Nyamohanga v Mogori (Suing as the Personal Representative of the Estate of Paulo Wangkio alias Paul WankioGetari-Deceased) & 2 others (Civil Appeal 105 of 2020) [2025] KECA 1619 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1619 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 105 OF 2020

MSA MAKHANDIA, P NYAMWEYA & LK KIMARU, JJA

OCTOBER 3, 2025

BETWEEN

CHRISTOPHER NYAMOHANGA ..... APPELLANT

AND

PETER MASAKWI MOGORI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PAULO WANGKIO ALIAS PAUL WANKIO GETARI-DECEASED) ..... 1ST RESPONDENT

KENYA COMMERCIAL BANK ..... 2ND RESPONDENT

AGRICULTURL FINANCE CORPORATION ..... 3RD RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court at Migori (G. Ongondo J.) dated 15th July 2020 in ELC Case No. 418 of 2017)

JUDGMENT

1. Peter Masakwi Mogori, suing as the personal representative of the estate of Paulo Wangkio alias Paul Wankio Getari (Deceased), filed a suit by way of a plaint dated 10th February 2010 in the High Court at Kisii, which suit was later transferred to the Environment and Land Court (ELC) in Migori as ELC Case No. 148 of 2017. Peter sought orders in the said suit that the sale and transfer of the land parcel known as Bugumbe/Mabera/298 by Kenya Commercial Bank to Christopher Nyamohanga be found to be null and void, the title in the said parcel of land be restored to the deceased's estate, and the land register be rectified to restore the deceased's name. In addition, that all other dealings on the suit land that followed the sale and transfer of the land between the Kenya Commercial Bank Limited and Christopher Nyamohanga including the charge to the Agricultural Finance Corporation be and are hereby nullified.

2. Peter's case was that the deceased was the registered proprietor of land parcel known as Bugumbe/ Mabera/298 (hereinafter "the suit property") measuring approximately twenty-three hectares, and on 23rd October 1976, while the deceased was alive and acting as guarantor for Simon Chacha, he charged the title of the suit property to Kenya Commercial Bank, to secure payment of a loan of Kshs 26,000/-. The deceased died on 28th December 1978, before the charge could be discharged, and that by the time of his death, the principal sum loaned and/ or a substantial amount of it had been repaid by Simon Chacha. However, that in 1990, Kenya Commercial Bank unlawfully, irregularly and fraudulently sold and transferred the suit property to Christopher Nyamohanga in exercise of a purported statutory power of sale conferred by the charge. The fraud and unlawful sale and transfer of the suit land were particularised in the plaint, and it was pleaded therein that the deceased estate was consequently deprived of ownership and use of the suit property and continued to suffer loss of mesne profits.

3. Kenya Commercial Bank Limited, Christopher Nyamohanga and Agricultural Finance Corporation denied Peter's assertions in their respective statements of defence dated 8th April 2010, 26th March 2010 and 3rd March 2010. Kenya Commercial Bank Limited pleaded that the sale and transfer of the property was lawful procedural and proper, and was in exercise of its statutory power of sale under the charge which arose as a result of the default of the principal debtor. Additionally, that Christopher Nyamohanga acquired a good title to the suit property, and denied that they colluded in any way or at all to secretly enter into a purchase agreement and transfer the suit property at a price far below the value of the suit property.

4. Christopher Nyamohanga (hereinafter "Christopher") denied the particulars of fraud and unlawful sale and transfer of the suit property attributed to him, and stated that he responded to an advertisement for the sale of the suit property by way of public auction on 22nd July 1988 which he attended, and upon complying with the conditions of the auction the property was sold and transferred to him. Subsequently, a title deed was issued to him under the provisions of the Registered *Land Act* and as the registered owner, he acquired proprietary rights over the suit property. He further averred that he thereafter obtained credit facilities from Agricultural Finance Corporation and charged his property as collateral, and an order for nullification was not merited as no fraud had been demonstrated.

