Cooperative Bank of Kenya v Gituma (Environment and Land Appeal E021 of 2024) [2025] KEELC 6297 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6297 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E021 OF 2024

JO MBOYA, J

SEPTEMBER 18, 2025

BETWEEN

COOPERATIVE BANK OF KENYA .... APPELLANT

AND

GEORGE MUGAMBI GITUMA .... RESPONDENT

(Being an appeal from the Judgement and decree of the Learned trial magistrate Hon. J.M Njoroge – Chief Magistrate, dated and delivered on 13th March 2024 in Meru ELC No. E031 of 2022)

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the subordinate court] filed the Plaint dated 30th March 2022. The said Plaint was thereafter amended resting with the amended Plaint dated 8th August 2023 and wherein the Respondent sought the following reliefs:

    a. A declaration that the advertisement and intended sale of the plaintiff's land parcel No. Nyaki/Kithoka/4195 scheduled to be conducted by Kentrack Auctioneers by way of public auction and or otherwise is fraudulent, premature, irregular, illegal, null and void.

    b. A permanent injunction restraining the defendant, its successors, assigns, agents, servants, employees and or anybody acting on their behest from entering, selling, trespassing and or interfering with LR. No. Nyaki/Kithoka/4195.

    c. General damages for wrongful detainer, retention, fraudulent and irregular and unlawful registration of charge or encumbrance over L.R No. Nyaki/Kithoka/4195 amounting to Kshs.15,000,000/=Only.

d. General damages for loss suffered as a result of mental anguish and untold suffering for the illegal advertisement and intended auction and eviction of the plaintiff and his family from the land and general damages for trespass.

e. An order directed to the defendant to execute and handover to the plaintiff an appropriate Instrument of discharge of charge on L.R No. Nyaki/Kithoka/4195 and surrender back the original title to the plaintiff and in default the executive officer to execute the relevant Instrument in compliance thereof.

f. Costs and Interests.

g. Any other relief[s] this Court may deem fit and just to grant.

2. The Appellant herein duly entered appearance and thereafter filed a statement of defence dated 8th May 2023. The said statement of defence was subsequently amended resting with the amended statement of defence dated 8th September 2023 and wherein the Appellant conceded that same [Appellant] had caused a charge to be registered over and in respect of the suit property. Furthermore, the Appellant conceded that the charge under reference was intended to secure the banking facility in the sum of Kshs.10,102,095 only. However, it was admitted that the banking facility under reference was cancelled and hence the monies were never disbursed to the Respondent.

3. The suit in the subordinate court was heard and disposed of vide Judgment rendered on 13th March 2024 whereupon the learned trial magistrate [Hon. J.M Njoroge – CM]; found and held that the respondent had duly proved his case as against the appellant. In particular, the learned trial magistrate found and held that the charge over and in respect of the suit property was fraudulent and illegal. Furthermore, the Learned Chief Magistrate found and held that the respondent had indeed been subjected to mental anguish. In this regard, the learned trial magistrate entered Judgment in favour of the respondent.

4. It is the said Judgment which was rendered on 13th March 2024; and the consequential Decree arising therefrom, which has aggrieved the appellant. To this end, the appellant has approached the court vide memorandum of appeal dated 18th March 2024 and wherein the Appellant has highlighted the following grounds:

i. That the learned magistrate erred in law and fact by holding that there was no privity of contract between the appellant and the respondent, despite compelling, overwhelming and unchallenged evidence proving otherwise and particularly D. Exh 10 (loan application form), D. Exh – 1 (letter of offer), D. Exh 5 & 6 (Evidencing payments made to KWFT at the instance for the respondent) and D. Exh – 3 (professional undertaking).

ii. That the learned trial magistrate erred in law and fact by holding that the charge registered in favour of the appellant over land parcel number Nyaki/Kithoka/4195 was fraudulent despite overwhelming evidence that the respondent had indeed applied for and was granted a loan facility of Kshs.10,102,095 by the appellant and part of the said facility was actually utilized towards offsetting the respondent's loan obligation with KWFT.

