REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 677 OF 2005

JOHN KURIA MATHENGE

T/A ABERDARE FILLING STATION……..…….PLAINTIFF

VERUS

CALTEX OIL (K) LTD…….....1ST DEFENDANT

SAMUEL GITONGA KANJA……..2ND DEFENDANT

J U D G M E N T

1. By a Further Re-Amended Plaint filed in court on 29th November, 2010, the Plaintiff alleged to be illegal, void, unenforceable and deceitful the disposal by the 1st Defendant of his property known as **LAIKIPIA/NGOBIT/SUPUKO BLOCK 2/2769** situate in Wiyumirire Trading Centre in Laikipia (hereinafter "the suit property"). The Plaintiff claimed that the purported process of exercise of statutory power of sale by the 1st Defendant was based on an illegality, collusion, breach of contract and contrary to the applicable laws under the now repealed Registered Land Act. He also claimed that the Auctioneers Act, and that the charge and sale instrument were null and void and unenforceable. The particulars of breach of contract were set out in the further Re-amended Plaint. The Plaintiff, therefore, prayed for a permanent injunction to restrain the 1st Defendant from selling the suit property; a cancellation of the sale by public auction of the suit property carried out on 4th April 2007; a declaration that the charge instrument dated 26th January 2000 over the suit property was null and void and damages to the tune of Kshs. 15,000,000/- as well as interest and costs of the suit.
2. On 19th July 2007 a temporary injunction for the preservation suit property was issued which was later confirmed to last until the suit is determined. The 2nd Defendant was enjoined in these proceedings on 26th October 2006.
3. In a short Re-amended defence, the 1st Defendant denied in the Plaintiff's entire claim and put him to strict proof thereof. As for the 2nd Defendant, he denied the Plaintiff's claim and stated that he only saw an advertisement in a national daily newspaper for the sale of the suit property whereby he attend the auction whereby his bid was the highest and beyond the reserve price whereupon he was declared the successful binder. He, therefore, contended that he was an innocent purchaser for value without notice and prayed that the Plaintiff's claim be dismissed.
4. At the trial the Plaintiff told the court that he purchased the suit property for Kshs.2,600,000/- in 1995/1996. That, thereafter carried out developments thereon costing Kshs.17,425,871/-. In 1999, the 1st Defendant approached him with an offer to undertake a joint venture of running a petrol

station. The latter advanced him an interest free loan of Kshs.5.5 million for the completion of the works on the suit property. He executed a charge over the suit property as security for the said advances. The charge was prepared and executed by the firm of Mwaura & Mwaura Waihiga Advocates. The sum advanced was payable to Batian Contractors who were appointed by the 1st Defendant to undertake the wok of installing the fuel pumps on the suit property. That, although the pumps were installed, due to poor workmanship, there were leakages that led to loss of fuel. Further repairs by other contractors commissioned by the 1st Defendant did not yield any positive reports. Although the Plaintiff severally complained to the 1st Defendant to overhaul the installation of the fuel tanks, the 1st Defendant failed to heed but instead closed the station.

5. The Plaintiff further testified that he approached two other independent operators, Somkem Limited and Nationla Oil Corporation of Kenya (NOCK0 who offered to pay off the 1st Defendant operate the petrol station but the 1st Defendant declined. Later on, the 1st Defendant attempted to auction the suit property in the exercise of its statutory power of sale but in the auction of 24th April, 2006 the highest bid of Kshs.2.7 million was declined as the forced sale value was Kshs. 4.2 million. However, the Plaintiff later learnt that another auction was allegedly conducted on 4th April 2007 and the suit property sold to the 2nd Defendant for a mere Ksh.1.5 million. The Plaintiff complained that he had not been served with any notice for the realization of the security. He contended that the auction of 4th April, 2007 was irregular and there had been collusion between the Defendants and the auctioneer in its execution. He denied that the 2nd Defendant was an innocent purchaser of the suit property. The Plaintiff contended that the charge had been prepared by an incompetent Advocate and the same should, therefore, be annulled.
6. On cross-examination, the Plaintiff admitted having signed the charge dated 26th January, 2000 over the suit property. That the suit property was put up for auction unsuccessfully on 16th December, 2005 and 24th April, 2006. According to him, the address he was using when operating the Petrol Station was P.O. Box 2114, Nyahururu but after it was closed down, he stopped using that address but switched to P O Box 2023 Nyeri where he had moved to. He denied having ever been served with any notice for the sale of suit property.
7. PW 2 Tabitha Wangari Kuria was the Plaintiff's wife. She told the court that she is a housewife and denied being a teacher or having been served with any notices by an auctioneer. PW 3, Boniface Gitonga Ndirangu told the court that he had worked for the Plaintiff at the Petrol Station throughout its business life. After its closure, he started repairing bicycles at the premises. At one time a person from NOCK visited the station and told him that NOCK intended to re-open the station. He denied ever seeing any posters advertising the station for sale or ever been served with any notice on behalf of the Plaintiff.
8. On cross-examination, PW 3 insisted that the people who visited the petrol Station allegedly from NOCK came on 10th July, 2007 he recalled that the Petrol Station was closed in 2003 and he started his business thereon in 2005.
9. At the trial, the 1st Defendant called one witness, Gibson Kimoli Mutua (D1W1), the Network Development Manager of Total Oil (K) Ltd. He told the court that in October, 1999, the 1st Defendant entered into a contract with the Plaintiff for joint operation of a service station on the suit property; that the 1st Defendant was responsible for installation of equipment and underground storage tanks; that the 1st Defendant advanced the Plaintiff a sum of ksh.5.5 million interest free for civil works repayable in five (5) years on a security of the suit property. That the said loan of Kshs.5.5 million was payable directly to the contractors. That pursuant to the said contract, the Plaintiff executed a charge over the suit property on 26th January, 2000.
10. According to D1W1, after installation of the underground tanks, the Plaintiff was responsible for their repairs through an approved contractor. That was at 29th December, 2005, there was a sum of Ksh.2,582,230/41 outstanding on the loan advanced to the Plaintiff. That a sum of kshs.1.2 million given by the Plaintiff as a guarantee was utilized to offset the amount outstanding. He told the court that the forced sale value of the suit property was Kshs.3 million according to the valuation report by Joe Munywoki Consultants.
11. D1W1 told the court that there were a total of three (3) auctions, to wit, held on 16th December, 2005, 24th April, 2006 and 4th April, 2007 respectively. That on the 2nd auction of 24th April,

2006, the 1st Defendant rejected the highest bid of ksh.2.7 million because it was below the reserve price. He denied any collusion between the 1st Defendant and the 2nd Defendant in the sale of the suit property.

12. On cross-examination, he denied knowledge that the 2nd Defendants Advocate, Mr. Muriithi was previously an advocate with Kibuchi and Company and that it was he, Mr. Muriithi Advocate, who gave instructions to the Auctioneers to auction the suit property. He denied the suggestion that the fact of Mr. Muriithi acting for the 2nd Defendant was evidence of collusion. Although as at the time of the sale the Plaintiff owed the 1st Defendant Ksh.2,600,000/-, nevertheless the 1st Defendant decided to sell the suit property for only Ksh.1.5 million.
13. D1W1 denied that any offers were made by either Somkem Ltd or NOCK for the petrol Station before the auction. He confirmed that he did not know how the auction was conducted and stated that, only the auctioneer could explain that fact. He confirmed that the address in the charge document was different from the one used to serve the

Statutory Notice of Sale. He further admitted that by the time the 1st Defendant was entering into the business relationship with the Plaintiff, the latter had undertaken massive developments thereon. According to him, the firm of Mwaura Waihiga & Com. Advocates who drew the charge documents was competent and compliant.

14. The 2nd Defendant also called one witness Justus Kirugo Thanga (D2W1). He told the court how he and the 2nd Defendant saw an advert in the Daily Newspapers for the sale of the suit property; how they inspected the sit property and attended its auction on 4th April, 2007. He testified at the auction, the 2nd Defendant's bid was the highest at Kshs.1.5 million which was accepted. He and the 2nd Defendant paid the 25% deposit and thereafter the balance of the purchase price in July, 2007. That when they presented the transfer for registration, they encountered problems as the current case had been filed.
15. On cross-examination D2W1 told the court that at the auction, the bidders were not informed what the reserve price for the property was, that the conditions of sale were never brought to the attention of the bidders at the auction. He stated that apart from him and the 2nd Defendant, the auction by three (3) other bidders. He denied that the auction had been stage managed.
16. At the conclusion of the trial, learned counsel filed their respective written submissions which the court has considered. After careful consideration of the pleadings, the evidence and submissions of counsel, the following are the issues this court considers that fall for determination.

a. **Whether there was any breach of contract by any of the parties in the contract between the 1st Defendant and the Plaintiff.**

b. **Whether the charge dated 26th January, 2000 over the suit property was valid.**

c. **Whether the 1st Defendant was entitled to exercise its statutory power of sale and if so, whether it properly exercised the same?**

d. **Whether the 2nd Defendant is an innocent purchaser for value without notice.**

e. **Whether the Plaintiff is entitled to the prayers sought in the Further Re-amended Plaint?**

17. According to the evidence on record (P Exhibit 4), the Plaintiff and the 1st Defendant entered into a contract to jointly develop a service station on the suit property. Under that agreement, the 1st Defendant was to provide and install fuel dispensing pumps, compressor, air gauges, gear oil buckets, drain mobile and signage. It was responsible for the underground product storage tanks and electrical installation. It offered a loan of Kshs.5.5 million interest free for the completion of civil and building works at the station repayable over a period of 5 years. The said loan was payable directly to the contractors on Builders Certificates and the balance, if any, to the Plaintiff.

Further, the sum was recoverable at the rate of Ksh.1.30 per litre of premium, regular, diesel and kerosene fuel purchased through the pumps at the station.

18. On the other hand, the Plaintiff was to give the 1st Defendant a 15 year renewable lease over the suit property whereby the rentals therefor was to be applied towards the loan repayment for the 1st term of 5 years of the lease; the Plaintiff charged the suit property in favour of the 1st Defendant and gave a guarantee of Ksh.1.2 million to enable him lift products from the 1st Defendant. That guarantee was with Barclays Bank of Kenya Ltd.

19. According to the evidence on record, whilst all the required equipment were installed by the 1st Defendant through its own contractor, Batian Construction Company Ltd, there was persistent leakage of underground tanks and pipes whenever it rained which led to fuel contamination and ultimate closure of the Petrol Station. Several works meant to repair and correct the anomaly or the leakages were unsuccessful. These works were carried out by various technicians or contractors appointed by the 1st Defendant. The Plaintiff produced correspondence (P Exhibit 10(a) – (d)) showing the various complaints he raised with the 1st Defendant in respect of the unsatisfactory works by its technicians which complaints however, were not effectively acted upon. Further, although the loan was admitted by way of the execution of the charge, there was no evidence to show that what was actually disbursed was Kshs.5.5 million. This is so because, whilst the said sum was disbursable to the 1st Defendant's appointed contractor vide builders certificates to complete the works commenced by the Plaintiff and the balance released to the Plaintiff; there was no Builder's Certificates produced upon which the amounts may be said to have been paid. This is crucial considering that the Bills of Quantities dated 28th July, 2000 by Batian Construction Co. Ltd (P Exhibit 8) were for a total sum of only Kshs.4,091,252/-. The Plaintiff denied having received directly any part of the Kshs.5.5 million advanced by the 1st Defendant. The question that arises, was Batian Contractors paid the amount of Kshs.4,091,252/- in terms of their Bills of Quantities? If so, to whom and when was the balance paid?

20. In Paragraph 9 of the Further Re-Amended Plaint, the Plaintiff had set out what he considered to be the particulars of breach by the 1st Defendant. In view of the foregoing, this court was satisfied that the 1st Defendant was in breach of its contract with the Plaintiff. It never acted in good faith in its dealing with the Plaintiff. It failed to properly maintain its equipment in a good tenantable or useable condition for the purpose for which they were to be applied. The particulars of breach set out n Paragraphs 9 (a), (c) and (d) of the Further Re-Amended Plaint were proved. There was no proof to the contention by the 1st Defendant that it was the Civil Works carried out by the Plaintiff at the Petrol Station that was defective. The evidence clearly pointed towards the leaking equipment supplied by the 1st Defendant and the works carried out by the 1st Defendant's own appointed contractors/electricians.

21. The second issue is the validity of the charge dated 26th January, 2000. The same was properly executed by both the Plaintiff and the 1st Defendant to secure the sum of Ksh.5.5 million. It was indisputably drawn by the firm of Mwaura & Mwaura Waihiga Advocates. The document was witnessed by Anne Mwaura, Advocate of the said firm on 26th January, 2000 on which date, it was duly registered at the Lands Registry. The Plaintiff's contention was that as at the time the said Anne Mwaura drew and/or executed or witnessed the Charge neither her nor any of the Advocates in her firm were competent Advocate to do so under the Advocates Act, Chapter 16, Laws of Kenya.

22. Section 34(1) of the Advocates Act provides: -

> ***"34(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument: -***
>
> a. **.....**
> b. **.....**
> c. **.....**
> d. **.....**
> e. ***For which a fee is prescribed by any order made by the Chief Justice under Section 44: or***

f. **.....**

Nor shall any such person accept or receive, directly or indirectly any fee, gain or reward for the taking of any such instruction or the drawing or preparation of any such document

or instrument"

23. Who then is qualified to act as an Advocate? Section 9 of the Advocates Act, Cap 16 provides for the qualifications of an Advocate. The Section provides: -

"9. Subject to this Act, no person shall be qualified to act as an advocate unless

a. ***He has been admitted as an advocate;***
b. ***His name is for the time being on the Roll; and***
c. ***He has in force a practising certificate; and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under Section 60(4)."***

The cumulative effect is that one must possess all that is set out in Section 9 (a), (b) & (c) to qualify to practice as an Advocate.

24. In the case of **National Bank of Kenya Ltd Vs Wilson Ndolo Ayah CA No. 119 of 2002 (UR**) the Court of Appeal held: -

"Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate? It is public policy that citizens obey the law of the land. Likewise it is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed to be invalid. .... however, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi illiterate population. There is a need to discourage the commission of such Acts. Allowing such acts to stand is in effect a perpetration of the illegality. .. A failure to invalidate the act by an unqualified advocate is likely to provide an incentive to repeat the illegal Act. For that reason alone, the charge and instrument of guarantee in this matter are invalid and we so hold."

25. In that case, the Court of Appeal was very categorical that documents drawn and executed by unqualified persons must be invalidated as a matter of public policy. That to allow actions perpetrated by unqualified persons to stand is to perpetuate illegalities that go towards breaking the law. The courts are there to uphold the observance of the law and not to encourage breaches of law by failure to enforce them strictly.
26. The Plaintiff produced P Exhibit 6(a) to (g) letters from the Law Society of Kenya showing that Anne Mwaura Advocate made her declaration that accompany the application for practicing certificate on 25th January, 2000, that she paid for her practicing Certificate on 2nd February, 2000; that the Law Society of Kenya did not have a copy of that Advocate's Practicing Certificate for the year 2000 as the same are issued by the Registrar of the High Court. The letters dated 1st September, 2010 stated as follows: -

"RE: ANNE MWAURA, ADVOCATES

As at 26th January, 2000 our records show that the advocate named above did not have a practicing certificate to enable her practice as an advocates."

As regards Anne Mwaura's Colleague, the letter stated;

"RE: <u>MWAURA WAHIGA, ADVOCATES</u>

Our records show that the above named advocate applied for his certificate of practice for the year 2000 on 1st February, 2000 and paid for it on 2nd February, 2000. As at 26th January, 2000, the Advocate did not have a practicing certificate."

27. It is the cardinal principle of our law of evidence that he who alleges the existence of some fact must prove the same (Section 108) of the Evidence Act. The 1st Defendant contended that since there was no evidence from the Registrar under Section 30 of the Advocates Act, that the Advocates practicing in the firm of Mwaura & Mwaura Wahiga Advocates did not have practicing certificates for the year 2000, there was no proof of such fact.
28. It is correct to state that it is the Registrar of the High Court who at the material time to this suit was issuing practicing certificates for Advocates. However, the Registrar could only do so upon production of a written approval from the Chairman of the Law Society of Kenya under Section 22(1) (c) of the Advocates Act. To my mind, that means that before the chair of the Law Society of Kenya could give his written approval as aforesaid, the requisite fees must have been paid to the society.
29. The evidence shows that, the practicing certificate by the firm of Advocates of Mwaura & Mwaura Wahiga was paid for on 2nd February, 2000. The Law Society itself confirmed vide P Exhibit 6(a) to (g) that according to its records the said Advocates did not hold practicing certificates as at 26th January, 2000. That evidence was not rebutted. To my mind, upon production of those letters the evidential burden shifted to the 1st Defendant to show that the Advocates whom it has instructed in 2000 to prepare its security documents was qualified to do so. No evidence was called to rebut the evidence of the Plaintiff in P Exhibit 6 (a) – (g). It was not even suggested that the said Advocates are no longer practicing and therefore they could not attend the trial and clarify to court that they were indeed qualified as at 26 January, 2000 to practice law. To my mind, I am satisfied that the Plaintiff had proved that the Advocate, who prepared and witnessed the Charge document dated 26th January, 2000 was not qualified. That document to that extent is invalid and cannot stand. The law must be applied strictly as this a country under the rule of law. See Article 10(2) of the Constitution of Kenya.
30. The next issue is whether the 1st Defendant was entitled to exercise its statutory power of sale and if so, whether it so properly exercised the same. I have already held on the first issue that there was no evidence that the sum of Kshs.5.5 Million was fully advanced. At pages 1 and 29 of the 1st D Exhibit 1 are the Statutory Notice dated 19th April, 2005 and the Auctioneers 45 day Notification of Sale dated 11th October, 2005, respectively. The amount demanded therein for which the suit property was finally auctioned is Kshs.2,582,694/41. How is this amount arrived at?
31. At pages 19 to 27 of the 1st D Exhibit 1 is a Statement of Account for the Plaintiff (Aberdare filling Station) with the 1st Defendant. At page 26 it is shown that as at 29th December, 2005, the outstanding sum in the statement was Kshs.2,582,230/41. This was after a sum of Kshs.464/- was credited to the Account on 24th October, 2005. Before the said sum of ksh.464/- was deducted on 24th October, 2005, the amount due therefore was Ksh.2,582,694/41. This is the amount disclosed as outstanding in the said Statutory Notice dated 5th April, 2005 on item 1. On item 2 in the said Statutory Notice, the sum due was Ksh.100,000/-.
32. From the Statutory Notice at page 1 of 1st D Exhibit 1 the debt of Kshs.2,682,694/41 for which the suit property was being auctioned constituted ***"... unamortized loan and petroleum products supplied"*** to the Plaintiff and it included ***"Kshs.100,000.00 worth of Caltex equipment on the filling station"*** which the Plaintiff had refused to hand over. Therefore, the amount demanded in the statutory notice of sale was not only for the loan, but it included sums due to petroleum products supplied and other equipment allegedly retained by the Plaintiff.
33. A scrutiny of the statement at pages 19 to 27 of the 1st D Exhibit 1 will show that the amounts debited to that account included, inter alia, "***cost of calendars purchased***," "***cost of purchases of uniforms purchased***" ***"service charge for five equipment***," "***air gauge & Compressors'***.

34. From the evidence of both PW 1 and D1W1, the loan of Kshs.5.5 million advanced by the 1st Defendant was for the completion of Civil and Building works at the station only. P Exhibit 4, the letter of offer dated 11th October, 1999 clause (iii) provided: -

> ***"Caltex will offer you a loan of Kshs.5.5 million interest free for the completion of Civil and building works at the station to be repaid in five years. This amount to be disbursed vide builder's certificates directly to the contractors to complete the work and any balance to be paid to you. Caltex will charge the property accordingly."***

35. Clause (XIV) thereof provided

> ***"you will provide a bank Guarantee of Kshs.1.2 million to enable you lift products once the station is ready to operate."***

36. At paragraphs 12 and 13 of D1W1 witness Statement dated 9th February, 2012 which was admitted as part of his evidence in chief , the witness stated: -

> ***"12. The Tenant advanced the landlord the sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs.5,500,000/-) to be utilized in the construction of the fuel station and which loan was to be repaid by the landlord to the Tenant in accordance with the legal charge dated 26th January, 2000***
>
> ***13. The Plaintiff defaulted in repayment of the loan and as at 31st December, 2005 the outstanding amount was Ksh.2,582,230/41".***

37. From the going, it is quite clear that the parties were in agreement that the loan of Kshs.5.5 million was advanced for the completion of the construction works at the station. A charge over the suit property was to be prepared to set out the terms of repayment and to secure the same. A guarantee for Kshs.1.2 million was provided by the Plaintiff through Barclays Bank of Kenya Ltd to enable the Plaintiff lift the 1st Defendant's products. In that letter of offer signed by both the Plaintiff and the 1st Defendant, it was not in the contemplation of the parties that the suit property was to be a security for any other debt other than the said loan of Kshs.5.5 million.
38. However, when the 1st Defendant's Advocates prepared the charge over the suit property which the Plaintiff stated he was made to sign without the same being explained to him, the charge was made to secure all past, existing as well as future debts of the Plaintiff. The charge provided at Clause 2(a): -

> ***".... PROVIDED ALWAYS that the security hereby Constituted shall be a continuing security for the payment of all moneys from time to time advanced by the chargee to the chargor or otherwise owing by the chargor to the chargee..." (***underlining provided)

39. The Plaintiff was firm in his testimony that Anne Mwaura, Advocate did not explain to him the meaning and tenor of the charge document which she made him sign. That Anne Mwaura was the 1st Defendants Advocates in that transaction. In view of the foregoing, it is quite clear that the 1st Defendant was not acting in good faith as far as the advancement of the sum of Kshs.5.5 million and the creation of the security was concerned. I have already shown that the realization of the security was not for monies advanced alone but it included trading debts notwithstanding the guarantee given by Barclays Bank which was later recovered by the 1st Defendant. It also included sums constituting other equipment lying at the station. These were never contemplated by the parties in the original letter of offer.
40. The conduct of the 1st Defendant can further be explained by its refusal to allow two other entities, Somken Petroleum Co. Ltd and National Oil Corporation of Kenya (NOCK) to take over the operations of the station and payoff the facility. The Plaintiff's testimony on this fact was not challenged at all. Although D1W1 testified that the letters produced as P Exhibit 12 and 13 (a) and

(b) were not addressed to the 1st Defendant, he did not dispute the Plaintiffs evidence that the Plaintiff held discussions with the 1st Defendant on the subject matter but the latter declined to allow it.

41. There was the issue of the Statutory Notice of sale. The 1st Defendant contended that it sent the Notice dated 19th April, 2005 (D1 Exhibit 1) page 1 by registered post to the last known postal address of the Plaintiff being P. O Box 2114, Nyahururu. The Plaintiff denied ever receiving the same. He told the court that after the petrol station was closed in or about 2003, he went back to Nyeri where he continued to reside and he stopped using that address. That henceforth he was using the address P O Box Number 2023, Nyeri. This piece of evidence was neither challenged nor controverted.

42. I have seen the Letter of Offer, P Exhibit 4, the Charge P Exhibit 5 and the Lease D1 Exhibit 2, the Plaintiffs address is given as P O Box 2023, Nyeri. It is not clear what informed the 1st Defendant's decision to use a different address than the one used in the said contractual documents. I have however, seen clause 5(9) of the Charge. The same authorized the 1st Defendant to serve the notice upon the Plaintiff on his last known Postal Address in Kenya.

43. D1W1 told the court that the Notice was properly mailed to the Plaintiff. He referred to the Certificate of Posting dated 22nd April, 2005 at page 3 of D1 Exhibit 1. However, he did not explain to court why the P O Box 2114, Nyahururu was the last known postal address of the Plaintiff. He further did not state that the said letter was never returned unclaimed in view of the Plaintiff's testimony that he stopped using that address upon the 1st Defendant shutting down the station in 2003.

44. To my mind, when a party alleges that a notice has been served upon a recipient, by an accepted mode of service e.g. registered post, that party has in my view partially discharged his burden of proof. The evidential burden shifts to the intended recipient to prove otherwise. If the intended recipient denies receipt thereof and gives a plausible explanation to that effect, the evidential burden once again shifts back to the party giving the notice to prove the fact. In such a scenario, such a party should show by averment that after posting, the notice was never returned to him or her unclaimed for the presumption of receipt by the intended recipient to arise. It is only then that the burden of prove will have to shift to the intended recipient to prove by confirmation from his local post master general that the letter was actually not received by him. See the case of **Kyangavo Vs Kenya Commercial Bank Ltd (2004) KLR**

45. In the instance case, once the Plaintiff denied receipt and explained himself as he did, it was incumbent upon the 1st Defendant to show that the Notice was never returned to it unclaimed. Having failed to do so, I hold that the 1st Defendant failed to prove that the notice was served.

46. On the Notification of Sale under Section 15 (e) of the Auctioneers rules 1997, the 1st Defendant relied on the affidavit of Joseph Mungai Gikonyo sworn on 17th October, 2005. The same alleged that Mr. Gikonyo, an auctioneer travelled to the suit property on 11th October, 2005 and served the same upon a Mrs. Mathenge at the suit property. That he sent another copy by registered Post to P O Box 2114, Nyahururu. That the said Mrs. Mathenge identified herself that she was the Plaintiff's wife and worked at Aberdares F. K. Academy.

47. PW 2 was Tabitha Wangari Kuria. She told the court that she was the wife of the Plaintiff. She denied on oath having been served on 11th October, 2005 as alleged or at all. She stated that she was a standard 7 graduate and has never been a teacher as alleged by Mr. Gikonyo in his Affidavit of 17th October, 2007. PW 3 Boniface Gitonga Ndirangu also testified on oath and denied having been served with any notification of sale by the auctioneer as claimed or at all. I saw the two witnesses testify. They were composed, firm and their testimonies were never shaken. I will prefer their testimonies as opposed to the testimony of D1W1 who only relied on Affidavits whose deponents were never called.

48. Accordingly, I am of the view and so hold that neither the Statutory Notice of Sale nor Notification of Sale was served upon the Plaintiff in accordance with the law.

49. There is then the issue of the auction of 4th April, 2007. The Plaintiff's testimony was that there was no auction at all that took place on that date. According to him, the sale of the suit property to the 2nd Defendant was but stage managed. D1W1 on his part told the court that the suit property

was sold in an auction held on 4th April, 2007, which was conducted by one Jesse M. Gitau of Gallant Auctioneers.

50. From the evidence on record, I am satisfied that the suit property was advertised for auction on 4th April, 2007. (D2 Exhibit 1 Pg. 23). However, neither PW1 nor D1 W1 attended the auction. The only witness said to have attended the auction was D2W1.

51. A careful consideration of the record shows the following regarding the alleged auction of 4th April, 2007;

In paragraph 11 of a Supporting Affidavit sworn on 26th September 2007, in an application seeking to be joined in these proceedings, Samuel Gitonga Kanja (the 2nd Defendant) swore:-

> ***"The auction was conducted in our presence and I was declared the highest and successful bidder <u>having bid the highest and above the set reserve price</u>".*** *(*underlining supplied)

52. In his Replying Affidavit sworn on 9th November, 2007, the 2nd Defendant once again swore:-

> ***"13. <u>We were given the terms and conditions of the Public Auction to familiarize with and I annex hereto a copy of the duly signed terms and conditions for sale which I executed with the Auctioneer Mr. Jesse Gitau,</u> Duly marked SGK 2.***
>
> ***14. ....***
>
> ***15. The Auction was conducted in our presence and I was declared the highest and successful bidder <u>having bid the highest and above the set reserve price</u>."*** (underlining supplied)

53. In the conditions of sale that the 2nd Defendant attached to his said Replying Affidavit, condition No.1 thereof stated "***the sale is subject to a reserve price."*** Those conditions were signed by among others the Auctioneer, Jesse M. Gitau and the 2nd Defendant. These conditions were also produced on behalf of the 2nd Defendant at pages 19-24 of D2 Exhibit 1.

54. I have seen page 34 of D2 Exhibit 1. It is the Standard Newspaper for 19th March, 2007. At page 23 of that Newspaper, the suit property was advertised for public auction for 4th April, 2007. Condition No.4 of the conditions for sale thereof it was provided that the ***"sale of the above properties will be subject to a reserve price".***

55. Despite making such firm and positive averments on oath in interlocutory applications, the 2nd Defendant decided not to testify at the trial. Instead he deputized D2W1 Justus Kirugu Thanga to do so on behalf. In his witness statement dated 24/1/12 which he adopted as part of his evidence in Chief , D2W1 stated :-

> ***"9- On 4th April, 2007, Gitonga and I travelled to Nairobi to attend the Public Auction at Utalii House Offices of M/s Gallant Auctioneers and which was concluded by Mr. Jesse Mburu Gitau. -------- <u>He introduced himself and gave us the terms and conditions of the Public Auction to read</u> ----------***
>
> ***10. .....***
>
> ***11. The Auction started at about 10.30 and was conducted in our presence. There were 3 other bidders but we beat then (sic) and won. Gitonga was <u>declared the highest and successful bidder having bid the highest and above the set reserve price</u> and the***
>
> ***Hammer fell at Kshs.1,500,000/=." (***underlining supplied)

56. What is very clear from the foregoing averments on oath by both the 2nd Defendant's and his sole

witness is that, at the alleged auction the property was subject to a reserve price; there was clearly a set reserve price, that the 2nd Defendant bid at Kshs.1,500,000/= was declared the highest and which sum was beyond the set reserve price.

57. On cross examination, D2W1 changed his testimony. He told the Court that at the auction when he and the 2nd Defendant arrived they found 3 bidders but they were later joined by two (2) others to make a total of six (6) and that D2 Exhibit 1, the conditions of sale, were not given to them. However, when he returned for further cross examination, seven (7) months after being stood down, he changed his testimony and stated that there were only three persons who bid at the auction and admitted that, the conditions of sale were given to him and 2nd Defendant but they were not told what the reserve price was. He denied knowing what the reserve price was.

58. I saw and observed D2W1 testify. He never struck me as a candid and truthful witness when giving his testimony, not only would he hesitate with long pauses in answering straight forward questions but he kept on gazing towards where the 2nd Defendant was sitting in court as if to seek approval. He seemed evasive. Both the advertisement and the conditions of sale stated that the sale was subject to a reserve price. Both the 2nd Defendant in his Affidavits filed earlier in these proceedings and D2W1 in his witness statement stated categorically that the bid of Ksh.1.5 million by the 2nd Defendant was the highest and above the set reserve price. The question that remained unanswered is. What was this set reserve price? Why didn't the 2nd Defendant or D2W1 want to disclose what this reserve price was?

59. Although the name of Jesse M. Gitau of Gallant Auctioneers had been given as a possible witness for the 1st Defendant, he was never produced to testify. It is only him who would have testified on whether there was actually an auction that took place on the 4th April, 2007, how it was conducted, the number of bidders attended and participated. He would have not only produced the bidding list but he would have also disclosed to court what the actual reserve price for the suit property was. This is so considering that although the sale was subject to a reserve price, which both the 2nd Defendant and D2W1 were firm on its existence, they flatly refused to divulge how much it was. There was no explanation that was given why Mr. Jesse M Gitau, a very crucial witness, failed to attend and testify..

60. It will be recalled that the Plaintiff made serious allegations that there was no actual auction conducted on 4th April, 2007. He gave the facts he relied on for his said contention. The only people, who would have shed the light on what happened, if at all, on the said 4th April, 2007 were the Auctioneer and the 2nd Defendant. The 2nd Defendant alleged in his previously filed Affidavit that his bid of Kshs.1.5 million was above the set reserve price. He and the Auctioneer failed to attend and disclose what this set reserve price was. It will be presumed that by failing to attend and discount the Plaintiff's assertions, the evidence they would have given on the matter would have been against them. Surely, there was something the Auctioneer and the 2nd Defendant and his witness (D2W1) did not want the court to know.

61. I have seen the Valuation Report prepared by Joe Munywoki on 23/9/05. The forced sale value for the suit property given in September, 2005 as Kshs.4,200,000/=. This valuation was produced by the 2nd Defendant at pages 6 to 17 of D2 Exhibit 1. There is yet another valuation by the very same Valuers dated 05th May 2006 produced by the Plaintiff as P Exhibit 16. Although the latter valuation was prepared eight (8) months after the first valuation, the forced sale value is shown to have fallen from Kshs.4.2 Million to Kshs.3 million. Although the reports are word for word with each other, save the difference in the photographs annexed to the reports, the valuer does not explain what had led to the sharp decline in the value of the property within a short period.

62. The unchallenged evidence on record is that the Plaintiff purchased the suit property in 1998 for Kshs.2,600,000/=. He tendered evidence and receipts showing that he put up developments thereon worth Kshs.17million. There was evidence that the additional sum of Kshs.5.5 million advanced by the 1st Defendant in 1999 was meant to complete the works or developments which were ongoing on the suit property. I am satisfied that on the basis of the evidence on record, the suit property was of substantial value. This court is also alive to the evidence tendered that at an auction held in or about April, 2006, (P Exhibit 4) the highest bid of Kshs.2.7 million was rejected for being too low.

63. On the basis of the foregoing, I am of the view and so hold that the amount of Kshs.1,500,000/=

allegedly tendered by the 2nd Defendant was at glossly an under value. It was below the forced sale value set by the 1st Defendant's own valuer both in September 2005 and May, 2006. To my mind, the forced sale value given by the latest valuation Report of May, 2006 should have been and was most likely the reserve price. In the absence of any evidence as to what the reserve price was, I hold that the forced sale value given on May, 2006 of Kshs.3 million was or should have been the reserve price. To my mind therefore, the bid of Kshs.1.5 million was below the reserve price and could not form the basis of a contract. There are milliard of authorities that a chargee has a duty of care towards the chargor when exercising his statutory power of sale. This duty of in my view, extends to ensuring not to dispose off the security at an under value. This is why the law requires that there be a valuation of the security within twelve (12) months of an auction.

64. I have always known law to be that while exercising its statutory power of sale the chargee, through his agents cannot act negligently, wantonly or recklessly to the detriment of the chargor. He cannot collude with a purchaser of the security to the prejudice of the chargor. In the instance case, the 1st Defendant rejected a bid of Kshs.2.7 million in April, 2006 which would have cleared its alleged debt only to proceed less than a year later to purport to accept a bid of Kshs.1.5 million which was far less the forced sale value of the property.

65. Section 77(1) of the Registered lands Act Cap 300 Laws of Kenya (now repealed) provided that:-

> ***"A chargee exercising his power of sale shall act in good faith have regard to the interest 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,....."*** (underlining supplied)

66. It is clear under the aforegoing section that one of the duty of care owed by the chargor in exercising his statutory power of sale on properties registered under that Act was to sell the property subject to a reserve price. This is further buttressed by Section 21(3) of the Auctioneers Act which stipulate that the conditions of sale must indicate whether the property is being sold subject to a reserve price or not. In the instant case, the sale was indicated to be subject to a reserve price.

67. In the case of **Koinange Investment and Development Ltd Vs Nairobi City Council & 3 others (2009) eKLR**, Visram J(as he then was) delivered himself thus: -

> ***"It has been submitted for the 3rd Interested party that the latter is an innocent purchaser for value, and is or was not in contempt of any court orders.... there is no evidence that it was aware of the court order stopping the sale. However, given that it was able to purchase the property at a grossly undervalued price, the applicant has raised questions about its "innocence".***
>
> ***According to annexture "EWK20" ... the suit property was given a forced sale" value of Kshs.180 million as of September 2006. Clearly, the market value was much in excess of that amount. It was sold for a mere kshs.113 million without even a reserve price. That according to the applicant brings into question the "innocence" of the 3rd Interested Party, and the "motives" of the auctioneer, the 2nd Interested Party....***
>
> ***Be that as it may, as I have found the auction sale of the suit property to have been unlawful, and in contravention of a court order, the 3rd Interested Party could not, and did not acquire a good title to the suit property. I see no prejudice that this finding will occasion the 3rd Interested Party. The deposit it had has been secured and will be refunded. It has nothing to lose."***

I associate myself with that pronouncement.

68. The law is quite clear that once a chargee has exercised its power of sale and the property is sold at an auction, the chargor's equity of redemption is extinguished. That the only remedy available is in damages. This principle of law is meant to protect an innocent purchaser for value without notice of the irregularities attendant to such sale.
69. In **Bomet Beer Distributors ltd & another Vs Kenya Commercial Bank Ltd & another (2005) eKLR** Kimaru J held that: -

> ***"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages."***

70. In **Kitur & another vs Standard Bank & another (2202) 1KLR 640**, the court held: -

> "***the law itself provides that any injury to a chargor by way of irregular exercise of the power of sale by a chargee or auctioneers, shall be compensated by an award of damages (See Section 77(3) of the registered Land Act and Section 26 (1) of the Auctioneers Act."***

71. However, my view is the foregoing stipulations presuppose where the ultimate beneficiary of the irregularities of the chargee and Auctioneer is innocent. The law, as well as equity, has always been a darling of an innocent purchaser for value without notice. If however, the purchaser at an auction is shown not to be innocent but has notice of or is an active participant in the irregularities attendant to the sale, there shall be no protection to such a purchaser. Such a sale cannot stand. In a democracy such as ours where one of the values and principles of governance is the rule of law as set out in Article 10(2) of the Constitution, no principle of law or any court should aid the perpetuation of an illegality. No party should be aided or allowed to benefit from his own wrong or illegal act.
72. In the present case, whilst the 2nd Defendant was not party to or was unaware of any irregularities prior to the exercise of the 1st Defendant's statutory power of sale, that cannot be said of the alleged auction of 4th April, 2007. He admits that he saw the advert in the daily newspapers which clearly indicated that the sale of the suit property was subject to a reserve price. He admitted that he was given the conditions of sale which clearly stipulated that the sale was subject to a reserve price. He stated on oath that his bid of Kshs.1.5 million was the highest and beyond the set reserve price. He, however, conveniently refused to disclose to court what the reserve price was. His bid was clearly far less than the forced sale value given for the suit property of Kshs.3 million. His innocence is seriously in doubt considering that he refused to testify and counter the Plaintiff's serious allegations against him of collusion. Will a Court of Law enjoined to enforce the provisions of Article 10 of Constitution uphold that? I do not think so.
73. From the foregoing and the circumstances of this case, in answer to issue Nos. (c) and (d) above, I hold that the statutory power of sale of the 1st Defendant had not yet arisen. The same was irregularly exercised. The purported auction of 4th April, 2007 was no auction at all. The same was stage managed as contended by the Plaintiff. The 2nd Defendant was an active participant in the said stage management of the purported public auction. He is not an innocent purchaser for value. He colluded with the auctioneer to deprive the Plaintiff of his property. No wonder both refused to testify at the trial. I see no prejudice to be suffered by him as he cannot be allowed to benefit from the wrong doing he actively participated in. In any event, he can still have the monies he paid refunded to him.
74. In the premises, I am satisfied that the Plaintiff has proved his case to the required standard. The Plaintiff succeeds and I accordingly enter Judgment in his favour against the Defendants jointly and severally. I grant prayer Nos. (a) (b) and (c) of the Further Re-Amended Plaint.
75. As regards damages, although it was clear that the 1st Defendant was clearly in breach of its obligations under the contract with the Plaintiff, further, although the Plaintiff has been out of his business/suit property for nearly 10 years now, as a result of the wrongful acts of the Defendants, the Plaintiff did not lead proper evidence at the trial to enable this court assess the damages he

suffered. There is completely no basis for the sum of Kshs.15 million he claims in his Further Re-Amended Plaint. In view of the orders I have already granted, I do not consider it necessary to award any damages. That claim is declined.

76. I award the costs of the suit to the Plaintiff against the Defendants together with interest thereon.

It is so decreed.

DATED and delivered at Nairobi this 06th day of March, 2015.

.....

A. MABEYA

JUDGE