



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

**CIVIL CASE NO. 2533 OF 1994**

**MARGARET ANYANGO T/A JABALO GARDENS LTD ..... PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

**1. Background**

The Plaintiff commenced the suit herein vide a Plaint dated 15<sup>th</sup> July, 1994 against the National Bank of Kenya Limited as the 1<sup>st</sup> Defendant, Hassan Ahmed Duale as the 2<sup>nd</sup> Defendant and Ideal Auctioneers as the 3<sup>rd</sup> Defendant. Subsequently, the Plaintiff amended her Plaint in 1997 dropping her claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and a further amendment on 9<sup>th</sup> October, 2014. It is the Plaintiff's contention that the Defendant illegally and fraudulently colluded with the purchaser, the valuer and the auctioneers to sell her property at a low price.

In her further amended Plaint, the Plaintiff seeks inter alia;-

1. ***A declaration that the sale of the said premises was fraudulent, unlawful and illegal;***
2. ***Pursuant to prayer (1) above, the Plaintiff seeks for compensation on account of the alleged loss of her prime property;***
3. ***General damages.***
4. ***Mesne profits for the loss of income from the date the property was sold.***

The Defendant on the other hand contends that there was no such collusion and denies the entire allegations of fraud. It is the Defendant's case that the Plaintiff defaulted in servicing her loan, the Defendant diligently exercised its statutory power of sale and as such, the Plaintiffs claim is misguided.

2. **The Plaintiff filed its Bundle of Documents dated 4<sup>th</sup> May 2014, and was her sole witness. The witness testified that she was a Director in Jabalo Gardens Limited, which is a registered Private limited liability Company. The Plaintiff testified that she was the registered proprietor of a parcel of land known as NAIROBI/BLOCK 72/224 situate in NGEI ESTATE PHASE II which is registered under the Registered Land Act, Cap 300 (*now repealed*) Laws of Kenya and comprises of a residential premises. Sometime in the year 1990, she charged the aforesaid property to secure a loan of Ksh.500,000/= from National Bank of Kenya Ltd., the Defendant. Prior to the mortgage facility being approved, a valuation of the property was done by City Valuers at the instruction of**

- National Bank of Kenya which put the value of the property at Ksh.2,600,000/=. The loan was secured by a Charge dated 10<sup>th</sup> September, 1990 and the money was advanced to Jabalo Gardens Limited. The Plaintiff took out a Further Charge dated 26<sup>th</sup> April, 2004 with the same bank for a further Ksh.250,000, which was also advanced to Jabalo Gardens Ltd. The said Company, Jabalo Gardens Ltd., experienced financial problems and therefore had difficulties in repaying the loan.
3. The Plaintiff received a letter on behalf of Jabalo Gardens Ltd. from the Defendant informing the Plaintiff that she was required to repay Ksh.400,000/=. Immediately after receiving the said letter the Plaintiff went to see the Defendant's manager, Mr. Mureithi on the 6<sup>th</sup> April, 1994 at his offices and informed him that the company was having financial difficulties. During the meeting, Mr. Mureithi assured the Plaintiff that no action would be taken and he even agreed to give the Plaintiff till the end of August 1994 to pay a substantial amount of the loan.

On the 30<sup>th</sup> June, 1994, the Plaintiff testified that she was surprised and shocked to learn that the property had been sold on the 20<sup>th</sup> May, 1994 by Public Auction. The Plaintiff received this information from her agent Priscilla Ndunge, who used to collect rent on her behalf from the tenants occupying the suit premises. Priscilla Ndunge learnt of the sale from the tenant when she had gone to collect the rent. The property was sold to Hassan Ahmed Duale at a price of Ksh.1,300,000, allegedly being the value of the property as per the Valuation Report prepared by Messrs Mwaka Musau Consultants.