iii. That the learned trial magistrate erred in law and fact by holding that the charge registered in favour of the appellant over land parcel number Nyaki/Kithoka/4195 was fraudulent without prove of any fraud on the part of the appellant or prove of fraud to the required standard.

iv. That being the learned trial magistrate erred in law and fact by equating the non-disbursement of the entire loan facility of Kshs.10,102,095/= to non – existence of the facility whereas there

was partial disbursement of the facility and therefore the appellant had a legitimate claim over title to land parcel number Nyaki/Kithoka/4195.

v. That the learned trial magistrate erred in law by discrediting the testimony of the appellant's witness (DW 1) on the basis of an affidavit that was not produced in evidence and whose deponent did not testify before the court and thereby rejected the appellant's evidence without any sound or proper basis for doing so.

vi. That the learned trial magistrate erred in law and fact by allowing the claim for general damages for mental anguish and trespass and awarding Kshs.5 million without proper pleading and specific proof thereof and thereby made an award that was not supported by the pleadings and the evidence adduced.

vii. That the learned magistrate erred in law and fact by allowing the claim for general damages for wrongful detainer, retention, fraudulent, irregular and unlawful registration of charge and awarding Kshs.12 million without any proper basis for such an award and thereby made an award that is not supported by the pleadings and the evidence on record.

viii. That in the alternative, the trial court award of general damages for wrongful detainer, retention, fraudulent, irregular and unlawful registration of charge in the sum of Kshs.12 million and award of general damages for mental anguish and suffering are inordinately excessive thus amounting an erroneous estimate of damages that would have been awardable had the respondent succeeded in proving his case.

ix. That the learned magistrate erred in law and fact by failing to properly evaluate the evidence presented before him, thereby resulting in multiple erroneous conclusions.

x. That the Judgment of the learned trial magistrate is against the law and weight of evidence on record.

5. The Appeal came up for directions on various dates, namely; 23rd March 2025; 22nd May 2025 and finally on the 16th July 2025, whereupon the advocates for the parties confirmed that the record of appeal had been duly filed. Furthermore, the advocates covenanted to canvass and dispose of the appeal by way of written submissions.

6. The appellant filed written submissions dated 16th June 2025; and wherein the appellant has highlighted five [5] key issues for determination. The issues highlighted by the appellant are namely; whether their existed a privity of contract between the appellant and the respondent and whether the charge in favour of the appellant was in pursuance of that contract and whether the discharge of the KWFT was done in pursuance to the contract between the appellant and the respondent; whether the pleaded particulars of fraud regarding the charge of the property in favour of the appellant by the respondent in his Plaint were proved to the standard required by the law; whether the non - disbursement of the full facility of Kshs.10,102,195.00 Only; negates the payment of the loan secured by the property to KWFT on account of the respondent; whether the trial court correctly evaluated the evidence on record and whether an award of damages to the respondent was proper.

7. Regarding the first issue, learned counsel for the appellant has submitted that the learned trial magistrate erred in fact and in law in finding and holding that there was no privity of contract between the appellant and the respondents. In particular, it was submitted that the appellant herein had tendered and produced various documents demonstrating that the respondent indeed applied for a loan facility with the appellant and thereafter signed the Letter of offer. In addition, it has been submitted that the respondent also procured the execution of the letter of offer by his spouse. Furthermore, it was submitted that the execution of the letter of offer was duly witnessed by an

advocate, namely; Mr. Gikunda Anampiu. To this end, learned counsel for the appellant has referenced a copy of the mortgage application as well as a copy of the professional undertaking, which are contended to demonstrate the existence of privity of contract.

8. It was the further submission by learned counsel for the appellant that the appellant also tendered and produced a copy of the Letter dated 18th January 2022; which was authored by the respondent and wherein the respondent confirmed/acknowledged the registration of the charge.

9. To buttress the submissions that there existed privity of the contract and that the documents tendered by the appellant had not been controverted, Learned counsel for the appellant has cited and referenced the decision in the case of A.A Bayusuf and Sons ltd & another vs Geoffrey wandera Muruka (2024) KECA.

10. Turning to the Second issue, learned counsel for the appellant has submitted that even though the respondent had impleaded the plea of fraud, the respondent failed to tender and produce credible/ plausible evidence to prove fraud. In particular, it was submitted that proof of fraud required plausible, cogent and credible evidence. Furthermore, learned counsel submitted that proof of fraud must be established to a higher standard, namely; a standard above the balance of probabilities.

11. Additionally, learned counsel for the appellant has submitted that the respondent herein was bound by his pleadings and therefore the particulars of fraud, which same ought to have proved must be the ones that were captured and pleaded at the foot of the Pleading[s] filed; and not otherwise.

12. Be that as it may, learned counsel for the appellant has submitted that the respondent failed to lead credible evidence on the particulars of fraud that had been pleaded. To this end, it was therefore contended that the finding[s] by the learned trial magistrate that fraud had been proved was erroneous and premised on a misapprehension of the evidence on record.

13. As pertains to proof of fraud and the applicable standard attendant thereto, Learned counsel for the appellant has cited and referenced various decisions, including Gichinga Kibutha vs Caroline Nduku (2018) KEELC and National Bank of Kenya vs Omwoyo & another (2023) KEHC; wherein the Courts spoke to and reiterated the Standard of Proof in respect of matters of fraud.

14. The next ground which has been submitted upon by the appellant touches on whether the non-disbursement of the full facility of Kshs. 10,102, 095 only negates the payment of the loan by the appellant which was secured by the suit property to KWFT. In this regard, learned counsel for the appellant has submitted that the appellant tendered and produced assorted documents showing that same tendered/remitted to KWFT monies which were owed by the respondent.

15. In particular, it was submitted that the payment to and in favour of KWFT was based on professional undertaking and the bank to bank undertaking given by the appellant to Kenya Women Finance Trust [KWFT].

16. Fourthly, learned counsel for the appellant has submitted that the learned trial magistrate failed to evaluate and appraise the evidence on record and thus arrived at a slanted conclusion. In particular, learned counsel for the appellant has submitted that the learned trial magistrate took into account the contents of an affidavit which was neither tendered nor produced in evidence. Moreover, learned counsel has contended that the learned trial magistrate failed to properly analyze the evidence tendered by the appellant and to this end, it was submitted that the conclusion[s] arrived at by the learned trial magistrate is fraught with errors.

17. Finally, learned counsel for the appellant has submitted that the learned trial magistrate erred in law in finding and holding that the respondent was entitled to compensation. Furthermore, learned counsel

has posited that the award of general damages in the sum of Kshs.12,000,000/= and Kshs.5,000,000/= only respectively were based on misapprehension of the evidence on record; and hence same are legally untenable.

18. Further and in addition, it has been submitted that the award of general damages was equally excessive and did not take into account the relevant/applicable principles governing/regulating award[s] of general damages. In this regard, learned counsel for the appellant has invited the court to set aside the award of general damages.

19. In support of the submissions concerning the legality or otherwise of the award of general damages, learned counsel for the appellant has cited and referenced various decisions including Paul Odera Akaka vs Comply Industries Ltd (2017) KEHC, Kenya Power & Lighting Co. Ltd vs Ringera & 2 others (2022) KECA and Philip Ayaya Aluchio vs Chrispinus Ngayo (2014) eKLR, respectively.

20. In the premises, learned counsel for the appellant has contended that the appeal beforehand is meritorious. To this end, learned counsel has invited the court to allow the appeal and to set aside the Judgment and the consequential decree of the subordinate court.

21. The Respondent filed written submissions dated 14th July 2025 and wherein the respondent has highlighted various issues. For good measure, the respondent has argued the appeal on the basis of the grounds that were highlighted by the appellant.

22. Firstly, learned counsel for the respondent has submitted that the respondent herein tendered and produced credible evidence to show that same did not apply for any loan facility with the appellant. Furthermore, it has been submitted that the loan application form which was tendered and produced by the appellant, was a clear forgery. For good measure, learned counsel for the respondent has posited that the appellant did not bring forth any forensic document examination report to demonstrate that the contested [disputed] signature belonged to the respondent.

