

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 929 OF 2004

DOROTHY WANGARI NDERI.....1ST
PLAINIFF

EDWARD NDERI MARINE.....2ND
PLAINTIFF

LUCY WANJIRU MARINE.....3RD
PLAINTIFF

VERSUS

HABIB BANK LIMITED.....1ST
DEFENDANT

JOSEPH MURIITHI MWANGI.....2ND
DEFENDANT

STEPHEN ONYANGO JUMA t/a
SERVICE (KENYA) LTD.....3RD
DEFENDANT

JUDGEMENT

1. The Plaintiffs herein have filed the instant suit to challenge the auction sale, the manner of sale and the occupation of the suit property being *Land reference Number 4480/149* which was up for sale by the 1st Defendant in exercise of its statutory power of sale contained in a legal charge dated 24th April 1985.
2. Consequently, the Plaintiffs prayed that the sale of 3rd September 2004 be set aside as well as any subsequent entries to the title pertaining to *L.R 4480/149 Ngong Town* and the property be reverted to the original owner. They also prayed for loss of income from the suit property since September 2004, general damages as well as costs of the suit.

3. The Plaintiff filed an Amended Plaint dated 29th September 2004 as the administrators of the estate of *Alfred Marine Nderi* who died having taken a loan of Kshs. 1.5 million from the 1st Defendant. The Plaintiffs have been taking steps to settle liabilities of the deceased's estate including the loan taken from the 1st Defendant.
4. As soon as the Plaintiffs learnt that *R 4880/149 Ngong* had been advertised for sale by public auction, they sought an injunction from the courts to stop the said sale as they were putting in place mechanisms to settle the amount. Despite getting the injunction and serving it upon the 1st Defendant, the 1st Defendant wilfully disobeyed the court order and proceeded with the sale through its agent, the 3rd Respondent. The Plaintiff's therefore prayed that the sale of 3rd September 2004 be set aside.
5. The 1st Defendant filed a statement of defence dated 23rd March 2007 where it averred that by a legal charge dated 24th April 1985 and registered at the Land Title Registry at Nairobi as Number *IR No. 3704/4* and made between *Alfred Manine Nderi* therein described and the 1st Defendant, the late Alfred charged his property known as Land Reference number *4480/149 Ngong Town* to secure the repayment of Ksh. 1.5 million with interest thereon for a banking facility to his business known as Umoja Electrical Company Limited.
6. It is further averred that the auction sale did take place in accordance with the law without any fraud or misrepresentation. The plaintiffs are entitled to pay off the debt under the said legal charge and annul the sale of the property. Nevertheless, the Plaintiffs did not pay any sum or monies at all towards the repayment of the said Legal Charge.

7. The 2nd Defendant filed an amended statement of defence and counterclaim dated 2nd June 2016 denying all the allegations of mischief, fraud, misrepresentation and impropriety alleged by the Plaintiffs. He contends that he purchased the suit property at an auction held by the 3rd Defendant who sold it on behalf of the 1st Defendant in exercise of the Statutory Power of sale the sum of Ksh. 5million.
8. Therefore, having purchased the property for value without of any impropriety he took possession of the same and has been doing business thereon save for the Plaintiffs who have by themselves or through their agents harassed, intimidated and continuously interfered with his quiet possession and enjoyment of the suit property.
9. The Plaintiff lost any right to redeem the suit property through their own fault because in law they had the opportunity to do so up to and until the transfer as registered in the 2nd Defendant's name. An option they failed to take up through their indolence. Thus, they cannot plead to equity to set aside the said sale. The Plaintiffs action is thus bad in law.
10. The 2nd Defendant counterclaimed loss of rental income at the rate of Kshs. 117,000.00 per month till the conclusive determination of the instant case as the Plaintiffs refused to grant him vacant possession of the property despite being the *bona fide* owner.
11. He thus prayed for general damages for illegal occupation and user of thirteen rooms in the premises on the suit property from 1st August 2005 until judgment. Special damages for loss of rental income amounting to Ksh. 14,859,000.00 between 1st August 2005 and 31st March 2016.