4. The Plaintiff testified that the Public Auction was done without giving her or Jabalo Gardens Ltd any Statutory Notice of the intended Sale as is required by law. It was the Plaintiff's case that the Defendant colluded with the buyer, their valuers and the auctioneers in making sure she lost the suit property at a throw away price of Ksh.1,300,000/= whereas it is common knowledge that similar houses without any renovations at all were commanding a sale price of over Ksh.2,000,000 at the time of the sale. The Plaintiff testified that the suit premises has an extension of an underground maisonette of one bedroom and a big sitting room cum dining room, kitchen, bathroom and toilet and a servant quarters.
5. On 20<sup>th</sup> July, 1994 the Plaintiff instructed Kinyua Koech Valuers & Estate Agents to value the property for court purposes. They valued the suit premises at an estimated Ksh.2,300,000/= which the Plaintiff testified was well above the price at which the suit premises was sold. The Plaintiff testified that the Valuation by Mwaka Musau Consultants was a pre-arranged bargain between the Defendant and the Valuer Mwaka Musau Consultants to undervalue the suit premises and dispose of the same to Hassan Ahmed Duale, who the Plaintiff said is a prominent client of the Defendant. She testified that she and her four children stand to suffer irreparable loss if the transfer of the suit premises to Hassan Ahmed Duale is not cancelled as the suit premises is the only asset she and her children have.
6. PW2 was Mr. BILL NDUNGU, who testified that he is a Valuer and that he had practised for 7 years in the firm of Kinyua Koech Ltd. He testified that he valued the suit properly on 1<sup>st</sup> September 2014 and estimated the value of the property as Shs.16.0 Million. He prepared a Valuation Report. In the report he stated that the approximate rental income is about Shs.65,000/= plus Shs.15,000/= for the guest wing which was detached from the main house. The witness testified that the same property was on 21<sup>st</sup> July 1994 valued by their firm at Shs.2,300,000/=. It had also been valued by the Defendant on 12<sup>th</sup> April 1994 at Shs.1,300,000/=. The witness said that he could not explain why almost at the same time there was such a big variance in valuation. He believed his current valuation of Shs.16,000,000/= was correct. On cross-examination the witness testified that a similar house in the same area goes at Shs.20,000,000/= for a new house.
7. On their part the Defendant called one witness. DW1 – Paul Chelanga, testified he was familiar with this matter as a recovery and records manager with the Defendant. He testified that the Plaintiff was given a notice before her property was sold. He referred the court to page 22 of the Defendants Bundle dated 31<sup>st</sup> October 2013, where there is a demand letter addressed to the Plaintiff as director of Jabalo Gardens. The witness testified that the whole suit revolves around a security property sold by the bank to recover a loan given to the Plaintiff. The auctioneers also issued notifications and advertised property three times but there was no response. The witness referred court to page 21 – 25 of Defendants Bundle where there are copies of demand notice,

Statutory Notice and the Plaintiff's response where she even states that income from the house was Shs.6,000/= as opposed to Shs.32,000/= in her pleadings and Shs.36,000/= in her testimony. The notifications were vide registered post (page 43) using two addresses, one is vide P.O. Box 189 Siaya, while the other is Box 22131 Nairobi. The witness denied any collusion to sell the Plaintiff's property. According to the witness the Plaintiff received the said notices and responded thereto vide her letter dated 28<sup>th</sup> January 1984 at page 25. Although the letter does not refer to the Statutory Notice, the debtor indicates she received the same and was responding to the same. The Statutory Notice was not vague.

DW1 testified that the bank carried out valuation of the property before the sale – (See page 30 – 37 of the Defendants Bundle) on 12<sup>th</sup> April 1994. The value was Shs.1,300,000/= (market value) and Shs.1,100,000/= (forced sale value). The valuer was M/s Mwake Musau Consultants. The witness on cross-examination agreed that the Plaintiff undertook a valuation of the suit property 3 months after the property was sold. It was done by m/s Kinyua Koech Ltd at Shs.2,300,000/=. Another valuation was by City Valuers, who were also in the panel of the bank as Valuers. They returned a value of Shs.2,600,000/= on 24<sup>th</sup> August 1990. The witness testified that the bank sold the suit property on 20<sup>th</sup> May 1994 at Shs.1,300,000/= and received the money, but did not show the movement of the money in the debtor's account.

### SUBMISSIONS

8. Parties filed submissions. The Plaintiff's Counsel, Mr. Machira, submitted that the court should note that the defence was not amended after the plaint was amended, and that therefore the amended pleading in the plaint are not controverted. The Plaintiff further submitted that the suit property was sold on 20<sup>th</sup> May 1994 without service of the Mandatory Statutory Notice which is clearly demonstrated by the Defendants own documents at page 23 of their documents vide a letter dated 18<sup>th</sup> October 1993. The Notice must state "from the date the Notice is served" and Not "from the date of the letter". The Plaintiff counsel further submitted that the Notice must state the consequences for failure to pay the amount claimed i.e that the property would be sold by public auction or private treaty, whichever is applicable. In this case the notice merely stated that legal proceedings shall be commenced. Counsel submitted that legal proceeding mean going to court, not selling property. Counsel submitted that the property was sold without serving the Plaintiff without mandatory Statutory Notice. Citing the case of **Trust Bank Limited – Vs – Ercas Chemicals Ltd (2000) 2 EA 550 CAK**, counsel submitted that without service of mandatory statutory notice the sale was a nullity. Therefore the Plaintiff is entitled to prayers contained in the plaint including compensation for loss of the property whose value is Shs.16,000,000/= according to the valuation of Kinyua Koech Ltd. The valuation was never challenged by any other valuation. **Mr. Machira also submitted that the property was sold at gross under value. In 1990 its value was Shs.2,600,000/= yet in 1994 it was sold at Shs.1,300,000/=. Counsel submitted that the valuation which supported the sale at Shs.1,300,000/= was a fraud. There was also breach of duty of care by the Defendant. The Defendant's conduct viewed in totality shows breach of duty of care, fraud and intention to deny the Plaintiff of her property. Counsel pointed out that the Defendant never saw it necessary to bring its own Valuer. So the Plaintiff's exhibit No. 2 remains unchallenged.**
9. **On their part the Defendant submitted that there was no fraud in the sale of the suit property and that the Defendant did not breach any duty of care owed to the Plaintiff in the sale of the suit property.**

### ANALYSIS

10. I have considered the pleadings in this suit and the submissions of the parties. I have also reconciled the issues raised by the parties for determination as follows;
  - i. ***Whether there was fraud in the sale of the suit property by the Defendant.***
  - ii. ***Whether the Defendant breached any duty of care owed to the Plaintiff in the sale of the suit***

**property.**

iii. **Whether a Valid Statutory Notice was served.**

11. In addressing the above issues I will refer to the evidence of the witnesses, as well as to the submission of the parties, and the pleadings whenever necessary.

### **WHETHER THE PLAINTIFF PROVED ALLEGATIONS OF FRAUD**

It is without doubt that the Plaintiff's case is hinged on the allegation of fraud. This means that the Plaintiff must prove fraud beyond a reasonable doubt. However the Plaintiff has treated the issue as if all it required was a proof on a balance of probability. This is not correct. The Defendant however disputes this notion and affirms that any allegation of fraud must be strictly proved more than on a mere balance of probabilities. In support of this, the Defendant cited the Court of Appeal's observation in Nancy Kahoya Amadiva v Expert Credit Limited & Another (2015) eKLR where the court quoted Tunoi JA (as he then was) in Vijay Morjaria v Nansingh Madhusigh Darbar & Another [2000] eKLR as follows:-

***"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 pleadings. 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".***

In further emphasis to this position, the court stated:

***"As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises (sic) to the standard of proof which was underscored by the court in Central Bank of Kenya Limited v Trust Bank Limited & 4 others [1996] Eklr as being beyond that of a balance of probabilities".***

From the foregoing, the next question in mind would be whether the Plaintiff proved her case on this issue beyond the balance of probabilities.

12. According to evidence tendered by the Plaintiff, it was her assertion that the defendant colluded with its valuers to undervalue the property and with the purchaser to buy the property at an undervalue price hence fraudulence. During examination in chief, the Plaintiff indicated to the Court that after conducting her own investigations, she found out that her property had been sold to a bank customer one Mr. Hassan at an undervalued price. She further stated that she was not served with any Notice on any intended sale. This assertion by the Plaintiff that the property was undervalued is pegged on the valuation report prepared by Kinyua Koech dated 21<sup>st</sup> July, 1994 stating that the open market value of the suit property was a sum of Kshs.2,300,000/-. The Plaintiff's Valuer Mr. Ndungu who works for Kinyua Koech in his cross examination could not shade much light on this valuation report apart from confirming that indeed it was prepared by their firm. He did however confirm to the Court that at the time it was prepared, he had not started his career as a Valuer and as such he could not shade light on the market price of the Plaintiff's property as at 1994. In a nut shell, the evidence tendered by Mr. Ndungu was more in relation to the valuation report dated 1<sup>st</sup> September, 2014 stating the value of the property as at the year 2014.

13. From the evidence tendered by the Plaintiff, it was evident that her assertion of fraud was based on the inference that her property was allegedly purchased by a Bank customer, the property was allegedly undervalued and she was allegedly not notified of the sale.

Having considered the pleadings and evidence before the court, this court is unable to state that there was any fraud. The allegations of fraud have not been proved. However this court hastens to add that there are very clear anomalies attendant to the sale of the suit property, especially very conflicting valuation reports. A chargee in the exercise of its statutory power of sale owes a

charger a duty of care and trust, and is obligated to exercise caution and to sell the chargor's property at a price which is supported by the market rates. Undervaluation of the suit property must never be entertained and a chargee must operate above board to ensure that the chargor's property is not deliberately sold undervalue.

14. The Plaintiff adduced two valuation reports in support of her allegation that her property was sold at a through away price. The reports adduced valued the property at Kshs.2,300,000/= in July 1994 by Kinyua Koech and Kshs.2,600,000/- in August 1990 by City Valuers. These City Valuers were also in the panel of Valuers for the Defendant bank. The most noteworthy characteristic of the two reports is that they only had the open market value of the property without the forced sale value. In fact the defendant had an issue with this, stating that a forced value is important for the purposes of an auction. However, the Plaintiff explained that she carried out these valuations with the simple reason of only knowing the value of the property, and not for sale. Be that on it may forced sale value cannot be less than half the market value, and the Defendant has a duty to act honestly in the sale of the suit property. The Plaintiff made serious efforts to keep up with the value of her property, and to ensure that even if the same were eventually sold she kept the tract of its value.

#### **WHETHER THE DEFENDANT OWED THE PLAINTIFF A DUTY OF CARE WHICH THE DEFENDANT BREACHED**

15. PW2 a valuer, testified that he valued the suit property on 1<sup>st</sup> September 2014 and estimated its value at 16.0 million. He also estimated the current rental income at Shs.80,000/=. The same property was valued on 21<sup>st</sup> July 1994 by the firm of PW2 at Shs.2,300,000/=. This was done three months after the property was sold. It was also in evidence that another valuation by City Valuers conducted on 24<sup>th</sup> August 1990 placed the value of the property of Shs.2,600,000/=. It is to be noted that the said City Valuers were also in the panel of Valuers for the Defendant bank, and it can be informed that they knew that the property was mortgaged to the bank. Their report has a great weight as they cannot be deemed to mislead their own client, even if instructions came from someone else. This court has noted that it appears that the value of the property depreciated between 1990 (Shs.2,600,000/=) and 1994 (Shs.2,300,000/=). However, depreciation of that margin is not as drastic as to persuade the court that the later valuation was not valid. That the said property was sold at almost half the price, at Shs.1,300,000/= by the defendant on 20<sup>th</sup> May 1994 raises a serious issue in the integrity of the sale process. This court finds that while the Plaintiff has not proved fraud, the Plaintiff has proved that the Defendant bank owed the Plaintiff a duty of care in the realization of the security, which duty of care the Defendant failed to discharge causing the Plaintiff to suffer loss of the suit property and other benefits attendant thereto.

16. Paragraph 13 (a) of the Further Amended Plaintiff pleads that the Defendant owed to the Plaintiff a duty of care and regard for her interest over the suit premises and that the sale of the suit premises by Public Auction was in breach of the said duty and care. This duty of care and good faith is a statutory one. Thus, Section 77(1) of the Registered Land Act Chapter 300 Laws of Kenya (now repealed) provides and I quote:-

***“ (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby, and may himself bid at any auction”.***

Particulars of Defendant's Breach of Duty are enumerated under paragraph 13(a) from sub paragraph (a) to sub paragraph (e). In a nutshell, the Plaintiff's complaint is that the Defendant sold her property at a throw away price of Kshs.1.3 million, whereas in fact at the material time the property had a value of Kshs.2.3 million, according to the Plaintiff's Valuers. I refer to the

Plaintiff's Documents, list dated 14<sup>th</sup> May, 2014. An earlier Plaintiff's List of Documents appears at page 14 and it is dated 12<sup>th</sup> June, 2001. In this Bundle of Documents, there is a Valuation Report by Messrs Kinyua Koech Limited which runs from page 34 to page 60. This Valuation Report shows at page 60 that the open market value of the property, as at 21<sup>st</sup> July, 1994, was a sum of Kshs.2.3 million. Yet, the property was sold at a paltry sum of Kshs.1.3 million. It is also to be noted, that this property had also been valued by another Firm of Valuers namely City Valuers, sometimes on/or about 24<sup>th</sup> August 1990. This Valuation Report appears from page 69 to page 72 of the aforesaid Bundle of Documents. At page 72 aforesaid, the valuation of the property was given as Kshs.2.6 million, as on 24<sup>th</sup> August, 1990. It is noted that the Defendant's Witness, one Mr. Paul K. Chelang'a told the Court that City Valuers were in the Defendant's Panel of Lawyers. In other words, they carried out various Valuations for the Defendant Bank. Then also, the Defendant in its own wisdom produced a Valuation Report by Mwaka Musau, which appears from page 31 to 37 of the Defendant's Bundle of Documents dated (12<sup>th</sup> April, 1994), indicating that the open market value was Kshs.1.3 million and "forced sale value was Kshs.1.1 million". What is to note is that these 3 Valuation Reports were carried out almost contemporaneously. In other words, the Valuation by Messrs Mwaka Musau Valuers was carried out on 12<sup>th</sup> April, 1994 (Kshs.1.3 million), the Valuation by Kinyua Koech Limited was carried out on 21<sup>st</sup> July, 1994 (Kshs.2.3 million), whereas the Valuation by City Valuers was carried out on 24<sup>th</sup> August 1990 (Kshs.2.6 million). Mr. Machira for the Plaintiff submitted, with approval of this court, that this Valuation by Mwaka Musau is seriously incorrect, partisan, and the same should not be believed. It is simply unreliable. It is no wonder that the Defendant did not call this Valuer to come and give evidence before this court. This court has the liberty to only rely on these other Two Valuation Reports. Considering the totality of these Valuations, it is the finding of this court that when the Defendant sold the Plaintiff's property at a throw away price of Kshs.1.3 million, the property had a value of anything between Kshs.2.3 million to Kshs.2.6 million. Therefore, the Plaintiff's complaint and claim that her property was sold at a throw away price is highly merited and deserves this court's serious consideration. This is particularly so when considering that the Plaintiff called a Valuer from Messrs Kinyua Koech Limited as a Witness, that was PW 2 namely B. M. Ndungu, whose evidence was never challenged. Although the Defendant was fully aware that the Plaintiff's claim was based on Valuation and Market Value, and although the Defendant was fully aware that the Plaintiff was complaining that the Defendant sold her property at a throw away price of Kshs.1.3 million, and thus claiming compensation, the Defendant chose not to call any Valuer to come and give evidence before this court to the contrary. This court therefore accepts the Plaintiff's Valuers' Reports produced before this Court at the hearing of the suit.

17. This brings me to the Second Valuation Report by Messrs Kinyua Koech Limited on/or about 1<sup>st</sup> September, 2014 and the original thereof was produced as Exhibit 2 before this court. The report shows that as at 1<sup>st</sup> September, 2014 the suit premises had a value of Kshs.16 million. PW2, Mr. B. M. Ndungu from Messrs Kinyua Koech Limited gave very clear and unequivocal evidence to support this figure of Kshs.16 million. In other words, his evidence was never challenged in Court. Mr. Machira in cross examination invited the Defendant's Witness Mr. Chelang'a, to make comments on this Valuation Report, but the witness declined the invitation stating that he was not a Valuer. The Defendant was fully aware of this Valuation Report (dated 1<sup>st</sup> September, 2014) and yet the Defendant chose not to call its own Valuer to challenge the same, just in case it had any inaccuracies. This court has no hesitation believing the contents of this Valuation Report to the effect that the suit premises as at 1<sup>st</sup> September 2014 had a value of Kshs.16 million. This court is therefore at liberty to apply this figure of Kshs.16 million in assessing the Plaintiff's compensation under the Plaintiff's Prayer (aaa), and also to apply the rate of interest, under Prayer (ccc), on this figure of Kshs.16 million, if the court were to take this route in this matter.
18. It is also to note for record that whereas the Plaintiff filed and served Further Amended Plaintiff on 10<sup>th</sup> October, 2014 (which was amended on 9<sup>th</sup> October, 2014), the Defendant never preferred any Amendments and the Defendant's last Pleading was Amended Defence which was filed in Court on 31<sup>st</sup> January, 2001. Therefore, pursuant to the Provisions of the Civil Procedure, the Defendant should be taken to have admitted the Plaintiff's claim in the Amendments.

19. Under paragraph 14 of the Plaintiff's Further Amended Plea, the Plaintiff has pleaded Particulars of illegality and fraud, running from paragraph (aa) to paragraph (k). However, this court has already found that the Plaintiff has not proved elements and fraud, and so the prayers on fraud cannot stand.

### WHETHER STATUTORY NOTICE WAS SERVED

20. The other very important complaint is on a legal point to the effect that the Plaintiff was never served with Statutory Notice as mandatorily required under the Provisions of law. On this issue, in the Defendant's Bundle of Documents at page 13, a letter dated 18<sup>th</sup> October, 1993 from Messrs Meraka & Co. Advocates and addressed to the Plaintiff. The heading of the letter is "**Charge Over Plot L.R. No. Nairobi/Block 72/224 – Nairobi**". The most important part of this letter is paragraph 3 which reads and I quote:-

***"....GIVE YOU NOTICE which we HEREBY DO that unless the above said monies which monies are exclusive of our legal fees are paid in full at our offices within three (3) months from the date of this letter we shall commence legal proceeding to enforce our clients rights under the Charge without further reference to you."***

The Plaintiff testified that she never received this letter. However that was not true because it later transpired that she had made a reply with the contents of the letter in mind vide her letter dated 28<sup>th</sup> January 1994. It is also true that the Defendant used the Plaintiffs two addresses i.e P.O. Box 189, Siaya and also the Nairobi address, and it is a blatant lie for the Plaintiff to state otherwise.

21. The Plaintiff also impugned the said Statutory Notice on the basis that the same was not clear on the legal consequences to be taken, and also that it was not clear from which date the notice would take effect. The Plaintiff's counsel submitted that in the first place, the 3 months Notice "***from the date of this letter***" is invalid in law because all Statutory Notices are supposed to take effect from the date of receipt of the Notice but not from the date of the letter. Counsel further submitted that service of Statutory Notice cannot be implied through correspondence between Parties. In other words, the law requires mandatorily that Statutory Notice shall be served on the Chargor i.e. the Plaintiff, and that there is no evidence that the same was ever done. Further counsel submitted that even if this letter were to be assumed to be a Statutory Notice, the same is vague and ambiguous. Nowhere does it tell the Plaintiff that her charged property, i.e. the suit premises would be sold by Public Auction on expiration of the 3 months Notice, if the amount claimed was not paid. Counsel submitted that, the threat "***we shall commence legal proceeding to enforce our clients rights under the charge...***" does not by any stretch of imagination notify the Plaintiff that her property would be sold by Public Auction. Counsel submitted that any Lawyer reading this threat would assume that the Defendant Bank was going to file a legal action, i.e. a suit, against the Plaintiff. No one would ever assume that the threat would mean that the charged property would be sold by Public Auction. The position of this court in this matter is that a Statutory Notice must be clear on unequivocal. However, it is the duty of this court to dispense justice by ensuring that the overriding objective of the section 1 A and 1 B of the Civil Procedure Rules are achieved. Where a court is satisfied as in this particular case, that a proper Statutory Notice was served, no amount of technicality will be allowed to impune that notice. In this case, the Plaintiff received the notice and understood it, replied to it and even later on engaged the Defendant on its impact. The Plaintiff cannot now turn around to impune the said Statutory Notice.

22. The other very important point is that even if the property was sold away at a throw away price of Kshs.1.3 million, the Defendant Bank never filed any Statement of Account, and of course none was served on the Plaintiff, to show how the amount raised from the sale was utilized. Cross examined on this issue the Defendant's Witness, Mr. Chelang'a, told this court that there was no such Statement of Account. It is trite law that such Statement is very, important because the Bank is obligated under the Provisions of law to refund the Chargor any amount over and above the sum claimed by the Defendant. At least, this is the impression that anyone would get from the Provisions of Section 77(1) of the Registered Land Act Cap. 300 Laws of Kenya (now repealed), i.e. the Bank should act in good faith and have regard to the interest of the Chargor. There is no

Statement of Account to show how the amount raised from the sale was utilized and what is the balance, and what happened to the balance thereof. It is important to note that the Defendant was claiming (see the Defendant's Bundle of Documents at page 13) a sum of Kshs.952,145.30/=, whereas the sale raised Kshs.1.3 million. What happened to the amount over and above Kshs.952,145.30/= ? This conduct by the Defendant Bank demonstrates clearly that the Defendant Bank neither acted in good faith and nor did it have any regard to the interest of the Plaintiff, which is contrary to Section 77(1) of the said Cap. 300.

23.This leads me to the issue of rental income. At paragraph 14a

(b) of the Further Amended Plaintiff, the Plaintiff pleaded that before the property was illegally sold by the Defendant, she used to let the same at a monthly rent of about Kshs.32,000/= p.m. Then in the same paragraph sub-paragraph ( c), she pleads that the rent continues to increase upward so that similar properties in the area are fetching Kshs.67,000/= p.m. At page 34 to 60 of Plaintiff's Document is the Valuation Report by Messrs Kinyua Koech Limited which put the value of the property to Kshs.2.3 million as on 21<sup>st</sup> July, 1994. At page 60 of the said Valuation Report, the said Valuers have made general remarks as follows:-

***“This is a good maisonette of solid construction in Ngei Estate Phase 2 whose popularity has steadily over the years ...”***

In a recent Valuation by the same Kinyua Koech Limited, dated 24<sup>th</sup> September, 2014 (i.e. the Plaintiff's Exhibit 2) whereof the value of the property is put at Kshs.16 million, the said Valuers at page 7 paragraph 7.0 make the following general remarks:-

***“This is a maisonette situated in Ngei Estate Phase 2 a typical residential estate in Langata.***

***The main house has a Guest Wing Staff Quarter and an extension with standard finishes and fixtures.***

***The neighbourhood of Langata is heavily built with new estates, but Ngei Estate does not suffer the congested layout experienced in the newer estates.”***

24.Similarly, when the Plaintiff's Valuer PW2 i.e. Mr. B. M. Ndungu, gave evidence before this court, he told this court that the suit premises was commanding monthly rent of at least Kshs.50,000/= p.m. It is not in dispute, that the Plaintiff lost a property which was fetching her rental income and she prays for an Award of this rental income. This Prayer appears at the Plaintiff's Further Amended Plaintiff at page 8 prayer (bbb) praying for Mesne Profits for the loss of income from the date the property was sold i.e. 20<sup>th</sup> May, 1994 until payment in full, the quantum thereof to be determined by this court.

25.However, this court has found as a fact that the sale of the Plaintiffs property was regular except that the sale was done at an under value. This court has found that the Defendant owed the Plaintiff a duty of care which it did not deliver. In the circumstances this court can only make orders of refund or restitution to the Plaintiff of what the Defendant denied the Plaintiff. This court cannot reverse the sale of the suit property, as indeed title had lawfully changed hands. So this court must ignore all the submissions on the lost income by way of lost rent.

26.It is the finding of this court that the Defendant was very careless in conducting the sale of the suit property at gross undervalue. It is also clear that the Defendant did not provide account statement to show how they applied the Shs.1,300,000/= raised from the sale. This is an act in bad faith, and at the time of this judgment this court cannot tell how much the Plaintiff owed the defendant at the time of sale. By a letter dated 25<sup>th</sup> August 1993, the Defendant was demanding Shs.952,145.30/=. How did it apply the proceeds of sale of Shs.1,300,000/=?

27.However, regardless of the aforesaid malpractices and misgivings, the court has no evidence that the sale was fraudulently occasioned, except that the Defendant failed in its duty of care owed to the Plaintiff. That kind failure, however, is not one which entitles the Plaintiff to have the sale declared a nullity, or to have the money equivalent of the suit premises as at time of judgment. But that kind of failure enables the court to assess and award damages. In that regard, the kind of

damages are those which entitles the Plaintiff to the refund of the balance of the true value of her property as at the time of sale, expressed on a commercial interest prevailing at that time until full payment. It may also entitle the Plaintiff to damages, punitive and aggravative, for the losses suffered as a result of the unlawful conduct of the defendant.

28. I am satisfied that the Plaintiff has on a balance of probability proved her case against the defendant to the extent that the Defendant failed to discharge the duty of care owed to the Plaintiff in the realization of the security.

29. This court therefore hereby enters restitutive judgment for the Plaintiff against the Defendant as follows;

- a. *A refund of Kshs.1,300,000/= with interest thereon at 28% per annum with effect from 20<sup>th</sup> May 1994 until payment in full.*
- b. *General damages for breach of duty of care, and for consequential loss of income or other benefits associated with the miscarriage of justice in the said sale, assessed at the value of the amount due under order (a) above at the time the same is paid.*
- c. *Costs of this suit and interests thereon at court rates.*

That is the judgment of the court.

**READ, DELIVERED AND DATED, AT NAIROBI**

**THIS 8<sup>th</sup> DAY OF APRIL 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Machira for Plaintiff

Mr. Ochwa hb Mr. Ngara for Defendant

Teresia – Court Clerk