5. He accordingly filed a counterclaim, in which he pleaded that on or about 2005, Peter Masakwi Mogori (hereinafter "Peter") and his family requested and were granted permission to do farming on the suit property on the terms that they would vacate the suit property when requested and directed to do so. That by a letter dated 8th October 2009, he requested Peter and his family to vacate the suit property but instead of complying, they instituted the suit in the ELC. Christopher pleaded that he had suffered loss and damage by way of inter alia; being deprived of the said land; being deprived the use and benefit of the said land. He sought for an order of eviction of Peter and his family from the suit property and damages for trespass.

6. Similarly, the Agricultural Finance Corporation denied the allegations of fraud and illegality and averred that Christopher applied for and received an agricultural loan facility in the sum of Kshs 50,000/- and offered the suit property as security for the loan facility. After conducting an official search to establish ownership, it confirmed that the suit property belonged to Christopher and charged it to secure the said loan advanced, and averred that all due legal processes were duly adhered to.

7. At the ensuing trial, Peter and Masakwe Sogona Mogori , testified as PW1 and PW2 respectively. In sum, their testimony was that they resided on the suit property which measured 23 hectares which was owned by Paulo Wangkio who died in 1978, and who was PW1's grandfather and PW2's uncle,

PW1 and PW2 stated that they only came to know in 2009 that the deceased had guaranteed a loan taken by Simon Chacha, who was the deceased's son, , and when they sought advice from the bank, they were informed that the loan had been fully paid. They claimed the land was sold to Christopher after the deceased's death in 1990, after the loan was fully repaid, and for Kshs.40,000/- at an undervalue. PW1 produced various documents to support their claim. He stated that had they been given notice by Kenya Commercial Bank and Agricultural Finance Corporation, they would have paid the outstanding loan.

8. Christopher on his part testified as DW1, and stated that he bought the suit property at an auction for Kshs.40,000/-, signed the agreement with the Kenya Commercial Bank, paid 25% of the sale price and 75% through the 2nd Respondent's counsel and obtained consent from the area Land Control Board. He told the Court that one Mwikwabe, a brother-in-law to him, requested him to take care of the suit property while he was away, and he agreed, and denied selling it to Peter. He also stated that he did not have the documents to show that he paid the balance to Kenya Commercial Bank's Advocates, and admitted that he charged the title to the suit property to Agricultural Finance Corporation for a loan of Kshs.50,000/= and that he had not cleared the loan facility as at 1993.

9. Willy Kimutai Cheruiyot (DW2), a credit manager with Kenya Commercial Bank testified on the Bank's behalf and reiterated the averments made in its defence. He produced documents in evidence, which included a copy of advertisement for sale of the suit property by way of public auction by Regent Auctioneers and a copy of title deed for the suit property. Similarly, Christopher Kimulwo Kipkosgei (DW3), an acting branch manager with Agricultural Finance Corporation based at Migori branch, while making reference to various documents he produced in evidence, testified that Agricultural Finance Corporation gave a loan to Christopher, who was at time of the trial in default with regard to repayment of the same, and that a notice had been issued to him accordingly.

10. After hearing the parties, the ELC (G. Ongondo J.) delivered a judgment on 15th July 2020, in which it was held that: Peter had demonstrated that he is the legal representative of the estate of the deceased and had the requisite capacity to lodge the suit; Kenya Commercial Bank Limited and Agricultural Finance Corporation had admitted the jurisdiction of the court in their respective statements of defence; the suit involved land and was not statute barred; the deceased acted as a guarantor for Simon Chacha in respect of a charge over the suit property; a substantial sum of the loan had been repaid before his death; and the actions of Kenya Commercial Bank Limited, Christopher and Agricultural Finance Corporation were therefore null and void. Judgment was therefore entered for Peter as against Kenya Commercial Bank Limited, Christopher and Agricultural Finance Corporation jointly and severally in terms of reliefs that had been sought in the plaint, while Christopher's counter claim was dismissed. Kenya Commercial Bank Limited, Christopher and Agricultural Finance Corporation were ordered to bear the costs of this suit and counter claim.