12. PW1, Ephraim Kititu Gathu, testified on 24th May 2010 on behalf of the 3rd Plaintiff. The late *Alfred Wasune Nderu* was the father to the 3rd Plaintiff and he had died in 1995. In early August 2004, he received information that the building in Ngong town was being sold by the 1st Defendant, he contacted members of his family and they proceeded to the bank where they learnt they were owing Kshs. 1.5 million which the deceased had guaranteed some friends. They negotiated and the bank agreed to let them pay Ksh.1 million. On 2nd September 2004, their lawyer obtained an injunction stopping the sale, the order was extracted and served upon the 1st Defendant. They were unable to reach the auctioneer as his office was locked. Therefore, they slid the order under the door and then proceeded to Ngong where they pasted the order on the walls. There were security personnel guarding the building under the instructions of the 2nd Defendant. The following day he proceeded to the place where the auction was to be undertaken but there was no auction. He waited from 7.45 am to 1.30pm but there was no auction that took place.
13. They believed the auction had been successfully stopped until when the 2nd Defendant alleged that he owned the premises in April 2005. On inquiry from the bank, they were informed that the 2nd Defendant had purchased the property through public auction by paying Kshs. 1.2 million to the bank. He maintains that there was no auction. He denied receiving any notice from the auctioneers on the intended sale. He learnt of the auction before it took place through the caretaker. He was not at Pophan, auction at Ngong was notified in posters. The auction venue was outside Massai Springs in Ngong at 9.00am.
14. They do not dispute that the deceased owed money but contend that they obtained orders stopping the auction.

15. PW2, Stephen Waigwa Munyeki, a Chief Security officer at Maasai Springs building. He states that on 2nd September 2004, he saw a notice saying the building was going to be auctioned on 3rd September 2004 by the 1st Defendant outside the building.
16. On 2nd September 2004, a process server brought order to stop the auction of 3rd September 2004. One order was placed on the glass chemist window. There were security officers. The order was posted on the main gate and the entire building. On 3rd September 2004, about 20 people came inquiring about the auction but he informed them that the same had been stopped. The auction notice was there one month before the auction. The 1st Defendant was selling the property through the 3rd Defendant.
17. PW3, Stephen Njuguna Muniu, a retired civil servant staying in Ngong. Testified that he saw a notice stating that the building Maasai Sprigs would be auctioned on 3rd September 2004. When he went there for the auction on 3rd September 2004, he found a court order stopping the sale. There was no auctioneer. The place was guarded and the court order was on the door, wall and on Mwangi's shop. Mwangi owned a chemist.
18. He had gone to the auction to buy the building upon being sent by his company to bid. He knew the house belonged to Nderu. He knew the auction would be at Ngong.
19. PW4 Dorothy Wangaru Nderu. She testified that court orders were issued stopping the sale of the property by the 1st Defendant. They served the order on the 3rd Defendant by slipping it under the door as he was not in the office. She was at Josphan house on the day of the auction but no auction ever happened. She denies receiving a statutory notice from the auctioneer. She

became an administrator in 2000. She was aware her father had guaranteed money from the 1st Defendant. On the day of the auction, they were both at Pophan house and at Ngong. It is D3 who informed her about the auction. The bank never wrote to her over the loan.

20. The matter proceeded for defence hearing on 22nd July 2024. DW1 Faith Ndong'a, the legal manager at Diamond Trust Bank, which had acquired the 1st Defendant through an acquisition in 2017. She adopted her witness statement dated 19th May 2024 and bundle of documents as evidence which were marked as DW exhibits 1-11.

21. DW1 testified that the matter in dispute occurred in 2004 when communication systems were not as advanced as today. The communication between the 1st and 3rd Defendant's was mainly through hand delivered hard copies. Therefore, it was difficult for the 1st Defendant to urgently communicate with the 3rd Defendant outside work hours. On cross examination, she testified that she had established from the 1st Defendant's records that the 1st Defendant was served with a court order stopping the auction of the property *Land Reference number 4480/149* situated at Ngong town on 2nd September 2024 at 05.00pm. she could not however identify the exact person who received the said court order on behalf of the 1st Defendant. She was not able to confirm whether any effort was made to serve the 3rd Defendant with the court order stopping the sale of the suit property. Despite her background in law, she did not see any challenge receiving cheques for sale while there was a stoppage order against the sale.

22. She confirmed that the 1st Defendant did not undertake any investigation regarding the availability of *Alfred Marine Nderi* or the administrators of his estate for purpose of serving the documents. The only

communication between the 1st Respondent and the estate of the deceased was the Statutory Notice dated 15th January 2004.

23. DW1 testified that the 1st Defendant had not contacted the auctioneers board to verify the 3rd Defendant. She denied the allegations that the 1st Defendant assisted the 2nd Defendant to irregularly and fraudulently graduate into ownership as public auctions are open to all members of the public.

24. As at 2nd September 2004, the 1st Defendant was seeking to recover Kshs. 7,045,000 from the Chargor, Alfred Marime Nderi. The borrower was Umoja Electrical Company Limited. The Statutory Notices were directed to the Chargor and not to the borrower. It was put to DW1 that there was no communication between the borrower and the bank because the loan was paid in full and borrower was to get a discharge. DW1 affirmed that when DTB acquired the 1st Defendant, it acquired all its assets and liabilities as well as per the press release dated 28th July 2017 from the Central Bank of Kenya.

25. DW1 did not produce any evidence to ascertain that the cheques were cleared in favour of the 1st Defendant.

26. Following the auction, the 1st Defendant transferred the suit property to the 2nd Defendant. The transfer was registered on 1st August 2005 and subsequently charged to East African Building Society. DW1 had no knowledge of whether the memorandum of sale had been challenged in the proceedings before court.

27. Neither the licence nor the capacity of the 3rd Defendant to practice had been challenged by the court.

28. The Plaintiffs admitted o being indebted to the 1st Defendant pursuant to paragraph 5-9 of the amended plaint. The Plaintiffs were duly served with the statutory notices via registered post and certificate of posting duly attached as exhibits.
29. DW2, Joseph Muriithi Mwangi, the 2nd Defendant herein, testified on 25th July 2024. He adopted his amended statement of defence and counterclaim dated 2nd June 2016 in evidence together with his witness statement and bundle of documents.
30. He testified that he brough property land reference number 4480/149/ Ngong on 3rd September 2018 via public auction. He learnt if the auction as it had ben advertised in the East African Standard and fliers of the same sent to is chemist situated in land reference number 4480/149. The auction was undertaken at Pophan Building 3rd Floor next to Khoja Mosque, it was attended by about 20 people.
31. Although the people who participated in the sale were not listed on the memorandum of sale, that was the work of the auctioneer.
32. He gave out three personal cheques in respect of the purchase price for the suit property. Kshs. 300,000.00, 400,000.00 and 550,000.00. He denied colluding with the bank to defraud. He knew the deceased children prior to the death of their father and had given them supplies to with medicine, money for upkeep. He shared a list of the items he had shared with the deceased family with the bank's lawyer to justify what he had given to the family.
33. He has been a landlord at the suit property since 2004 and has been collecting rent as well as remitting income tax on rent. He used the property to obtain a loan facility

from East Africa Building Society as he did not have enough cash to bid for the property.

34. He had no prior dealings with the 3rd Defendant prior to the auction. He did not see any court orders posted on the premises nor any court orders that stopped him from purchasing the property. Also, between 29th September 2004 till registration of the property on 1st August 2005, he did not receive any court order stopping the transfer from being registered.
35. He carried some money with him as he went for the auction since the newspaper advert had indicated that 25% of the purchase price ought to be paid at the fall of the gavel. At the end of the auction, he accompanied the auctioneer to the bank and paid for the property both in cash and in cheque. He she was a tenant in the suit property prior to buying it at the auction.
36. Any discrepancy in the letter by the auctioneer to the and listing 3 cheques was a mistake by the auctioneer that he had no hand in. the actual registration number of the property is 4480/149.
37. By order of the court the matter was disposed through written submissions.
38. The Plaintiff submitted that the alleged public auction was shambolic and unmaintainable as there was a court order in force stopping the said auction. The court order had been duly served upon the 1st Defendant and affixed at the 2nd Defendant's chemist and the auction premises. Therefore, proceeding with the auction amounted to a legal nullity. Reliance was placed on the case of **Aggrey Maiyo v Kenya Commercial Bank Ltd and 2 others [2018]** to urge the position that the 1st Defendant as

principal was I wilful disregard of a court order when it proceeded with the sale of the suit property.

39. There was no evidence that the 1st Defendant made any efforts to reach the 3rd Defendant to update him on the court order stopping the auction from being conducted. Also, the amended defence and counterclaim filed by the 2nd Defendant were filed way after the close of the Plaintiff's case. The allegation that the 2nd defendant obtained a facility form the East African Building society to clear the balance of the purchase price is ridiculous and unsupported by evidence. The entire sale by public auction was made contrary to **section 77 (1) of the repealed Registered Land Act Cap 300**. The 2nd Defendant did not pay the 25% at the fall of the hammer.
40. The law regarding public auctions in Section 9, 96 (2) of the Land Act Cap 280, and Rule 15 (d) and (e) of the Auctioneers Rules, 1997 were not adhered to as there is no evidence of delivery of letter of instructions from the 1st defendant to the 3rd Defendant.
41. The statutory notice was not served as required by law. The letter was addressed to the estate of the deceased. **Martev Guest House Limited v Njenga & 3 others Civil Appeal 400 of 2018 [2022] KECA 539 (KLR) (28April 2022)**. The Statutory Notice was supposed to be sent to the known court appointed administrators of the Estate and not merely be addressed to the estate of the deceased.
42. In **Ragui vs Barclays Bank of Kenya Ltd [2002]1KLR 647** Ringera J clearly expressed that A statutory notice addressed to a deceased person is invalid and has no effect. In this case, the statutory notice ought to have been served upon the administrators of the estate.

The 1st Defendant, having been aware that the Chargor was deceased ought to have addressed the statutory notice to the administrators of his estate as required by law, Section 102 (2) of the Repealed Transfer of Property Act, 1882.

43. It was further submitted that, Section 96 (2) of the Land Act, Cap 280 requires a Chargor to effect service of a notice to sell the charged land, to the Chargor in the prescribed form. In **Act Fast Security Limited vs Equity Bank [2014] KLR**, the court stated that, before exercising that power of sale, however, as above, the Chargee must give a further notice as required under Section 96 (2). The Plaintiffs maintained that no such 40-day statutory notice was ever served upon them. The absence of a notice to sell is evidence that it was neither issued nor served. Without the notice, there is no means of ascertaining the time that the 45-day redemption period was to commence. This omission undermined the validity of any subsequent action taken by the Chargee.

44. The redemption notice that was eventually issued misdescribed the property charged as it referred to land parcel number 4990/149, a property not known to the Plaintiffs. Such misdescription rendered the redemption notice defective. **Sharok Kher Mohammed Ali and Another v Southern Credit Banking Corporation Limited [2008] eKLR** M.A Warsame J.

45. The attempt to correct the defect through a letter dated 12th July 2004 was legally inadequate as it is not provided in law. a new statutory notice ought to have been issued in its stead.

46. The Plaintiff thus prayed for exemplary damages for breach of duty of care and statutory obligations to the plaintiffs by the defendants.
47. The 1st and 3rd Defendants submitted that the Plaintiffs had failed to discharge the burden of proof in support of the claim against the defendants. It was further submitted that the alleged injunction order stopping the auction was null and void as it was issued in contravention of Order 39 of the Civil Procedure Rules as per the decision of the Court of Appeal in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1995] eKLR.**
48. It was also submitted that the proper law on statutory power of sale in 2004 was **section 69** of the **Indian Transfer of Property Act, 1882.** The notices were served upon persons who were yet to become administrators as no grant of letters of administration had been taken out. The situation was therefore distinguishable from **Martev Guest House (Case)**
49. Therefore, the statutory notices were validly served and all subsequent notices followed the law. Also, the auction was valid. None of the plaintiffs was present at the auction house.
50. The contract of sale did not affect the Plaintiffs equity of redemption. Court of appeal in **Industrial and Commercial Development Corporation v Kariuki & Gatheca Resources Ltd [1977] eKLR.** The Plaintiff's had a whole 11 months to exercise the equity of redemption but they did not.
51. There is no basis for granting loss of income as the auction was undertaken following a proper and lawful

process. Nevertheless, the Plaintiffs failed to particularize the loss of income in the amended plaint.

52. The 2nd Defendant submitted that the 1st Defendant duly served the Statutory notice as required by law. It was further submitted that the 2nd Defendant had proved that a sale by public auction occurred on 2nd September 2004 and that he was a bonafide purchaser for value. Reliance was placed on *Lawrence Mukiri V Attorney General & 4 others [2013] eKLR*. He argued further that there was no evidence of fraud or any element to vitiate the sale by public auction.

53. As per the counterclaim, it was submitted that the same was merited as the Plaintiffs retained possession of the property and collected rent despite protests by the 2nd Defendant thereby depriving the 2nd defendant a sum of Ksh. 14,859,000.00 as at 31/03/2016 which amount the 2nd defendant claims as damages for loss of rent. The Plaintiff gave full possession in 2021, therefore the order for vacant possession has been overtaken by events.

54. I have considered the pleadings, the rival submissions by the parties as well as the oral evidence in court. The issues that commend itself for determination is whether a valid sale of the suit property took place.

55. Having analyzed the trial record, it is not in dispute that the deceased received a loan of Kshs. 1,500,000.00 secured by the suit land from the 1st Defendant in the year 1985. However as at 2004, the deceased had not yet repaid the loan within the prescribed timelines. Consequently, on 3rd September 2004, the 1st Defendant resorted to exercise its statutory power of sale by selling the suit land which was the security for the loan to recover the arrears owed to them.

56. On 2nd September 2004, the Plaintiffs moved the honourable court seeking an injunction to stop the auction sale of the suit property. The said temporary injunction was granted by the honourable Justice Ojwang J.B (as he then was) in the following terms:

- i. That an order for an injunction be and is hereby issued restraining the Defendant, its servant and or agents from selling, disposing and or in any way interfering with L.R No. 4480/149 on the basis that there will be an inter parte hearing on 17.09.2004.***
- ii. The order to be served within two days.***

57. The 1st defendant admitted receiving the court order on 2nd September 2004 at around 5.00pm. However, it cited communication breakdown as the reason for failing to inform the 3rd defendant in time to stop the auction sale. This was an express acknowledgement by the Bank that it was well aware that the Order served upon it on 2nd September 2004 at 05.00pm was to restrain the Sale of the Suit property scheduled for 3rd of September 2004. There is therefore succinct evidence that the Order was duly served and the Bank was well aware that the court had injuncted the Sale of L.R No. 4480/149 pending inter parte hearing on 17th September 2004.

58. It is now common cause that the Auction proceeded inspite of the Court Order. In Defence the Bank testified that it was unable to communicate to the auctioneer in time to stop the sale. It is instructive that no evidence was led by the Bank as to the effort it made to reach the Auctioneer and that it became completely impossible to stop the Auction.

59. It is not lost to Court that the Order was served at 05.00pm and the auction was allegedly conducted on 3rd

September 2004 at 11.00am. The bank had more than 12 hours to communicate the contents of the Order to the Auctioneer. No evidence has been placed before the Court that all effort was made but in vain.

60. This Court finds that the Bank was in willful disregard of a Court Order when it proceeded with the Sale of the suit property. It was enough that only the Bank was served because it was the principal. An argument that the Auctioneer should have also been served is unhelpful because for purposes of the sale, the Auctioneer was merely an agent of the Bank. The Bank bore the responsibility of informing the Agent about the Order and its effect.

61. It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with **Section 74(1) of the Registered Land Act (Cap.300, Laws of Kenya)** which provides for the remedies of a chargee as follows:

(1)If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance 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:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

62. **Section 74** gives a chargee remedies which includes the right to sell the charged property. However, before that right can be exercised, the chargee is required to serve a notice on the Chargor in writing, requiring him/her to pay the money owed or perform the agreement. That notice must be served at least three months before the sale, and the sale can only take place if no payment is made. **Section 77 of RLA** gives the chargee the power to sell the charged property at a public auction through a licensed auctioneer, after the service of appropriate notices.

63. The Court of Appeal in **Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others [1996] KECA 205 (KLR)** remarked that:

“It is for the chargee to make sure that there is compliance with the requirements of s.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.”

64. The Defendants have argued that the statutory notices were delivered by registered post to the last known address of the deceased. Even though the 1st Defendant was aware that the Chargee was deceased, it caused the Statutory notice to be sent to the estate of the deceased, which according to it was the last known address of the deceased. The Statutory notice was sent via registered post. the Plaintiffs on the other hand contended that the

law required that the statutory notice be served upon the administrators of the estate of the deceased and not to the estate of the deceased.

65. The bank not only appreciated but also conceded that the court order stopping the sale of the suit property was duly served upon them on 2nd September 2004, however, due to communication challenges, they were unable to reach the 3rd Defendant in time to withdraw the said instructions. As a result, the sale proceeded as planned without regard to the existence of the court order.

66. The duty of a Chargor was articulated by the Court of Appeal in **Martev Guest House Limited v Njenga & 3 others (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (28 April 2022)** thus:

“A mortgagee has a duty to act in good faith, have regard to the interests of the mortgagor, obtain the best price for the property realized to pay off the debt for the benefit of both the mortgagor and the mortgagee, ensure that its power of sale is not exercised fraudulently, ensure that the mortgagors right of redemption is only lost pursuant to a valid sale. In sum, the mortgagee has a duty to ensure that the exercise of the statutory power of sale is not tainted by some kind of impropriety.”

67. The Court of appeal in the case of **Kenya Commercial Bank Limited v Pamela Akinyi Ochieng Civil Appeal No 114 of 1991**, was explicit that compliance with the prerequisites with regard to service of the notice on to the “Chargor” is mandatory and noncompliance with this prerequisite renders the entire process undertaken by the chargee to realize the security invalid.

68. It is a common position on record that the bank did not move to exercise its statutory power of sale during the lifetime of the deceased. That is why documents informing the said process were served on the “estate of the deceased”.
69. PW4 testified that she became an administrator to the estate of the deceased in the year 2000. This testimony regarding the time when she was appointed as an administrator of the estate of the deceased has not been challenged by any of the defendants.
70. The bank has alleged that the instant suit is distinguishable from the **Martevé guest House Case** *supra*, since at the time the bank was exercising its statutory power of sale, letters of administration had not been taken on behalf of the estate. As a result, they proceeded to serve the statutory notices to the entity referred to as the ‘estate of the deceased’.
71. **Section 45 (1) of the Law of Succession Act** bars anyone from dealing with the estate of a deceased person other than through the means provided under the Act.
72. The allegation by the Defendants that the statutory notices were sent to the estate of the deceased since grant of letters had not been taken is not legally sound. The Law of Succession Act empowers creditors to take out grant of letters of administration intestate. Therefore, nothing would have barred the 1st Defendant from initiating the succession process, if it was under the impression that such a process had not begun. **Section 66 of the Law of Succession Act** provides that:
- When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of***

administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference

- (a) surviving spouse or spouses, with or without association of other beneficiaries;**
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- (c) the Public Trustee; and**
- (d) creditors. (Emphasis added)**

73. There was no reason advanced by the bank on why it failed to comply with the provisions of the **Law of Succession Act** to the extent envisioned in **Section 82** of the Act on powers donated to a personal representative. In the **Martevé case supra**, the Court of Appeal further observed that:

“...the Law of Succession Act does not donate power to the “estate of a deceased person” to deal with property forming that deceased person’s estate, and instead donates that power to an administrator with a will or a personal representative to the intestate estate of a deceased person to deal with a deceased person’s property after the death of such a deceased person.”

74. Flowing from the above, it is evident that the bank erred in sending the statutory notices to the estate of the deceased person when they had the option of sending to either the personal representatives of the deceased Chargee or exercising their powers as creditors under **Section 65 of the Law of Succession Act**.

75. The belief, necessity or interests of the bank could not of themselves override a clear provision of the law.

76. The Court finds that the Auction and Sale of 3rd September 2004 infringed the law on at least two aspects. There was breach of the 45-day Notice required by **Rule 15(d) of the Auctioneers Act** and significantly it proceeded in disobedience of a Court Order. It is now pertinent to address the issue as to what would be the legal implication of these infractions on the validity of the Sale to the 2nd Defendant.

77. The Plaintiffs have alleged that the suit property was fraudulently disposed. **In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR**, Tuno J stated the law on fraud as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch D 473 at 489.”

78. I concur with the Defendants that whereas the Plaintiffs alleged that the auction was fraudulent, the particulars of fraud were not specifically pleaded and the particulars stated on the face of the pleading. Nevertheless, I will be guided by the totality of the evidence to determine whether the 2nd Defendant's plea that it is an innocent *bona fide* purchaser of the suit property for value without notice of any defect either in the title or the process that resulted in the title being vested in its name is merited.

79. **Section 77(3) of the Registered Land Act**, 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.

80. The 2nd Defendant argued that he was a bonafide purchaser for value without defect in the title pursuant to Section 39 of the Registered Land Act. The Court of Appeal in **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** expressed itself, *inter alia*, as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

81. **Black’s Law Dictionary, 8th Edition** defines a bona fide purchaser as:

“one who buys something for value without notice of another claim to the property and without actual or constructive notice of any defects in or infirmities, claim or equities against the seller’s title; one who has in good

faith paid valuable consideration for property without notice of prior adverse claims".

82. I adopt the ingredients for qualification of a party as a bona fide purchaser as distilled in the case of **Lawrence P Mukiri v Attorney General & 4 others [2013]eKLR**, namely, proof that the claimant:

- a) Holds a certificate of Title;***
- b) Purchased the Property in good faith;***
- c) Had no knowledge of the fraud;***
- d) The vendors had apparent valid title;***
- e) Purchased without notice of any fraud;***
- f) Was not party to any fraud.***

83. On the role of the court when confronted with a claim of this nature, the position I take and which I fully adopt is that taken by the court of Appeal in the case of **Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR) (Civ) (19 November 2021) (Judgment)**. The principles distilled by the court upon reviewing numerous case law that I find relevant to this matter are the following:

- i. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing the obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court.***
- ii. It is trite law that where an act is a nullity it is void and every proceeding founded on it is also in law a nullity.***
- iii. Every act premised on a nullity cannot accrue legitimacy or legality.***
- iv. Sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at another person's expense.***

v. A court of law cannot protect title to land which has been obtained illegally or fraudulently merely because a person is entered in the register as proprietor.

84. On illegalities and irregularities, I find these proved to the required threshold based on the fact that the bank well knowing that in law it could only invoke its statutory power of sale upon service of a demand and notification of sale on a chargor, purported to comply with that prerequisite by purporting to serve the said processes on the estate of the deceased a process not provided for in law either under the **Registered Land Act or Law of Succession Act.**

85. Nyamweya J. in the **Marteve Guest House case** (*supra*) held that:

“Want of compliance with the Law of Succession Act provisions by the bank in the exercise of its statutory power of sale rendered the entire process an illegality and therefore null and void. The position in law with regard to nullities and or illegalities and which I adopt is as was crystallized by the locus classicus decision of the privy council in the case of Macfoy v United Africa Co Limited [1961] 2 All ER for the holding, inter alia, that once an act is null and void, it amounts to nothing. No right can be founded on it.”

86. It is further alleged that the misdescription of the suit property by the 3rd Defendant amounted to material misrepresentation. To the Court’s mind, the misdescription of the property could have had a negative impact on the public auction. It is the Court’s view that once a Chargee commences the exercise of the statutory power of sale, it

should at all times endeavor to give full and proper description of the affected property.

87. The 2nd Defendant having paid the full purchase price, the suit property was transferred to it, and a title issued in its name. There is no evidence that the Defendant was complicit in or had any knowledge of any fraudulent dealings involving the sale of the suit property or irregularities concerning the exercise of the statutory power of sale by the Bank. The 2nd Defendant was therefore an innocent purchaser for value without notice. The question is, what is the impact of the wrongful exercise of the Bank's statutory power of sale on the purchase of the suit property by the appellant?

88. The power of the court to order cancellation of a transaction that has been procured by fraud or mistake is circumscribed by **section 143 of RLA** as follows:

143.(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake.

89. A plain reading of **section 143 of RLA** reveals that the court can only order cancellation of registration of a title where fraud is established in the case of a proprietor who is in possession and acquired the property for valuable

consideration, where it is 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 RLA** provided that once the sale is registered, a person who is aggrieved by an irregular exercise of a chargor's statutory power of sale is only entitled to damages against the person exercising the power.

90. There is a distinction between an auction sale which is rendered irregular during the sale, and a sale which is void because the statutory power of sale either had not accrued or is vitiated by fraud. While an innocent purchaser in an irregular sale may be saved by **section 77(3) of the RLA**, that section cannot help an innocent purchaser in the case of a void sale, particularly in a situation such as this where the Bank is complicit and has unlawfully sold the suit property.

91. In the **Nyangilo case** *supra*, the Court of Appeal remarked thus:

"A sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land so sold. ...Her remedy is against the bank primarily to obtain a refund of the consideration paid."

92. Despite the court having the obligation to protect an innocent purchaser for value at an auction sale, Bank financing is critical to the economy of this country and fraudulent realization of security by a large Bank such as the 1st defendant, cannot be allowed to take root by the court protecting an innocent purchaser who is the ultimate beneficiary in such a transaction. In the circumstances of this case, it would be inimical to justice and public interest to allow a situation where a Bank deliberately ignores a court order and proceeds to sell property belonging to a

dead person, and the deceased's estate has not even been served with any statutory notice.

93. In light of the above crystallized position, since the 2nd Defendant's title has its roots in the bank's flawed process in the exercise of its statutory power of sale on the basis of which the 2nd Defendant got title to the suit property. The said title is therefore tainted with nullity, irregularly and illegality. Thus, the Defendant's plea of an innocent purchaser for value without notice to either title or the process resulting in it being vested with title to the suit property is unsustainable.

94. The upshot is that this Court declares that:

- i. The purported Sale and Auction held on 3rd September 2004 in respect to L.R 4480/149 is null and void.***
- ii. Consequently, The registration and entries in the Register of L.R 4480/149 shall be restored to the pre-auction position, that is, the Plaintiffs as legal representatives of the deceased but with the charge of the Bank duly registered.***
- iii. The cost of restoration shall be borne by the Bank. On costs of this Suit the Bank shall meet both the Plaintiff's and 2nd Defendant's costs. I make this Order of costs in favour of the 2nd Defendant as he was blameless for the infractions that aggrieved the Plaintiffs.***

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 16TH DAY OF OCTOBER, 2025.

**HON. T. W. Ouya
JUDGE**

ORIGINAL