REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL CASE NO 1565 OF 2001

RAPHAEL JOSEPH KARURI……....……PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD…....1ST DEFENDANT

PAUL WAITHAKA MACHARIA…….....2ND DEFENDANT

SALOME WANGUI KAMAU……..….3RD DEFENDANT

JUDGEMENT

1. The issues in contention and for the determination of the Court arise from the Amended Plaint instituted by the Plaintiff against the Defendants. In the Amended Plaint dated 4th February 2005 and filed on 7th February 2005, the Plaintiff sought for the impugned sale of the suit property be set aside, a declaration that the purported consent by the Land Control Board dated 3rd October 2001 issued by the Oloolaiser Land Control Board as null and void for all purposes, breach of contract, deceit, conspiracy and fraud in purported exercise of statutory power of sale, damages for the said breach, both punitive and exemplary, costs of the suit and interests thereof. These allegations were denied by the Defendants as set out in their Amended Statements of Defence.

History/Background

2. The Plaintiff had on or about 1992 approached the 1st Defendant for a loan facility of Kshs 540,000/-. The same was to be repaid for a period of fifteen (15) years at the interest rate of 18% per annum. This facility was to be secured over **LR No Ngong/Ngong/2421**, the suit property herein, which was registered in the name of the Plaintiff. The Plaintiff alleged that he dutifully and diligently repaid the loan, and as at the time of filing the suit had repaid a total of Kshs 1,604,665/- to the 1st Defendant. It was averred that the 1st Defendant had, without notice to the Plaintiff, unilaterally varied the terms of the loan agreement by increasing the interest rates. The Plaintiff averred that the same were uncontractual, unlawful and unenforceable in law.

The Plaintiff's Case

3. The Plaintiff filed its statement of claim against the Defendants through its Amended Plaint dated

7th February 2005. In contending that the variation of interest rates was unconscionable and unlawful, the Plaintiff averred that the 1st Defendant had unilaterally varied the terms of the original contract, which caused fundamental changes and alterations thereof. It was averred that the rate of interest was varied from 18% per annum to 20% in the year 1993, and further increased it to 26% in the year 1994, and imposed a penalty interest of 1.5% per month on the outstanding amount. These changes, it was contended, was without notice to the Plaintiff and that the variation were arbitrary and oppressive.

4. With regards to the sale of the suit property, the Plaintiff contends that the same was irregular and arbitrary, in that the sale was conducted in purported exercise of statutory power of sale on alleged arrears due on the loan account together with interest of Kshs 1,815,492.27 which was not payable. Further, it was contended that the Defendant conspired to undersell the suit property as there was no valuation that had been conducted to arrive at the reservation price or the market price. On conspiracy and fraud, the Plaintiff contended that the Defendants, jointly and severally, lodged a false application to the Oloolaiser Land Control Board for consent for transfer, fraudulently obtaining the said consent dated 3rd October 2005 and lodging the same with the Land Registrar, Kajiado with full knowledge that the same falsified to effect registration of the suit property in favour of the Defendants.
5. The hearing of the Plaintiff's case proceeded on 9th March 2005 before Hon. Njagi, J. The Plaintiff was the first witness to testify. In his testimony, he testified that he had indeed borrowed certain facilities from the 1st Defendant, which facility was secured by a charge over the suit property. He attested that there had been variations in the rate of interest charged on the loan facility, but admitted that the 1st Defendant had notified him severally of the changes by issuing notices. However, he testified that he had not consented to these changes in interest rates, and to which had subsequently, made the monthly repayments untenable.
6. With regards to the sale of the suit property, the Plaintiff testified on several related issues; (1) that there was no valuation done before the suit property was disposed of to the 2nd and 3rd Defendants, (2) that there was no valid consent obtained from the Oloolaiser Land Control Board on 3rd October 2001 and that (3) the 1st Defendant was asking for repayment of a facility that had exceeded the agreed terms of the loan agreement and in breach and violation of the provisions of Section 44 of the Banking Act.
7. During cross examination, the Plaintiff was unable to explain how he had concluded that there was no consent of the Oloolaiser Land Control Board on 3rd October 2001, yet he had adduced evidence before the Court of the Board's resolution of the same date in which the District Officer, as the Chairman of the Board, and the Secretary, had appended their signatures thereto. Further, he admitted that the 1st Defendant had on several occasions informed him of the outstanding arrears in the repayment of the loan, to which he had made promises to repay but admitted that he had been unable to satisfy the repayments thereof. He further testified that he had received notices on the variation of the interest rates from the 1st Defendant, but had continued to repay the same without raising issue with the 1stDefendant until the time that they exercised the power of sale in disposing of the suit property to recover the loan.
8. The Plaintiff called on PW2 a Mr. William Fredrick Omondi who claimed to be an accountant, although he did not provide any certification as to his qualifications. He testified that he had worked at the firm of Wanyasa & Co. although he did not state whether the same was an accounting or auditing firm. On cross-examination, he admitted that the information in his filed report, which was undated, was predicated upon assumptions as to the variation of interest rates, and further that he had not taken a course on credit analysis.
9. The Plaintiff further called upon PC James Kamilu Wambua who testified on 14th November 2005 as PW3. In his testimony he stated that he had received a complaint from the Plaintiff of disturbance at the suit property. He further testified that he had arrested and apprehended two individuals, David Wanderi and Waithaka Macharia, who were to be charged with the offence of creating disturbance. He testified that whilst carrying out investigations at the Lands Office, he was able to obtain some documents from the clerk with regards to the meeting of the Oloolaiser Land Control Board on 3rdOctober 2001. In this regard, he testified that the LCR No 313/10/2001 which was an application by the 2nd and 3rd Defendant for consent to transfer the suit property to