11. Being dissatisfied with the decision of the trial Court, Christopher filed KSM Civil Appeal No. 105 of 2020 through a Memorandum of Appeal dated 12th August 2020 where he raised 9 grounds of appeal, while Kenya Commercial Bank Limited lodged KSM Civil Appeal No. 136 of 2020 where it raised 14 grounds of appeal in a Memorandum of Appeal dated 2nd October 2020 . The two appeals were consolidated for hearing together. We heard the appeals on this Court's virtual platform on 26th November 2024, learned counsel Mr. T. Macharia appeared for Christopher learned counsel Mr. J. B. Macharia appeared for Kenya Commercial Bank Limited, while learned counsel, Mr. Nyamori appeared for Peter. There was no appearance for Agricultural Finance Corporation despite service of the hearing notice on their advocates on record. Mr. T Macharia, Mr. J.B Macharia and Mr. Nyamori highlighted their respective submissions dated 4th October 2023, 6th November 2023 and 5th October 2023, respectively in which they reiterated the averments made in their clients' respective pleadings.

12. In commencing our determination of the appeal, we are mindful of our duty as a first appellate Court as set out in the decision of Selle and Another vs Associated Motor Boat Co. Ltd & Others (1968) EA 123, namely, to reconsider the evidence, evaluate it, and draw conclusions of facts and law. We will depart from the findings by the trial Court only if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in the case of Jabane vs Olenja (1986) KLR 661; or where its discretion was exercised injudiciously as was held in the case of Mbogo & another vs Shah (1968) EA 93.

13. The salient legal arguments put forward by learned counsel T. Macharia were that once a property is given to a bank as security, the same becomes a commodity that can be sold, and since the value is ascertainable, any loss is remediable by an award of damages. Counsel relied on various judicial authorities for this position, including the decisions by this Court in Etrade Limited & another vs Thrift Estates Limited & 2 others [2019] eKLR, Nancy Kahoya Amadiva vs Expert Credit Limited & another [2015] eKLR, Patrick Kanyagia & another vs Damaris Wangechi & 2 others [1995] eKLR, Marco Munuve Kieti vs Official Receiver and Interim Liquidator Rural Urban Credit Finance & another [2010] eKLR, Marteve Guest House Limited vs N jenga & 3 others [2022] KECA 539 (KLR) and Downhill Limited vs Harith Ali El-Busaidy & another [2000] eKLR; while stating that this position has statutory backing under section 99(4) of *Land Act*, 2012.

14. In addition, Christopher was a bona fide purchaser for value without notice of any defect either in the title or the process that led to him being registered as the owner of the suit property and he satisfied the legal threshold for a bona fide purchaser as set out in the cases of Weston Gitonga & 10 others vs Peter Rugu Gikanga & Another [2017] eKLR , Lawrence P. Mukiri vs Attorney General & 4 Other (2013) eKLR and Nancy Kahoya Amadiva vs Expert Credit Limited & another (supra). Further, there was no evidence that Christopher was complicit in or had any knowledge of any fraudulent dealings, if any, involving the sale of the suit property or irregularities concerning the sale by Kenya Commercial Bank so as to vitiate his title to the suit property. Lastly, the suit filed by Peter by the plaint dated 10th February 2010 was fatally defective as it was filed out of time, after a delay of at least 20 years, without leave of the Court.

15. Learned counsel J.B Macharia on his part submitted that Peter failed to adduce sufficient evidence to the required standard to sustain a finding of fraud as against Kenya Commercial Bank Limited, and the learned Judge of the ELC failed to consider and analyze the evidence in reaching his finding of fraud as against Christopher and Kenya Commercial Bank Limited. Further, that the unavailability of documents on the loan facility and on the exercise of the statutory power of sale did not dispel Peter's burden of proving the alleged fraud to the requisite standard. Lastly, that Peter was not entitled to the remedy of redemption of the suit property, and if aggrieved by the sale of the suit property through the public auction as conducted by the auctioneers, his sole remedy was a claim for damages as highlighted by this court in the cases of Nancy Kahoya Amadiva vs Expert Credit Limited & another (supra) and Etrade Limited & another vs Thrift Estates Limited & 2 others (supra).