23. As pertains to ground 2 of the Memorandum of appeal, learned counsel for the respondent has submitted that the preparation and the registration of the charge over the suit property were fraudulent and illegal. In particular, it has been submitted that the appellant did not tender any evidence to show that the respondent authorized the charge. Besides, the appellant also failed to tender evidence authorizing same to procure the certificate of title from Kenya Women Finance Trust [KWFT].

24. Regarding ground number Three [3] of the Memorandum of Appeal; learned counsel for the respondent has submitted that the respondent tendered and produced before the trial court evidence to demonstrate that the execution and consequential registration of the charge over the suit property was fraudulent. In particular, it has been submitted that the appellant herein proceeded to charge the suit property even when same [appellant] had not disbursed the monies in question.

25. Turning to ground number Four [4] of the Memorandum of Appeal; learned counsel for the respondent has submitted that the letter of offer which the appellant relied upon to purport that the respondent had applied for the loan facility, was never signed by the respondent. In this regard, learned counsel for the respondent has contended that the activities by the appellant were outrightly illegal and fraudulent.

26. In respect of ground number Five [5] of the Memorandum of Appeal; learned counsel for the respondent has submitted that the affidavit of Sisto Macharia, which was referenced by the learned trial magistrate, formed part of the proceedings. Furthermore, it was admitted that the appellant's witness [DW 1] alluded to the said affidavit and was substantially cross-examined on same. In this regard, learned counsel for the respondent has submitted that the learned trial magistrate correctly referenced and relied upon the said affidavit.

27. Next is ground six of the Memorandum of appeal. Regarding the said ground of Appeal, learned counsel for the respondent has submitted that the learned trial magistrate correctly assessed and awarded general damages. Furthermore, it was contended that the award of general damages was premised on the basis of the evidence that was tendered by the respondent. Similarly, it was posited that the award of general damages was also informed by various decisions/case law that were cited to the trial court.

28. Finally, learned counsel for the respondent has submitted that the jurisdiction of the appellate court to interfere with the assessment and award of general damages is circumscribed. In particular, it was submitted that the appellate court should not interfere with the quantum of general damages unless it is shown that the learned trial magistrate misapprehended the evidence; adopted and applied a wrong principle; or the award of damages is inordinately low or high, so as to represent an error of principle.

29. Be that as it may, learned counsel for the respondent has submitted that the appellant herein has neither proven nor demonstrated the requisite ingredients to warrant interference with the exercise of discretion by the trial court. To this end, learned counsel has posited that this court should be reluctant to interfere with the award of general damages.

30. Having reviewed the record of appeal; the pleadings that were filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on Three [3] key issues, namely; whether the registration of the charge in respect of the suit property was/is illegal, unlawful and fraudulent or otherwise; whether the respondent suffered any loss and or damages as a result of the impugned charge; and whether the award of general damages by the trial court ought to be interfered with or otherwise.

31. Before venturing forward to address the issue[s], which have been highlighted in the preceding paragraph, it is important to underscore that the appeal beforehand is a first appeal before this Honourable Court. By virtue of being a first appeal, this court is vested with the jurisdiction to subject the evidence on record to fresh and exhaustive scrutiny; and thereafter to discern whether the finding[s] and conclusion[s] that were arrived at and reached by the Trial Court ought to stand or otherwise.

32. Additionally, it is important to state that this Court is also at liberty to arrive at an independent conclusion; and to depart from the finding[s] of the trial Court. However, it suffices to underscore that the jurisdiction of this court to depart from the finding[s] and conclusion[s] of the trial Court are circumscribed. In particular, this Court can only depart from the Conclusion[s] of the Trial Court where it is shown/ proved that the finding[s] of the trial court were arrived at in the absence of evidence; on the basis of mis-apprehension of the evidence on record; the conclusion[s] are perverse to the evidence on record; or where it is demonstrably shown that the trial court committed an error of principle which negate[s] the decision under reference.[See the holding in Jabane versus Olenja [1986] eklr].

33. The Jurisdictional remit of the first appellate court was recently re-visited by the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) where the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We also have to remember that it is a big thing to

overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses.

In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.

This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts, among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:

"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law, an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.

This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...

It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

34. Bearing in mind the principles espoused by the Court of Appeal in the decision [supra], I am now disposed to revert to the subject matter and to discern whether the impugned judgment is well-grounded or otherwise. Notably, I shall address the issues herein before mentioned sequentially, starting with whether the registration of the charge in respect of the suit property was illegal, unlawful and or fraudulent.

35. The appellant herein contended that the respondent made an application seeking to be granted a banking facility. In particular, the appellant contended that the respondent applied for a facility in the sum of Kshs.10,102,095 only vide application letter dated the 14th May 2015. Furthermore, it was contended that upon the making of the application under reference, the appellant generated a letter of offer dated 28th August 2015 and wherein the appellant offered the respondent the monies that had been applied for.

36. Additionally, the appellant contended that the Letter of offer was duly signed and executed by the respondent. Furthermore, it was posited that the letter of offer was also signed by the respondent's spouse. Moreover, the appellant maintained that the execution of the letter of offer was duly attested by an advocate, namely; Mr. Gikunda Anampiu.

37. On the other hand, it was the position of the appellants that following the execution of the letter of offer by the respondents, the appellant proceeded to and generated a professional undertaking which was issued to Kenya Women Finance Trust [KWFT], in whose favour the title of the suit property was previously charged.

38. It was the further contention by the appellant that subsequently, KWFT released the title of the suit property unto the appellant, culminating into the perfection and the registration of the charge against the suit property. For good measure, the appellant posited that the charge over the suit property was registered to secure the banking facility in the sum of Kshs.10,102,095/= only, which was granted to the respondent.

39. Furthermore, the appellant contended that the registration of the charge over and in respect of the suit property was premised on the instructions of the respondent, as well as the Letter of offer which had been executed by the respondent and his [respondent's] spouse.

40. Be that as it may, it is not lost on me that the appellant herein filed a statement of defence and which was thereafter amended and wherein the appellant conceded that the respondent did not comply with and or adhere to the terms of the letter of offer.

41. To this end, it was posited that the appellant was constrained to and indeed cancelled the banking facility. Moreover, the appellant also acknowledged that as a result of the cancellation of the banking facility, no monies were disbursed to and or paid out in favour of the respondent. Further and in any event, the appellant indicated that at one point same were keen to discharge the charge and revert the title of the property to KWFT. [See paragraph 5 (ix, x, xi, xiii, xiv) and paragraph 6] of the amended statement of defence.

42. From the foregoing paragraphs which are contained at the foot of the amended statement of defence, what becomes apparent is that the banking facility, [if at all] same was applied for by the respondent was never disbursed. In this regard, it is common ground that the registration of the charge against the suit property was undertaken without the corresponding consideration. Absent consideration, it means that the charge itself must fall to the ground.

43. The ingredients that underpin the existence of a lawful and binding contract, a charge not excepted, were highlighted by the Supreme Court of Kenya [the apex Court] in the case of Moi University v Zaippeline & another (Petition 43 of 2018) [2022] KESC 29 (KLR) (17 June 2022) (Judgment).

44. For coherence, the court stated thus;

> " 37. It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in Garvey v Richards [2011] JMCA Civ 16 ought to ordinarily reflect the following principles:
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> > "[10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

45. Other than the fact that there was no consideration underpinning the registration of the charge, there is also the issue as to whether the respondent herein ever sanctioned and or authorized the collection of the title of the suit property from KWFT. For good measure, evidence abound that the title of the suit property was previously charged to and held by KWFT on the basis of a banking facility which was issued to Aurelia Kendi [the respondent's] spouse.

46. There is no gainsaying that the title of the suit property could only have been discharged and released to the appellant on the advise and request of the respondent, who was the charger or the borrower [albeit with the concurrence of the respondent]. Nevertheless, the appellant herein failed to tender and produced any authority which was issued unto to them [the Appellant] by the respondent to facilitate the procurement of the title and the ultimate utilization of same [title] to register the charge.

47. Further and in any event, DW 1 [who testified on behalf of the bank] acknowledged that same did not have any evidence to show that the respondent herein had authorized the appellant to obtain the title of the suit property from KWFT.

48. For ease of reference, it suffices to reproduce the testimony of DW 1 while under cross-examination by learned counsel for the respondent. Same testified thus;

> " We had a professional undertaking. There is no agreement between the plaintiff and the defendant that the defendant was to obtain the title deed from KWFT.

49. The question that does arise is how and on what authority did the appellant procure and obtain the certificate of title. Surely the appellant herein could not engage with KWFT and proceed to issue a professional undertaking, unless the chargor [namely the respondent herein] had sanctioned the release of the certificate of title. In the absence of any authority or agreement authorizing the appellant to obtain the title deed from KWFT, I come to the inevitable conclusion that there was an illegality by the appellant.

50. Additionally, there is the question as to how the charge was registered. The appellant contends that same proceeded to and caused the charge to be registered against the suit property. To this end, the appellant averred that the charge was registered on the 16th November 2015. However, it is worth recalling that the appellant herein was unable to tender and produce before the trial court a copy of the registered charge [if any]. For good measure, it behooved the appellant to tender and produce the charge to demonstrate that indeed the charge was duly executed by the respondent and that same was lawfully attested.

51. Suffice to highlight that the witness who testified on behalf of the appellant, [DW1]; conceded that the charge was not tendered and or produced.

52. For ease of reference, it is instructive to reproduce the evidence of DW1 while under cross-examination by learned counsel for the respondent. Same stated thus;

> " I have not produced the discharge of charge. I did not carry the legal charge for 10 million to court. D. Exhibit 2 is before undertaking to charge the land. We obtained a spousal consent in the letter of offer.

53. My understanding of the foregoing evidence by DW 1 drives me to the conclusion that the registration of the charge appears to have been undertaken contrary to and in contravention of the law. Furthermore, it is also evident that no spousal consent was procured and or obtained. For good measure, the spousal consent could not be obtained at the foot of the letter of offer. Instructively, a spousal consent forms part of the charge and must be in the prescribed form, duly executed and attested in accordance of the law.

54. Flowing from the foregoing, I come to the conclusion that the registration and continuation of the impugned charge on the suit property is not only illegal but also fraudulent. Furthermore, I agree with the learned trial magistrate that the process of charging the plaintiff's parcel of land was arrived at by the defendant in a casual, cavalier, careless manner and in a manner injurious to the plaintiff's ownership.

55. Additionally, I agree with the learned trial magistrate that the process of charging the land was never explained in court, even though the land was eventually charged. For the umpteenth time, I beg to reiterate that the failure to tender the charge instrument by the appellant constitutes a basis to infer that there was no charge instrument that was duly executed and attested in accordance with the law.

56. Turning to the second issue, namely; whether the respondent suffered any loss and or damages as a result of the impugned charge, it is common ground that the suit property belongs to and is registered in the names of the respondent. By virtue of being the registered owner and proprietor of the suit property, the respondent is invested with statutory rights and privileges over the suit property. In particular, the respondent herein is entitled to absolute and exclusive rights to occupy, possess and use the suit property. [See the provisions of section 24 and 25 of the *Land Registration Act* 2012]. [See also the holding of the court in the case of Moya Drift Farm Ltd vs Theuri (1973) E.A].

57. One of the critical aspects pertaining to use of a landed property includes deployment of same for purposes of security. In this regard, the respondent herein could very well use the suit property as collateral to obtain funding from a financial institution.

58. However, I beg to highlight that the cause of the illegal and fraudulent charge by the appellant herein, the respondent was denied and deprived of his proprietary right. Such deprivation of rights, have no doubt inflicted injury and or damages upon the respondent.

59. Premised on the foregoing, I come to the conclusion that indeed the actions by the appellant herein, namely, perfecting and registering a charge over the suit property without lawful cause and or basis, have infringed upon the rights of the respondent. To this end, I agree with the learned trial magistrate that the respondent herein has established a basis to warrant compensation as a result of wrongful, illegal and fraudulent charge.

60. Moreover, evidence was tendered that the appellant herein proceeded to and subjected the suit property to sale. In this regard, it suffices to recall the testimony of DW 1, who admitted and acknowledged that the appellant dispatched/sent auctioneers to auction the suit property. Instructively, the actions by the appellant, namely; the endeavor to dispose of the suit property must have subjected the respondent to mental anguish.

61. In my view, the finding and holding by the learned trial magistrate that the respondent was entitled to recompense was well-founded. Indeed, a failure to compensate the respondent would be tantamount to breach and or violation of the respondent's right to property as enshrined in Article 40 (3) of *the Constitution*. [see also the decision of the court in Patrick Musimba vs National Land Commission (2016) eKLR, where the question of compensation for breach of property rights was expounded.

62. Next is the issue as to whether the award of damages by the learned trial magistrate ought to be interfered with. The appellant has assailed the award of damages by the learned trial magistrate on two accounts. Firstly, it was contended that the assessment and award of general damages was based on misapprehension of the evidence on record. However, while dealing with issue number one [1]; I have found and held that the registration of the charge in respect of the suit property is illegal and fraudulent.

63. Furthermore, I have also come to the conclusion that the impugned registration of the illegal charge over and in respect of the suit property infringed upon the respondent's property rights. In this regard, I beg to reiterate that a lawful basis existed for award of compensation to the respondent.

64. The second perspective which has been highlighted by the appellant, relates to the quantum of damages that were awarded to and in favour of the respondent. It has been contended that the award of damages in favour of the respondent was excessive and thus same ought to be interfered with. Nevertheless, it is worthy recalling that even though the appellant challenges the quantum of damages, same has, however failed to make a proposition as to what [if at all] is commensurate recompense/compensation.

65. I am alive to the fact that this court is seized of the jurisdiction to interfere with the assessment of damages by the trial court. However, it must be remembered that the jurisdiction of the court to interfere with an award of damages [which is largely an exercise of discretion] is circumscribed. In particular, this court can only interfere with the assessment/quantum of damages if certain parameters are established and proven. [See Butt v Khan [1978] KECA 24 (KLR) and Gitobu Imanyara vs the Attorney General [2016] eKLR.

66. Bearing in mind the dictum espoused in the decision [supra], I beg to state that I can only interfere with the assessment of damages if it was shown to be inordinately low or inordinately high as to represent an error of principle. However, I have reviewed the judgment of the trial court and taken into account the decision in Allan George Njogu Residence Ltd vs National Bank of Kenya Ltd [2013] eKLR and Alton Homes Ltd & another vs Davis Nathan Chelugui & 2 others (2018) eKLR; and I come to the conclusion that the assessment of damages was reasonable; and well informed.

67. Finally, the appellant has submitted that the award on account of general damages for illegal advertisement and intended illegal auction was granted even though no evidence was tendered that the appellant ever caused any advertisement. I am afraid that the contention by the appellant is based on misapprehension of the evidence on record. For good measure, the affidavit sworn by Cisto Macharia

and which affidavit was duly referenced and utilized during cross-examination by DW 1 is explicit. In addition, DW 1 also conceded that the appellant had proceed to instruct auctioneers to sell the suit property.

68. In this regard, there was basis to find and hold that the respondent was subjected to mental anguish and suffering on the basis of the illegal advertisement and threatened auction.

69. Flowing from the discussion herein; and having taken into account the principles highlighted in the case of Mwanasokoni vs Kenya Bus Services Ltd (1985) eKLR and Jabane vs Olenja (1986) eKLR, respectively, I come to the conclusion that the findings by the learned trial magistrate were well-informed and well-grounded.

Final Disposition.

70. From the analysis [details highlighted in the body of the Judgment] it must have become apparent that the appeal beforehand is devoid and bereft of merits.

71. Same courts dismissal.

72. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

    I. The Appeal be and is hereby dismissed.

    II. The Judgment of the Learned trial magistrate [Hon. J. M Njoroge – CM] and the consequential decree be and are hereby affirmed.

    III. Costs of the appeal be and are hereby awarded to the Respondent.

    IV. The Costs in terms of clause [III] shall be agreed upon; and in default be taxed by the Deputy Registrar.

73. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF SEPTEMBER, 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Kimani for the Appellant

Mr. Gikunda Anampiu for the Respondent

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