them, was the same number that had been issued for consent to charge property in Ngong/Ngong 1216 between Inter Active World Limited and Barclays Bank of Kenya Ltd.

10. In cross examination, the witness testified that he had been conducting two investigations; (1) on the report of malicious damage on the suit property and (2) on fraudulent transfer of the suit property to the Defendants. However, he further testified that he had not investigated as to why there were two (2) different applications for consent that bore the same entry number LCR No 313/10/2001 and further, that he did not follow up with either the 1st Defendant nor Inter Active World Limited and/or Barclays Bank of Kenya Ltd. He further testified that he had requested for a restriction to be placed on the title pending the investigations, and that since the investigations had been completed and after which the Office of the Director of Prosecutions had advised that the matter was civil in nature, no further investigations were carried out and the restriction had not been lifted.
11. The Plaintiff further called upon his 4th witness one Mercy Rasiato Kishil, a copy typist at the Ministry on Lands. She testified that on 3rd October 2001 she was on duty as the acting secretary to the Board. She further testified that she had prepared the agenda for the meeting and had further prepared the minutes and consents for deliberation by the Board. She testified that on that day, they had forty-one (41) applications before the Board, and that the LCR No 313/10/2001 was not part of the agenda for that day's meeting. On the issue of two different applications bearing the same LCR number, she stated that Board gave numbers according to the number of applications, and that in this instance, she was unaware of how the two different application were given the same application number and that she had not received any application from neither the Defendants nor Inter Active World Ltd.
12. During cross-examination, she pointed out that it was not possible to miss out information which should be included in the minutes, although it was pointed out in the minutes to the meeting held on 3rd October 2001 there had been missing information. Further, and with regards to the two different applications bearing the same application number, it was the witness's testimony that she was not the one that had prepared the applications, and further, that she was unsure whether the District Officer had approved the applications or not, even though she attested that the signature was similar to that of the District Officer. Further she had submitted that the lack of numbers was not a mistake or omission attributable to her, and that for some of the transactions, she was unware of what had happened for certain information to be missing.

The 1st Defendant's Case

13. The 1st Defendant filed its Amended Defence on 22nd February 2005. In denying the allegations in the Amended Plaint, the 1stDefendant reiterated that it reserved the contractual right to vary the rate of interest levied and that the penalty charges were contractual and therefore lawful and enforceable. It was further contended that the letter of offer and charge contained all the terms and conditions relating to the amount secured and interest payable.
14. Further, it was contended that with regards to the sale, proper notices were issued in accordance with the law, and that all procedures incidental to the sale including consents from the relevant bodies and a valuation of the suit property was carried out to ascertain the forced sale value and open market value. It was also contended that the suit file was misconceived, defective, bad in law and that in any event, the Plaintiff had been erratic and irregular in servicing his account and causing substantial arrears to accumulate.
15. The 1st Defendant at the hearing of its case on 21st March 2007 called upon one Joseph Kamau Kania, the 1st Defendant's Legal Services Manager. He reaffirmed that the Plaintiff had applied for a facility and had accepted a letter of offer dated 29th August 1991 for Kshs 540,000/- for a term of fifteen (15) years at the rate of 18% per annum. The same was secured by a charge over the suit property. It was also a term of the charge that the rate of interest was variable as provided under the charge. It was also a term of the charge that in the event of default in the repayment of the loan, the suit property would be disposed to recover the outstanding arrears.
16. On 18th November 1993 the 1st Defendant wrote to the Plaintiff informing him that he had defaulted in repayment of the loan, which default was acknowledged by the Plaintiff in his letter

dated 2nd December 1993. This was the commencement of correspondence between the 1st Defendant and the Plaintiff, culminating with the notices issued to the Plaintiff on 5th January 2001 and 1st February 2001. It was stated that on 28th June 2001, a valuation of the suit property was carried out and the auctioneers, Taifa Auctioneers, duly instructed to proceed with the sale of the suit property by public auction.

17. DW1 further testified that the requisite redemption notices had been issued and duly served upon the Plaintiff in accordance with the provisions of Section 74 of the Registered Land Act. Further, it was reiterated that the sale was conducted on 28th September 2001, where the 2nd and 3rd Defendants emerged as the highest bidders and subsequent purchasers of the suit property.
18. During cross examination, it was reiterated that the consent of the Land Control Board was required as provided under Cap 302 of the Laws of Kenya, and that as far as presentation of the application before the Board seven (7) days before the date of the meeting, the provision was not complied with. However, with regards to the variation in the rates of interest, it was the 1st Defendant's contention that the Plaintiff was duly informed of the effected changes to the rate of interest, and that there was no requirement then to seek approval from the Minister of Finance. Further, he testified that there were also penalties for default in repayment and interest on arrears in repayment of the principal and interest, and that the penalties and subsequent charges lead to increase in the amount payable in arrears on the outstanding loan. As with regards to the application for consent to the Oloolaiser Land Control Board dated 2nd October 2001, the 1st Defendant reiterated that it had not made the application, and that it was a matter for conjecture whether the 2nd or 3rd Defendant who made the application.
19. Further to the testimony of DW1, the 1st Defendant also called upon DW2 the 2nd Defendant herein. In his testimony on 4th October 2010, the 2nd Defendant reiterated that he had seen an advertisement sometime in September 2001 for the sale of the suit property. He enquired about the same from the auctioneers office, and was informed when the sale and even visited the suit property and the office of the 1st Defendant to submit his details as they too had made an offer to assist with the purchase price of the suit property. At the date of the auction, he stated that he had paid a bid price of Kshs 100,000/- and at the end was declared the highest bidder having bid Kshs 1,300,000/-. After the auction, the 2nd Defendant stated that he approached the 1st Defendant on account of a facility to offset the balance of the purchase price, and on 3rd October 2001, visited the Oloolaiser Land Control Board offices with his advocate, who later wrote to advise him that the suit property had been registered in both his and the 3rd Defendant's names. He further contended that the Plaintiff had earlier instituted a suit against him and the 3rd Defendant in HCCC No 1018 of 2001 seeking for an order prohibiting the transfer of the property, but which suit had been determined in his favour.
20. With regards to the application for charge and consent to the Land Control Board, the 2nd Defendant averred that the form had been filled by an advocate from the duly instructed firm of Walker Kontos Advocates, and was only required to sign at the form. He further stated that the implication of signing the document had been explained to him, and that he had signed the documents on behalf of the 3rd Defendant as well. He reiterated that he did not know neither the Plaintiff nor Inter Active World Ltd who had been issued with the same LCB No 313/10/2001, and that he had instructed the said firm of advocates to evict the Plaintiff from the suit property after he had been advised that the property had been duly registered in his and the 3rd Defendant's names.

The 2nd& 3rd Defendants' Case

21. In their Amended Defence dated 11th February 2005, the 2nd and 3rd Defendant denied the allegations as set out in the Plaintiff's Amended Plaint. It was contended that they were strangers to the allegations raised by the Plaintiff, and further that they never conspired with the 1st Defendant, or any other party, in the purchase and subsequent transfer of the suit property in their names.
22. It was further stated that they had attended the public auction conducted by Taifa Auctioneers on

28th September 2001, and were declared the highest bidders having bid Kshs 1,300,000/-. Further, they reiterated that the rights and interest in the suit property claimed by the Plaintiff had been extinguished on 28th September 2001 when the suit property was sold to them, and that thy therefore had no cause of action against them as bona fide purchasers.

23. The 2nd and 3rd Defendant filed a counter claim against the Plaintiff, seeking mesne profits, valuation costs of Kshs 48,000/-, an eviction order against the Plaintiff and costs and interest of the counterclaim. It was contended that since the purchase of the property, and its subsequent transfer to the 2nd and 3rd Defendants, the Plaintiff has refused and/or failed to hand over vacant possession of the suit property to them despite several attempts and demands of the same. They further sought rental income pegged at Kshs 40,000/- from the date of purchase of the suit property until they are handed vacant possession of the suit property.

Determination

24. From the proceedings and the testimonies presented before the Court, it is not in dispute that the Plaintiff and the 1st Defendant had entered into an agreement, whereby the Plaintiff borrowed and the 1st Defendant lent Kshs 540,000/-, which agreement was manifested by both the letter of offer and charge created as security over the Plaintiff's property dated 29th August 1991 and 10th January 1992 respectively. It is also not in dispute that by accepting the facility from the 1st Defendant, and further offering his property as security for the loan facility, both parties were in agreement that the terms and conditions of the letter of offer and subsequent charge would be binding and enforceable upon them. It was with this meeting of the minds that the parties, that being the Plaintiff and the 1st Defendant, agreed to consent to the terms. However the Plaintiff, in breach of the terms of this agreement, failed to repay the loan facility as agreed, necessitating the 1st Defendant to take appropriate steps in the recovery of the arrears and outstanding amounts from the sale of the suit property.
25. The Plaintiff disputed the variation of the terms of the charge and the letter of offer, terming the variations by the 1st Defendant of the interest rate as unilateral and unconscionable, to the extent of stating that the same was unlawful and hence unenforceable. On its part, the 1st Defendant maintained that the variation of the rate of interest was provided in the contract, and to which conditions the Plaintiff had agreed to, and could thus therefore, not turn around when he was unable to settle the claim to state the same to be unlawful and illegal.
26. The issues for determination were formulated in the list of agreed issues filed by the parties dated 1st July 2004. Therein, the parties raised the following issues for consideration by the Court;

    1. **Whether the Plaintiff dutifully repaid the principal sum due and interest thereon to date in the sum of Kshs 1,553,065/- to the 1stDefendant;**
    2. **Whether the 1st Defendant charge and subsequent fluctuating interest rates on the loan were brought to the attention of the Plaintiff at the time of the execution of the letter of offer or whether the said interest rates and have been charged on the Plaintiff's account arbitrarily and is thus oppressive;**
    3. **What were the terms of the charge on L.R Ngong/Ngong 2421 between the Plaintiff and the 1st Defendant;**
    4. **What was the real value of the subject property L.R Ngong/Ngong 2421 as at 8th June 2001;**
    5. **Is the Plaintiff ready and willing to redeem his property L.R Ngong/Ngong 2421;**
    6. **Was the Plaintiff right to redemption extinguished on 28th September 2001;**
    7. **Are the 2nd and 3rd Defendants the legal registered owners of L.R Ngong/Ngong 2421;**
    8. **Who will be the costs of the suit and the counter-claim.**

27. It was noted from the statement filed in the Plaintiff's bundle of documents at pages. 29 to 53, that the Plaintiff had periodically made remittances to the 1st Defendant in repayment of the loan facility. From the same statements, it was also discernible that the Plaintiff had failed to remit

repayments, hence debits on penalty interest and accrued monthly interest. It is not in dispute that the Plaintiff had remitted repayments to the 1st Defendant with regards to the loan, but what is however not clear was whether the sum of Kshs 1,553,065/- was paid by the Plaintiff as alleged. It could also not be immediately discerned whether the Plaintiff had been dutiful in making monthly remittances to the 1st Defendant, but the letters at pages. 132 to 160 indicate that the Plaintiff had severally defaulted in making remittances to the 1st Defendant.

28. The Plaintiff had further acknowledged that it was indeed indebted to the 1st Defendant, and had made proposals for the settlement of the debt on 2nd December 1993, 22nd February 1995 and 16th January 2001 but which proposals were unfortunately never fulfilled. Further, the 1st Defendant diligently notified the Plaintiff of the variation in the rates of interest rate in the letters dated 31st May 1993, 15th December 1994 and 20th December 1999. The Plaintiff was therefore of the view that the variation and fluctuation of the interest rate, could not therefore be made without seeking his consent. In relying on the case of **Harilal & Co. &Another v The Standard Bank Ltd (1967) EA 512**, the Plaintiff contended that the 1st Defendant did not have the unfettered discretion to vary the rate of interest.
29. However, the charge instrument at page. 106(b) and at Clause 5(ii) at page. 102(a), it was provided that the rate of interest would be variable, and therefore the rate of 18% was not fixed. In the case of **Harilal & Co. & Another v The Standard Bank Ltd** (supra), it had also been determined *inter alia*, in the absence of usage or prior agreement, the rate of interest cannot be altered save by a new agreement, either express or implied. The 1st Defendant further reiterated that the variation of interest rate was a custom and usage in the banking industry, and as such the same would be applicable in the circumstances, and as was reiterated in **Maithya v Housing Finance Co. of Kenya Ltd & Another (2002) LLR 1795**.
30. In **Morris & Co. Ltd v KCB (2003) 2 EA 265**, Ringera,J (as he then was) held *inter alia*;

> ***"As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be. The borrower will not be heard to say that such interest was usurious, unconscionable or otherwise unpayable."***

The Plaintiff, being aware and cognizant of the fore-stated clause in the charge instrument, and in agreement to its various terms and conditions, would be deemed to have entered into the agreement knowingly and aware that there would be variations to the rate of interest.This was the position as reiterated in **National Bank of Kenya Ltd v Cador Investments Ltd Milimani HCCC No 2105 of 2000**where Emukule, J reiterated that the rates had been freely negotiated and confirmed by the signing of the charge documents by the parties, and that therefore, the contention that the interest rates charged were unconscionable and unreasonable would fall by the wayside. In any event, the Plaintiff had never disagreed to the application of these interest rates and thus the same could not be deemed as arbitrary and oppressive.

31. The Plaintiff on the issue of valuation of the suit property, contended that the same was undervalued and that the sale was therefore null and void. They relied on the case of **Osebe v Kenya Commercial Bank Ltd (1982) KLR 296** in which it was stated that the sale of property below the market price can be evidence of underselling. It was the Plaintiff's contention that the sale of the suit property at Kshs 1,300,000/- was an attempt by the Defendants to undervalue the property. The 1st Defendant had presented a valuation report by Camp Valuers dated 20th January 2003 with an open market value of Kshs 1,500,000/- and a reserve price of Kshs 1,200,000/-. There was also a valuation conducted by Horizon Associates Ltd in which the open market value of the suit property was given as Kshs 3,600,000/- as at 1st October 2001.
32. There is evidently a disparity in the valuation reports, although it has not been stated, or put forward to the Court that the valuation conducted on the suit property by Camp Valuers was incorrect or imputed any attempt on the part of the Defendants at undervaluing the property. What the law requires, and provided under the provisions of the repealed Registered Land Act, was that

a valuation of the suit property was to be conducted as a pre-requisite before the disposition of any security in exercise of a statutory power of sale. No grounds have been made to discount the valuation by Camp Valuers, and as aptly stated, no independent expert has impeached the impugned valuation report.

33. In **Mbuthia v Jimba Credit Finance Corporation & Another (1986-1989) EA 340**, as was in **Ze Yu Yang v Nova Industrial Products Ltd [2003] 1 EA 362**, it had been determined that the existence of a valid sale agreement extinguished the equity of redemption and that there were no remedies touching on the property as existing between the mortgagee and the person exercising power of sale. In **Civil Appeal No 164 of 2009 Marco Munuve Kieti v The Official Receiver & Interim Liquidator of Rural Urban Finance; (2010) eKLR**, it was reiterated *inter alia*;

> ***"In any event, even if we were minded to decide on it and even if we were to find that the notices were not valid, still nothing would turn on that. This is because by the time the matter went for hearing in the superior court, the suit property had long been registered in the name of the second respondent pursuant to a public auction properly carried out by the auctioneers as found by the trial court. As at the time the auction proceeded, there was no injunction order existing against the sale. That meant that as far as the suit land was concerned, the appellant's equity of redemption had long been extinguished."***

34. The Plaintiff had brought the issue of the consents by the Oloolaiser Land Control Board issued on 3rd October 2001. He went further to call upon the testimony of a copy typist attached to the said Board, whom, at the time of the issuance of the consents, was standing in for the secretary. She was unable to definitively give a concise response when asked about the procedures of the Board and the manner in which the application was made. She was, to the mind of the Court, unable to ascertain for sure who had made the application to the Board, and who had approved the same. Further, she had reiterated that there had been no mistake in the application, which however, the 1st Defendant was able to point out numerous mistakes in the various minutes presented before the Board. She was also unable to show that she had the authority of the Board to issue the testimony that she did in Court, which issue had been raised by the Defendants. Barring this fact, there was no impediment as far as the Court can establish as to why transfer and subsequent registration of the suit property could not be legally and lawfully transferred to the 2nd& 3rd Defendants. No illegality, coercion or fraud has been established, and the same was correct with regards to the investigations carried out.
35. Under Section 77(3) of the Registered Land Act (repealed) it was provided that;

> **A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and *any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power*.**

Further at subsection (4), it was provided that;

> **Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee has consented in writing).**

Section 77(3) and (4), as read together with Section 34(1) of the same Act, provided that once a person is registered as a proprietor to property, such registration by the register shall be held and deemed as evidence of such registration until the contrary is proven. At Section 34(1) it reads;

> **Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed until the contrary is proved.**

36. In so far as the Court is concerned, the 2nd& 3rd Defendant are the duly registered owners of the suit property having acquired the same through a public auction. As provided further under

Section 39(1)(a) of the Registered Land Act (repealed), the 2nd& 3rd Defendants were not obliged to inquire into the previous circumstances that lead to the disposition of the suit property and were in essence, therefore, protected purchasers. Under Section 26(1)(a) and (b) of the Land Registration Act, the issuance of a certificate of title shall be conclusive evidence as to absolute and indefeasible ownership, save for any fraud, coercion and or corrupt scheme that may be proved. In this instance, the Plaintiff has not been able to establish that there was fraud, misrepresentation, illegality or a corrupt scheme in the acquisition of the suit property. As such, therefore, the land as registered vests in the 2nd and 3rd Defendants, vested with all rights and interests appertaining thereto.

37. With the right of redemption being deemed as extinguished, and the rights and interests vesting in the 2nd and 3rd Defendants, it would, in the natural progression of matters, that the suit property be relinquished to them, for the quiet and peaceful enjoyment thereof. The same cannot be enjoyed without vacant possession, to which the Plaintiff has denied them since the purchase of the suit property. Aggrieved as the Plaintiff may have been, it was encumbered upon him, to give vacant possession of the suit property to the 2nd and 3rd Defendants as he proceeded to institute legal proceedings against them and the 1st Defendant. The 2nd and 3rd Defendants as it stands, may have lost out on economic gains and opportunities in terms of rent, which the Plaintiff admittedly received during the course of these proceedings. He had stated that he did not reside at the suit property but that there were residents (read tenants) who resided there, and further admitted that the rental collection was Kshs 37,000/- per month. It would be correct to presume at this juncture, without any information to the contrary, that this amount would have been made by the 2nd and 3rd Defendant had they been granted quite possession of the suit property. However we have to take to account the variability of tenancies, rents ,occupancy rate, tax factors, expenses inter alia in fixing the mesne profits not merely a mention of indicated rent allegedly earned by the plaintiff. What was rent at the time of auction?

38. In consideration of the foregoing, the Court dismisses the Plaintiff's suit against the Defendants. In so doing, the Court allows the Counterclaim as filed by the 2nd and 3rd Defendants, and for the avoidance of doubts, issues orders for vacant possession to be given to them over the suit property, failure to which they are at liberty to initiate eviction process against the plaintiff, his agent or servant or anybody claiming under him after lapse of 30 days from dates herein. The Court further awards the 2nd and 3rdDefendant loss of income taking all factors to account assessed at Kshs 10 ,000/- per month from the date the counterclaim was lodged until such time as possession shall be given to them. Further, the Court orders for the payment of Kshs 48,000/- as valuation fees paid to the valuers duly appointed by the 2nd and 3rd Defendants. Costs of the suit and the counterclaim shall be borne by the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 2ndDay of December, 2015.

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C. KARIUKI

JUDGE