ***Winfield and Jolowicz on Tort*** pg 363.

138. It was submitted that the valuer (PW-2's) evidence placed the loss of rental income at Kshs. 3, 985,000 as at February 2012 which evidence was uncontroverted and accepted by all parties and the Court was urged to adopt this. Further as at February 2012, the valuer assessed the monthly rental income at Kshs. 57,500/- hence it was urged that damages for trespass in the form of loss of rental income be granted together with interest at courts rate from the date of filing suit up to delivery of possession.

139. Considering the foregoing, it was argued that the Defendant had completely failed to prove his counterclaim and the same should be dismissed with cost to the Plaintiff since the counterclaim was based on allegations of fraud that were generally pleaded and not specifically proven to the required standard.

140. Accordingly, the Plaintiff prayed that judgement be entered for the Plaintiff as follows:-

i. An order for delivery of Vacant possession of the premises known as Land Reference Number 209/9854 Nairobi, immediately upon judgement herein and in default eviction to issue.

ii. An order for damages for trespass for the period up to 28th of February 2012 in the sum of Kshs. 3,985,000 together with interest thereon at the rate of 14% from 22nd August 2003 until payment in full.

iii. An order for damages for trespass in the sum of Kshs. 57, 500/- per month from 1st of March 2012 until possession is delivered up together with interest thereon at the rate of 14% from 1st of March 2012 until payment in full

iv. Cost of the Main Suit and the Counterclaim.

Defendant's Submissions

141. On behalf of the Defendant it was submitted that the sale price of Kshs.3.8 million was inordinately low and was therefore fraudulent. It was submitted that the Bank alleged to have sold the said property in the year 2003 for Kshs.3.8 million when the valuation report by **Dr. George N. Ngugi** of **Grassroots Real Estates** for the said property during the time it was being charged to the bank was Kshs.7,600,000/=. According to the Defendant, it is not possible that the said property could have been valued at Kshs.7.6 million in 1997 and then six (6) years down the line in the year 2003, it would fetch merely a half price of Kshs.3.8 million instead of appreciating.

142. It was submitted that though three valuers, namely **Prof. George Njuguna Ngugi** of **Grassroots Valuers**, **Mr. Herbert Mwangi Kamau** of **R.R. Oswald** and **Dr. S. Ole Keriasek** of **Keriasek & Co Ltd** offered their expert opinions together with an economist in the name of **Dr. Joseph Arap Ng'ok**, the only divergent opinion came from **Dr. S. Ole Keriasek** who gave evidence and defended his report prepared on the instructions of the Bank. It was however submitted that the said report cannot be relied on for the following reasons:-

i) The witness and valuer who prepared the said report, **Dr. S. Ole Keriasek** admitted that he only viewed the property from outside and never conducted any inspection inside. The Defendant wondered how he could have valued the property without taking measurements of the sizes of the rooms and without literally verifying the quality of workmanship so that he could arrive at a fair, accurate, reasonable valuation figure is hard to tell. To the Defendant, it was evidently clear that the said valuer ended up in an undertaking what was more less guess work and did not even know how the property looked like thus his erroneous opinion that the property is a three (3) bedroomed house when the truth of the matter is that the house is four (4) bedroomed as confirmed by **Prof. George Njuguna Ngugi** of **Grassroots Valuers** and **Mr**. **Herbert Mwangi Kamau** of **R.R. Oswald**.

ii) There are no academic certificates attached to **Dr**. **Keriasek's** report to confirm his qualifications as a valuer.

iii) It is ironic for the said valuer to have unashamedly told the court that he relied on messengers, maids, nearby contractors, masons and passers by in compiling his report.

iv) The said valuer, when put to task that the value of the property as per the 1997 valuation was Kshs.7.6 million so that the same could not have been sold at a half price (Kshs.3.8 million) six (6) years later, said that the same was caused by the Goldenberg scandal that led to an economic downturn in the country without explaining how this led to the shrinking of the property market. But to confirm his guesswork and lies, he states that Goldenberg scandal took place in 1997 and that by 1999, property prices had plummeted- a total fabricated lie as it is common knowledge that the Goldenberg scandal came about in the year 1990 which is more than ten (10) years before the sale of the said property.

v) The said valuer's evidence that the value of properties tend to depreciate during an election year is also a fabricated lie, not supported by any factual evidence since the other two separate reports by the plaintiff and the defendant's valuers in the year 2013 and 1997 respectively were

coincidentally also prepared during an election year. With the two (2) said experts (valuers) concurring in their report, **Dr. S. Ole Keriasek's** report cannot be relied on unless supported with reasonable, justifiable facts.

vi) The considerations made by the said valuer to arrive at the very low valuation figure of Kshs.4.3 million as at 13th November 2012 are totally misplaced and strange. Factors like comparable market rates, effect of the Goldenberg scandal, security situation, area prone to muggings due to proximity to Kibera slums, the value of the properties depreciating during election year etc. were never included in his report dated 13/11/2012 in support of the findings arrived at by himself but were strangely sneaked in during his evidence in court as an afterthought when he was hard pressed to justify how he arrived at the very low valuation figures for the suit premises.

143. The Defendant therefore urged the Court to disregard the said valuation report on the basis that its aim was simply to mislead the Court in a bid to justify the fraudulent actions of the Bank and the plaintiff. To the Defendant, the evidence of an economist, **Dr. Joseph Arap Ng'ok**, was clear that the economic trends in the country were all the time positive and price index of the properties were always appreciating especially in the year 2002 and it was therefore not possible for the value of the suit property to depreciate to Kshs.3.8 million during this time down from Kshs.7.6 million in the year 1997. With respect to the valuation report of **Herbert Mwangi Kamau** and **Rajiv Gujral** of **R.R. Oswald** in the year 2012 as comprised in the plaintiff's supplementary list of documents dated 2nd May 2012, it was submitted that the value of the suit property was placed at **Kshs.32,500,000/=** while the valuation by **Prof. George Njuguna Ngugi** on behalf of the Bank as undertaken on 23rd October, 1997 place the value of the property at Kshs.7.6 million hence uniformly confirming that the said property appreciated over time by at least a value increment of about 100% and/or approximately Kshs.8 million every five years. According to the Defendant, therefore in 1997 the property value was Kshs.7.6 million. In 2002, additional 100% increment of Kshs.8 million would translate to Kshs.15.6 million then in 2007 same Kshs.8 million increment would bring the figure to Kshs.23.6 million then add another Kshs.8 million five years to 2012, would bring the figure to Kshs.31.6 million which is almost the same as the 1st defendant in the counterclaim's R.R Oswald's valuation in the year 2012 of Kshs.32,500,000/=. To the Defendant, the valuation of **Prof. George Njuguna Ngugi** and **Mr. Herbert Mwangi Kamau** concur with the realistic property value appreciation and therefore confirm that the property could not have been **Kshs.4.3 million** in the year 2002 as **Dr. S. Ole Keriasek** wanted the Court to believe but could not be less than Kshs.15 million so that selling the property at Kshs.3.8 million was a clear fraud undertaken to benefit and aid the plaintiff in purchasing the suit property at a throw away price therefore lending credence to the fact that the property would have initially been slated for a public auction sale on 17th January, 2003 but was purportedly changed to a sale by private treaty.

144. According to the Defendant, the valuation by **Prof. George N. Ngugi** was professionally done, inspection of the suit premises undertaken and unlike **Dr. Keriasek's** valuation, sizes of the rooms in terms of measurements are indicated. The workmanship and the factors considered in arriving at the valuation figure are also specified in the said report therefore justifying why the report by **Dr. Keriasek** was made up to suit the plaintiff and the Bank. Selling the suit property at a throw away, low price of Kshs.3.8 million was therefore a fraud perpetrated by the collusion of both the plaintiff and the Bank. It was contended that the plaintiff and the Bank did challenge the suitability of **Prof. George Njuguna Ngugi** as a valuer, claiming, as stated by **Dr. S. Ole Keriasek** in his witness statement that he was not a registered valuer in accordance with the valuers act as at 23rd October, 1997 when he undertook the valuation of the suit premises on behalf of the Bank. However, the allegations that **Prof. George Njuguna Ngugi** is not a registered valuer cannot be true because:-

i) The Bank is the same one who instructed him to undertake a valuation of the suit premises in the year 1997. Trying to associate the said valuer with the defendant who at the material time was an employee of the Bank and who had not by then envisaged he would be in the present predicament which would lead to a court contest with the Bank is tantamount to looking for farfetched excuses as instructions carried by the defendant while in the employment of the Bank was undertaken for and on behalf of the said 1st defendant and not otherwise.

ii) The defendant in its list of documents dated 27th October, 2014 has annexed all the relevant documents to confirm that **Prof. George Njuguna Ngugi** was a duly registered valuer. There is the letter dated 23rd October, 2014 by the Registrar, Valuers Registration Board at page **1** of the defendant's additional list of documents dated 27th October, 2014. The letter confirms that **Prof. George Njuguna Ngugi** was a registered valuer by virtue of his practicing certificate that was issued on 14th May 1997 while his valuation report was prepared on 23rd October, 1997, much after he had been issued with a practicing certificate, also annexed at page **2** of the said defendant's additional list of documents dated 27th October, 2014.

iii) The copy of the Kenya gazette notice dated 4th July 1997, annexed to the Bank's list of documents dated 15th September, 2014 is headed "schedule continued" which means that there are other names preceding the list from where the schedule of names continues. The list from where the said gazette copy continues is not attached and it cannot therefore be a full proof document to be relied on, prima facie that **Prof. George Njuguna Ngugi** was not among the valuers enlisted in the Kenya gazette as at 4th July 1997. The said **Prof. George Njuguna Ngugi** stated in his evidence that he tried to trace a copy of the said gazette notice from the government printer and from the Registrar Valuers Board but was not able to obtain it and had no otherwise but to get the registrar to draw to him the letter exhibited by himself at page **1** of the defendant's additional list of documents dated 27th October, 2014 confirming that he was licensed to practice as a valuer in the year 1997.

145. It was submitted that by virtue of the said letter dated 23rd October, 2014 confirming that **Prof. George Njuguna Ngugi** had been issued with a practicing certificate as at 14th May 1997 which certificate is annexed at page **2** of the defendant's additional list of documents dated 27th October, 2014, **Prof. George Njuguna Ngugi** was a practicing valuer licensed to practice as at the time he prepared the valuation report for the 1st defendant in the counterclaim i.e. 23rd October, 1997, as the custodian of the records of all registered valuers in Kenya is the same registrar of Valuers Registration Board who transmits the names for gazettement to the government printer. Coupled further with the irony that the Bank on whose behalf the 1997 valuation report by **Prof. George Njuguna Ngugi** was prepared is the one now conveniently challenging the same, it is clear that **Prof. George Njuguna Ngugi** was licensed to practice as a valuer as at 14th May 1997.

146. According to the Defendant, the sale herein was clearly a fraud as there were no less than four versions of sale as particularized hereunder:-

i) There is the sale price of Kshs.3.8 million as per the sale agreement dated 20/2/2003 between the plaintiff and the 1st defendant in the counterclaim (page 10-16 of the defendant's list of documents dated 3/5/2012).

ii) Then there is the purchase price of Kshs.3.405 million in the transfer documents by the 1st defendant in the counterclaim to the plaintiff at page 2-5 of the defendant's list of documents dated 3/5/2012.

iii) There is also the sale price of no less than Kshs.4,515,884/= as evidenced from the letter dated 7th January 2003 from the plaintiff's then advocates, Oraro & company to himself which letter acknowledges receipt of cheque no. 034115 for Kshs.1,128,971.15 being 25% deposit of the purchase price.

iv) There is the purchase price in excess of Kshs.4,515,884/= as per the plaintiff's letter dated 6th February 2003 to his then advocates, Oraro & co advocates enclosing the said cheque. The plaintiff states that **Kshs.1,128,971.15** is part of his 25% payment of the purchase price of the suit premises so that if **Kshs.1,128,971.15** is part of the 25% purchase price then it means that 25% purchase price is definitely more than **Kshs.1,128,971.15** so that the ideal purchase price must be in excess of **Kshs.4,515,884/=**

147. According to the Defendant, there are therefore four (4) versions of the sale price of the suit property, confirming that the purchase price kept varying, reasons why there was initially a public auction then a private treaty agreement manipulated downwards in favour of the plaintiff. Public auction and/or private treaty agreement should be a one off undertaking that cannot be negotiated and varied now and again. Such negotiation and variation would only be correctly presumed to have preceded collusion and price manipulation between the plaintiff and the Bank.

148. The Defendant further submitted that the Bank also has two versions of sale i.e by public auction on 17th January 2003 to the highest bidder and then by a privately negotiated treaty which translates to a clear, open fraud between the plaintiff and the Bank. The Defendant relied on the averments in paragraph **5** of the plaintiff's amended plaint where he states that he attended the public auction on 17th January 2003 and was the highest bidder but was thereafter informed by the auctioneers that the auction sale would not take place and instead the bank would sell the suit premises by private treaty and he was requested to submit a written bid is quite telling- why the public auction was conducted and the plaintiff became the highest bidder then again it was cancelled is not understandable as no auction price by the highest bidder is even indicated. The Defendant's position was that in the circumstances thereof the purported sale agreement dated 20/2/2003 was executed with a view to effecting an unlawful transfer in favour of the plaintiff for a price lower than the price bid in a previous public auction and also to give the plaintiff more time to raise the required funds. This is informed by the fact that the highest bid in the public auction of 17/1/2003 by the plaintiff as averred in his plaint is not disclosed and even then it was not until 11/2/2003 when the 25% deposit of the purchase price was paid as per the letter dated 11/2/2003 at page **57** of the defendant's list of documents dated 3/5/2012 when ordinarily the same should have been paid at the fall of the hammer on the auction date of 17/1/2003. In his view, an analysis of the correspondence between the plaintiff and the Bank only begs for more questions than answers therefore reinforcing the fact that the public auction of 17/1/2003 in which the plaintiff was purportedly the highest bidder but was later cancelled and private treaty arrangement entered into had more to do with the fixing and manipulation of the auction price downwards in favour of the plaintiff at the expense of the defendant's property. To him, it is evidently clear that the purchase price of this property was predetermined and the purported auction was a smokescreen to camouflage a semblance of a non-existent auction.

149. According to the Defendant, the requisite 90 day statutory notice and the auctioneer's 45 day notification of sale was never served on him. It was submitted that in the face of glaring omissions that are irreconcilable on the face of the alleged registered post letter and in the circumstances that the defendant had put the Bank on notice that he was never served with a statutory notice, therefore shifting the burden of proof of service on the Bank, and in the absence of a document that would be full proof in terms of service of the statutory notice on the plaintiff, a process server or the officer who dispatched the said statutory letter should have been called to give evidence and clarify all the above omissions which fall short of evidence of service that ought to have been effected on the defendant. The Court was similarly urged to find that the forty five (45) day mandatory notification of sale was never served on him as no evidence was exhibited by the 1st defendant to rebut the averments by the defendant in his paragraph **18** of the defence and counterclaim denying service of the same. In the Defendant's view, in the absence of evidence of service of the statutory notice and the notification of sale, the purported auction sale therein became null and void ab initio and the prayers for cancellation of the same, should follow as a matter of course.

150. It was submitted that the public auction of 17th January, 2003 should not have proceeded because the notification of sale and statutory notice was not served on the defendant, a fact confirmed by the Bank's own advocates- 2nd last letter in the Bank's list of documents dated 29/1/2003.

151. According to the Defendant, the plaintiff's prayer for the sum of Kshs.2,890,000/= which is a special damage claim was never proved as no evidence or receipts of expenses were exhibited in support of the special damage claim neither are damages for trespass and the claim for vacant possession justified in the circumstances of the representations made herein.

152. With respect to the Defendant's damage claim for Kshs.575,000/= being damage occasioned to suit premises by the plaintiff and his caretaker's personal belongings taken away by the plaintiff, it was submitted that the same was never rebutted and should be allowed. In support of his case the Defendant relied on **Kisumu Court of Appeal Civil Appeal No. 148 of 1995 - Nyangilo Ochieng and Obel Obuom vs. Fanuel B. Ochieng Gladys Oluoch & Kenya Commercial Bank Ltd; Nairobi Court of Appeal Civil Appeal No. 155 of 2006 - Elijah Kipng'eno Arap Bii vs. Samwel Mwehia Gitau & Kenya Commercial Bank Ltd;** N**airobi Court of Appeal Civil Appeal No. 150 of 1993 - Captain Patrick Kanyagia & Another vs. Damaris Wangechi & 2 Others;** N**airobi Court of Appeal Civil Appeal No. 111 of 1986 - Mbuthia vs. Jimba Credit Finance Corporation & Another** and urged the Court to find in favour of the defendant in terms of its counterclaim and declare the sale therein as null and void *ab initio*.

153. In response to the Plaintiff's submissions the Defendant averred that the plaintiff deliberately chose to misrepresent facts in terms of the evidence adduced by the witnesses that were called to testify in this matter. According to the Defendant the authorities relied upon by the Plaintiff were distinguishable from the instant case. He therefore urged the Court to allow the defendant's counterclaim and dismiss the plaintiffs' suit.

Kenya Commercial Bank's Submissions

154. On behalf of the Bank after setting out the history of this case, it was submitted that the suit property is registered under the ***Registration of Titles Act*** (Chapter 281, Laws of Kenya) (now repealed) and is therefore the applicable law together with the ***Indian Transfer of Property Act***. The title having been transferred by a Transfer of Chargee and Registered in the name of the Plaintiff as from 18/06/2003, it was submitted that he is in this case, an innocent purchaser for value without notice and obtained good title. According to the Bank, under section 69B(2) of ***The Indian Transfer of Property Act***, the Plaintiff's title is unimpeachable and the only remedy upon proof of fraud that the Defendant would have is damages against the Bank and its auctioneers. This position is further supported by section 24 of the ***Registration of Titles Act*** and the holding of **A.B. Shah, J** in the case of **Civil Appeal No. 150 of 1993 Captain Patrick Kanyagia & another vs. Damaris Wangui & 2 Others (1993) e KLR**. The Bank also relied on section 24 of the ***Registration of Titles Act.***

155. According to the Bank, under the provisions of Section 69B (2) (c), the title acquired by the Plaintiff as a *bona fide* purchaser for value is unimpeachable as he did not either before or on transfer of the suit property have an obligation to inquire whether a case has arisen to authorize the sale, or due notice has been given or the Bank's statutory power of sale had been properly and regularly exercised and relied on **Elijah Kipng'eno Arap Bii vs. Samuel Mwehia Gitau & Another (Civil Appeal No. 155 of 2006)** and **Civil Appeal No. 150 of 1993, Captain Patrick Kanyagia & another vs. Damaris Wangechi & 2 others (1993) e KLR**.

156. It was submitted that in this matter, the Defendant had not shown the Plaintiff had any notice of the alleged irregular exercise of the statutory power of sale by the Bank as per the evidence before the Court, the Plaintiff's decision to purchase the suit property was based on advertisements for sale by public auction in the ***Daily Nation*** and on attending the auction, he was informed by the auctioneers that the public auction was cancelled and the mode of sale would be by way of private treaty. On placing a bid and being requested to improve it, it was accepted and the suit property was sold to him via an agreement of sale. To the Bank, the Plaintiff's title is also unimpeachable on the basis the Defendant lost his Right of Redemption the moment the Bank and the Plaintiff entered into a valid Agreement of Sale of the suit property and reliance was sought in **Mbuthia vs. Jimba Credit Finance Corporation & Another (1988) Civil Appeal No. 11 of 1986.**

157. To the Bank, once suit property is sold by a chargor under section 69B of the ***Indian Transfer of Property Act***, in exercise of its statutory power of sale, either by public auction or private contract, the Purchaser acquires a good title to the property. That title cannot be impeached on any grounds even that of fraud. The only remedy available to an aggrieved charge is an award of damages when the alleged fraud is proved and the Bank relied on **Danson Mbugua Njuguna v East African Building Society**

Bank Ltd Formerly Known as Akiba Bank Ltd & Another and **Charles Karathe Kiarie & 2 Others vs. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] e KLR (Civil Application Sup No. 12 of 2013)**.

158. The Bank also relied on section 2 of the ***Registration of Titles Act*** (now repealed) for definition of fraud as well as **Nancy Kahoya Amadiva vs. Expert Credit Limited & another [2015] e KLR (Civil Appeal No. 133 of 2006).** It was submitted that section 75 of the ***Registration of Titles Act*** (now repealed) preserves this Honourable Court's jurisdiction for cases of actual fraud by providing that: - "nothing contained in this Act shall take away or affect the jurisdiction of the Court on the ground of actual fraud." It was however submitted that fraud is a serious allegation that amounts to a criminal offence and that the onus (burden) of proof is on the party alleging fraud to provide evidence to the Court proving to a standard higher than is ordinarily in other civil matters, that is, beyond that of a balance of probabilities as underscored by the Court of Appeal in the case of **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR, Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd and Another [1979] KLR 76; [1976-80] 1 KLR 1168** and **Koinange & 13 Others vs. Koinange [1986] KLR 23.** It was however submitted that an analysis of the facts and evidence produced by the parties in this case as well as case law below, shows that the Defendant in bearing the burden of proof has not proved his allegations of fraud to the required standard.

159. To the Bank there was only one version of sale of suit property, that is, by way of Private Treaty and the other alleged version of sale by public auction was cancelled. The Bank relied on section 69(1) of the ***Transfer of Property Act*** 1882 of India as amended by the ***Indian Transfer of Property Act (Amendment) Act 1959***. With respect to the allegation that the balance of the purchase price was paid after the completion date it was submitted that clause 8 of the said agreement provides that the Bank had the sole discretion to extend the period for completion and payment of the balance of the purchase price, which discretion it exercised hence the fact that the balance of the purchase price was paid after the completion date does not amount to fraud a supported by the case of **Mbuthia vs. Jimba Credit Finance Corporation & Another (1998) (Civil Appeal No. 111 of 1986)** and **Bloodstock Ltd vs. Emerton [1967] 3 All ER 321.**

160. As regards the allegation that the suit property was undervalued and consequently sold at a low price, it was submitted that before the scheduled public auction, as required by law, the Bank commissioned another valuation report, which was prepared by its valuer and expert witness, **DW1- Dr. S. Ole Keriasek**. The said valuation report gave a market value of Kshs. 4,300,000/=, a forced sale value of Kshs. 3,400,000/= and a recommended reserve price of Kshs. 3,000,000/=. **DW2 - Professor George Njuguna**, the Defendant's valuer, confirmed that **Dr. S. Ole Keriasek** was his lecturer at university. It also emerged from his cross-examination that he was not commissioned to do the valuation report by or on behalf of the Bank in which it could compare prices to determine the best price for sale of suit property but was commissioned by the Defendant himself. This fact was further confirmed by **DW2, Mr. Francis Komen** in examination-in-chief, who stated that the Valuation Report by Trans roots Real Estate by **Dr. Ngugi** dated 23/10/1997 is not within the Bank's records nor did the Bank instruct him (but was instructed by the Defendant when he was still working for the Bank as the General Manager). It was submitted that from the documentary evidence produced by the Bank, **DW2 Professor George Njuguna**, was not licensed at the time of conducting the valuation and preparing the valuation report as a valuer. **DW2** was neither gazetted in The Kenya Gazette Issue of 4th July 1997 nor The Kenya Gazette Issue of 2nd August 1997(notably, the Bank's valuer was gazetted as the 53rd person in the Kenya Gazette Number 2854). In this regard, the valuation report by **DW2** is invalid, null and void as per Part III, Section 8 and 9 and Part V Section 22 the ***Valuers Act*** 1984 (Chapter 532, Laws of Kenya) that require annual publication and should not be admitted as evidence or considered by this Honourable Court.

161. Pursuant to Section 9 and 11 of the Valuer Act, only Gazette Notice (Publication) or an extract from the register is considered prima facie evidence that a person is registered as a valuer and in the absence of any person from the publication is prima facie evidence that the person is not registered as a valuer. In this regard, the letter from the registrar dated **23/10/2014** cannot be admitted as proof that **DW2** was a registered valuer. It is also questionable why **DW2** waited for so long to confirm if he was a registered valuer, seven years after the publication and in the course of prosecution of this suit. According to the

Bank, the letter dated 23/10/2014 by the Registrar, Valuers Registration Board confirms annual subscriptions for 1992-1997 were received by the Board on **27/10/1997** yet the valuation by **DW2**is dated **23/10/1997**meaning **Professor George Njuguna** did not have an annual practicing certificate for 1997.

162. The Certificate that was issued on 14/05/1997 referred to by the Defendant and **DW2** is not an annual practicing certificate but an interim one to confirm payment of all subscription arrears usually at Kshs. 500/= per annum and this is why it bore the abbreviations U.F.N (Until Further notice). However, for annual practice he should have paid Kshs. 2,500/= so that he is issued with one for 1997 and thereafter gazetted according to law. To also note is that although **DW2** paid the annual subscription on **27/10/1997**, the interim certificate is backdated to 14/5/1997 which is questionable and illegal if not suspect that it was issued to try and justify the valuation. Secondly, the payment made on **27/10/1997** explains why **DW2** was not gazetted in the Kenya Gazette Notice Number 3436 dated **4/07/1997** and Kenya Gazette Notice Number. 4355 dated **15/08/1997**.

163. To the Bank, **DW3-Dr. Joseph N.K. Arap Ng'ok** witness statement (documentary evidence) is by a pure economist as opposed to a valuation surveyor (valuer) or land economist. It was submitted that **Dr. S. Ole Keriasek's** valuation used the comparison mode of valuation which entails use of empirical data hence a more realistic valuation. The Bank relied on **Peter Kamau Ilia vs. Barclays Bank of Kenya & manor HCCC No. 719 of 2003 eKLR.**

164. To the Bank as a matter of principle, sale below the real value is not necessarily an act of fraud and if there is fraud, relief must be sought promptly. Reliance was placed on **Mbuthia vs. Jimba Credit Finance Corporation & Another (Civil Appeal No. 111 of 1986).**

165. As to the issue whether the Defendant was neither issued with statutory notice of sale nor was a notification of sale served on him as required by law, it was submitted that proper statutory notice was served upon him via registered post and ordinary and no action was taken by him. The Bank through its advocates served the Defendant with a Statutory Notice dated 20/11/2001 notifying him that a sum of Kshs. 187,855,378/= (inclusive of arrears of principal and interest) was outstanding and that it had the option to exercise its statutory power of sale either after expiry of three (3) months from date of service of statutory notice or if the interest in arrears is unpaid for two (2) months without further notice to him (meaning there was no need to serve another statutory notice as the notice was final). This position is further confirmed by Section 69 A (1) of the ***Indian Transfer Property Act***.

166. It was submitted that as the suit property is registered under the ***Registration of Titles Act*** Court should not nullify the sale as the proper remedy for the Defendant lies in damages if allegations of fraud are proved. As the Defendant has failed in to prove the allegations of fraud to the required standard, he can neither claim general damages against the Bank nor the auctioneers for non-service of notification of sale (as service of notification of sale does not apply to sale by way of private treaty). Secondly, it is in the interest of justice that the prayer of nullification of sale is not granted by this Honourable Court. If the sale is nullified it will mainly prejudice the Plaintiff and the Defendant and the Bank will not be prejudiced as it will restore the status quo before the sale, registering the charges in its favour, amounting owing and interest thereof accruing as to date of judgment and giving it another opportunity to sale in the event the Defendant does not pay, a situation the ***Registration of Titles Act*** was trying to avoid by providing for damages as a remedy as opposed to nullification of sale. The Bank relied on **Mbuthia vs. Jimba Credit Finance & Another (1988 KLR at page 30)** in support.

167. Be as it may, even under the Registered Land Act, for the remedy of setting aside a sale to be effected by the Court, it must be sought promptly before registration and involvement of innocent purchasers and once the mortgagor losses he his title, it makes it more difficult to set aside a sale. This position was held by Justice Platt in the Court of Appeal Case of **Mbuthia vs. Jimba Credit Finance Corporation &Another (1988) Civil Appeal No. 11 of 1986.** On whether the plaintiff is entitled to damages for trespass until possession is given up, it was submitted that the Defendant's refusal to grant possession of the suit property makes him a trespasser against whom damages should accrue and relied on **Peter Kamau Ikigu vs. Barclays of Kenya & Another [2013] eKLR**. According to the Bank the correct and reasonable measure of damages would be loss in rental income. The valuer (**PW-2's**) evidence place

the loss of rental income at **Kshs. 3,985,000/=** as at February 2012. This evidence was uncontroverted and accepted by all parties. Moreover, the valuer assessed the monthly rental income at Kshs. 57,500/=. To the Bank, the Defendant's arguments that lost rental income cannot be consideration because the property has no tenant, the construction of building is not completed and that there is no evidence that the Plaintiff intended to make rental arrangements are refuted by the fact that photographs of the suit property attached to the documentary evidence prove that the construction is complete. Secondly, the Plaintiff's intention can be inferred from his pleadings that he had not enjoyed a return on his investments and requested for damages in form mesne profits (lost rental income).

168. It was submitted that the Defendant has failed to defend the case filed against him by Plaintiff and has failed to prove his Counterclaim against the Defendants therein (the Bank and the Plaintiff). In this regard, the Bank prayed that this Honourable Court enters judgments as prayed by the Plaintiff in the main suit and dismisses the Counterclaim with costs being awarded to the Defendants therein (the Bank and the Plaintiff).

Issues

167. Having considered the foregoing, it is my view that the following issues fall for determination:

1. Whether the statutory power of sale as exercised by the Bank was lawful or whether it was tainted with deceit and/or fraud?

2. Whether the variation of the credit contract was wrongful and if it affected the Bank's Statutory Power of Sale.

3. Whether the Plaintiff is entitled to vacant possession?

4. Whether the Plaintiff is entitled to damages for Trespass until Possession is given up, and if so how much?

5. Whether the claim in the Counterclaim can stand?

6. Who should bear the cost of the case?

Determinations

170. Having considered the pleadings, the evidence adduced, the issues and the submissions made as well as the authorities relied upon by the parties herein, this is the view I form of the matter.

171. With respect to the 1st issue, whether the statutory power of sale as exercised by the Bank was lawful or whether it was tainted with deceit and/or fraud, it is clear that the Defendant's case was hinged on the following allegations:

(i) There were several versions of the sale of suit property to the Plaintiff.

(ii) The balance of the purchase price was paid after the completion date.

(iii) The suit property was undervalued consequently sold at a low price.

(iv) The Defendant was neither issued with a statutory notice of sale nor was a notification of sale served on him as required by law.

172. This issue calls for an investigation as to what constitutes "fraud" under the relevant Act, the ***Indian Transfer of Property Act***. Section 2, of the ***Registration of Titles Act*** (RTA) which defines "fraud" as including "*a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats that registration*".

173. From the said definition it is clear that knowledge on the part of the party charged with commission of fraud as to the existence of the interest by the person being deprived of the interest in the property is a prerequisite for the purposes of fraud. Further the action of that person must be intended to defeat that particular interest. In this case therefore the burden is upon the Defendant to prove that both the Plaintiff and the Bank had knowledge of the Defendant's interest in the suit property and that they both intended to defeat that interest unlawfully. This view is buttressed by the provisions of section 23 of the ***RTA*** which provides that a certificate of title issued by a registrar is conclusive proof that the person named therein is the 'absolute and indefeasible owner' whose title is not 'subject to challenge except on grounds of fraud and misrepresentation to which he is proven to be a party'.

174. Therefore to defeat the registered interest of the Plaintiff in the suit land, the Defendant must show that the registration of the title to the suit land in the name of the Plaintiff was as a result of a fraud or misrepresentation to which the Plaintiff was a party. My view is supported by the holding in **Jandu vs. Kirpal & Another (1975) EA 225**), at pg. 231 in which the elements of fraud are outlined as a proven knowledge, the existence of an unregistered interest and knowingly and wrongfully defeats. I also agree with the learned view of the author of ***Black's Law Dictionary*** **1990** who defines fraud as:

> ***"An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right; a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal inquiry; anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture; fraud comprises all acts, omissions, and concealments involving a branch of legal or equitable duty and resulting in damage to another."***

175. It is however clear that where actual fraud is proved the Court has the power to nullify a sale. This must be so because section 75 of the ***RTA*** that preserves the court's jurisdiction for cases of 'actual fraud' by providing that:

> ***Nothing contained in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud.***

176. With respect to the issue whether there were several versions of the sale of suit property to the Plaintiff, it is clear that the transfer of the suit property by the Bank to the Plaintiff was based on private treaty and not on auction sale. That the Bank was entitled to resort to the sale by private treaty is clearly provided under section 69(1) of the ***Transfer of Property Act*** 1882 of India as amended by the ***Indian Transfer of Property Act*** (Amendment)Act 1959 which states as hereunder:

> ***A*** **mortgagee**, ***or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall by virtue of this Act and without intervention of the Court, have power when the mortgage money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof either subject to prior encumbrances or not, and together or in costs, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgage thinks fit, with power to vary any contractual sale, and to buy it at an auction, or to rescind any contractual sale, and to resell, without being answerable for any loss occasioned thereby;***
>
> ***The power of sale aforesaid is in the Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act, the mortgage money shall be deemed to become due whenever either the day fixed for repayment thereof, or paid thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money or part thereof, immediately due and payable***.

177. It is on record that the auction was stopped by a Court order hence the auction could not proceed to its finalisation. Accordingly the only version of the sale that can be investigated by this Court is the sale by private treaty. It follows that the issue whether there were several versions of the sale must be answered in the negative.

178. As to whether the balance of the purchase price was paid after the completion date, it is clear from the sale agreement that the Bank could extend the time for completion. I associate myself with the position adopted in **Bloodstock Ltd vs. Emerton [1967] 3 All ER 321 page 329** where it was opined that:

> **"even if time is of the essence for completion of the contract, which includes payment of the price, late payment would not matter…it is still the case that the equity of redemption is extinguished when a binding contract of sale has been entered into before completion …"**

179. It is further my view that the mere fact that the purchase price was not paid within the agreed time, even if true would not amount to fraud since the party who ought to be aggrieved by the failure to pay the purchase price should to be the Bank as opposed to the chargor. It is in this light that I associate myself with the opinion of **Platt, JA** in **Mbuthia vs. Jimba Credit Finance & Another [1988] KLR at pg. 30** that:

> **'… one fact that must not be lost sight of is, notwithstanding the parties,…the real issue of 'nullification is being fought between the Plaintiff as purchaser and the Defendant, if the sale is held as defective, the bank is entitled to re-advertise the property, the only loser will be the Plaintiff. Equity is designed to a large measure to protect a bonafide purchaser for value. A description which the Plaintiff in this case fits.**

180. This position is in line with the provisions of section 69B(2) of the ***Indian Transfer of Property Act*** which provides as follows:

> ***where transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the grounds-***
>
> ***a) that no case has arisen to authorize the sale; or***
>
> ***b) that due notice was not given; or***
>
> ***c) 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 authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.***

181. In my view the failure to pay the purchase price particularly where there is a provision for extension of time cannot amount to fraud. That omission in my view amounts to impropriety or irregularity in the exercise of the sale which does not necessarily nullify the sale. It is however my view that actual fraud does not fall within the definition of impropriety or irregularity for the purposes of the aforesaid section. In the case of the latter section 24 of the ***Registration of Titles Act*** which provides as follows:-

> ***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 fraud, error or***

misdescription.

182. When it comes to actual fraud it is my view that what the above section provides is that the person suffering loss may in lieu of applying for nullification of a sale apply for damages.

183. It is in this respect that I understand the holding in **Mbuthia vs. Jimba Credit Finance Corporation & Another (1988) Civil Appeal No.111 of 1986** where **Apaloo JA** in dissenting stated at page 21 that *"…the law is settled that the equity of redemption is lost on the completion of a valid agreement for a valid sale*." In my view a sale that can be nullified by law cannot be termed as a valid sale. Accordingly, where actual fraud is proved on the part of the registered proprietor, it cannot be successfully argued that such a sale cannot be nullified as such a sale is legally invalid. It is in this light that I understand the holding by the Court of Appeal in **Nyagilo Ochieng & Another vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995** where it was held that:

> **"In our view a sale that is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land so sold. It is therefore clear that the second respondent did not acquire proper titles to the suit properties. Her remedy is against the bank primarily to obtain a refund of the consideration paid."**

184. It is therefore my view and I hereby hold that nothing turns upon the allegation that balance of the purchase price was paid after the completion date.

185. That then leads me to the issue whether the suit property was undervalued and consequently sold at a low price. This Court in **Peter Kamau Ikigu vs. Barclays Bank of Kenya & Manor HCCC No. 719 of 2003 [2013] eKLR** set out the general law on this subject when it expressed itself as follows:

> **"Valuation is a matter of opinion hence it is prudent that evidence touching on the valuation of properties be based on some empirical evidence or data in the absence of which the standard expected cannot be met. Whereas the mortgagee is expected to exercise the power of sale in a prudent way, with due regard to the interests of the mortgagor on the surplus sale moneys, he is not a trustee for the mortgagor as regards the exercise of the power of sale and has his own interest to consider as well as the mortgagor, and provided he keeps within the terms of the power, exercises the power bona fide for the purposes of realising the security and takes reasonable precautions to secure a proper price the Court will not interfere, nor will it inquire whether he was actuated by any further motive. A mortgagee is entitled to sell at a price just sufficient to cover the amount due to him provided the amount is fixed with regard to the value of the property."**

186. However it was appreciated by **Masime, JA** in **Mbuthia vs. Jimba Credit Finance Corporation & Another (Civil Appeal No. 111 of 1986),** while referring to *Fisher and Lightwood on Mortgages*, 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. In other words, a sale may be so low as to be evidence of fraud. This however is not actual fraud but fraud inferred from the circumstances of the case. Accordingly, even if fraud can be inferred based on the fact that the suit property was sold at an undervalue, that does not warrant the nullification of the sale though it may be a ground for awarding damages.

187. With respect to the expert evidence, with due respect this Court does not attach much weight to the valuation report of **Professor George Njuguna Ngugi.** From the totality of the evidence on record it is clear that he did not possess a legally recognised practising certificate at the time of his valuation of the suit property. Section 8 of the ***Valuers Act*** provides:

> ***(1) The registrar shall cause to be published in the Gazette, as soon as may be practicable after entry in the register, the name, address and qualification of each registered valuer and, subject to the directions of the Board, he may cause to be so published any amendments to the register.***

(2) The registrar shall cause to be published in the Gazette at the beginning of each year a list containing the names, addresses and qualifications of all registered valuers then appearing on the register.

188. Section 9 of the same Act provides:

Publication under section 8 shall be prima facie evidence that the persons named therein are registered valuers and the deletion from the register of the name of any person notified by the publication, or the absence of the name of any person from the publication, shall be prima facie evidence that the person is not registered.

189. Whereas such evidence may be rebuttable, it is my view that the same cannot be rebutted by a letter from the Registrar, Valuers Registration Board. In my view such *prima facie* evidence may only be rebutted by the production of the certificate itself. Similarly a person may resort to section 11(1) of the said Act which provides that:

In any legal proceedings a document purporting to be a copy of, or an extract from the register or of or from any document kept or published by the registrar, shall be admissible as prima facie evidence of the contents of the register or document.

190. In my view a letter purporting to be from the Registrar is not the same thing as a copy of or an extract of a document kept by or published by the Registrar. According to the evidence of **Professor George Njuguna Ngugi,** he had not paid for the years 1992 to 1997 since he was out of the country for his doctorate and came back around 1997 and his subscription was received on 27th October, 1997. He however issued the valuation report on 23rd October, 1997. His subscription was received during the process of compiling the report. In his evidence the difference was only 3 days. In effect at the time **Professor George Njuguna Ngugi** issued his valuation report he had no valid practising certificate. Whereas he could testify based on his experience, his valuation report had very little evidential value. However, the mere fact that his report had little evidentiary value does not diminish the weight of his evidence given on oath. This must be so due to the fact that sections 13(1) and 20 of the ***Valuers Act*** provide as follows:

13. (1) Upon application being made to the Board in the prescribed form by a person claiming to be qualified under section 12 and upon payment of the prescribed fee the Board shall consider the application and if it is satisfied that the person is so qualified it shall accept that person for registration and shall direct the registrar to enter the name of the person on the register.

20. Every person whose name has been entered on the register shall, so long as his name remains on the register, be entitled to adopt and use the title "Registered Valuer" and such contraction thereof as the Board may approve.

191. From the record it is clear that though **Professor George Njuguna Ngugi** had not been issued with the practising certificate for the relevant year, his name had been restored to the register and he was therefore entitled to use the title "Registered valuer". He could therefore competently give an opinion based on his experience though he could not practice as a valuer and despite the inadmissibility of his valuation report. As to who actually instructed him, it is not in doubt that he was instructed by the Defendant who averred that he was doing so on behalf of the Bank. That he was the General Manager of the Bank is not in doubt. It has not been contended that he was not authorised to give such instructions. Whereas eyebrows may be raised on the propriety of the borrower instructing a valuer to undertake a valuation of his property, the Bank has not produced any other valuation report commissioned on its behalf on the basis of which it advanced the subject facilities to the Defendant. In the absence of any other valuation report, this Court has no option but to rely on the testimony of **Professor George Njuguna Ngugi** based on the Bank's commission.

192. From the evidence the suit property was valued in 1997 at Kshs 7.6 million by **Professor George Njuguna Ngugi**. In 2012, **Herbert Mwangi Kamau** and **Rajiv Gujral** of **R.R. Oswald** arrived at a

value of **Kshs.32,500,000/=** for the same property. However in the year 2002 **Dr Clement Sironka Ole Keriasek** found that the value of the property had depreciated to Kshs.4.3 million. Although this depreciation was contributed to the fact that the year was an election year and also due to the Goldenberg scandal, none of these explanations, which in my view were crucial, considering the fact that the depreciation was unusual, were never mentioned in the report of **Dr Keriasek.** As this Court held in **Zakayo Ndungu Ngugi vs. National Bank of Kenya Limited & Another Nairobi HCCC No. 219 of 2004 (unreported)**.

> **"With respect to whether the suit property was sold at an undervalue, it is not in dispute that in the year 1994, the suit property was valued at Kshs. 485,000/-. Ordinarily one would have expected that by the time of the sale of the suit property in the year 2003 the value would appreciate. It is therefore surprising that in the year 2003 the same property was being valued at Kshs. 400,000/- unless the original valuation was not genuine…Whereas, the defendant's valuation is not of much help without explaining the depreciation in the value of the property, the plaintiff's evidence was not of much help either because the valuation report produced by the plaintiff in this case was in respect of valuation done on 27th March 2010. It would have been more helpful if the valuation was conducted at the time of the sale or soon thereafter. Accordingly, I am unable to find one way or the other on the issue."**

193. Dr Keriasek did not get access to the suit property. He relied on evidence of third parties and based thereon made some erroneous assumptions of fact such as that the suit property is a three (3) bedroomed house when the truth of the matter was that the house is four (4) bedroomed as confirmed by **Prof. George Njuguna Ngugi** of **Grassroots Valuers** and **Mr**. **Herbert Mwangi Kamau** of **R.R. Oswald**. With due respect to **Dr Keriasek**, I find his valuation report though admissible, unreliable.

194. In my view the testimony of **Prof. George Njuguna Ngugi** of **Grassroots Valuers** and the report by **Mr**. **Herbert Mwangi Kamau** of **R.R. Oswald** taken together with the opinion of **Dr. Joseph N.K. Arap Ng'ok** seem to corroborate each other. Therefore doing the best in the circumstances, I do not see why the open market value could not have been Kshs 7.6 million at the very least all factors being considered.

195. It is therefore my view that there was an undervalue of the suit property and hence there was a misrepresentation by the Bank on that score.

196. The next issue is whether the Defendant was served with a statutory notice and a notification of sale. The Bank has exhibited evidence that the notices were issued. The Defendant himself admitted that the address appearing on the face of the postage was his correct address. He however contended that during a considerable period of time he did not check his post. In those circumstances the Bank cannot be faulted. In my view a party who for some reason is unable to access his postal correspondences ought to notify the Bank and provide alternative address otherwise the Bank would be perfectly entitled to resort to the last known or provided address by the borrower.

197. The next issue for determination is whether the variation of the credit contract was wrongful and if it affected the Bank's Statutory Power of Sale. The issue of variation of the credit contract, it is on all fours, is the subject of another case being HCCC No.324 of 2000 in which the Defendant had sued the Bank and claimed damages for alleged wrongful dismissal which suit was pending hearing and determination though the Defendant's applications for injunction against the sale of the subject property was dismissed by both the High Court and the Court of Appeal. To make a finding thereon in these proceedings places this Court at the risk of prejudicing the outcome of the said suit. Accordingly I will not delve into the matter.

198. That brings me to the issue of whether the Plaintiff is entitled to vacant possession. In **Peter Kamau Ikigu vs. Barclays of Kenya & Another [2013] eKLR** it was held that:

> **"a mortgagor against whom power of sale has been enforced loses any enforceable equitable or legal right and becomes a trespasser."**

199. In the same case this Court held that the 2nd defendant in that case (who was the purchaser of the suit property) was entitled to vacant possession of the suit property without an order, upon the sale and transfer of the property to him by the 1st defendant (the bank.). **W.V.H. Rogers, MA** in his book ***Winfield and Jolowicz on Tort*** similarly states at page 363 that:

> **"…this fiction, known as trespass by relation, has the result that he can sue for acts of trespass committed while he was actually out of possession and it also provides the foundation for the claim in respect of 'mesne profits" that is, the claim for the damages suffered by a person as a result of having been kept out of the possession of his land. The Author on pg, 375 further states that…a plaintiff in an action for recovery of land to join with it a claim for mense profits, and if he does so it is unnecessary for him to have entered the land before he sues.**

200. In this case I have fund that there is no evidence of actual fraud. Pursuant to section 69B of the ITPA as read with section 24 of the RTA, the only recourse available to the Defendant was a suit for damages and not to cling to possession of the suit property. It was contended that the Defendant slept on his rights and therefore undeserving of such remedy. I agree with the views of **Pumfrey J** in **Corbett vs. Halifax PLC at page 196** that:

> **"…where a market is rising as is the case here, it seems to me that the claimant (read Defendant in original action-Plaintiff in the counterclaim) has a particular duty to press on with the action so that the Defendant (read plaintiff in main suit) is not prejudiced in the housing market more than necessary. In that case, because of the delay in prosecuting the claim by the mortgagor, damages were held to be the proper remedy."**

201. I also adopt the position of the Privy Council in **Tse Kwong Lam vs. Wong Chit Sen & Others (The Weekly Law reports Vol. 3 at Pg. 1349** where it was found that:

> **"… the borrower was by reason of his own inexcusable delay in prosecuting the counterclaim not entitled to have the sale set aside, but was entitled to damages'."**

202. That a gross undervalue of the property may be inference of fraud and that a suit in respect thereof must be brought promptly was alluded to in **Captain Patrick Kanyagia & Another vs. Damaris Wangeci & 2 Others Civil Appeal No. 150 of 1993** where it was held that:

> **"It has not been suggested that the price bid by the appellants is so far below the real value of the suit land as to taint its sale at the public auction with fraud. The bank may like Shylock, have insisted on its pound of flesh but it cannot be said that it acted fraudulently. In my view S.77 of Registered Land Act which permits a sale to be set aside, if there is fraud and provided relief is sought promptly, which was not so in this case, would not therefore apply even if, which is not the case here, the suit land had not been transferred and registered in the names of the appellants."**

203. Similarly in **Nairobi Court Of Appeal Civil Appeal No. 111 of 1986 - Mbuthia vs Jimba Credit Finance Corporation & Another** the Court expressed itself as hereunder:

> **"It would seem therefore that the issue for trial will be whether the suit premises was sold for such an under- value, as would entitle the court to set the sale aside, and hence prevent the transfer and registration of the land in the name of the second defendant. That would depend on the terms of sec. 77 of the Registration Land Act, (cap 300) which provides that the mortgagee is bound to act in good faith, and have regard to the interest of the mortgagor. What is meant by having "regard to the interest of the mortgagor?" there is similar legislations in England (see section 101 of the Law of Property Act (1925))…In *Halsbury's Laws of England*, 4th ed. Vol. 32 para. 276 it is stated:**
>
> **If the mortgager seeks relief promptly a sale will be set aside if there is fraud or if the price is**

so low as to be in itself evidence of fraud.

When the plaintiff alleges that the sale was unfair, no more. The issue arising from the plaint therefore is whether the sale was unfair in the context of it being a fraud at least impliedly so, from the allegedly low price itself…So far as mortgagees are concerned the law is set out in *Cuckmere Brick Co. Ltd vs Mutual Finance Ltd (1972) 2 ALL E.R. 633, (1971) Ch.939*. If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible…There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care."

204. Those decisions restate the correct legal position. I am however unable to fault the Defendant for not prosecuting his case during the pendency of the appeal. In my view, it would not have been sensible to pursue the counterclaim in light of the summary judgement entered against the Defendant when the appeal was still pending. To that extent the Defendant was a trespasser. Accordingly the issue whether the plaintiff is entitled to damages for trespass is in the affirmative.

205. That leads to the issue of how much the Plaintiff is entitled to. Apart from the evidence of **Herbert Mwangi Kamau**, there was no other expert witness called to either contradict or support the same. In his view, the total sum for the period was Kshs 3,955,000/=. Though where there is concrete evidence of the loss certainly suffered by the Plaintiff the Court ought to award the same, in an award of damages which are at large in this case, the Court ought to take into account the imponderables. It is therefore my view that in the circumstances of this Court it would be proper to go by the amount quoted rather than to award damages till possession is given. The status of opinion evidence was dealt with in **Shah and Another vs. Shah and Others [2003] 1 EA 290** where the learned Judge expressed himself as follows:

"One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct…The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field…However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony…The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so…If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the court…Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

206. The Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139** held:

"Like other sciences, medicine is not an exact science and that is why expert medical opinion is no different from other expert opinions and such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

207. However, as was appreciated in **Institute of the Blessed Virgin Mary, Kenya (Registered**

Trustee) vs. The Commissioner of Lands [1980] KLR 5; [1976-80] 1 KLR 1493, "valuation is not an exact science; otherwise at least two experts of the appellants would have arrived at the same figure." This view given impetus by the decision of the East African Court of Appeal in **The Collector vs. Kassam Shivji Bhimji and Two Others Civil Appeals Nos. 58 and 60 of 1959 [1959] EA 1063** when it held that:

> **"It is no doubt true that the valuation of immovable property is not an exact science and the very best efforts of an expert or a court to fix a market value for a property can never amount to much more than a *quasi* scientific guess, which the court should in the case of compulsory acquisition temper with liberally. The judge ought to be liberal in the sense that he should not be too meticulous or pedantic in dealing with the evidence."**

208. However, when all is said and done, as was held by the Court of Appeal in **Juliet Karisa vs. Joseph Barawa & Another Civil Appeal No. 108 of 1988,** expert evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.

209. In this case I do not have any firm ground on the basis of which I can fault the evidence of **Herbert Mwangi Kamau.** Accordingly, I find that the Plaintiff ought to have been entitled to Kshs 3,955,000/=. I have however found that the suit property was sold at a grossly undervalued price. Accordingly to award the Defendant that sum of money would amount to an unjust enrichment and that would be inequitable. In my view the Defendant is only entitled to the said sum less the difference between the Sum of Kshs 3.8 million which he ought to have paid had the suit property been properly valued. It follows that the Plaintiff is entitled to vacant possession of the suit property plus Kshs 155,000.00. from the Defendant.

210. That brings me to the issue whether the claim in the Counterclaim can stand. I have already found that the Defendant's property was sold at an undervalue. The suit property ought to have been sold for at least 7.6 million. It was instead sold at Kshs 3.8 million. Accordingly, the Defendant is entitled to Kshs 3,800,000.00. being the difference from the Bank.

211. As regards the costs of the suit, none of the parties to the suit was completely blameless. Whereas the Plaintiff was not guilty of fraud, the price he paid for the suit property was clearly way below what ought to have been paid. With respect to the Defendant, he was clearly in default at least in respect of the period following the termination of his employment. As regards the Bank, it relied on a valuation report that was clearly unsatisfactory.

212. In the foregoing premises the order which commends itself to me is that there should be no order as to costs.

Order

213. Accordingly I make the following orders:

> **1. The Defendant is hereby directed to give vacant possession of the suit premises the Plaintiff.**
>
> **2. The Defendant to pay the Plaintiff Kshs 155,000.00.**
>
> **3. The Bank to pay the Defendant Kshs 3,800,000.00**
>
> **4. There shall be no order as to costs.**

206. It is so ordered.

Dated at Nairobi this 12th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ngugi for the Plaintiff

Mr Sumba for the Defendant

Miss Gatuhi for Mr Njagi for the Bank

CA Mwangi