16. In response, learned counsel Mr. Nyamori submitted that Kenya Commercial Bank Limited admitted to not having a statutory notice to prove it was issued or served before the property's sale, as required by section 74 of the repealed Registered *Land Act*. Further, Willy Kimutai Cheruiyot, the chargee's witness (DW2), testified that no such notice was available, nor were the bank statements for the loan, making it impossible to determine if a statutory notice was served on the deceased chargor's next of kin or if they were informed of the sale. Furthermore, the witness confirmed the bank could not establish the loan's repayment period, whether it was fully repaid, or if any media advertisement was made before the auction sale.

17. Therefore, the purported auction sale was irregular and fraudulent, as it is trite law that the failure to serve the statutory notice renders the sale void, and (purchaser) could not obtain proprietorship or title to the land through such a sale. Counsel cited the provisions of section 74 (1) of the repealed Registered *Land Act* and decision of this Court in the case of Stephen Boro Gitihia vs Nicholas Ruthiru Gatoto & 2 Others [2017] eKLR to submit that chargors were protected from having their property disposed of without the necessary notice which was mandatorily required, and the legal consequences of failing to issue a statutory notice on the sale of charged property was that any sale by auction of the property was void and did not entitle the purchaser at such sale to obtain proprietorship or title to the land sold. Accordingly, that auction sales not preceeded by the requisite statutory notice were not mere irregularities, and are unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.

18. We have considered the arguments by counsel and the evidence adduced during the trial in the Environment and Land Court (hereinafter the "ELC"). There are three issues for determination in this appeal. The first is whether the suit in the ELC was statute-barred. The second issue is whether the sale of the suit property was fraudulent. The last issue is whether the remedies sought by Peter in his suit and by Christopher in his counterclaim are merited.

19. On the first issue, counsel for Kenya Commercial Bank relied on section 7 of the Limitation of Action Act which provides that an action may not be brought by any person to recover land after the end of twelve years from the date when the right of action accrued to him. The legal basis for the submission by counsel that the plaint dated 10th February 2010 was filed after a delay of at least 20 years is not urged in his submissions. It is also notable in this regard that the appellants did not file any submissions in the ELC. Be that as it may, the learned Judge of the ELC found that the suit was not statute barred and specifically that:

> "40. Mr. Nyasimi, learned counsel for the plaintiff (PWl) cited Section 26 of the *Limitation of Actions Act* (Supra) and submitted that as distinctly pleaded at paragraphs 9 and 10 of the plaint, alongside the evidence of PWl , fraudulent sale of land was discovered in the year 2009, when time started running as held in Kibiro and Muchera cases(supra)."

20. Section 26 of the Limitation of Actions in this regard provides for the extension of time in cases of fraud or mistake as follows:

> " Where, in the case of an action for which a period of limitation is prescribed, either—
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> a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
>
> b. the right of action is concealed by the fraud of any such person as aforesaid; or
>
> c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
>
> Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—
>
> i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and

did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

21. There are two aspects to the application of section 26 of the *Limitation of Actions Act* in the circumstances of this appeal. The first aspect is its application as regards the suit by Kenya Commercial Bank, and Peter's claim in the plaint dated 10th February 2010 was that in 1990, Kenya Commercial Bank "unlawfully, irregularly and fraudulently sold and transferred the said parcel of land title No. BUGUMBE/MABERA/298" to Christopher purportedly in exercise of a statutory power of sale. We also note that Kenya Commercial Bank did not raise the plea of limitation in its defence dated 8th April 2010, and instead raised it in a notice of preliminary objection dated 2nd December 2015 in which it sought to have Peter's suit struck out on account of being filed in contravention of the provisions of the *Limitation of Actions Act*. Directions were given by the ELC that the preliminary objection would be decided in the impugned judgment.

22. The suit against Kenya Commercial Bank was based on its alleged fraudulent and illegal actions and time therefore started to run when the alleged fraudulent action were discovered by Peter in 2009 under section 26 of the *Limitation of Actions Act* as correctly held by the ELC. It is notable that Peter in this respect did produce a copy of an eviction notice dated 8th October 2009 sent to him by Christopher's lawyers as an exhibit. We are also of the view that Kenya Commercial Bank cannot rely on the defence of limitation for the reason that Order 2 Rule 4(1) of the Civil Procedure Rules expressly requires the said defence to be specifically pleaded. This Court in the case of Stephen Onyango Achola & another vs Edward Hongo Sule & another [2004] eKLR held that Order 6 Rule 4(1) and (2) [now Order 2 rule 4(1)] of the Civil Procedure Rules requires a person relying on the provision of a statute such as limitation to specifically plead the statute on whose provisions he relies to defeat the claim and that a plaintiff is not bound to plead in his plaint issues which would negate possible defences such as limitation, fraud, mistake long before such issues are raised.

23. The Court further held that a party who has not specifically pleaded limitation is not entitled to rely on that issue and base his preliminary objection on it; nor is he entitled to rely on that defence during the trial as cases must be decided on the issues pleaded. See also the decision of this Court in the case of Mwangi & another (Suing as the Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased) vs Ngure & ? [2023] KECA 448 (KLR).

24. The second aspect concerns the application of limitation of actions in the suit against Christopher. We note that the defence of limitation was indeed pleaded in his Defence and Counterclaim, wherein it was stated that the jurisdiction of the ELC was not admitted for the fact that the suit was statute barred. Section 26 of the *Limitation of Actions Act* will therefore only be applicable to the suit against Christopher if we find that he did not purchase the suit property for valuable consideration and at the time of the purchase knew or have reason to believe that any fraud had been committed, which we shall therefore determine in our consideration of the second issue as regards whether the sale of the suit property was fraudulent.

25. Turning to the second issue, it is trite law that any allegation of fraud must be specifically pleaded and strictly proved. A party alleging fraud must therefore, besides specifically pleading the acts that are alleged to be fraudulent (the particulars of fraud), also adduce evidence to prove the allegations as held by this Court in the case of Vijay Morjaria vs Nansign Madhusihn Darbar & Another [2000] eKLR.

This Court also emphasised in the case of Kinyanjui Kamau vs George Kamau (2015) eKLR that since what is at stake is a serious charge of fraud, the standard of proof required is higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but not one beyond a reasonable doubt as in criminal cases.

26. Peter in this regard pleaded that the fraudulent acts committed by Kenya Commercial Bank were as follows:

i. Selling and transferring the said parcel of land without issuing a statutory notice of sale.

ii. Selling the land secretly without advertisement.

iii. Selling the land by private treaty

iv. Selling the land without informing the deceased's estate, his family, next of kin or dependants.

v. Selling the land without giving the deceased's estate, family or dependants an opportunity to redeem it.

vi. Selling the land at a price far below the sale price or value of the land.

vii. Exercising the statutory power of sale without due regard, care and protection of

viii. interests of the deceased's estate, his family and dependants.

ix. Failing to exercise good faith in conducting the sale and transfer of the suit land.

x. Selling and transferring the land to a third party improperly and unprocedurally through concealing important information to the Land Control Board.

27. It is evident the applicable procedure with regard s to the sale of land by a chargee in exercise of the statutory power of sale underpins the alleged fraudulent acts. Peter exhibited a copy of the charge registered by the decceased in favour of the Kenya Commercial Bank on 23rd October 1976 under the repealed Registered *Land Act*. Section 74 of the repealed Registered *Land Act*, which was the applicable law at the time of the alleged sale of the suit property on 22nd July 1988, provided that before that right of a statutory power of sale could be exercised, the chargee was required to serve a notice on the chargor in writing, requiring him/her to pay the money owed or perform the agreement. That notice had to be served at least three months before the sale, and the sale could only take place if no payment was made. Section 77 of the repealed Registered *Land Act* further provided that the chargee had the power to sell the charged property at a public auction through a licensed auctioneer, after the service of appropriate notices.

28. Peter and PW2 gave oral testimony that Kenya Commercial Bank sold the suit property after the death of the deceased, when the loan that was guaranteed by the charge over the suit property had been repaid, and without the notice or service of the statutory notice of sale required by law. This evidence was not controverted by the Kenya Commercial Bank, and on the contrary it's witness (DW2) stated as follows on cross- examination by Peter's lawyers:

> " The owner of the suit land was Pau L Wang Kio. The loan was given to Simon ChaCha in October 1976 by the 1st defendant. The repayment period is not readily available with me. I cannot tell the period and whether Simon Chacha repaid the loan in full.
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> I have no bank statement in
>
> respect of the loan taken by Simon Chacha. I am not sure if the owner of the suit land was alive at the time of sale of the suit land. I cannot tell if the next of kin of the owner of the

suit were informed of the sale. I have no records thereof. A statutory notice of sale given by the 1st defendant before sale of the suit land is not with me. The first as per DExhibit 1 did not give timelines to repay the loan and sale of the suit land. The 1st DExhibit 1 does not show the date thereof.

The suit land was sold on 22/7/1988 as per 1st DExhibit 1. The advert was not circulated in the local newspapers. It originated from Regent Auctioneers. The 1st did not get order of the court to dispose of the suit land. The sale was done and I cannot confirm if it in secrecy. I am not a valuer. I do not have valuation report herein. The sale of the suit land was not against every requirement of the law.

We had archived some document in this matter. I have no notification of sale of the suit land in our records ..."

29. It was held by this Court in the case of Nyangilo Ochieng & another vs Fanuel B Ochieng & 2 others [1996]eKLR as follows

> " It is for the chargee to make sure that there is compliance with the requirements of Section 74 (1) of the Registered *Land Act*. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent."

30. No such evidence of service of a statutory notice was tendered by Kenya Commercial Bank or indeed of any outstanding loan that was secured by the charge over the suit property, and we therefore find that there was no legal basis for the exercise of the statutory power of sale, and that the sale of the suit property was therefore not only illegal but also fraudulent.

31. As regards Christopher, the fraudulent acts alleged against him were the following:

    i. Colluding with the First Defendant's (Kenya Commercial Bank's) officials, workers or agents to secretly enter into a purchase agreement and transfer the land to himself at a price far below the value of the value of the property.

    ii. Engaging in a transaction to purchase the land without following legal procedures and requirements.

    iii. Using bribery and unfair influence to purchase the land irregularly from the First Defendant (Kenya Commercial Bank).

    iv. Charging the land to the Third Defendant (Agricultural Finance Corporation) in bad faith to secure a loan to make it difficult for the deceased's estate to recover the land.

32. Peter in this respect produced documentary evidence that showed that the deceased died on 28th December 1978, a letter of consent dated 28th February 1990 by the Land Control Board to the deceased to transfer the suit property to Christopher, and which referred to an application made by the deceased on 18th January 1990, a copy of which was also produced as an exhibit by Peter. It is evident that it was fraudulently represented by Christopher that the deceased seeking consent to transfer the suit property, twelve years after his death, and without any participation by his estate, and we find that Christopher was therefore complicit and colluded to defraud the estate of the deceased of the suit property.

33. On the payment of the purchase price, Christopher produced a receipt showing payment on 22nd July 1988 of Kshs.10,000/=, being 25% deposit of the purchase price after the alleged public auction of the

suit property. Also of interest was a letter dated 29th September 1988 addressed to Christopher from the lawyers for Kenya Commercial Bank, that was produced as an exhibit by the two appellants, and which read as follows:

> Mr. Christopher Nyamohanga,
>
> Box 148, Suan Migori. Dear Sir,
>
> Re: Simon Chacha
>
> Auction Sale of Bugumba/Mabera/298
>
> We refer to our letter dated 6th September, 1988, which you have not had the courtesy of replying.
>
> As you must be aware, the balance of the purchase price is. payable on 10th March, 1988.
>
> You have therefore failed (sic)comply with the conditions of sale and unless we hear from you with payment within the next 14 days, our client will rescind the .sale, forfeit the deposit and resell the property elsewhere, . any short fall in price and all expenses attendant upon the resale being met by you.
>
> Yours faithfully,
>
> for Hamilton Harrison & Matthews

34. While Christopher testified that he paid the balance of the purchase in cash, he did not bring any evidence of the said payment, and in any event, it was clear from the Memorandum to the conditions of sale at the alleged public auction dated 22nd July 1988 that the balance of the purchase price was due to be paid within thirty days of the public auction, and therefore by the latest 22nd August 1988. It is however evident that by 29th September 1988 the balance of the purchase price had not paid, and no evidence was produced by Christopher that it was ever paid at all. We therefore additionally find that Christopher was not an innocent purchaser for value nor did he pay valuable consideration for the suit property. Consequently, section 26 of the *Limitation of Actions Act* also applied to the suit against him, which was not statute barred.

35. In conclusion, we are satisfied that the learned Judge of the ELC did not err in dismissing Christopher's counterclaim and allowing Peter's claim. On the last issue of the remedies that were merited, we need at the outset to distinguish the authorities cited by the learned counsel for Kenya Commercial Bank in support of the submission that the appropriate and available remedy to Peter was that of damages. Firstly, it is notable that in a number of the cases he cited (Nancy Kahoya Amadiva vs Expert Credit Limited & another [supra], Patrick Kanyagia & another vs Damaris Wangechi & 2 others [supra], and Downhill Limited vs Harith Ali El- Busaidy & another (supra), the applicable law and procedure of sale was different, namely under the repealed Indian Transfer of Property Act. In particular, it is notable that under the repealed Registration of Lands Act which applied in the instant case, a chargee was obliged to sell property which was subject to the exercise of a statutory power of sale by public auction, and the sale was subject to the Auctioneer rules unlike the procedure that applied under the repealed Indian Transfer of Property Act.

36. Secondly, in all the authorities that were cited by the learned counsel, there was either evidence of default of repayment of the secured sum or/and issuance of statutory notices produced, the purchasers of the suit properties were found to be innocent purchasers for value, and/or there was no fraud established in the sale of the said properties, unlike in the present appeal. The legal position obtaining

in the present appeal was aptly explained in the majority decision in the case of Marteve Guest House Limited vs Njenga & 3 others (supra) as follows:

> " The power of the court to order cancellation of a transaction that had been procured by fraud or mistake was circumscribed by section 143 of Registered *Land Act*. A plain reading of section 143 revealed that the court could only order cancellation of registration of a title where fraud was established in the case of a proprietor who was in possession and acquired the property for valuable consideration, where it was established that the proprietor was either complicit in the fraud or had knowledge of the fraud, and was therefore not a bona fide purchaser for value without notice. In addition, section 77(3) of the Registered *Land Act* provided that once the sale was registered, a person who was aggrieved by an irregular exercise of a chargor's statutory power of sale was only entitled to damages against the person exercising the power.
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> 39. There was a distinction between an auction sale which was rendered irregular during the sale and a sale which was void because the statutory power of sale either had not accrued or was vitiated by fraud. While an innocent purchaser in an irregular sale could be saved by section 77(3) of the Registered *Land Act*, that section could not help an innocent purchaser in the case of a void sale, particularly in a situation such as the instant case where the bank was complicit in the fraud and had unlawfully sold the suit property"

37. We need to reiterate that unlike in Marteve Guest House Limited vs Njenga & 3 others (supra) where the appellant was found to be an innocent purchaser for value, in the present appeal we have found that Christopher was not an innocent purchaser for value. However, it is notable that under section 77(3) of the repealed Registered *Land Act*, even innocent purchasers for value did not have any protection in the case of void sales. The only remedy available was as explained in Nyangilo Ochieng & another vs Fanuel BOchieng & 2 others (supra):

> " Having held that the auction sale was void we must consider the consequences. Miss Awino argued that section 77(3) of the Registered *Land Act* gives her client a good title. That subsection reads: (3) A transfer by a chargee in the exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising such power"……..
>
> In our view, a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land so sold. It is therefore clear that the second respondent did not acquire proper titles to the suit properties. Her remedy is against the bank primarily to obtain a refund of the consideration paid."

38. Lastly, there was no evidence tendered by Kenya Commercial Bank that the suit property was subjected to any valuation and it is therefore not possible to determine what loss the estate of the deceased will suffer in monetary terms. An award of damages would therefore also not be appropriate in the circumstances. We accordingly find no merit in the appeals filed by Kenya Commercial Bank and Christopher Nyamohanga and hereby dismiss the two appeals, with the result that the judgment delivered on 15th July 2020 by G. Ongondo J. in ELC Case No 148 of 2017 is accordingly upheld. The appellants shall meet the respondent's costs of the appeal.

39. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR