



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 41 OF 2009

FOUR FARMS LIMITED.....PLAINTIFF

- VERSUS -

AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT

MILFAN DEVELOPERS LIMITED2ND DEFENDANT

REGISTRAR OF TITLES MOMBASA.....3RD DEFENDANT

PATBON INVESTMENTS LIMITED.....4TH DEFENDANT

ALICE GITHERE.....5TH DEFENDANT

JAYNE GITHERE.....6TH DEFENDANT

NDATANI ENTERPRISES LIMITED.....7TH DEFENDANT

ANDREW MUGAMBI.....8TH DEFENDANT

JUSTUS MULWA NDUYA.....9TH DEFENDANT

GATANNA ENTERPRISES LIMITED.....10TH DEFENDANT

MARY WACEKE MUIGAL.....11TH DEFENDANT

REVTAT ORUYA NALO.....12TH DEFENDANT

LAURIAN MKALA.....13TH DEFENDANT

JOHN NGALA MUGO.....14TH DEFENDANT

REGINA WAIRIMU THAARA.....15TH DEFENDANT

JANE NJOKI GITAU.....16TH DEFENDANT

ANN W WARUINGE.....17TH DEFENDANT

FENOSA HOLDINGS LIMITED.....18TH DEFENDANT

KENNEDY MWANGLI.....19TH DEFENDANT

J U D G M E N T

1. By way of a Re-Amended Plaintiff dated 4th September, 2015, the Plaintiff seeks the following orders:

- a. **A declaration that the Plaintiff has fully paid the said loan and interest due to the 1st Defendant.**
- b. **A declaration that any sale transaction and/or conveyance and/or transfer and/or any subsequent dealings entered into in respect of L.R Subdivision No. 544 (Original No. 482/3) Section III M.N. and/or any of the subdivisions relating to the same in respect of the suit property which required Land Board Consents and which were not obtained shall be rendered null and void.**
- c. **A declaration that each of the subdivided plots 3449/III/MN, 3463/III/MN and 3464/III/MN in respect of the suit property were unlawfully transferred by the 1st Defendant to itself and said transfers and subsequent titles issued by the 3rd Defendant to the 1st Defendant are null and void.**
- d. **A declaration that the titles issued by the 3rd Defendant in respect of the subdivided plots 3463/III/MN and 3449/III/MN relating to the suit property and which are currently registered in the name of the 20th Defendant are not genuine and are null and void.**
- e. **An order directing the 1st Defendant to undertake a full forensic audit through an independent and reputable firm of accountants.**
- f. **Judgment be entered in any amount plus interest thereon at court rates found to have been overpaid or in respect of any surplus sums received by the 1st Defendant in excess of the loan amount inclusive of interest.**
- g. **General damages and/or compensation be assessed and awarded in respect of any unlawful sale of the Plaintiff's subdivided plots in the suit property against the 1st and 2nd Defendants.**
- h. **An order directing the 1st Defendant to give a full discharge of the Plaintiff's title L.R Subdivision No. 544/Section III/M.N. Mombasa and release all certificates of titles and title documents thereof and/or all subdivision titles remaining unsold and/or in respect of which any dealings thereof have been rendered null and void to the Plaintiff.**
- i. **Orders for possession and eviction of the Defendants from the suit property and all its subdivisions as aforesaid, which have been ordered to be discharged by the 1st Defendant and in respect of any sale transactions with any of the Defendants which have been declared null and void.**
- j. **Costs of and incidental to the suit with interest thereon at court rates.**
- k. **Any other or further relief that this Honourable Court shall deem fit to grant.**

2. The Plaintiff alleges that it is the registered and legal proprietor of Plot No. 544 (Original No. 432/2) Section III/M.N CR Number 33735 (herein after to be referred to as the suit property) measuring 133.4 acres. The suit property was subdivided into 54 (or 44) plots all registered in the name of the Plaintiff vide a consent entered into as between the Plaintiff and the 1st Defendant in HCCC No 652 of 1988.

3. The Plaintiff states that as at 1984 the suit property had a farm house, over 400 heads of cattle, several tractors and farming equipment all valued at over Kshs.17 million excluding the value of the land. The Plaintiff claims that it sought a land facility of Kshs.5 million from the 1st Defendant and the same was granted.

4. The Plaintiff pleaded that a dispute arose between itself and the 1st Defendant over the outstanding loan amount and interest. The 1st Defendant proceeded to sell by public auction all the cows and farm equipment. The Plaintiff claims that the 1st Defendant was able to recover the outstanding loan amount but the 1st Defendant failed to account for the surplus amount it received from the auction.

5. As result of the failure to account for the surplus amount, the Plaintiff instituted a suit in which various injunctions were issued restraining the 1st to 3rd Defendants from selling or whatsoever dealing with the suit property. The Plaintiff points to an injunctive order issued on 6th November 2009 restraining the 1st Defendant from dealing with the suit property in any manner. The Plaintiff claims that the order was served upon the 1st Defendant.

6. The Plaintiff avers that when the suit property was subdivided into 54 plots, an agreement was reached between itself and the 1st Defendant that the subdivisions would be sold by both parties through their disclosed agents. The 1st Defendant breached the agreement and sold 19 subdivided plots by public auction in exercise of its statutory power of sale without the knowledge of the Plaintiff. The 19 plots were then transferred to the 2nd Defendant by the 1st Defendant. The Plaintiff avers that the transfers were done on 31st May, 2010 and registered against the suit property being entries 42, 45 to 57 inclusive and 56 to 60 inclusive in breach of the court order and consent between the Plaintiff and the 1st Defendant and without obtaining consent from the Land Control Board and by misrepresentation on the part of the 1st

and 2nd Defendants. The said 19 subdivisions were registered as Subdivision No. 3435, 3436, 3437, 3438, 3448, 3453, 3454, 3455, 3456, 3457, 3458, 3460, 3461, 3462, 3465, 3466, 3467, 3468 and 3469.

7. The Plaintiff alleges that on 9th February, 2011 another injunctive order was issued by the court restraining the 1st and 2nd Defendants from whatsoever dealing with the suit property or the subdivisions arising from thereon. However, on or about September to November, 2010 most of the subdivisions were transferred by the 2nd Defendant to the 4th to 19th Defendants in further breach of the court orders. To achieve the said transfers, the Plaintiff alleges that the 3rd Defendant unlawfully cancelled the court order given on 9th February, 2011 under Section 60 of the Registration of Titles Act Cap 281, Laws of Kenya (now repealed).

8. The Plaintiff stated that the 1st Defendant unlawfully acquired duplicate titles for plot No. 3464 while titles for plots no. 3449 and 3463 were fraudulently acquired by the 20th Defendant from the 3rd Defendant creating a situation where there were duplicate titles issued by the 3rd Defendant to both the 1st Defendant and the 20th Defendant.

9. The Plaintiff claims that the 3rd Defendant unlawfully created two separate titles being CR 43848 and CR 43849 in respect of subdivision Nos. 3463 and 3449 and by reference to a partial discharge registered as No. CR 7190/40 which discharge the Plaintiff had obtained from the 1st Defendant in respect of CR 43549 and subdivision No. 3464 which the Plaintiff had lawfully sold with the knowledge of the 1st Defendant.

10. The Plaintiff avers that it did not at any time agree to sell any subdivision or transfer any subdivision to one Henry Obuya Were or the 20th Defendant who subsequently acquired subdivisions No. 3449 and 3463.

11. It is the Plaintiff's case that no Land Control Board Consent was acquired for the sale transactions and/or transfers from the 1st Defendant to the 2nd Defendant and from the 2nd Defendant to any of the 4th to 19th Defendants. Further, the Plaintiff avers that the 1st Defendant has fully recovered the loan amount and interest from the sale of the Plaintiff's farm movable assets and from the unlawful auction of the 19 plots. The Plaintiff claims that a substantial amount of money was recovered in excess of the loan amount and interest and the 1st Defendant, despite demand, has refused to render a full and true account of the proceeds of the auctions.

8th, 9th, 10th, 12th, 15th, 16th, 17th, 18th and 19th Defendants

12. In response to the Re-Amended Plaint, these Defendants filed a Statement of Defence dated 27th October, 2015 in which they simply denied the allegations raised by the Plaintiff and put the Plaintiff to strict proof.

1st Defendant

13. The 1st Defendant filed an Amended Defence on 27th May, 2017. The 1st Defendant admitted that the Plaintiff was the registered owner of the suit property. The 1st Defendant contended that the Plaintiff used the suit property to secure various loans from its financial institution totaling to Kshs. 13,500,000/= which credit facilities were issued as follows:

- a. A sum of Kshs. 5,000,000/= through a Loan Agreement dated 18th June, 1984.
- b. A sum of Kshs. 3,500,000/= through a loan agreement dated 6th June, 1985.
- c. A sum of Kshs. 500,000/= through a notification of charge dated 17th December, 1985.
- d. A sum of Kshs. 4,500,000/= through a Loan Agreement dated 19th December, 1985.

14. The 1st Defendant claims that over and above the duly executed notifications of Charge with respect to the loans, the Plaintiff also executed chattels mortgages against the said loans as further security for the loan advances.

15. The 1st Defendant, in its defence, alleges that when the Plaintiff failed to honour the loan repayment it issued instruction for the sale of the security property by way of auction. The sale was advertised in a leading daily Newspaper and scheduled the sale by public auction on the 26th June, 2009. On the day of the sale, the suit property was sold to the 2nd Defendant who was the highest bidder for Kshs.38, 445, 000/=. The 1st Defendant executed letters of transfer and relinquished any proprietary rights to the suit property to the 2nd Defendant. The 1st Defendant alleges that at the time of sale of the suit property the amount the Plaintiff owed was Kshs.210, 884, 300.92/=.

16. The 1st Defendant alleges that the claims that the ruling containing the injunctive orders was issued on 6th November, 2009 and since then it has done nothing against the Plaintiff. Further, the 1st Defendant claims that it is not aware of any transactions that were done after the transfer of the suit property to the 2nd Defendant.

17. The 1st Defendant lodged a Counterclaim against the Plaintiff. The 1st Defendant claims that it granted the Plaintiff various loan facilities totaling to Kshs.13,300,000/= secured by the suit property but the Plaintiff failed to honour the repayment of the loan amounts and the interest thereof. The 1st Defendant then initiated recovery process but the same was stopped by a suit filed in Mombasa HCCC No. 652 of 1988.

18. The 1st Defendant avers that a consent was reached between itself and the Plaintiff on 24th November, 1989 in which both parties agreed that the suit property be subdivided and the portions emanating from thereof be sold at a minimum price of Kshs.150,000/= per acre provided that the sale occurs within 90 days from the date of the consent. The purchasers would deposit 25% of the purchase price with Messrs. Kiambo & Co. Advocates as stakeholders and the balance would be paid in accordance with the individual sale agreement.

19. The 1st Defendant claims that the Plaintiff breached the consent and it was forced to dispose off the whole property by way of public auction in exercise of its statutory power of sale. That the suit property was sold to the 2nd Defendant and the 1st Defendant realized Kshs.38,445,000/= from the sale against an outstanding amount of Kshs.210,884,300.92/= which was owing at the time of the sale.

20. The 1st Defendant therefore claims a sum of Kshs.172, 439, 300.92 from the Plaintiff which was owing as at 26th June, 2009 together with interest accrued. The 1st Defendant prays for judgment to be entered against the 1st Defendant for a sum of Kshs.280,702,809.83/= which was outstanding as at 31st December, 2016 with interest at the rate of 20% per annum until payment in full.

21st Defendant's Defence

21. The 21st Defendant filed his statement of defence on 28th March, 2018. The 21st Defendant pleaded that he had subdivisions No. 3449 and 3463 registered in his names on 14th day of May, 2015 after purchasing the two parcels from the 20th Defendant at Kshs.10 million and 30 million respectively. In order to have the two parcels transferred to his name, the 20th Defendant procured a consent from the local area Land Control Board and the consent was granted on 7th May, 2015.

22. The 21st Defendant contended that at the time of purchase of the two parcels, there were no any inhibitions on the titles of the properties and he only became aware of the injunctive orders that were issued by this court on 20th April, 2016 on 2nd March, 2018 when he conducted a search at the land's office. The 21st Defendant also claimed that his two parcels of land were not subject to the orders issued on 9th February, 2011 and extended on 11th April, 2011.

23. It is also the 21st Defendant's case that he was purchaser for value for the two parcels of land without any notice of any defect, default or irregularities in the titles hence the Plaintiff is estopped from claiming any rightful interest in the two properties.

Evidence Adduced

24. The hearing of the main suit kicked off on 3rd October 201 with. Hussein Nurmohamed giving evidence as the sole witness for the Plaintiff. He stated that he is the Managing Director of the Plaintiff and adopted his statement filed on 15th June 2016 as well as his pleadings as evidence. By consent of the parties the Plaintiff's bundle of documents was produced as P.Ex 1 except for the documents marked at items 24, 28 and 35 which were marked for identification. PW1 narrated that there were 54 subdivisions of the mother title to the suit property. That the 1st Defendant had sold 32 leaving 22 prior to 2009. He continued that they had an agreement with the 1st Defendant for partial discharge of one plot No. 3464. The said plot was sold by the Plaintiff to the National Intelligence Service at a consideration of Kshs.28.5 million (item no. 22 on the Plaintiff's List of Documents). That they obtained consent for the said transaction. PW1 asserted that they had obtained a discharge from the 1st Defendant and that they did not owe them any monies. As per the auditor's report, it is the 1st Defendant who owes them.

25. On cross-examination by Counsel for the 1st Defendant, PW1 admitted to having borrowed Kshs.5 million from the 1st Defendant as stated in the 1st Defendant's Defence. When confronted with the 1st Defendant's letter of 2002 in the Plaintiff's bundle referring to a loan of Kshs.13.3 million PW1 stated that he applied for the same but his application was rejected. Later on, he saw drafts in favor of the Plaintiff which never reached him. In accordance with the agreement dated 18th September 1994, it was the Defendant's obligation to advance him the money and it was the Plaintiff's corresponding responsibility to repay it. PW1 continued that they used to repay the money through the 1st Defendant's Mombasa Branch. That he was told to go back for receipts as the person issuing them was absent but averred that he was never given any receipt or statement.

26. PW1 testified further that save for this case, he has sued the Defendant six or seven times and that he got injunctions in those cases. The first was granted on 1st August 1988 – 1989; with the 1989 consent being recorded in Court. He continued that he obtained a Land Control Board consent pursuant to the court order. Later on, he executed a Power of Attorney and one Don Amolo wrote a letter. PW1 admitted that he did not have a copy of the Power of Attorney in Court. He narrated that he offered his title to the farm as security and a charge was registered against it. That the title was subdivided in 1987 as there was a slight delay in repayment. He had no choice over the subdivision that resulted in AFC having a charge over the resultant titles.

27. PW1 gave evidence that he did not pay any money to the 1st Defendant after the subdivision. He was however at pains to explain the contents of paragraph 27 of the re-amended plaint regarding the partial discharge of some parcels. He stated that he got a partial discharge for plot no. 3464 but did not know when the same was effected and admitted that paragraph 27 did not mention plot Nos. 3464, 3449 and 3463. Further, his letter requesting partial discharge was dated 30th May 2002 but the discharge he got was on 31st January 2008.

28. PW1 continued that the Managing Director of the 1st Defendant in 2002 was a Mr. Toroitich. That the partial discharge was in respect of plot Nos. 3463 and 3464. He admitted that he did not have a partial discharge for 3449. The property was sold before they got an injunction from Judge Ojwang. That he lost the property because he was not allowed to access it. Further, the Memorandum of sale of the same is dated June 2009 while the injunction was issued on 24th November 2009. PW1 protested against the auction because he was at the farm but never saw the buyer nor the auctioneer. There were other orders issued in February 2011 whereby he got an injunction for the whole farm. He did not know if it made sense that the 1st Defendant gave a part of the land back to him without loan repayment. PW1 confirmed that they

pleaded what they lost and had not filed a valuation report.

29. On cross-examination by Mr. Sitonik, PW1 stated that he was in agreement that he took a loan from the 1st Defendant. That Item No. 19 was signed by the Plaintiff but line 19 did not indicate the correct figure. He reiterated that he signed it because he had no choice. Further, that in the letter of 30th May 2002, he made a declaration of Kshs.13 million on request of the 1st Defendant's Managing Director. On the last paragraph, PW1 requested a waiver of the interest. He continued that in paragraph 5 of the Witness statement, a sum of Kshs.5 million was indicated. At paragraph 6, the reasons for which he was unable to service the loan were listed. That the injunction referred to in paragraph 16 of the re-amended Plaintiff was given on 6th November 2009. The auction as per an advertisement was slated for 26th June 2009. He continued that there were previous orders issued by Justice Bosire and Justice Shields. That between 1988 and 2009 when the orders had been issued; there was a 21 year difference. PW1 narrated that in 2009, the parties before Court were AFC and the Plaintiff. That the 2nd-20th Defendants were enjoined later pursuant to the amendment. As at February 2011, the only issues* before Court were between the Plaintiff and 1st Defendant.

30. PW1 clarified that the 1st court order of 6th November 2009 referred to the original title while the 2nd order of 9th February 2011 was in respect of the subdivisions. In reference to Paragraph 28, he explained that the order of February 2011 came after transfers were done in 2010. PW1 confirmed the veracity of paragraphs 27, 28 and 39 of the re-amended Plaintiff. He stated that paragraphs 34-39 referred to plot Nos. 3464, 3449 and 3463. He however did not know whether the 4th-19th defendants* had anything to do with the aforesaid subdivisions. PW1 averred that he had overpaid the loan and that he was entitled to a refund of the overpayments from the 1st Defendant.

31. Mr. Kibara cross-examined PW1 further. PW1 stated that he did not know the 4th, 8th - 12th and 15th-19th Defendants personally. That he only met them once at the farm. As at 5th November 2009, they had not been enjoined in the case. When he got the injunction in 2009, he registered the order in the main title no. 544 (original no. 432)/III/MN CR. No. 33735. PW1 had a consent dated 24th November 1989 for the subdivisions between himself and AFC. He continued that as stated in paragraph 22 of the re-amended Plaintiff, the 2nd Defendant sought to register the transfers in the mother title as entries no. 42-60. PW1 then asked his advocate Mr. Oguk to register the orders for him. He testified that the particulars of fraud attached to Henry Obuya; the 3rd and 20th Defendants. He testified that he had not stated in the Plaintiff that he was defrauded by the 4th, 8th - 12th and 15th-19th Defendants.

32. On cross-examination by Mr. Kinuthia for the 2nd Defendant PW1 once again admitted to taking a loan from AFC in 1984. That the Ruling made by Justice Bosire in 1988 was in respect of this charge. The amount quoted in the ruling was Kshs. 14,500,000. He narrated that the sale of loose assets occurred in 1988 which development was not reflected in the ruling. That the consent of 24th November 1989 allowed the Defendant to sell some of the subplots. PW1 reiterated that the first injunction made by Justice Ojwang was made on 6th November 2009. Further, there was an auction advertised to happen at the Post Office in Mtwapa slated for 27th January 2009 which he tried to stop. He admitted that he did not make any payment to offset the loan. That he did not know the 2nd Defendant before the auction nor if the 2nd Defendant was aware of the proceedings between himself and the 1st Defendant.

33. With regard to the 3rd Defendant PW1 gave evidence that there were other previous proceedings where the 3rd Defendant was not a party. That the consent was between himself and the 1st Defendant. His main complaint against the 3rd Defendant was that there was an injunction registered at the Lands Office which was removed. After he got the order, he personally served the Land Registrar and paid for it but admitted that he did not have the receipt in Court. He continued that paragraph 40 of his witness statement spoke of service on the 1st and 2nd Defendants. That the subdivision done in 1987 resulted from the consent between himself and the 1st Defendant. The injunctions were registered initially on the old plot number. He was however adamant that the Land Registrar violated court orders. PW1 did not report the violation to the police nor did he institute contempt proceedings against the Registrar. He was categorical that what he claimed was the remaining land portions.

34. On redirect by Mr. Khana PW1 clarified that his complaint against the Land Registrar was that he removed the injunction allowing subsequent transactions to be conducted thereon as a result of which he suffered. That he outlined particulars of fraud. Entry no. 42 was the injunction recorded in the main title entered by the Registrar pursuant to the court order which he was served. Moreover, item 23 was the court order and the application was pending until November 2009. The Plaintiff had engaged S. Oguk Advocate and Mr. Rashid was present when the order was issued. PW1 narrated that the order was in respect of LR plot No. 544 which is the entire farm. He was aware of the auction advertised by Murphy's but did not know when it took place. There was however an injunction against the 2nd Defendant at page 71 of the Plaintiff's bundle. That the said orders of 23rd February 2011 were extended.

35. PW1 gave evidence that there was a letter written by the Plaintiff to the 1st Defendant's Managing Director, Mr. Toroitich at page 27. He went to see Mr. Toroitich in Nairobi and personally delivered the letter in which he asked for help. That Mr. Toroitich gave a verbal promise but did not commit himself then left the 1st Defendant's employment in 2003. PW1 continued that he got to see the partial discharge prepared by Mr. Maghmani. Later on, he got a buyer, the NSIS and sold plot 4, 5 years after 2002. That the statement of accounts was prepared by AFC.

36. PW1 only received a statement for the whole country, not one specific to the Plaintiff. He asserted that he never received monthly or annual statements of accounts from the 1st Defendant. That on the 1st page of the statement, he did not see the Kshs.5 million in one figure. Further, he could not remember receiving the figures mentioned in the 1st Defendant's witness statement. At page 9 there was possession of log books of vehicles belonging to the Plaintiff. Some had depreciated and others were sold. PW1 was unaware if the sale proceeds were credited to his account. He was adamant that the auction of 23rd August 1988 never took place and if it did sale proceeds were not credited. That some of the items were left out due to depreciation. **PW1** averred that the 1st Defendant did not comply with the terms of their consent at page 17. About 17 – 18 plots were sold in accordance with the same but he did not receive any credits from the sale. He later sold plot no.3464 for 28.5 million as shown in the LCB consent for which reason it was excluded from the Application.

37. 7 witnesses testified on the side of the Defence. Evans Mwangi Maabe gave evidence as **DW1**. He stated that he trades as Murphy's Auctioneers based in Mombasa. That he is licensed as class B allowing him to realize securities within the Republic of Kenya. **DW1** narrated that on 6th August 2008, he received instructions from the 1st Defendant to sell plot no. 544/III/MN registered in the name of the Plaintiff. He then served a notice on 22nd November 2008 upon the Plaintiff's Managing Director. **DW1** knew Mr. Hussein as he was introduced to him by the Branch Manager of AFC Kilifi, one Mr. Haro. That he was told that unless they received contrary instructions, they were to sell the property. On 27th January 2009, they advertised the property for sale slated for 19th February 2009. The sale however did not take place on that date as there were no serious bidders and they did not get a base approved by their principal. They were advised to re-advertise which they did on 13th June 2009 setting the sale date as 26th June 2009. That the auction took place as scheduled outside Mtwapa Post Office.

38. **DW1** gave evidence that they had put handbills within the area where the property is situate as well as an advertisement in the newspaper. That they got a bidder who bid the reserve price of Kshs.500,000 per acre. The total sale price was about Kshs.38,445,000. He continued that the highest bidder was Milfan Ltd who were not known to them prior to the auction. The 2nd Defendant knew of the sale through the advertisement. **DW1** averred that having perused the court papers, there had been no challenge to the auction process. He produced the requisite 45 days' notice served upon Mr. Hussein as D.Ex 1(a) with D.Ex 1(b) and (c) having been sent by registered post on 22nd and 20th November 2008 respectively. That 1(c) was stamped by the post office as sent to the Plaintiff's last known address. **DW1** narrated further that their letter of 5th September 2008, D.Ex1(d), gave the explanation of why they did not serve notice immediately on receipt of the instructions. D.Ex 2 was the letter of instruction on which a schedule of the property was annexed.

39. The 1st advertisement of 27th January 2009 was produced as D.Ex 3(a) while the re-advertisement published in The Standard on 11th June 2009 was produced as D.Ex 3(b). **DW1** testified further that on 26th June 2009, the suit property was sold to the highest bidder being the 2nd Defendant who deposited 25% of the sale price being Kshs.9,611,000 and they entered into a memorandum of sale produced as D.Ex 4. He confirmed that they only acted in accordance with their client's instructions and duly delivered.

40. On cross-examination by the Plaintiff's Counsel **DW1** stated that he has been an auctioneer for 26 years in Mombasa. That he knew the area where the suit property is located and its value as at that time. **DW1** continued that he served Mr. Hussein at his house in person but he refused to sign prompting them to send the other notices vide registered post and a certificate of posting. He could not recall the reason why Mr. Hussein refused to sign and nevertheless left him with the notices. Regarding the auction **DW1** stated that two were held but Mr. Hussein was not in attendance. That at the 2nd auction they had six bidders but the others did not meet the base rate. The 2nd Defendant on whose behalf one Mr. Lawrence Mwangi bid and signed the Memorandum of sale were the only party who bid upto the reserve price.

41. **DW1** gave evidence that when the sale does not take, they do not give another notice; they just re-advertise. He admitted that they advertised the sale of the entire farm as per his instructions of 6th August 2008. That he was not aware that the land had been subdivided. Moreover, on the 2nd advertisement the paper size of the property differed from the size contained in the instruction letter*. It was **DW1**'s case that payment was made directly to the principal which they only witnessed. That all cheques were made in favour of AFC. They however did not make copies of the cheques paid on the same day as the auction. He contended that after the sale, it was the prospective buyer's prerogative to obtain the Land Control Board's Consent.

42. **DW1** confirmed to Mr. Kinuthia that the property passes on to the purchaser at the fall of the hammer. That they were aware of the reserve price as displayed in the advertisement. The same was known to the manager and the client set the valuation price knowing what they sought to realize. He continued that Mr. Haro was present at the auction. **DW1** knew the reserve price was Kshs.500,000 after the corporation told him to receive the bid. He could not tell if the price was under value but observed that it was an approximate value of an acre in that area. **DW1** averred that he followed rule 15 of the Auctioneer's rules. He admitted that he did not write that Mr. Hussein refused to sign on the notice. He was adamant that the property was not redeemed within 45 days. That if Milfan* paid the balance of 75% after the 25% deposit and execution of the Memorandum of sale they became the legal owners of the land sold. **DW1** concluded that to date, he has never had any protestation of the sale at auction.

43. On cross-examination by Mr. Sitonik and Mr. Kibara, **DW1** clarified that the advertisement is a standard notice with standard terms. That the advertisement gave the time and date of the auction. He asserted that the actual sale took place on the date advertised. That it was not unusual for debtors to refuse to sign and during auctions, they do not always get the actual market value. He confirmed that he did not require an LCB consent to have an auction proceed. On re-examination he reiterated that they issued notices to the Plaintiff which were left at the Plaintiff's premises. That Mr. Haro of AFC is the one who took him there. He narrated further that he did not handle finances; his role was only to witness.

44. Geoffrey Muthui Mwirebwa gave evidence as **DW2**. He stated that he worked with AFC as a debt recovery manager having been in employment for 31 years. That he began as a credit officer, branch manager, head of inspection before assuming his current position. He produced the items in the 1st Defendant's List of Documents as D.Ex 1 – 19. **DW2** narrated that he came across this case while he was the manager in Debt recovery. The account was not being serviced. He found that some action had been taken. That the Plaintiff's directors were not personally known to him; he only knew of them through correspondence hence he had nothing against the Plaintiff. It was **DW2**'s evidence that the Plaintiff borrowed a total of Kshs.13.5 million vide 4 different loans but the 1st Defendant disclosed a figure of Kshs.13.3 million. That the 1st loan was for Kshs.5 million taken on 17th June 1984; the 2nd for Kshs.3.5 million vide a loan agreement of 6th June 1985; the 3rd of Kshs.500,000 taken on 17th December 1985 while the 4th was Kshs.4.5 million taken on 18th June 1985.

45. **DW2** narrated further that in the 1st loan, Kshs.3.6 million was to lift the bank mortgage whereby AFC took over the loan since the client was unable to service it.* The 2nd item consisted general farm infrastructure of Kshs.1 million with Kshs.400,000 advanced to kickstart the business. He continued that the 1st part of the Kshs.3.6 million was to run for a 15 year period. That the loan was properly secured by plot no. 544/III/MN by way of a notification of charge. There was further security of charge over the client's loose assets. The 2nd loan of Kshs.3.5million was for further development of the farm such as dairy feedlots, cattle dips etc. It was secured on security of the 1st loan and was to run for 15 years from the date of inception. **DW2** gave evidence that the 3rd loan of Kshs. 4.5 million was for purchase of land for

Kshs.3.86 million with working capital of Kshs.640,000. That the same security was used. Its repayment period was for 15 years. The 4th loan of Kshs.500,000 was also for farm development.

46. DW2 stated that the loans were due annually. For instance with regard to the 1st loan installments of Kshs.239,793 were due effective 30th June 1985 and thereafter every subsequent year. However, on perusal of the file, DW2 found that the borrower did not comply with repayment terms. That there was no single payment of any instalment at the time they fell due prompting them to demand payment in writing. DW2 continued that if there is default, the process of realizing the security by auction is set in motion. That there were intermittent payments. Instead of the client paying the stipulated amount, they made little payments that did not have much effect on the over-all loan. He averred that the account was still heavily indebted. As at December 2016, the debt was Kshs.280,702,800. That they disposed of the security in 2009 but proceeds were still not sufficient to pay the debt. At the time of auction, the debt was Kshs.210,000,000 but the sale realized only about Kshs.38 million.

47. DW2 observed that there was a notification of charge for Kshs.5, 3.5 and 4.5 million respectively as well as a notification of a chattels mortgage. He stated that there were many correspondences between the Plaintiff and AFC. Some involved needing more time on account of illness suffered by himself and his wife and drought in the Coast region. He offered a solution that he be allowed to dispose the properties to settle the debts such as in the letter dated 16th June 1988 addressed to the General Manager pursuant to which an auction took place and some cattle were sold. The letter however does not indicate if the amount realized was deposited with AFC. DW2 testified that because the debt remained unpaid, they filed a counter-claim for the outstanding amount until payment in full as well as costs of the suit and counterclaim.

48. On cross-examination by Mr. Khanna DW2 confirmed that loan disbursements were made after acceptance of offers made by the client. That the terms and conditions for the loan of 18th June 1984 were signed by the Plaintiff's directors security for the same being the 1st charge over LR No. 544/III/MN. He continued that the charge remained in force until the auction. That AFC exercised its statutory power of sale after the requisite statutory notices were issued. He reiterated that the auction took place on 26th June 1989 realizing Kshs.38,445,000 from the 2nd Defendant as the highest bidder. Moreover, there was a 2nd charge over the property. The 3rd loan was also secured using the suit property. DW2 gave evidence that the interest was captured in the agreement. It was pegged at 12% which applied during the life of the loan as long as it there was no default. Upon default, it rose to 20%. He admitted however that the same was in accordance with the bank's policy but not stated in the loan agreement.

49. DW2 continued that he was aware that there were other suits concerning the property and that there was an injunction stopping the sale. That he was advised by his advocates that the injunction had a finite life span. On valuation, he stated that the property was appraised before the loan was disbursed. At the time, it was valued at Kshs.2.6 million for the land; Kshs.800,000 for farm infrastructure and improvements and cash crops at Kshs.3.3 million giving a total of Kshs.6.7 million. DW2 could not explain why AFC gave a loan double the value of the security. He also was not aware of the consent of 24th November 1988. He knew that the property was subdivided but for purposes of sale. That the charge remained over the subdivisions and the corporation would give partial discharge for the plots to be sold. DW2 stated that the auction was in respect of the main title and not the subdivisions. That the subdivisions had not been given titles hence what was advertised was the main title. Once the property was sold, they gave a transfer by the charge. He was not aware if a full discharge was given. The effect of the sale of the suit property was that the charge was extinguished. DW2 contended that once the property was sold and the debt settled in full, the client no longer owed a debt to AFC. In this case however, they did not recover the outstanding debt because this suit came soon after the auction. That before the auction, AFC had sent 4 foreclosure notices on 3rd January 2006 demanding Kshs.110 million and on 22nd November 2007 for Kshs.95 million that was less than the initial notice. He was however at pains to explain the variance between the two figures and attributed it to a typographical error.

50. DW2 confirmed on cross-examination by counsels for the defence that he did not know the 2nd Defendant before the auction. That there was a successful sale to the 2nd Defendant who paid 25% at the fall of the hammer. On the issue of the loan value, he denied that the Plaintiff borrowed only Kshs.5 million as pleaded which fact was demonstrated by the documents he presented in Court. On re-examination, DW2 clarified that the 20% interest rate was a policy decision after consultations with treasury and the parent ministry. That he was unable to explain the basis upon which AFC gave a loan double the property value. However, AFC had a mandate to give loans without security depending on one's integrity and character. On the issue of the discharge he gave evidence that after a sale at a public auction, they issue transfer documents hence a discharge is not necessary. That in their operations, they were guided by the AFC Act, policies and service charters as stipulated in clause 13 of the loan agreement.

51. **Henry Kimani** gave evidence as DW3. He stated that he was an accountant with AFC having worked there for over 20 years; since 1988. His testimony was largely in consonance with that of DW2. He gave finer details of the Plaintiff's loans and default in payment as they fell due vide the statement produced as D.Ex 20 which he confirmed that he prepared. He observed that the Plaintiff borrowed Kshs.13.3 million between 1984 and 1986. That for the 1st loan whose instalment was Kshs.239,793; the Plaintiff paid only Kshs.40,000 in July 1986. For the second whose instalment was Kshs.135,887 per month from 1985 there was no repayment reflected. Further, what was owing as at 31st December 2017 was Kshs.303,503,285.

52. On cross-examination, DW3 explained that they had drafts that disbursed the funds into the Plaintiff's account such as no. 234 dated 6th May 1985. That the account numbers in the draft relates to loan accounts held by the bank. The draft says, "Account Payee Only" and the payments were made by way of cheques. He narrated that the purpose of the loan account is to allow one to debit the account with the requisite amount. Regarding the Plaintiff's case, the 1st draft of 15th February 1985 to Pandya & Talitya for Kshs.3.6 million was to lift the mortgage as per the agreement of 18th June 1984. He however could not tell who collected the cheques on behalf of the Plaintiff. DW3 continued that he was aware that statutory power of sale was exercised with respect to the suit property. That a discharge of charge is only issued after a loan is paid in full. He admitted that a transfer cannot be done without discharging the charge. He however salvaged himself by stating that when one is buying at the auction, he pays the price agreed which is the offer. There is no "buying of the loan".

53. When tasked to explain extraneous charges levied on the Plaintiff's account DW3 testified that administrative fees were for purposes of administering the account. In 2011, they were renamed "Loan maintenance fees." That on 6th April 2001, the Kshs.109,164 figure charged

included legal fees while the entry of 25th April 2015 pegged auctioneer's fees at Kshs.557,951 after it was approved. He admitted that he did not have receipts of the disputed entries before Court because he was not aware that they were in contention. Moreover, information was readily available to clients at the AFC office if they sought to be given their balances and any queries would be explained to them. That it was prudent for the client to ask for his statement. The same were only sent upon request. That copies of receipts were in the client file held by the institution with originals having been issued to the Plaintiff. **DW3** testified further that in 2004, the Plaintiff's loan was already matured and interest charged was in arrears. That from the end of December 2012, they charged simple interest as per the policy. He admitted that in 2003, the president issued directives for waiver on specific loans. That after the auction, they did not take steps to recover the remainder of the outstanding debt. On re-examination, DW3 observed that as per the letter dated 15th March 2006, the Plaintiff's loan was reduced from Kshs.95million to Kshs.21 million. That it was not possible for the Plaintiff to claim he did not know his loan balance.

54. DW4, Lawrence Mwangi gave evidence on behalf of the 2nd Defendant. He stated that he is a property agent and produced a Witness statement and bundle of documents marked as the 2nd Defendant's D.Ex 1. DW4 continued that at the material time he was employed by the 2nd Defendant as a manager, involved in the procuring parcels of land, subdividing and selling them. Regarding the property, DW4 came across fliers stuck on the road and an advertisement in the standard newspaper of 11th June 2009 pursuant to which the auction of 26th June 2009 was conducted outside Mtwapa Post Office. He participated in the auction conducted by Murphy Auctioneers as one of about 6 bidders. DW4 conducted searches after seeing the advert and confirmed that they were selling on behalf of AFC. He continued that they paid Kshs.500,000 per acre. They had a memorandum of understanding prepared after the sale whereby he paid 25% of the sale price of Kshs.38,445,000. DW4 averred that before buying the property, he had no knowledge of any suit between the Plaintiff and 1st Defendant nor was he served with any court orders. Subsequently, the parcel was sold to various persons within six months of which he was not served with any court document preventing the same. He contended that entire the process was procedurally sound and above board.

55. On cross-examination, DW4 gave evidence that he was no longer in employment with the 2nd Defendant. That Moses Waweru employed him and was a director. He never met his wife, Mrs. Faith Waweru; DW4 clarified on re-examination that he worked for Milfan Ltd and did not act for Mr. Waweru in his personal capacity. DW4's duty was to identify parcels of land and forward to the office which he did. Mr. Waweru then expressed interest in purchasing the suit property. He admitted that he became aware of the advertisement during the auction. That after the auction, he was shown the advertisement in the file. Further, they were not aware of the reserve price before the auction; which he stated on re-direct that as per the advertisement, condition 4 was that the sale was subject to a reserve price and LCB consent.

56. DW4 stated that he had been told he could go upto Kshs.500,000 per acre and he knew the value of the land ranged from that amount to Kshs.1 million per plot. He could not recall any plot sold for upto Kshs.1.2 million but confirmed that they made a good profit from the sale. DW4 asserted that the suit plot was advertised as one plot which they paid for. Afterwards, they realized that it had been subdivided when they were given subdivided deed plans. That development made their work easier as they intended to subdivide for re-sale purposes. He reiterated that he was unaware of any court case regarding the suit land. That he did not see the service by advertisement on February 2009 or the court injunction against AFC in November 2009. That most of the legal issues were handled in February 2011 when they had sold all parcels of land.

57. DW4 observed that the transfer to the 10th Defendant is dated 8th October 2010 yet the injunction registered in 2011 had a cancellation under section 60 of the Registration of Titles Act. He admitted that there was no signature against the cancellation. On the matter of transfers, DW4 testified that he was not involved as the same were handled by the office. He was not aware of the conditions of sale on the face of the advertisement but was aware of the requirement for LCB consent which applications were handled by his office. DW4 heard about the letter of by the Ministry of Lands which he did not have sight of. He was aware that titles had been revoked. According to the letter, the titles were obtained by misrepresentation. However, as at that date; 1st July 2011, all the pieces of land had been sold. He also knew that there was a charge on the property before the auction but it was discharged.

58. DW5, Justus Mulwa Nduya testified that he is a practicing Advocate based in Mombasa for the last 22 years named as the 9th Defendant in this case. He adopted his statement of 21st October 2016 and produced his list of documents as a bundle as D.Ex 5*. That they comprised copies of titles for various subdivisions of plot no. 544/III/MN. The title at page 9-10 was that of the plot DW5 purchased. He narrated that while purchasing the property, some of his friends named as defendants in this case approached him to act for them. He produced as D.Ex 6 a bundle of documents similar to Mr Sitonik's documents whose clients he also met during the purchase*.

59. DW 5 continued that an agent of the 2nd Defendant informed them that they had bought a plot which they were interested in selling. They requested to see the original titles and beacons which confirmed that the land was vacant. Thereafter, they agreed on the purchase price of the plots. DW5 personally went to the Lands Office where the Registrar confirmed that the copies of the respective titles were issued by him from 25th June 2010. He continued that for each of the subdivisions the Registrar had opened parcel files. His CR No. was 48028 which was the reference number they used to conduct searches that showed the 2nd Defendant as the registered owner whose title was issued on 25th June 2010. There were no encumbrances registered against the title.

60. DW5 prepared sale agreements for each individual, paid the purchase price and prepared transfers which were registered by the Registrar. His was registered on 8th October 2010. He became aware of this case in 2011 long after he had taken possession. Afterwards, the registrar wrote to some of his clients asking for the return of the original titles for cancellation. They did not comply as they had purchased the land procedurally. They instituted judicial review proceedings in case no.863 of 2011 against the registrar for purporting to cancel titles which powers he did not have; and were successful. Justice Emukule quashed the Registrar's letter in his judgment of 5th April 2016. DW5 averred that he and his clients hold genuine titles. He subdivided his portion into 6; the registrar issued titles of the same and some of the portions have been transferred to third parties. DW5 stated that they were not aware of any dispute between the Plaintiff and 1st Defendant before purchasing the property and as such they should not be affected by it. He was also not aware of the auction and prayed that the titles remain as they are.

61. On cross-examination by Mr. Khanna DW5 stated that the 2nd Defendant's agent did not explain the history of the suit land. That he only relied on the Registrar's word, one Mr. R. Ikombe. They were only interested in particular portions of the property which they had been

shown and identified. That at the time he saw the registrar, titles of the same were confirmed to be genuine. On the letter from the Ministry of Lands of 1st July 2011, DW5 observed that it was signed by R. Ikombe and issued to Milfan. At the time the 2nd Defendant was not in possession of all titles like his. He contended that it was mischievous for the Land Registrar to write such a letter. DW5 averred that he did not receive such a letter. As far as he was concerned, they did not misrepresent anything to the Registrar. He admitted that there was also a prayer for declaration of validity of title which was not granted.

62. DW5 continued that that when they were buying, the property was not agricultural land as it was situate within Mtwapa Township. He was not aware if the 1st or 2nd Defendants applied for LCB consent. That they did not apply for the same because it was not necessary. At the time he visited the site, there were residential buildings by NSIS and Coca Cola bottlers. DW5 admitted that there was an injunction registered after the transfers of plots into their names which had not been cancelled. He observed that there was an entry no. 4 which cancelled the court order no.3 under section 60 of the RTA. That the cancellation date was not indicated. He concluded that they have not developed their plots due to the injunction in place.

63. On cross-examination by defence counsels DW5 stated that he had no claim against the 1st Defendant as he was in possession of his plot and had a title. He admitted that he had no correspondences from the Lands Office. He had not attached a copy for the search at lands but there was a formal application for it. DW5 stated further that the Registrar participated in the judicial review proceedings whose letters he confirmed on re-direct were referred to in the judgment and subsequently quashed.

64. Samuel Kariuki Mwangi gave evidence as DW6 in his capacity as the Land Registrar stationed at Mombasa. He confirmed that the subdivisions arising from plot no. 544* were registered as 33735 on 25th June 2010. The contention was that at the time of registration there was an injunction order issued on 9th December 2009. On perusal of their records, when the subdivisions were registered, there was a reconstruction of the file at the Lands office evidenced by entries no. 2 – 41 which are an exact replica of the contents of the original title deed. That entries no. 42 – 63 bear the original ink and pen of the Registrar. DW6 continued that he came across a copy of the title which surprisingly had a court order as entry no. 42. That the reason for reconstruction was that the original register at the lands office was reported missing. He admitted that there was no correspondence reporting loss. It was possible that the order was registered in the original register which is still missing. A copy of the register showed that the order was registered.

65. DW6 testified further that he saw correspondence by his predecessor whereby the Registrar of titles had commenced the process of recalling the titles from the owners for cancellation purposes. That action became a subject of HCCC No. 45 of 2011 which sought to nullify and quash all transfers and titles issued in breach of the order issued on 11th December 2009. He continued that currently, the record shows that transfers were registered and title numbers issued to the respective plots. DW5 was aware of the allegation accusing the Registrar of creating two registers for 43849 and 43848. That he perused the title register which revealed the two titles were registered as new grants from the government in respect of plot no. 14798 and 14799; not subdivisions arising from the suit property. DW5 contended that it was not illegal to reconstruct a file hence the allegations of fraud leveled against the Land Registrar lacked merit. He produced the copy of the register, letter recalling title and the proceedings in Petition No. 45 of 2011 as his evidence.

66. DW6 stated on cross-examination that he produced a certified copy of the register. They got the original deed file but the register was still missing. When AFC gave a loan the charge was registered over the original no.482 in 1984 – 1985. He however was not aware of the consent entered into by the parties on 30th August 1988. He continued that there has never been a change of user as per their records which show that the property is freehold. He confirmed that as far as land was classified as agricultural and does not fall within the municipality, they required LCB consent as shown in page 18 - 19 of the 1st Defendant's documents. That if the consent was not obtained, they would not have registered the transfers.

67. DW6 explained that entry no. 2 gave the subdivisions created from 544. Entry 60 showed that there was a minimum of 45 subdivisions. Further, subdivision no. 7190 was directly from the mother title. He continued that according to their records, all 45 subdivisions have been sold. Below entry no 41, there was a big gap and lines probably as a result of the reconstruction. Similar lines were on the Plaintiff's copy. On entry no. 42 being the Court order he stated that there had been an alteration. That they received the injunction on 9th December 2009 but the register in their custody does not have an entry where it was registered. He admitted that from a comparison of the Plaintiff's documents, the copy of the title at page 37 - 42 is similar to the copy at the lands office. The Plaintiff's copy however shows that the order was registered on the original title as entry no. 42. DW6 averred that he never saw the original title before it went missing. Page 34 of the register stated that the Plaintiff was the registered owner of 3464; one of the subdivisions. Entries no. 61 – 63 were altered from 63 – 65 being the last entries on the register.

68. DW6 reiterated that there was an issue with the aforesaid entries that was resolved by cancellation of the entry in respect of 3464 to AFC by Four Farms Limited. That in the other two, 3449 and 3463 AFC had requested for Land Control Board consent. He could not confirm whether AFC paid any consideration on acquisition of the two plots nor did he have records on how the consents were obtained. At page 52, it was stated that the registered owner was the Plaintiff and that there were subdivisions arising. DW6 continued that the advertisement described the property for sale as 544/III/MN making reference to the subdivisions. He could not confirm what size the 2nd Defendant bought at the auction but from the record, they bought the remainder of the subdivisions. The letter written to the 2nd Defendant asking for recall of the title was because of the injunction order registered as entry no. 3. He clarified that the cancellation was of the title, not the court order. On the Judicial Review proceedings, DW6 admitted that they were served with the resultant order which was also registered.

69. In cross-examination by the Defence, DW6 gave evidence with regard to page 52 of the Plaintiff's documents that subdivisions from the mother title get independent parcel files. Consequently, the search dated 15th December 2009 shows the subdivisions and also refers to a court order. He admitted that the court order was not reflected in the subdivisions hence a search would not reveal the same. DW6 could not tell with finality that the suit land was subject to Land Control Board consent. The advertisement at clause 4 referred to the reserve price and Land Control Board consent if any. He continued that the description of the property mentioned that it was next to some offices and an EPZ factory. That in their list of documents, entry no. 3 revealed that the court order was presented on 17th May 2011. Entry no. 2 thereof showed that there had already been a transfer. He added that the cancellation process was not completed because of the order.

70. DW6 testified further that the original acreage of the property was 144 acres. That the property originally charged in favor of the 1st Defendant was parcel no. 482 MN from 162/2. Charges were registered on 26th November 1984 and 23rd October 1986. The original consent order to subdivide was not registered but there were charges registered on the resultant titles. At the time of subdivision there were several government acquisitions which changed the number of the original title and only the remainder was registered as the last subdivision being no. 544 from 482/3. Plot no. 544 measured 54.11 ha; approximately 133.708 acres. That the resultant 1989 subdivisions being 44 plots namely 3426 – 3469 add up to the said 133.708 acres. DW6 narrated that all the plots were charged on the outstanding debt. That as a registrar, he was aware that nothing took away the power of a chargee from realizing any of their securities. Moreover, by the time of the 2009 order, the plots had been subdivided and transferred by the Plaintiff where they sold 22 plots each. He was not aware if the Plaintiff remitted sale proceeds to the 1st Defendant.

71. When shown the Memorandum of sale drawn by Murphy Merchants selling the property to Milfan on 26th June 2009 at a public auction DW6 contended that in the absence of a registered injunction order in the record, the Registrar could not tell if there was an existing order. He did not know if there was any limit set for the chargee to sign a transfer after receiving the auction proceeds. That at the time of the auction plot Nos. 3449, 3463 and 3464 had not been sold to third parties. Their titles were in the 1st Defendant's possession. Since they were registered in the Plaintiff's name, it was not open for the Plaintiff to raise issues on them.*DW6 observed that at page 73 of the Plaintiff's bundle was a letter of the Registrar in which it was highlighted that one of the plots assigned a number was registered in the name of the 1st Defendant. That the same was rightfully cancelled by the Land Registrar after he confirmed that the registration was fraudulent.

72. It was DW6's evidence that the 2nd Defendant could not be faulted for any mistake. Similarly, the other defendants came to the property as a result of a transfer by the 2nd Defendant to them. That the 2nd Defendant had acquired 19 of 22 plots whose titles were lawfully issued by the Lands Office. Consequently, purchasers from the 2nd Defendant acted on the 2nd tier of files, not from the mother title hence any search conducted by the 5th – 20th Defendants revealed the 2nd Defendant as the registered owner. Moreover, in 2011 a new order separate from the 2009 order was issued barring the 5th – 20th Defendants from transacting which order was the only one registered in the new parcel files. He averred that the 2009 order did not require the Registrar to do anything and that they were not a party to the proceedings when the order was issued. That no contempt proceedings were ever taken against the Registrar for non-compliance nor was he restricted from dealing with the property. DW6 continued that the original file for the suit property was eventually found save for the title register that has entries from no. 2 to the last one. That the original title was in the custody of the 1st Defendant which was presented and from which verification and reconstruction was done. He was not aware of any investigations in respect of entry No. 42 regarding fraud.

73. The 21st Defendant, John Njeru Ngaruiya gave evidence as DW7. He stated that he applied to be enjoined in these proceedings vide the application dated 28th March 2018 pursuant to which he filed his defence and statement on even date. He produced the same as his evidence. On cross-examination by Mr. Khanna he narrated that subdivisions no. 3449 and 3463 are registered in his names and that he has developed them. He was not aware that the two plots comprised of the original plot no. 544/39. DW7 continued that he applied for consent to transfer as the property was agricultural land. That he bought his plots from one Fredrick Osimba Marachi named as the 20th Defendant in this suit. Before purchasing his plots he conducted his due diligence and results of a search revealed that Mr. Marachi was indeed the registered owner thereof. He only learned of this case when he did a search and found a court order registered against his plot. It was DW7's case that Mr. Fredrick gave him the documents he used while purchasing the plots from AFC Ltd namely title deeds, a letter from AFC and the LCB consent. DW7 stated that he had put up a factory on one plot worth Kshs.84 million and the other was fenced with a perimeter wall. He confirmed that there were many factories in the neighborhood including Coca Cola.

Submissions

Plaintiff's submissions

74. The Plaintiff filed its submissions on 3rd October, 2019. The Plaintiff submitted that the suit property was agricultural land that required consent from the Land Control Board before the transfer from the 1st to 2nd Defendant thus the transaction between the two Defendants was voided by the failure to obtain the consent. Counsel referred the court to the provisions of Section 6 of the Land Control Act on the importance of consent from the Land Control Board when dealing with agricultural land. Further, the Plaintiff stated that there was no evidence brought forth by the 2nd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th and 19th Defendants to show that they had procured Land Board Consents before the transfer of their respective subdivisions of the suit property.

75. As regards the Land Control Board consent obtained by the 1st Defendant dated 5th March, 2015, the Plaintiff opined that the same was invalid as the transaction in respect of which the consent was obtained i.e. the transaction between the 1st Defendant and the 20th Defendant involving a transfer of a subdivision of the suit property had occurred on 20th February, 2015.

76. The Plaintiff submitted that the 1st Defendant was well aware of the injunctive orders issued on 6th November, 2009 and 8th February, 2011 but disregarded the same and went on to deal with the suit property in the years 2010, 2011, 2012, 2013, 2014 and 2015 with the 2nd, 20th and 21st Defendants.

77. The Plaintiff stated that when the suit property was subdivided into 44 portions the charge over the suit property was substantially altered and could no longer be enforceable under the chargee's statutory power of sale. Hence, the Plaintiff submitted that the 1st Defendant was in breach of Section 33 of the Agricultural Finance Corporation Act when it exercised its statutory power of sale.

78. In relation to the public auction of the suit property, the Plaintiff submitted that the first auction was scheduled to take place on 19th February, 2009 and the advertisement in the Standard Newspaper named the suit property as measuring 33.206 Ha (82.02 acres). The said auction did not take place and another auction was slated for 26th June, 2009. In the advertisement for the subsequent auction, the suit property was said to be measuring 31.12Ha (76.89 acres). Counsel for the Plaintiff contended that the original measurement of the suit

property at the time of procuring the loan was 54.11Ha (133.4 acres). Counsel suggested that the 2nd Defendant bought 19 subdivided plots that were not part of the public auction and the sale to the 2nd Defendant by the 1st Defendant was not in exercise of the 1st Defendant's statutory power of sale. Further, the Plaintiff submitted that the sale of the suit property by public auction was unlawful as there were material irregularities, misdescriptions and breach of orders on the part of the 1st Defendant.

79. In support of the submission that the sale of the 19 sub-divided plots to the 2nd Defendant by the 1st Defendant was unlawful, the Plaintiff referred the court to a letter by the 3rd Defendant dated 1st June, 2011 in which the 3rd Defendant informs the 2nd Defendant that the registration of the 19 plots was by misrepresentation and directs the 2nd Defendant to return all the titles relating to the 19 plots for cancellation. The 2nd Defendant did not return the titles as all the 19 plots had already been sold and transferred to the 4th to 19th Defendants.

80. The Plaintiff submitted that the transfer of plots no. 3449 and 3483 by the 1st Defendant to itself was in contravention of Section 33(1) and (2) of the Agricultural Finance Corporation Act.

81. The Plaintiff then proceeded to challenge the evidence of DW6, the 3rd Defendant submitting that the 3rd Defendant, during cross examination, admitted to inconsistencies in the register relating to the suit property. For instance, the 3rd Defendant confirmed that entries No. 61-63 were altered from 63-65; entry No. 42 which was supposed to register the injunction order issued on 9th December, 2009 was missing. The 3rd Defendant claimed that 44 plots were sold by the 1st Defendant and 22 plots by the plaintiff yet all plots except for plot No. 3464 were sold by the 1st Defendant. The plaintiff stated that the 1st Defendant went on to transfer plot No. 3464 to itself yet the same had been transferred to Mtwapa Heights Ltd forcing the 3rd Defendant to cancel the registration by the 1st Defendant for fraud.

82. As regards the Counter-claim, the Plaintiff submitted that leave was not sought before the filing of the counterclaim hence it should be struck off. In the alternative, the Plaintiff submits that if the court declines to strike off the Counter-claim, the court should find the same to be time barred under the provisions of the Limitation of Actions Act. The Plaintiff argued that when the suit property was sold vide public auction on 26th June, 2009, the charge over the suit property was fully discharged thus any outstanding amount became a debt that ought to have been recovered within 6 years from the date when the debt accrued which was 26th June, 2009. The Plaintiff directed the court to the evidence of DW2, DW3 and DW4, who all admitted that no steps were taken by the 1st Defendant to recover the debt after the auction in 2009.

83. In light of the above submissions, the Plaintiff urged the court to direct the 3rd Defendant to cancel entries No. 43 to 62 in the original register and to re-instate the Plaintiff as the registered proprietor of all the subdivision referred to in the entries No. 43 to 62.

1st Defendant's Submissions

84. The 1st Defendant submitted that it advanced various loans to the Plaintiff which were secured by the suit property. The Plaintiff failed to honor the loan and interest repayment terms leading to the 1st Defendant instituting recovery proceedings. Before the 1st Defendant could recover the loan amount, the Plaintiff lodged Mombasa HCCC No. 652 of 1988. On 25th November, 1989, the Plaintiff and 1st Defendant entered into a consent in that suit to have the suit property subdivided and later sold with the participation of both parties to recover the loan amount.

85. The 1st Defendant submitted that the Plaintiff frustrated the implementation of the consent forcing the 1st defendant to exercise its statutory power of sale. The 1st Defendant stated that it served the Plaintiff with the statutory notice as well as the 45 days redemption notices (by the auctioneer) vide letters dated 19th November, 2008, 20th November, 2008 and 22nd November, 1988. The suit property was finally sold on 26th June, 2009 to the 2nd Defendant at a price of Kshs.38, 445,000/=.

86. The 1st Defendant contended that the amount recovered from the auction did not offset the loan fully and there were still arrears owed. The 1st Defendant put the amount owed as at 31st December 2019 at Kshs.303,503,285/=. The 1st defendant opined that this amount was still owing and could not be subjected to the provisions of the Limitation of Actions Act as the principle of *in duplum* does not apply to the 1st Defendant because the 1st Defendant is not governed by the Banking Act and the Companies Act.

87. The 1ST Defendant submitted further that at the time of the public auction i.e 26th June, 2009 there was no injunctive order restricting the 1st Defendant from exercising its statutory power of sale. The 1st Defendant indicated that the injunctive orders were issued five months after the sale (on 6th November, 2009).

88. The 1st Defendant took issue with the manner in which this suit was instituted by the Plaintiff. The 1ST Defendant claimed that one HUSSEIN MURMOHAMED had no authority from the Plaintiff to institute the suit on behalf of the Plaintiff company and also that there was no resolution from the Plaintiff company appointing the firm of Anjarwalla & Khanna Advocates to file the suit on its behalf. Counsel for the 1st Defendant referred the court to the case of **Assia Pharmaceuticals v. Nairobi Veterinary Centre, HCC No. 391 of 2000** where the court observed that where a suit is instituted on behalf of a company there must be a company resolution to that effect.

89. In response to the allegation that consents from the Land Control Board were never sought for the transactions between the 1st and 2nd Defendant and subsequently between the 2nd Defendant and 4th to 19th Defendants, the 1st Defendant contended that the issue of the Land Control Board should then be considered from the initial transaction between the Plaintiff and the 1st Defendant in which a mortgage was registered in favour of the 1st Defendant by the Plaintiff. The 1st defendant submitted that consent of the Land Control Board was not sought in the registration of the mortgage. Counsel for the 1st Defendant explained that it was a government body by virtue of its parent statute thus

it was exempted from obtaining Land Control Board consents under the provisions of Section 6(3) of the Land Control Act.

90. The 1st defendant also submitted that the user of the suit property changed from agricultural to residential when the Plaintiff registered the subdivision No. 3464 in its name and later transferred the same to National Security Intelligence Staff Superannuation Scheme who later transferred the plot to Mtwapa Heights Limited.

91. In conclusion, the 1st Defendant reiterated that it had not defied any court order with respect to the suit property. The 1st Defendant restated that at the time of issuance of the injunctive order on 6th November, 2009 the suit property had already been sold. Further, the 1st Defendant added that there was no enforcing order between 2010 and 2015 owing to the provisions of Order 40 Rule 6 of the Civil Procedure Rules which provides that where a suit in respect of which an interlocutory judgment has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless the court orders otherwise.

2nd Defendant's Submissions

92. The 2nd Defendant filed submissions on 21st November, 2019. The 2nd Defendant submitted that its involvement in this matter was triggered by the public auction held in June, 2009 in which it emerged as the highest bidder. The 2nd Defendant considered itself as a bona fide purchaser for value without knowledge of the over 30 years of dispute between the Plaintiff and the 1st Defendant.

93. The 2nd Defendant submitted that prior to the auction it verified the status of the suit property both physically and at the land's registry. The 2nd Defendant found the suit property to be idle and devoid of any activities. At the registry, the 2nd Defendant established that a charge to the 1st Defendant had been registered as No. C.R 7190/24 and a notification of charge to the 1st Defendant registered as CR No. 7190/25 and CR No. 7190/26. Based on this information, the 2nd Defendant went ahead to place its bid which was ultimately successful. Subsequently, the 1st Defendant transferred the land to the 2nd Defendant who later sold various portions to the 4th to 19th Defendants.

94. While relying on the equitable maxim that equity does not aid the indolent, the 2nd Defendant argued that the Plaintiff did not challenge the auction or make any attempt to stop it thus the Plaintiff could not now be seeking to reclaim proprietary rights over the suit property.

95. As relates to the Land Control Board consent, the 2nd Defendant stated that there was nothing on the face of the suit property to show that it was agricultural land. Further, the 2nd Defendant submitted that the Plaintiff had not tendered any evidence to show that the suit land was agricultural land. In the alternative, the 2nd Defendant urged that if the Land Control Board consent was mandatory, the 3rd Defendant would not have registered the transfers presented by the 2nd Defendant.

96. With regard to disobedience of court orders, the 2nd Defendant submitted that it was not a party to the proceedings that resulted in the issuance of the injunctive orders of 6th November, 2009 and that when the orders were extended and served upon it on 8th February, 2011, the 2nd Defendant had already sold the suit plots to the 4th to 19th Defendants.

97. The 2nd Defendant submitted that it had no obligation to inquire into the validity of the power of sale exercised by the 1st Defendant during the auction and once the suit property was knocked down to it as the highest bidder, the chargor's equity of redemption was extinguished and if the chargor had suffered any loss owing to the exercise of the power of sale by the chargee, the loss would be redeemable by way of damages from the chargee.

3rd Defendant's Submissions

98. The 3rd Defendant filed brief submissions on 30th January, 2020. The 3rd defendant submitted that only two prayers were sought against it, that is a declaration that the subdivided plots No. 3449/III/MN and 3463/III/MN and 3464/III/MN were unlawfully transferred to the 1st Defendant and the titles issued by the 3rd Defendant to be declared as void; and a declaration that the titles issued by the 3rd defendant in respect of subdivisions 3463/III/MN and 3449/III/MN relating to the suit property and currently registered in the name of the 20th Defendant were not genuine thus null and void.

99. The 3rd defendant submitted that the original parcel file for the suit land got lost and another was reconstructed. Due to the said loss, there was an oversight of entry No. 42 which related to the injunctive orders issued on 6th November, 2009. Counsel for the 3rd Defendant stated that when the oversight was corrected, parties affected were informed and the Land Registrar recalled transfers of the subdivisions in entry 42-60. However, before the Land Registrar could revoke the titles emanating from the said entries a court order was issued restraining the revocation.

100. As to the issue of the Land Control Board consent, the 3rd Defendant admitted that he could not conclusively confirm whether the same was required as it was dependent on the location of the suit property.

5th, 6th, 11th, 13th and 14th Defendant's Submissions

101. These Defendants filed their submissions on 20th November, 2019. On the issue whether the transactions between the 2nd Defendant and the 4th to 20th Defendants were invalid for lack of the Land Control Board Consent, the Defendants submitted that the Plaintiff had not tendered any evidence in support of this assertion. In support of this assertion, the Defendants relied on the evidence of DW3 (who purchased one of the portions), who testified that at the time of purchase the suit property was not agricultural land as it was located within Mtwapa

Township and there were residential buildings erected by NSIS and Coca Cola bottlers. Further, these Defendants submitted that the 3rd Defendant had confirmed during cross examination that there was no condition on the face of the suit property title requiring mandatory procurement of the Land Control Board consent.

102. The Defendants submitted that if the court were to find that Land Control Board Consent was required, the court should apply substantive justice and find that a constructive trust had arisen from the transaction in favour of the 4th to 20th Defendants as the Defendants paid the full purchase price and took possession of their respective portions. Counsel for the Defendants relied on the case of **Willy Kimutai Kitilit Vs Michael Kibet [2018] eKLR**, where the Court of Appeal observed that the lack of the consent from the Land Control Board does not preclude the court from giving effect to equitable principles.

103. As to whether the transfers to the 4th-20th Defendants was done in contravention of the court order dated 6/11/2009, the Defendants stated that the court order was issued when the suit property had already been sold by way of public auction on 26/06/2009. Also, the Defendants contended that the 2nd Defendant was not a party to the proceedings from which the order dated 6/11/2009 emanated hence the 2nd Defendant was not aware of the said orders. Additionally, there was no evidence to show that the order issued on 6/11/2009 was registered against the title to the suit property thus when the 4th to 20th Defendants conducted search on the suit property there was no entry containing the order.

104. As regards the consent entered into between the Plaintiff and the 1st Defendant in 1988, the Defendants submitted that court orders were only enforceable for a period of 12 years from the date of issue and as such the consent was not enforceability at the time the 4th to 20th Defendants purchased their respective portions.

21st Defendant's Submissions

105. The 21st Defendant filed his submissions on 21st October, 2019. The 21st Defendant submitted that he became the proprietor of land parcels NO. 3449/Sec III/MN and No. 3463/Sec III/MN vide registration that occurred on 14th May, 2015. The 21st Defendant stated that he purchased the two parcels of land from the 20th Defendant who had in turn purchased them from the 1st Defendant. The 21st defendant contended that the transaction between the 1st Defendant and the 20th Defendant was valid and a Land Control Board Consent was obtained.

106. The 21st Defendant stated that at no time did he purchase the two portions of land from one Henry Obuya who the Plaintiff alleged was the registered owner of the two portions. The 21st Defendant explained that he was the registered owner of the two portions at the point when the Plaintiff Re Amended its Plaint yet the Plaintiff did not include him in the proceedings.

107. As relates to the orders issued in February 2011 and extended in April, 2011, the 21st Defendant submitted that he was neither a party to the proceedings neither were his two parcels of land subject to the order.

108. The 21st Defendant states that there were never any inhibitions registered against the two parcels of land hence there was nothing stopping registration of the 21st Defendant as the owner of the two parcels. The 21st Defendant concluded that he had indefeasible titles to the two portions of land that could not be challenged as there was no fraud or misrepresentation.

109. With regard to the Land Control Board Consent, the 21st Defendant pointed out that the Plaintiff had conceded that 20th Defendant had obtained consent of the Board before transferring the two portions pf land to the 21st Defendant. The said consent was obtained on 7th May, 2015 while the transfers were registered on 14th May, 2015.

110. In concluding, the 21st Defendant observed that he was an innocent purchaser for value without notice of any previous defects in the title. He contended that he cannot be liable to the Plaintiff for any illegalities that may have occurred prior to his dealings with the 20th Defendant. He argued that it was only the 1st Defendant that can be liable for such illegalities and any damages payable.

8th, 9th, 10th, 12th, 15th, 16th, 17th, 18th and 19th Defendant's Submissions

111. These Defendants filed their submissions on 20th November, 2019. They submitted that the Plaintiff had admitted to having taken various loan facilities from the 1st Defendant secured by the suit land. The Plaintiff did not demonstrate that it paid the loan amount and accrued interest hence the 1st Defendant was well within its rights when it exercised its statutory power of sale. The Defendants state that the Plaintiff's rights over the suit property were extinguished when the property was sold by way of public auction to the 2nd Defendant.

112. The Defendants state that they were innocent purchasers for value without notice of any defect in title. While relying on the case of **Nancy Kahoya Amadiva Vs Expert Credit Limited & Another [2015] eKLR**, the Defendants argued that there is no duty cast on an intending purchaser at an auction, properly advertised, to inquire into the rights of the mortgagee to sell.

113. The Defendants claim that they all purchased their respective portions of the suit land without knowledge of the court order issued on 6th November, 2009 as the order was not register in the mother title to the suit property and they were not party to the court proceedings. Further, the Defendants explained that the said order was issued to stop the auction of the suit property, which had already been auctioned, and was not directed at the 3rd Defendant prohibiting him or her from transferring or in whatever manner dealing with suit property.

Determination

114. The re-amended plaint which included the 2nd – 21st defendants had several prayers as listed in paragraph 1 of this judgment. Having perused the pleadings filed by the respective parties, evidence adduced (oral and documentary) and the submissions rendered, I do frame the following issues arising for determination;

- a. Whether or not the 1st defendant lost its right to exercise statutory power of sale over the suit property.
- b. If (a) is negative, whether or not the plaintiff was properly issued and served with statutory notices before the sale.
- c. (i) Whether or not the property was properly described in the *advertisement for public auction and*;
(ii) If an auction took place on 26/6/2009.
- d. Whether or not Land Control Board consent was required for the ensuing transactions between the defendants.
- e. Whether or not the 2nd – 21st defendants are innocent purchasers for value without notice.
- f. Whether or not the plaintiff is entitled to the reliefs sought in the claim.
- g. Is the 1st defendant's counter-claim timebarred?
- h. Who bears the costs of the suit.

115. The plaintiff pleaded and submitted that the 1st defendant lost its right to exercise statutory power of sale over the original parcel No. M.N./544 because of the consent entered into on 24/11/1989. The consent was executed between the parties in Mombasa H.C.C.C No. 652 of 1988 (O.S). The brief terms of the consent was to allow sub-division of the suit land into 54 plots and the same be sold at Kshs.150,000/= per acre. The funds received from the sale was to eventually be used to settle the debt owed to the 1st defendant. The consent did not indicate that the charge registered on the property was to be discharged before the subdivision process could commence. Infact the plaintiff's **Pex 19 (page 29 – 31 of her list)** displays a partial discharge executed on 31/1/2008 in respect to sub-division No. 3464 C.R. No. 7190 between the 1st defendant and the plaintiff. This confirms that the charge remained registered on the title (and or the resultant sub plots).

116. The plaintiff alleged that the consent set out the mode in which the debt was to be paid thus the 1st defendant was estopped from backtracking on the consent by now advertising the property for sale. The 1st defendant on its part states that the consent settled the case No. 652 of 1988 making it a judgment. That since 12 years had expired from the time it was executed, the consent was thus caught up with limitation and this defence was not available to the plaintiff. The plaintiff denied the consent was a judgement. However, the plaintiff did not mention what became of that earlier suit and if the consent was not a judgment, why he did not pursue the present claim in that former suit.

117. Be that as it may, the consent having said nothing about the rights of the 1st defendant in exercising its statutory power of sale, I decline to be invited to infer the same. Although the plaintiff referred the Court to the ruling by J.B. Ojwang' (as he then was) rendered in case No. 652 of 1988 where the learned Judge stated thus, **"I hold therefore that the defendant has not met the conditions which alone will provide the justification for proceeding under the original charge-agreement. This ruling has set out in detail the essential responsibilities which the defendant must perform as the validating condition for it to proceed under the terms of the original charge-agreement"**.

118. Justice J.B. Ojwang whose findings then is applied persuasively to this Court did not conclusively make a finding that the 1st defendant had forfeited his rights to exercise the statutory power of sale. It is also noteworthy that the said ruling was rendered on 6/11/2009 after the sale had taken place. The orders given were not stated to apply retrospectively. This court was not provided with evidence that the trial court in MSA HCC 652 of 1988 made a determination that the sale conducted on 26/6/2009 was irregular and or null and void. Consequently, I answer the first question that there is no evidence presented to demonstrate that the 1st defendant forfeited its rights under the original charge document as provided in section 70 of Cap 300 (repealed) which stated thus;

"where a charge contains an agreement, express or implied, by the chargor with the chargee that he will not transfer the land, lease or charge or any part thereof without the written consent of the charge, the agreement shall be noted in the register, and no transfer by the chargor shall be registered until the written consent of the charge, verified in accordance with section 110, has been produced to the Registrar."

119. On the second question whether the plaintiff was properly issued and served with the statutory notices, the plaintiff has annexed at pages 90 – 93 letters addressed to itself giving it the 3-months' statutory notice. The 1st defendant presented evidence on the dates the foreclosure notices were served. In the 58 paragraph witness statement dated 14/6/2016 by Hussein Nurmohamed, he does not mention anything about non-service of the statutory notices. Therefore, court draws an inference that the statutory notices were duly served as per the provisions of section 74(1) & (2) of the Registered Land Act Cap 300 (repealed). The said section states that;

"1. If default is made in payment of the principal sum of any interest or any other periodical payment or of any part thereof, or in the performance or observe of any agreement expressed or implied in any charge, and continues for one month, the

chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

2. If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property.”

120. The 2nd part of the question is whether or not the suit property was properly described in the advertisement of the public auction. The advertisement referred to the property as subdivision No. 544/III/M.N. The plaintiff submits that the advertisement had material irregularities, misdescriptions and breach of orders on the part of the 1st defendant. Part of what is considered as misdescription of the property was the fact that the original No. 544 stated in the advert had been sub-divided into 54 plots thus it no longer existed. Further, of the 54; the 1st defendant had sold 32 of the plots leaving 22 plots prior to the auction. Therefore, plot 544 could not be advertised as available for sale. The plaintiff stated in cross-examination that when he got the injunction order on 6/11/2009, he applied to have it registered on the main title 544/III/M.N. He also pleaded in paragraph 22 of the re-amended plaint that the 2nd defendant applied to register the transfers in the mother title. The said paragraph reads thus;

“The said transfers were all dated 31st May 2010 and registered against Plot L.R No. 544 (Original No. 482/3) Section III, M.N. being entry numbers 42, 45 to 57 inclusive and 56 to 60 inclusive in blatant breach and in complete disobedience of the said Court Ruling and Order and without applying for and obtaining the necessary consents from the Land Control Board and or by misrepresentation on the part of the 1st and or 2nd defendants rendering the sale transactions null and void.”

121. At page 38 to 44 is the title document in respect of the suit property. From the evidence of the parties, this Court got the impression that entries Nos 1 – 41 on the main title are not contested. The contested entries run from Nos 42 – 63. For purposes of my determination, although there is no dispute that the original title was subdivided, it never ceased to exist as the sub-divisions were being registered on it. Given that the titles for the sub-divided numbers had not been issued as at the date of the auction, the auctioneer (1st defendant’s agent) option was to describe the property in accordance with the records held at the lands office which is L.R No. 544/III/M.N. The difference in acreage given in the advertisement in January 2009 and the one for June 2009 in my opinion is a minor issue which could not alter the terms of sale of the property. The plaintiff had admitted in cross-examination that Agricultural Finance Corporation (1st defendant) had a charge over the resultant titles. Thus whether advertised as separate plots or one plot, the outcome would still be the same – sale for redemption of the loan.

122. The plaintiff pleaded in paragraph 13 of the re-amended plaint that the 1st defendant proceeded to sell by public auction all the dairy cows and farm equipment and from the sale proceeds the 1st defendant had not only recovered the entire outstanding loan in full payment as well as all the disputed interest but it failed to account for all the money received by it especially the surplus moneys which the 1st defendant had recovered with interest as at 1988.

123. The plaintiff added that the 1st defendant never disclosed to it the actual amount of the sale proceeds and failed to account for the same without transparency despite repeated requests. The plaintiff thus contends that the loan owing to the 1st defendant was settled by the proceeds from the public auction done in 1988. This assertion is however contradicted by the documents produced and relied on in this case. Inter alia, the consent of 24/11/1989 which provided way forward on how to repay the loan and correspondences exchanged between the plaintiff and the 1st defendant.

124. For instance, by a letter dated 30/5/2002, the plaintiff wrote to the managing director of the 1st defendant requesting for waiver of interest. The letter even made reference to the public auction that took place in 1988. In the plaintiffs letter dated 28/10/2003, written on *without prejudice* the plaintiff made a counter-offer to the 1st defendant that the debt be agreed at Kshs.1,500,000 which will be redeemed within 4 months upon approval. In the letter dated 10/1/2005, the plaintiff besides asking for waiver of interest, was complaining why the 1st defendant had declined some payments. All these evidence show the debt that the plaintiff owed to the 1st defendant was not fully settled by the auction of goods done in 1988 as pleaded by the plaintiff.

125. Paragraphs 16 & 17 of the re-amended plaint referred to the order of injunction given on 6/11/2009 against the 1st defendant its agents, employees or otherwise restraining them from selling, auctioning, repossessing, foreclosing alienating or in any way interfering with the suit property. As I have discussed earlier, the selling, auctioning or foreclosing had taken place before the order was issued.

126. The 4th issue is whether or not the Land Control Board consent was required in the transactions which took place between the 1st & 2nd defendant and subsequently between the 2nd – 21st defendants. And the consequences of the said transactions if no such consent was obtained. The 1st defendant invoked the provisions of section 6(3) (b) of the Land Control Act Cap 302 which provides thus;

“3 This section does not apply to (b). A transaction to which the Government or the settlement Fund Trustees or (in respect of Trust Land) a county council is a party”.

127. The 1st defendant’s evidence is that because of the above provision of law, even the consent to charge the property was not obtained. But the plaintiff argued that the 1st defendant is not a government body thus cannot enjoy the exemption as the provisions of section 3(3) of the Agricultural Finance Corporation Act defines it as, **“the corporation shall be a body corporate with perpetual succession and a**

common seal, and shall have power to acquire, own, possess and dispose of property, and to contract, and to sue and be sued in its own name.”

128. Section 3(4) of the same Act states that the Corporation is not subject to the companies Act (Cap 486) or the Banking Act (Cap 488). Section 4(2) gives the composition of Board of director of the 1st defendant thus;

“2. The Board shall consist of:

a. Not less than four or not more than six persons appointed by the Minister of whom at least two shall be appointed by reason of their knowledge of banking or financial matters;

b. The Permanent Secretary of the Ministry, or a person deputed by him in writing to take his place as a director of the Board; on

c. The Permanent Secretary of the Ministry for the time being responsible for finance, or a person deputed by him in writing to take his place as a Director of the Board.”

129. Further, section 3 of the State Corporations Act CAP 446 states that; “(1) *The President may by order establish a State Corporation as a body corporate to perform the functions specified in that order. (2) A state corporation established under this section shall- (a) have perpetual succession (b) in its corporate name be capable of suing and being sued.*”

130. In the case of *Kimoi Ruto & Ano Vs Samuel Kipkosgei Keitany & Ano (2014) eKLR*. Munyao J. held –

“41. That is a bit of a grey area, of which I need not make a definite decision in the circumstances of this case, for I am prepared to hold, that land held by a State Corporation is land "otherwise enjoyed by the Government" as to fall within the exception provided in Section 41 (a) (i) of the Limitation of Actions Act. State Corporations are actually vehicles through which the Government performs its operations, and if they hold land, then that land is really for the benefit of the Government and the public at large. The Government "enjoys" such holding as it is the actual entity behind the Corporation. When a Corporation is wound up, its assets, including land, will revert back to the Government and to no other entity.

42. AFC is a State Corporation created pursuant to the provisions of Section 3 of CAP 323, and since I have held that land held by State Corporations is land "otherwise enjoyed by the Government" then, the duration when the land was held by AFC cannot be counted in accumulating the 12 years required to sustain a claim for adverse possession. It follows that the duration between 1990 and 2007 cannot be relied upon by the applicants. Time therefore started running in favour of the applicants as from 7 July 2007. This suit was instituted on 29 August 2007 and certainly 12 years had not lapsed.

131. In light of the provisions of section 3(4) and 4(2) of the Agricultural Finance Corporation Act Cap 323 and case cited, I am persuaded to find that the 1st defendant is a government body and thus entitled to enjoy the exemption provided under section 6(3)(b) of the Land Control Act. This was corroborated by the evidence that as at the time of charging the property, no consent of LCB was obtained.

132. Furthermore, the sale to the 2nd defendant was pursuant to a public auction. The proviso to section 3 of the Law of Contract Act Cap 23 states thus, “**provided that this section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creating of a resulting, implied or constructive trust.**”

133. The Court of Appeal in the case of *Willy Kimutai Kitilit Vs Michael Kibet (2018) eKLR* cited the decision in *Public Trustee Vs Wanduru Ndegwa (1984) eKLR* where Madan JA as he then was said “**The provisions of Land Control Act have no application to where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land.**”

134. Having analysed the status of the 1st defendant and taking into consideration that the purchase by the 2nd defendant was by public auction (pursuant to provisions of section 70 of Cap 300), this Court concludes that there was no requirement for the Land Control Board consent to be obtained. Further that if my position is wrong, then the law protects the interest of the 2nd defendant whose intention was to buy having done due diligence. The sale by public auction on 26/6/2009 cannot therefore be declared null and void when the intentions of the 1st & 2nd defendants was clear and the plaintiff having failed to stop the sale before it took place.

135. Did the 1st defendant breach the order of 6/11/2009 by executing the transfers in favour of the 2nd defendant? The 2nd – 19th defendants have argued that at the time they acquired their titles, there was no order registered on the title. That even if there was such an order, they had not been made party to the suit so they were not bound by it. It is indeed true that the order of 6th November 2009 was issued when the plaintiff and the 1st defendant were the only parties to the suit.

136. In the case of *Mbuthia Vs Jimba Credit Finance Corporation and another [1986-1989] 1 EA 340 (CAK)* considered the impact of an auction sale on the equity of redemption where the charged property was sold by public auction to the second respondent. The Court of Appeal held that:-

"A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagee's exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the persons interested according to priorities.

The Court will not grant to a mortgagor tampering the moneys due under the mortgage, an injunction restraining the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of this power of sale unless it is proved that the mortgagee entered into the contract in bad faith. The transaction which is the subject of the dispute was entered into in February 1982 and is therefore governed not only by the Registered Land Act itself, but also by the common law and equity under section 72(1) of that Act, the equity of redemption subsisted in the mortgagor until the leasehold premises was sold. It was then extinguished and the Act provides that **"a charge shall be deemed to have been sold when a bid has been accepted at the auction sale."**

This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act. (underline mine for emphasis).

137. In the case of ***Ze Yu vs Yang Nova Industrial Product Ltd*** [2003] 1 EA 362 (CCK), Justice Nyamu (*as he then was*) held as follows:-

"The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power. *Mbuthia Vs Jimba Credit Corporation* [1986] LLR 3292 (CAK), *Grant Vs Kenya Commercial Finance Company Limited* civil appeal number 227 of 1995 and *Central Bank Kenya Limited Vs Trust Bank and others* [1996] LLR 472 (CAK) applied." A similar position was adopted in *Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others*** [2005] eKLR, where the court held that:**

"The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie prove that they are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages... 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...The balance of convenience tilts in favor of the 5th Defendant who purchased the property at the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th Defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction."

138. The 2nd defendant produced a memorandum of sale dated 29th June 2009 and rates receipts dated 10th September, 2009 and transfers in the respect of subdivision Nos 3435, 3436, 3437, 3447 – 3448, 3453 -3458, 3460 – 3462, 3465 – 3469 are all dated 31/05/2010. Can the execution of these transfers by the 1st defendant while aware of the order of the Court of 6/11/2009 be declared illegal null and void?

139. In the case of ***Captain Patrick Kanyagia Vs Damaris Wangechi & Others, Civ. Appeal No. 150 of 1993***, the Court of Appeal held that, **"when does the title pass; putting it another way; when does the right of redemption vest in the mortgagor come to an end? It is clear that Muchemi's equity of redemption came to an end when the Kanyagia's signed the contract of sale and not later."**

140. From the decisions cited herein, I am of the considered opinion that the rights of the plaintiff in regard to redeeming the suit property was extinguished at the fall of the hammer on 26th June 2009. Therefore, there is no basis why the 1st defendant ought not to have executed the transfers touching on the suit property inspite of being it being party to the orders of temporary injunction which orders were issued after the sale.

141. Further, to prove there was disobedience of the order, the plaintiff had an obligation to prove that the 2nd defendant who presented the transfers were aware of it. This is in accordance to the rules of natural justice that a person should not be condemned unheard. The 2nd defendant was joined to these proceedings after February 2011. The plaintiff thus ought to have first; joined the 2nd defendant to these proceedings and secondly proved that the order had been registered on the title as at the time when the transfers were presented to the 3rd defendant for registration.

142. The issue on whether or not the order was registered was hotly contested. On the face of the order, there was nothing directing the 3rd defendant to cause it to be registered. On the copy of the two titles produced by the plaintiff; at page 44, it shows that the order was registered on 9th December 2009 as entry No. 42. While at pages 60 – 61 of the plaintiff's documents, there is no entry of the order on the title. The Land Registrar testified as DW5. He stated that registration of the sub-divisions was done on 25/6/2010 after the reconstruction of their file because the original register was recorded missing. That it is possible the order may have been registered in the original register which was recorded missing.

143. DW5 stated that he never saw the original title before it went missing. Given the evidence that at the time of registration of the transfer in favour of the 2nd defendant the register containing the order was missing, there was an obligation on the plaintiff to show that the 2nd defendant was a party to the illegality if any committed by the lands office. This is in view of the provisions of section 39 of the Registered Land Act which provided thus;

"(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-

(a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous

proprietor was registered; or

(b) to see to the application of any consideration or any part thereof; or

(c) to search any register kept under the Land Registration (Special Areas) Act, the Government Lands Act, the Land Titles Act or the Registration of Titles Act.”

144. From the evidence adduced, there is no evidence that the 2nd defendant was aware of the order or that he contributed to the loss of the Original register (the fact of loss not controverted by the plaintiff). Therefore, I find no basis to vitiate the sub-divisions titles acquired by the 2nd defendants. Having found that the 2nd defendant's title was regularly acquired, it follows that it had good titles to pass on to the 4th – 19th defendants. It is further my considered view and I so hold that the plaintiff could only question the transaction as between the 1st and 2nd defendant and not between the 2nd to 3rd parties (4th – 19th defendants) since he has no direct claim against them. The plaintiff has submitted as much that should the plaintiff's suit be dismissed; it should not be ordered to pay for the costs of the 4th – 21st defendants as they were joined by the order of the Court.

145. In light of my foregoing analysis, I conclude that the plaintiff's claim has not been proved within the required standards. The same is hereby dismissed.

146. The 1st defendant also filed an amended defence and counter-claim on 29/5/2017. The 1st defendant counter-claimed for the sum of Kshs.280,702,809 from the plaintiff as the balance of the outstanding loan as at 31/12/2016. In its defence, the plaintiff averred the said claim was brought without leave of the Court. Secondly that the claim is time barred.

147. A counter-claim is equivalent to a suit. The recovery for money/debt is limited to a period of six (6) years under section 4 of the Limitation of Actions Act from when the debt accrued. In this instance, I hold the view that the balance of the loan due to the 1st defendant became a debt after the sale accruing from 27th June 2009 which is the date after it exercised its statutory power of sale. The six-year period thus lapsed on 26th June 2015. The counter-claim brought without leave of the court is thus time barred. I proceed to strike it out for being time barred.

148. Although costs follow the event, I am inclined to order that each party meets their respective costs of the suit going by the history of the case.

Judgement dated & signed at Busia this 16th Day of September 2020

A. OMOLLO

JUDGE

And delivered electronically via email to the parties' advocates this 21st Day of September 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE