



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 717 OF 2017

(Formerly Machakos ELC No. 380 of 2011)

CHARLES NAKULO OSALLO.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

JULIUS CHUMBI WAITIKI.....2ND DEFENDANT

LAND REGISTRAR, KAJIADO.....3RD DEFENDANT

JUDGEMENT

By a Plaint dated the 13th December, 2011 the Plaintiff prays for judgement against the Defendants jointly and severally for: -

- a) A permanent injunction order restraining the Defendants whether by themselves or through their agents, servants or workmen from doing any of the following acts that is to say, evicting, attempting to evict, levying distress, trespassing into, encroaching into, asserting ownership, laying claim or in any other manner whatsoever interfering with the Plaintiff's quiet use, possession, occupation and enjoyment of that parcel of land known as KAJIADO/ KAPUTIEI NORTH/ 19734;
- b) A declaration that all that parcel of land known as KAJIADO/ KAPUTIEI NORTH/ 19734 is not and does not lie within land parcel number KAJIADO/ KAPUTIEI NORTH/ 3587 and the 1st Defendant had no right therefore to sell the same;
- c) A declaration that any resurvey if carried out in respect to the boundaries touching on the premises known as KAJIADO/ KAPUTIEI NORTH/ 19734 was null and void for non-compliance with the Registered Land Act (Cap 300);
- d) Costs of the suit;
- e) Any other relief that the Honourable Court may deem just to grant.

The 1st Defendant filed its Statement of Defence dated the 21st April, 2015 where it denied the averments in the Plaint except for the descriptive and the jurisdiction of the Court. It contended that the Plaintiff is not in possession of land parcel number KAJIADO/ KAPUTIEI NORTH/ 19734 but is illegally occupying KAJIADO/ KAPUTIEI NORTH/ 3587 which belongs to the 2nd Defendant. It insisted that the property which was advertised for sale is KAJIADO/ KAPUTIEI NORTH/ 3587 that was duly charged to it by one Mr. Geoffrey Kyalo Muema, its registered owner. Further, that the said property was transferred to the 2nd Defendant by the 1st Defendant by way of transfer by Chargee. It avers that there was no mistake on its part in advertising the property comprised in title number KAJIADO/ KAPUTIEI NORTH/ 3587. It explains that it is a stranger to the alleged eviction of the Plaintiff but confirms that in exercise of the statutory power of sale, via a public auction, it sold land parcel number KAJIADO/ KAPUTIEI NORTH/ 3587 to the 2nd Defendant. It denies the particulars of malice as particularized in the Plaint and that any action on its part was in bad faith and intended to defeat the Plaintiff's proprietary rights. Further, that it did not collude with any party with the intention of depriving the Plaintiff, his property.

From the Court Records, there is no copy of the 2nd Defendant's statement of Defence but in his submissions, he refers to the same wherein he had denied the allegations in the Plaint. He confirmed being the registered owner of land parcel number KAJIADO/ KAPUTIEI NORTH/ 3587, which position was confirmed in the subsequent joint surveys that were undertaken.

From the Court Records there is no evidence that the 3rd Defendant filed his Defence.

Evidence of the Plaintiff

PW1 John Dominic Obel who is a licensed Surveyor confirmed that his office undertook the subdivision of land parcel number Kajiado/ Kaputiei North/ 3585 into 19734; 19735; and 19736 which parcels were owned by Elizabeth Wanjiku Muigai. He explained that land parcel number Kajiado/ Kaputiei North/ 3585 and 3587 emanated from a larger parcel Kajiado/ Kaputiei North/ 3034 which was owned by Kenyuko Cooperative Society. It was his testimony that in September 2005, Kenyuko Cooperative Society wrote to the Kajiado Land Control Board seeking to resurvey as well as conduct reparation of Kajiado/ Kaputiei North/ 3034 to add more plots. Further, that they created 73 additional plots. He further explained that the 73 additional plots were added on the ground which culminated in reduction of sizes of the plots, shifting of some plots and roads with some plots curved from the river. It was his testimony that the initial map of 1997 could not be found in the registry. PW1 stated that in the new plan of 2005, parcel number Kajiado/ Kaputiei North/ 3586 was in between Kajiado/ Kaputiei North/ 3585 and 3587. He further testified that the reparation of Kajiado/ Kaputiei North/ 3034 which was non-existent was illegal and produced a defective Registry Index Map (RIM) or Cadastral Map.

In cross examination, he confirmed doing subdivision of parcel number Kajiado/ Kaputiei North/ 3585 through his assistant. Further, that the owner of the said land was Elizabeth Wanjiku Muigai. He explained that the Plaintiff physically resides on the subdivided land. He denied subdividing land parcel number Kajiado/ Kaputiei North/ 3568 and insisted there was a clerical error in the Mutation form where initially it was indicated as Kajiado/ Kaputiei North/ 3568 and amended to 3585. Further, that they received instructions through his assistant Joseph Mwagiru Ndegwa to undertake subdivision and the Mutation Form was prepared by his assistant after which he countersigned it. He confirmed that the mutation in the Plaintiff's bundle was the same one in the 2nd Defendant's bundle except that there was a cancellation from Kajiado/ Kaputiei North/ 3568 to 3585. He did not produce a Copy of the Certificate of Title in the name of Elizabeth Wanjiku Muigai but only produced one in the name of James Kariuki Kaburu. He stated that Kajiado/ Kaputiei North/3585 and 3587 still existed in the map. He could not confirm if the reparation of Kenyuko Cooperative Society Limited was indeed undertaken but contended that as per the RIM, it confirmed 73 parcels are indicated as created on the ground as shown in the map which he produced. He was referred to the District Surveyor's reports of 2014 and 2015, where it indicated that the property subdivided was not the correct one.

In re examination, he clarified that Kajiado/ Kaputiei North/ 3585 and 3587 could not have a boundary dispute as they have Kajiado/ Kaputiei North/ 3586 in between. Further, that they indeed subdivided Kajiado/ Kaputiei North/ 3585. He reiterated that there are two reports from the District Surveyor which are contradicting.

PW2 Elizabeth Mungai confirmed she was the owner of land parcel number Kajiado/ Kaputiei North/ 3585 which she purchased from James Kariuki Kaburu whose title is dated 14th May, 1997. She explained that she did not transfer the land to herself as her intention was to subdivide and sell, hence she never got the copy of the title in her name. She stated that she subdivided land parcel number Kajiado/ Kaputiei North/ 3585 into 19734, 19735 and 19736 respectively. Further, that she sold Kajiado/ Kaputiei North/ 19734 to the Plaintiff who got his Certificate of Title dated the 18th July, 2007. She testified that at that time she sold land parcel number Kajiado/ Kaputiei North / 19734, the area was undeveloped. She later learnt that Kenyuko Cooperative Society Limited had tried to resurvey the land much later. She knew her neighbour as Geoffrey Kyalo Muema.

In cross examination, she insisted her land was Kajiado/ Kaputiei North/ 3585 and not 3568. Further, that she bought the land from James Kaburu but did not have a Sale Agreement, Transfer, evidence of payment of stamp duty in court. She confirmed transferring land parcel number Kajiado/ Kaputiei North/ 19734 to the Plaintiff and denied ever owning land parcel number Kajiado/ Kaputiei North/ 3587. She explained that she went to the land after subdivision and was shown the beacons. She clarified that at the time of subdivision, she did not accompany PW1 to the suit land.

In re-examination, she clarified that she was never the owner of Kajiado/ Kaputiei North/3568. Further, she did not have a dispute with James Kaburu who sold her Kajiado/ Kaputiei North/ 3585.

PW3 Charles Nakulo Osallo who is the Plaintiff herein stated that he is the registered owner of Kajiado/ Kaputiei North/19734 on which parcel he resides. He explained that he acquired the said parcel of land from Muigai Commercial Agencies through Elizabeth Muigai (PW2). It was his testimony that sometime in 2010 he started receiving visitors who came to view his property for purposes of sale and yet the property that had been advertised for sale was Kajiado/ Kaputiei North/ 3587 which was owned by Mr. Geoffrey Kyalo Muema. He testified that by the time he was constructing his house, Mr. Geoffrey Kyalo Muemawas also constructing his. Further, that Mr. Geoffrey Kyalo Muema's property is about 30 metres away from where he resides. He explained that Mr. Geoffrey Kyalo Muema's property is a bungalow while his property is a maisonette. He insisted that the 1st Defendant was aware of the dispute on the actual status on the ground and referred to the Bank's letter dated the 10th December, 2010 addressed to Makhandia & Makhandia Advocates. It was his testimony that he built on land parcel number Kajiado/ Kaputiei North/ 19734 and the dispute had been referred to the Land Registrar Kajiado to resolve.

In cross examination he confirmed purchasing his land on 31st May, 2005 from Elizabeth Muigai. Further, that the said land measured 0.03 hectares and he inspected it while accompanied with representatives from Muigai Commercial Agencies before he purchased it. He further confirmed seeing the surveyors' reports which state that he had built on land parcel number Kajiado/ Kaputiei North/ 3587. It was his testimony that the 1st Defendant advertised land parcel number Kajiado/ Kaputiei North/ 3587 for sale which he did not have any interest over. Further, the 1st Defendant stopped the auction so as to conduct investigation and this culminated in a report from Thagishu & Associates. He contended that based on the said report, the 1st Defendant was not wrong in selling land parcel number Kajiado/ Kaputiei North/ 3587 which was purchased by the 2nd Defendant. He confirmed that vide a report by the District Surveyor dated the 30th September, 2014 it stated that the owner of parcel number Kajiado/ Kaputiei North/ 19734 had built on land reference number Kajiado/ Kaputiei North/ 3587 on the ground. Further, the second surveyor's report dated the 19th May, 2015 confirmed he constructed on a wrong parcel of land.

In re-examination, he clarified that there is evidence of reparation. He stated that at the time of reparation, he had constructed but obtained his title in 2007. He insisted that all reports were referring to the map after reparation. He contended that he was constructing at the same time with Mr. Geoffrey Kyalo Muema. Further, that he started constructing in 2005 while Mr. Geoffrey Kyalo Muema came in 2007 after the reparation. He reiterated that the Bank was well aware he constructed a storeyed building.

The Plaintiff produced various documents including Copy of Title Deed to Land Parcel Number KAJIADO/KAPUTIEI-NORTH/19734; Certificate of official search over Land Parcel Number KAJIADO/KAPUTIEI-NORTH/19734; Copy of the Title Deed to Land Parcel Number KAJIADO/KAPUTIEI-NORTH/3585; Extract of Mutation Form and Map for Land Parcel Number KAJIADO/KAPUTIEI-NORTH/19734; Copy of Press Advertisement by Garam Investments in the Daily Nation of 29th November, 2010; Letter dated 29th November addressed to GARAM Investment Auctioneers by Makhandia & Makhandia Advocates'; Letter dated 6th December, 2010 addressed to Barclays Bank of Kenya by Makhandia & Makhandia Advocates; Letter dated 10th December 2010 addressed to Makhandia & Makhandia Advocates by the Barclays Bank of Kenya; Letter dated 25th March, 2011 from Makhandia & Makhandia Advocates to the Registrar of Land; Letter of 10th June 2011 from the Registrar of Lands addressed to the District Surveyor, Kajiado; Letter of 13th June 2011 addressed to Barclays Bank of Kenya by Makhandia & Makhandia Advocates; Boundary Disputes Summons dated 15th June 2011 by the Land Registrar addressed to Geoffrey Muema Kyalo; Receipt for payment of Kshs. 6,000 fees for the boundary Dispute; Letter dated 27th June 2011 addressed to the Barclays Bank of Kenya by Makhandia & Makhandia Advocates; Letter dated 29th June 2011 addressed to the Land Registrar, Kajiado by Makhandia & Makhandia Advocates; Application for Registration of Restriction dated 29th June 2011; Certificate of Official Search for Land Parcel Number KAJIADO/KAPUTIEI-NORTH/3587; Letter of Julius C. Waitiki dated 6th December, 2011 addressed to Girmat Auctioneers; Notification of sale from Girmat Auctioneers dated 7th December, 2011; Certified true copy of the Green Card to the Land Parcel No. KAJIADO/KAPUTIEI/NORTH – 3585; and Certified true copy of the Green Card to the Land Parcel No. KAJIADO/KAPUTIEI-NORTH 19735 as his exhibits.

Evidence of the Defendants

DW1 Samuel Njuguna who is the legal officer for the 1st Defendant testified that they had a legal charge dated the 28th May, 2009 for Kajiado/ Kaputiei North/ 3587 which was perfected and duly registered. He confirmed the Chargor's name was Geoffrey Kyalo Mwema and the acreage for the property is 0.1 hectares. He explained that after an issue arose on the ground, the 1st Defendant instructed Thagishu & Associates and obtained a report. Subsequently, it exercised its statutory power of sale over land parcel number Kajiado/ Kaputiei North/ 3587 through GARAM Investments. He contended that no Court Order prevented the auction, with the highest bidder being the 2nd Defendant. Further, that the 1st Defendant was fully paid and they have no further interest on the property. He averred that there was also a valuation done by Zenith Management Valuers Limited for land reference number Kajiado/ Kaputiei North/ 3587 and the report is dated 30th October, 2009.

In cross examination he confirmed that the Bank identified and sold the correct property. He confirmed that there was an initial dispute on the correct location of the suit land culminating in their instructing Thagishu & Associates to identify the correct location. He reiterated that by the time of sale there was no contrary evidence on size and location of the property. In further cross examination, he explained that Geoffrey Muema sought for a loan facility for construction of a house but did not submit an approved plan; pre valuation conducted before the Charge; nor stage valuations during construction. He was not aware of the nature of the construction. He confirmed that Geoffrey Kyalo Muema was an employee of the Bank by the year 2009. Further, that Makhandia & Makhandia Advocates informed them of the dispute and they suspended the auction on 10th December, 2010. He further stated that in the report by Thagisu & Associates, it indicated the built-up area was 0.034 hectares which was far much less than the position where the Charge was created. Further, the Bank at all times was well aware the Storeyed building was built by the Plaintiff. He further confirmed that the report by Zenith Management Valuations Limited dated the 30th October, 2009 was done after the Charge.

In re-examination he clarified that the Bank did not give consent to the Plaintiff to construct on the suit land and neither was there an order from the Court stopping the Bank from exercising its statutory power of sale. Further, that there was no contractual relationship between the Bank and the Plaintiff. He insists the Bank was not informed of the reparation.

DW2 Julius Chumbi Waitiki stated that he purchased land parcel number Kajiado/ Kaputiei North/ 3587 on 20th June, 2011 vide a public auction undertaken by GARAM Auctioneers with instructions from Barclays Bank. Further, that when he purchased the land, there was a house thereon. He confirmed the Plaintiff resides on the suit land.

In cross examination, he confirmed visiting the suit land before the Auction and saw a house thereon. Further, that he was the highest bidder. He explained that in 2010 he was told there was a dispute over the suit land but he later saw an advertisement to sell the said land in 2011. On further cross examination, he confirmed the size of the land he bought was 0.10 hectares. Further, that the house he saw on the suit land did not fill the whole land. He learnt there was a dispute before purchasing the land. Further, he had never asked the Bank to refund his purchase price. He further confirmed that he was shown a valuation report dated 30th October, 2009 by the Auctioneer. The Defendants produced the following documents as their exhibits: Charge dated 28th May, 2009; Title Deed for KJD/KAPUTIEI NORTH-3587; Report by Thagishu & Associates; Report by the District Surveyor dated 30th September, 2014; Report by the District Surveyor dated 19th May, 2015; Memorandum of Sale and Corresponding Documentation; Advertisement for Sale of Property; Transfer by Chargee; Report and Valuation by Zenith Management Valuers; Newspaper advertisement dated 13th June, 2011; Copy of title in the name of Geoffrey Kyalo Muema; Cheques dated 28th June, 2011 for payment of bid deposit amount; Memorandum of Sale dated 28th June, 2011; RTGS payment form for sum of Kshs. 3,000,000.00; Letter of Consent dated 14th September, 2011; Stamp Duty assessment and payment documents; Transfer by Chargee; Copy of Title Deed in the name of 2nd Defendant; Survey report dated 30th September, 2014; Survey Report dated 19th May, 2015 and Mutation Form as exhibits.

The Plaintiff, 1st and 2nd Defendants' filed their respective submissions which I have considered.

Submissions

The Plaintiff in his submissions reiterated his claim and relied on section 26 of the Land Registration Act (previously section 23 of the Registered Land Act). He further relied on the decision of **Gitwany Investment Limited Vs Taj Mal Limited & 3 Others (2006) eKLR**. He further submitted that the title issued to a purchaser arising from an auction can be impeached on grounds of fraud since the 1st and 2nd Defendants fraudulently transferred the suit property knowing it belonged to a totally different party other than the Chargor. He stated that he

is entitled to orders of a permanent injunction as together with his family they have faced threats of eviction. To buttress this argument, he relied on the decision of **Salim & Another Vs Mohammed (KLR) (E & L) 1 page 347**. He submitted that his rights rank higher than those of either the Bank or the subsequent purchaser of the property in an auction. He further relied on the decision of **Park View Shopping Arcade Vs Kangethe & 20 Others (KLR) (E & L) Page 951**. He insists his Certificate of Title is conclusive proof of ownership and if the Bank lost its property, then it can seek damages. He further relied on the decision of **Elias Joseph Waburi Wanunyu Vs Joseph Mwangi Njoroge (2017) eKLR** and insisted parcel number Kajiado/ Kaputiei North/ 3587 was imposed on Kajiado/ Kaputiei North/19734 and sought for his title to be protected.

The 1st Defendant in its submissions reiterated its claim and insisted that it legally exercised its statutory power of sale in respect to land parcel number Kajiado/ Kaputiei North/ 3587. It submitted that the registered proprietor of Kajiado/ Kaputiei North/ 3587 was initially Geoffrey Kyalo Muema. It relied on section 32 (2) of the Registered Land Act (now repealed) and the decision of **Margaret Njeri Wachira V Eliud Waweru Njenga (2018) eKLR**. It further submitted that the 2nd Defendant having purchased the suit land through a public auction and the title having been transferred to him, he is the current registered proprietor of Kajiado/ Kaputiei North/ 3587. It further submitted that Kajiado/ Kaputiei North/ 3587 and 19734 are distinct and different from each other. Further, that Kajiado/ Kaputiei North/ 3587 and 19734 do not stand on the same site or location and are different in sizes. It further submitted that the Bank had every right to exercise its statutory power of sale over land parcel number Kajiado/ Kaputiei North/ 3587 as Geoffrey Kyalo Muema had defaulted in repaying the loan. Further, the property was properly advertised, no court order was issued to stop the sale and the 2nd Defendant became the highest bidder culminating in the title being transferred to him. To buttress its averments, it relied on the following decisions: **Jim Kennedy Kiriro Njeru V Equity Bank (K) Limited (2019) eKLR; HCCC No. 3125 of 1995, John P. O. Mutere & Another V Kenya Commercial Bank** and **Joyce Wairimu Karanja Vs James Mburu Ngure & 3 Others (2018) eKLR**. It also submitted that the Plaintiff constructed on Kajiado/ Kaputiei North/ 3587 without permission from Geoffrey Kyalo Muema and the Bank. Further, the Plaintiff failed to engage a surveyor before constructing his house and the dispute herein arose from his own mistakes. It reiterated that the 2nd Defendant is now the absolute proprietor of Kajiado/ Kaputiei North/ 3587. It relied on section 27 (1) of the Registered Land Act (repealed). To support these arguments, it relied on the following decisions: **Salim & Another Vs Mohammed (2000) 1 KLR; Alwi Mohamed Alwi Vs Swaleh Omar Awadh (2015) eKLR; Jesse Kamau Kinuthia V Teresia Wanjiku Kamande (2008) eKLR; and Daniel K. Cherai & 2 Others Vs Kipkoech Kangogo & Another (2018) eKLR**. It further reiterated that the Plaintiff is hence not entitled to the orders sought in the Plaintiff.

The 2nd Defendant submitted that there was no evidence of the alleged re parcellation and the Plaintiff's case was premised on hearsay as neither the Plaintiff nor the Surveyor were party to that process, hence the facts were unsubstantiated. He further submitted that three different surveyors having visited the property arrived at the conclusion to the effect that the Plaintiff constructed on the wrong parcel of land. Further, that the surveyor (PW1) failed to visit the property and in fact the mutation forms indicate a different parcel of land altogether. It relied on the decision of **Eastern Produce (K) Ltd Vs Chemomi Tea Estate V Bonfas Shoya (2018) eKLR** to support his averments. He reiterated that the Plaintiff was not entitled to the orders sought in the Plaintiff as he is in occupation of the wrong property. He relied on section 24 (a) of the Land Registration Act. He insisted the Plaintiff cannot rely on the fact that he has an interest in Kajiado/ Kaputiei North/ 19734 to infringe on his rights. He reiterated that the Plaintiff cannot be granted orders that mischievously validated and extends his unlawful occupation. To support these arguments, he relied on the case of **Derrick Kibaara Munyua & Another Vs Mwevia M'Murungi M'tuikathi and Joseph Githogori Ndegwa (3rd Party) (2019) eKLR**.

Analysis and Determination

Upon consideration of the Plaintiff, Defences, Witnesses Testimonies, Exhibits and rivaling Submissions, the following are the issues for determination:

- Whether the 1st Defendant legally exercised its statutory power of sale in respect to the disputed land.
- Whether the 2nd Defendant can be deemed to be a bona fide purchaser for value.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Who should bear the costs of this suit.

As to whether the 1st Defendant legally exercised its statutory power of sale in respect to the disputed land. It is not in dispute that the Plaintiff is the registered proprietor of land parcel number Kajiado/ Kaputiei North/ 19734. It is further not in dispute that the 2nd Defendant is currently registered as the proprietor of land parcel Kajiado/ Kaputiei North/3587. What is in dispute is the Plaintiff's claim that the 1st Defendant illegally proceeded to sell his land by public auction yet there was a dispute in terms of location of the Charged land. PW1 in his testimony stated that the Plaintiff built on the correct land but the confusion over the location of the two parcels of land (Kajiado/ Kaputiei North/ 3587 and 19734) arose due to the re-parcellation conducted by Kenyuko Cooperative Society Ltd that had initially owned Kajiado/ Kaputiei North/ 3034 where the disputed parcels emanated from. He produced a letter in his report dated 2nd September, 2005 where the officials of the said Kenyuko Cooperative Society Ltd wrote to the Kajiado Land Control Board seeking resurvey including restructuring of Kajiado/ Kaputiei North/ 3034 where the disputed parcels emanated from. The 1st and 2nd Defendants insisted there was no evidence of re-parcellation by Kenyuko Cooperative Society Ltd but did not controvert the contents of the said letter. The Plaintiff as PW3 testified that he acquired his land from PW2 and commenced building thereon at the same time when Geoffrey Kyalo Muema the Chargor of Kajiado/ Kaputiei North/ 3587 was also building on his land. Further, that his house was a maisonette while Geoffrey Kyalo's house is a bungalow. DW1 testified that Geoffrey Kyalo Muema charged land parcel number Kajiado/ Kaputiei North/ 3587 to the 1st Defendant to obtain a construction loan but failed to repay the loan culminating in the bank exercising its statutory power of sale. The Plaintiff as PW1 testified that when he saw the advertisement for sale, he lodged a complaint with the 1st Defendant through his lawyers Makhandia & Makhandia vide a letter dated the 6th December, 2010 culminating in the sale being suspended as indicated in the 1st Defendant's letter dated the 10th December, 2010. He was surprised to note that six months down the line, the 1st Defendant proceeded to sell his land by public auction to the 2nd Defendant knowing fully well there was a dispute over the location of the charged land. DW1 confirmed in Court that the 1st Defendant

on receipt of a complaint from the Plaintiff proceeded to hire the services of Thagisu & Associates that conducted a valuation to ascertain the location of the Charged land. Upon perusal of a letter dated the 10th June, 2011 by the Land Registrar, Kajiado addressed to the District Surveyor in respect to land parcel number Kajiado/ Kaputiei North/ 19734 he states that: ' **The above property was subdivided from plot No. 3585 but plot number 3587 is shown where 3585 currently stands**'. I note the Land Registrar issued summons dated the 15th June, 2011 to determine the boundary dispute between parcels Kajiado/ Kaputiei North/ 3587 and 19734 on 25th July, 2011 but the bank still proceeded to sell the charged land by public auction on 28th June, 2011 before the said dispute was determined. Which brings me to the question of what led to the confusion leading to the Plaintiff constructing on land parcel number Kajiado / Kaputiei North/ 3587 instead of 19734 which was a resultant subdivision of Kajiado/ Kaputiei North/ 3585. PW1 contended that Kenyuko Cooperative Society Limited which initially owned Kajiado/ Kaputiei North/ 3034 where all the parcels of land emanated from, sought to reparcel the said land to create more plots after the Plaintiff had already taken possession of his land. This position was confirmed by PW2. Further, it emerged that there was an increase of 73 additional plots on the ground yet land parcel number Kajiado/ Kaputiei North/3034 had already been closed on subdivision. PW1 was categorical that this could have led to the confusion and shifting of boundaries culminating in the quandary herein. The Plaintiff as PW3 confirmed that he was shown his plot by one Albert a representative of Muigai Commercial Agencies that represented PW2 who sold him the said plot. Upon cross examination, PW1 explained that there was an error on the Mutation Form which indicated Kajiado/ Kaputiei North/ 3568 but the same was cancelled to indicate 3585 that led to its subdivision to produce 19734, 19735 and 19736 respectively. Further, PW2 confirmed she did not visit the suit land before subdivision but visited it after that. PW1 also confirmed he did not personally undertake the subdivision nor receive instructions but the same was done by Mr. Mwangi from his office and he only signed the Mutation Form. As per the two reports by the District Surveyor dated the 30th September, 2014 and 19th May, 2015 which were presented in court, after this matter had been filed, they all confirmed that the owner of parcel No. Kajiado/ Kaputiei North/ 19734 had constructed on parcel No. Kajiado/ Kaputiei North/ 3587 on the ground in respect to the Registry Index Map. I however note from the District Surveyor's report dated 19th May, 2015 at the observation section, the said Surveyor stated that '**parcel No. Kajiado/ Kaputiei North/ 3034 was subdivided giving rise to parcel Nos. Kajiado/ Kaputiei North/ 3517 to 3894 and parcel Nos Kajiado/ Kaputiei North/ 23401 to 23473 and amended on the Registry Index Map**'. To my mind, this is a clear indication that there were indeed changes on the grounds which could have affected the locality of the disputed plots. From the findings of the two surveyors including Thagisu & Associates that had been hired by the 1st Defendant, it is emerging that the Plaintiff actually built on land parcel number Kajiado/ Kaputiei North/ 3587 and not Kajiado/ Kaputiei North/ 19734. Which brings me to the question on whether the 1st Defendant on being made aware of the confusion over location including size of the Charged land, was legally entitled to proceed to exercise its statutory power of sale, knowing fully well it is the Plaintiff who had built thereon. DW1 testified that the 1st Defendant was holding land parcel number Kajiado/ Kaputiei North/ 3587 as security as the same had been charged by Geoffrey Kyalo Muema to secure a construction loan. Further, the said Chargor defaulted in repaying the loan and the Bank had no recourse but to proceed to realize the security. What is baffling is that despite the Bank knowing fully well that it is the Plaintiff who had put up a massonete on the disputed land proceeded to sell the property before the dispute on location had been resolved by the District Land Registrar. DW1 confirmed in his testimony that the Bank was well aware it is the Plaintiff who had built on the charged property but insisted that the said land belonged to Geoffrey Kyalo Muema. The Plaintiff as PW3 testified that when he was putting up his house, Geoffrey Kyalo Muema too was putting up his house in another parcel of land which evidence remained uncontroverted. DW1 during cross examination confirmed that Geoffrey Kyalo Muema had been granted a construction loan but the valuation conducted by Zenith Management Valuers Ltd was undertaken after the Charge dated 28th May, 2009. I note the said report by Zenith Management Valuers Limited is actually dated the 30th October, 2009 which was done almost six months after the Charge had been perfected. DW1 did not furnish court with any building plans nor stage valuations during construction to confirm what the Bank had financed. It also emerged that as at the year 2009, the said Geoffrey Kyalo Muema was actually an employee of the 1st Defendant at the time he charged the land. To my mind, I smell an element of bad faith and mischief by the 1st Defendant as against the Plaintiff. It seems the said Chargor was well aware of the location of his land having been building thereon while the Plaintiff was also constructing but was aided to commit a wrong after realizing there was a confusion over the respective parcels of land and instead of the Bank confirming the true position of the Charged land before perfecting the Charge, it only hired a Valuer much later. Insofar as the 1st Defendant insists that it was the Chargee, however in line with the principles of equity which are enshrined in our constitution, it behoves this Court to provide substantive justice. To my mind, I find that the 1st Defendant was negligent and did not act prudently, as well as exercised bad faith in disposing of the Charged property before the issue of the disputed location, size and boundary was determined by the Land Registrar as required by the provisions of the Registered Land Act (repealed) which was the law by then. It is against the foregoing that I find that the 1st Defendant acted illegally in exercising its statutory power of sale over the disputed parcel of land.

As to whether the 2nd Defendant can be deemed to be a bona fide purchaser.

It was not in dispute that the 2nd Defendant purchased land parcel number Kajiado/ Kaputiei North/ 3587 vide a public auction and was thereafter registered as the proprietor of the said land. The Chargor further never disputed the fact that the Bank had actually exercised its statutory power of sale. It emerged in evidence that the 2nd Defendant had attempted to evict the Plaintiff from the disputed land and even tried to levy distress for rent. DW2 who was the 2nd Defendant confirmed in Court that he had been well aware that there was a dispute in respect to the suit land culminating in the first auction being called off. However, he still proceeded to purchase the said land when he saw it readvertised. He confirmed that the Auctioneer showed him the valuation report from Zenith Management Valuers Ltd before the auction. In the said report at the improvements section, I note the said Valuers actually indicated that there was a developer who was not the registered owner of the plot and did not allow them access therein. I note there was a second valuation report by Thagisu & Associates which was prepared just before the auction, wherein at the ownership section it stated as follows: '**Parcel number Kajiado/ Kaputiei North/ 3587 is owned by one Geoffrey Kyalo Muema but charged to Barclays Bank.....However the location of the ground is occupied by one Charles Wakulo Asano.....Mr. Charles Wakulo Asano holds title No. Kaputiei North/ 19734 (a subdivision of Kaputiei North/3585) and has constructed the storey building which as per the survey plan (RIM) is on parcel No. Kaputiei North/3587. This properly indicates a mislocation of the strip of plots on the ground. This thus calls for intervention of the District Land Registrar and District Surveyor to go and correct the anomaly and Redraw the RIM to reflect the actual ground occupation.**'

I note despite the said comments within the two valuation reports the 2nd Defendant still proceeded to purchase the said property. I wish to make reference to various decisions touching on the issue of bona fide purchaser for value without notice. In the case of **Arthi Highway Developers Limited V West End Butchery Limited & 6 others (2015) eKLR** the Court of Appeal held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular while in the case of **Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, Court of Appeal held as follows:- "**We have stated that when a registered proprietor root of title**

is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (See also the decision in **Gitwany Investment Limited Vs Taj Mal Limited & 3 Others (2006) eKLR**). From these decisions, it is clear the Courts held that where a root of title is challenged where there is an interest, which are not noted in the register, a party cannot claim to be a bona fide purchaser for value without notice. In associating myself with the said decisions and applying it to the circumstances at hand, I note the 2nd Defendant was well aware of the defect in the title he was acquiring but still proceeded to purchase the same through a public auction. At this juncture, I opine that insofar as he holds a Certificate of title which is deemed to be prima facie evidence of ownership in accordance with section 26 of the Land Registration Act as read together with section 23 of the Registered Land Act (repealed), his title is defective and he is not entitled to evict the Plaintiff from the disputed portion until the correct location of the Charged land he purchased is determined. I opine that in case he is aggrieved, he is only entitled to be indemnified by the 1st Defendant who was well aware that the Chargor never put up a house on the Charged land and there was a dispute in respect to its location but still proceeded to transfer the same to him.

As to whether the Plaintiff is entitled to the orders sought in the Plaint. Based on the findings above, I find that the Plaintiff is indeed entitled to the orders sought in the Plaint. I note the Plaintiff never sought for the correction of the error on the ground vis a vis his title. However based on the averments of PW1 in relation to reparation by Kenyuko Cooperative Society Ltd and the report by Thagisu & Associates which I have quoted above and in relying on the recent decision of **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another [2020] eKLR** where the Court of Appeal held as follows: ‘The issues that the parties proceeded on and which the judge made findings on all arose from the pleadings and the operation of the 1st respondent’s account by the appellant. As was held by the predecessor of this Court in the case of **Odd Jobs v Mubea [1970] EA 476**, a court may base its decision on a non-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. The trial court did not err in the way it reached its decision in the matter that was before it. The judge proceeded on the prayers set out in the amended plaint and the findings made were in accord with the pleadings and the issues that arose in the proceedings.’ I will direct that the District Land Registrar, Kajiado and District Surveyor to intervene and correct the error on location of the disputed parcels of land (Kajiado/ Kapatiei North/ 3587 and 19734) respectively by amending the RIM (Cadastral Map) to reflect the actual ground occupation of the same within 90 days from the date hereof.

Who should bear the costs of this suit?

I note the Plaintiff is the inconvenienced party while the 1st Defendant was responsible for the dispute herein. In the circumstance, I will award the Plaintiff costs and direct the same to be borne by the 1st Defendant.

It is against the foregoing that I find that the Plaintiff has proved his case on a balance of probability and will proceed to enter judgement as against the Defendants and make the following final Orders:

- i) A permanent injunction be and is hereby issued restraining the Defendants whether by themselves or through their agents, servants or workmen from doing any of the following acts that is to say, evicting, attempting to evict, levying distress, trespassing into, encroaching into, asserting ownership, laying claim or in any other manner whatsoever interfering with the Plaintiff’s quiet use, possession, occupation and enjoyment of that parcel of land known as KAJIADO/ KAPUTIEI NORTH/ 19734;
- ii) -A declaration be and is hereby issued that all that parcel of land known as KAJIADO/ KAPUTIEI NORTH/ 19734 is not and does not lie within land parcel number KAJIADO/ KAPUTIEI NORTH/ 3587 and the 1st Defendant had no right therefore to sell the same;
- iii) The District Land Registrar, Kajiado and District Surveyor are hereby directed to intervene and correct the error on location of the disputed parcels of land (Kajiado/ Kapatiei North/ 3587 and 19734) respectively by amending the RIM (Cadastral Map) to reflect the actual ground occupation of the same within 90 days from the date hereof.
- iv) The costs of this suit is awarded to the Plaintiff to be borne by the 1st Defendant.

Dated Signed and Delivered at Kajiado this 22nd Day of September, 2020.

CHRISTINE OCHIENG

JUDGE