



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 124 OF 2017

EVANS KEMBOI KOECH.....PLAINTIFF/APPLICANT

VERSUS

MARY JUSTER CHEPLETING.....DEFENDANT/RESPONDENT

AND

AGRICULTURAL FINANCE CORPORATION.....INTERESTED PARTY

JUDGMENT

Evans Kemboi Koech (hereinafter referred to as the plaintiff), sued ***Mary Juster Chepleting (hereinafter referred to as the defendant)*** and enjoined Agricultural Finance Corporation (hereinafter to as the interested party) stating that he purchased all that parcel of land known as Land Reference No. 3209/1 the suit property) situate in Arbabuch Area-Moiben, Uasin Gishu County measuring approximately 305 acres in a public auction held on 9.09.2016. He claimed that the public auction was conducted by M/s Legacy Auctioneering Services on behalf of the Interested Party herein who was exercising its statutory power of sale.

He learnt of the intended public auction through an advertisement placed in the Standard Newspaper on 17.08.2016 and proceeded to verify the details of the charged property prior to making a decision to purchase the said property.

He duly participated in a competitive bidding process at the public auction held on 9.09.2016 and emerged the highest bidder with a bid of Kshs. 100,000,000.00. The plaintiff duly paid a deposit of Kshs. 25,000,000 as stipulated in the conditions of sale and immediately signed the Memorandum of Sale on 9.09.2016 and subsequently paid the balance of the purchase price being Kshs. 75,000,000.00 within the 90 days period as set out in the conditions of sale whereupon he was granted possession of the suit property by the Interested Party herein.

According to the plaintiff, the defendant has been trying to gain forceful entry into the suit property with the help of hired goons purposely to interfere with his rights therein but the same has been resisted. The defendant's persistence to gain forceful entry into the property prejudices his statutory right to enjoy the use of the property more so after investing his financial resources to purchase the suit property.

The defendant has flatly refused to remove her animals from the suit property feigning ignorance of the public auction. The defendant's attempts to gain forceful entry into the suit property is unlawful, illegal and goes against the plaintiff's statutory right to charged property.

The particulars of illegality are namely; Interfering with the purchaser's right over charged properties; Hiring goons to prevent the plaintiff from accessing or making use of the property; Interfering with the plaintiff's use of the property having lost her right after sale of the charged property; Deliberately denying the plaintiff the opportunity to make use of the suit property; The auction sale became complete the moment he paid the full purchase price hence the defendant has no basis to interfere with his rights on the suit property.

According to the plaintiff, the defendant lost her rights on the suit property at the fall of the hammer hence she has no justifiable reason to lay any claim on the property. The plaintiff's claim against the defendant is for an order of permanent injunction restraining the defendant whether by herself, her agents, servants, employees and/or assigns from encroaching, trespassing, gaining entry, stocking animals, or in any way carrying out any activity on all that property known as Land Reference Number 3209/1 situate in Arbabuch Area-Moiben, Uasin Gishu County.

The plaintiff claims that despite demand and notice of intention to sue having been issued, the defendant has failed, refused and/or ignored to make good the plaintiff's claim. There is no other suit pending neither have there been any previous proceedings in any court between the plaintiff and the defendant over the same subject matter of the present suit. This honorable court has jurisdiction to entertain this suit.

The plaintiff prays for an order of permanent injunction restraining the defendant whether by herself, her agents, servants, employees and/or assigns from encroaching, trespassing, gaining entry, stocking animals, or in any way carrying out any activity on all that property known as Land Reference Number 3209/1 situate in Arbabuch Area-Moiben, Uasin Gishu County. The plaintiff prays for the costs of this suit plus Interest at court's rate.

The defendant filed statement of defence denying the averments contained in the plaint and in particular that the plaintiff is the purchaser of all that parcel of land known as L.R. No. 3209/1 (the suit land) measuring 305 Acres in a public Auction held on the 09.09.2016. The defendant contends that she is the registered owner of the parcel of land and the plaintiff herein has not acquired any legal or proprietary interest on the suit land.

She states that the interested party either through themselves or their agents never conducted a public auction on the alleged date of 09.09.2016 and if indeed there was albeit denied then the same was either through a private treaty or through local arrangement at a later date. The defendant categorically denies the public auction being conducted by M/s Legacy Auctioneering Services on behalf of the interested party who was exercising its statutory power of sale.

The defendant further denies the allegations by the plaintiff that he dutifully and/or diligently verified the status/details of the charged property prior to making a decision to purchase the suit property. The defendant contends further that contrary to the averments by the plaintiff in paragraph 6 of the plaint, the plaintiff did not with due diligence verify the status maintaining on the suit as on 09.09.2016 as the lease/tenure had expired.

The defendant contends that if indeed the plaintiff purchased the suit land on the alleged date of 09.09.2016 through the interested party, authorized agent then the plaintiff did not acquire a good title as the chargee's right had been extinguished on the lease in the year 2010.

The defendant contends that contrary to the allegations by the plaintiff the relevant instrument of transfer on public auction including the certificate of sale, prove of payment of Kshs. 100,000,000/= within the stipulated 90 days in the purported sale of land agreement, a bank statement from the interested have not been furnished or exhibited.

She denies having been trying to gain forceful entry to the suit property with the help of hired goons as she has been on the suit land since she acquired it till 24.03.2017 when the plaintiff through misrepresentation/fraudulent means obtained interim restraining orders to evict the defendant, her workers, livestock and wantonly destroying properties/trees,

It is therefore the defendant's contention that the interim orders issued against the defendant on the 22.03.2017 were unlawful, irregular and oppressive as it amounted to evicting the defendant from her matrimonial home without the plaintiff following the lawful procedures.

The defendant contends that the plaintiff cannot egress and engross by averring that the defendant has flatly refused to remove her animals from the suit land at the same time states that defendant's attempts to gain forceful entry into the suit land is unlawful, illegal.

The defendant contends that the plaintiff's actions are tainted with illegality, deceit, misrepresentation, fraud and malice in claiming ownership on the suit land:

The defendant filed counterclaim stating that she is the bonafide owner of the suit parcel of land namely L.R. No. 3209/1 measuring 305 Acres. That the defendant contends that the plaintiff never participated in the public auction on the 09.09.2016 and the purported claim of ownership by virtue of purchase is tainted with a lot of irregularity, fraud and conspiracy with the interested party. The defendant states that the plaintiff if indeed was declared the highest bidder albeit denied then he transferred his interest on land to a third party (namely Spaceler Co. Ltd) on the 09.12.2016. The defendant further states that as at the time of obtaining temporary injunctive orders, the defendant was still in possession of the suit land contrary to a claim by the plaintiff that he was in possession. The plaintiff having conspired and worked in cohorts with interested party used the interim orders to evict the defendant.

The defendant avers that the plaintiff lacks the *locus standi* to sue as the interested party passed no title to the plaintiff and further states that the lease/tenure expired in the year 2010 hence the interested party had nothing to pass or sale at the public auction on the 09.09.2016. The defendant contends that she has the residual interest on the suit land as the rights still vests in the registered owner.

It is the defendant's case that the defendant is entitled to vacant possession of the suit land till the plaintiff and the interested party procedurally follow the right procedure as envisaged under the relevant Land Act and the Auctioneers rules.

The defendant contends that the plaintiff obtained irregular orders through misrepresentation, gained forceful entry and started general wanton destruction of the property including occasioning death to the livestock, felling of trees and did acts which are abominable and inconsistent to the proprietary rights of the defendant.

The defendant seeks compensation for the general wanton destruction of the property (flora/fauna) killing and poisoning of animals, psychological trauma visited upon the defendant during the heinous exercise.

The defendant prays that for a declaration that she is the lawful and absolute owner of the suit land together with all the developments thereon comprising the livestock, homestead and/or other properties apartment thereto and an order of injunction restraining the plaintiff/interested party and/or any other party claiming on their behalf over the suit land.

The defendant further prays for a declaration that the public auction conducted on the 09.09.2016 be declared null and void as it was vitiated by irregularities and/or fraud. General damages for wanton destruction of properties and killing of animals. Plus, costs and interest.

The **Agricultural Finance Corporation** was enjoined as an Interested Party. The Interested Party filed a defence and reply to counterclaim stating that the plaintiff herein purchased all that parcel of land known as land reference No. 3209/1 (the suit property) situate in Arbabuch Area-Moiben, Uasin Gishu County measuring approximately 305 acres in a public auction held on 9/09/2016.

That the Interested party avers that indeed they instructed M/s Legacy Auctioneers to auction land L.R. No. 3209/1 on its behalf in exercising its statutory power of sale. The Interested party avers that the statutory power of sale was exercised pursuant to the default by the defendant in fulfilling her obligations arising pursuant to a charge registered in the property. That the interested party avers that pursuant to the sale the plaintiff was granted vacant possession.

In response to counter claim by the defendant, the Interested party avers that sometimes on or about 5.6.1996 the defendant applied for and received Kshs.7,800,000/= for purchase of the suit land known as L.R. No. 3209/1, Kshs.1,720,000/= for purchase of Ford Tractor 5640 4WD and Kshs.580,000/= for implements totaling to Kshs.10,100,000/= which sum was to be repaid in full with interest and repaid in full with interest and costs within a cumulative period of 10 years.

That on or about 14.3.97, the defendant applied for and received a further loan of Kshs.1,750,000/= for purchase of new Holland 7840 tractor, Kshs.280,000/= to purchase 5 discs hardy plough and 24 discs, Kshs.1,610,000/= to purchase new Holland Ford 6640 4WD tractor Kshs.700,000/= to purchase baler 5657 new Holland and Kshs.1,553,650 to purchase canter track for Holland 100H totaling kshs.5,893,650/= which sum above and interest and was to be repaid in full within a cumulative period of 3 years.

That the Interested party avers that on several occasions the defendant was reminded of her indebtedness and the outstanding amount in her loan account but she was never moved to regularize her loan account save for many proposals which were never honoured.

The Interested party avers that the defendant herein ceased being the *bonafide* owner of the suit parcel of land namely L.R. No 3209/1 when she defaulted repaying the loan facility she had acquired when they were due and on demand.

That in response to paragraph 24 of the counterclaim, the interested party avers that indeed the plaintiff participated in the public auction on 9.9.2016 and was the highest bidder. That the Interested party avers that by the time of obtaining temporary orders, the plaintiff had already taken possession of the suit land.

The Interested party avers that there was no conspiracy between the plaintiff and the interested party and the auction was done in the limelight where several bidders participated. The defendants' alleged residual interests were extinguished upon fall of the hammer and vacant possession of the suit land and was given to the plaintiff herein. The defendant herein has not come to this court with clean hands as she has always filed suits in court whenever the interested party herein intended to exercise its statutory power of sale.

According to the interested party, the suits filed by the defendant include;

a. ELDORET ENVIRONMENT AND LAND CASE NUMBER 151 OF 2015 - MARY JUSTER -VS- AGRICULTURAL FINANCE CORPORATION.

b. KISUMU HIGH COURT CASE NUMBER 108 OF 2016 -MARY JUSTER -VS AGRICULTURAL FINANCE CORPORATION.

c. ELDORET HIGH COURT CIVIL CASE NUMBER 50 OF 2006 -MARY JUSTER-VS AGRICULTURAL FINANCE TRUST.

The Interested party avers that the defendant is not entitled to any vacant possession of the suit land and the interested party followed the right procedure in disposing off the land. The interested party avers that the counterclaim offends the statutory provisions of Civil Procedure Act and precedents and shall prior or at the hearing hereof raise a preliminary objection on points of law with the view to have the same struck out with costs. That the counterclaim is frivolous vexatious and an abuse of court proceedings by virtue of the existence of previous proceedings some of which have been determined and other pending hearing in court.

The Interested Party prays that Judgment to be entered in favor of the plaintiff as against the defendant as prayed in the plaint. The defendant's counterclaim be dismissed with costs to both the plaintiff and the interested party.

The plaintiff filed reply to defense and defense to counterclaim stating the defendant lost her proprietary interest on the suit property after the plaintiff was declared the highest bidder in a competitive auction sale conducted on 9/09/2016.

The plaintiff reiterates that he duly participated in the competitive auction sale conducted on 9/09/2016 by the interested party's agent, M/S Legacy Auctioneering services whereupon he was declared the highest bidder. He denies any fraud or irregularity. The plaintiff claims to have the proprietary interest of the suit property.

The plaintiff states that the defendant was not in possession of the suit property as at 22nd March 2017 when the interim orders were issued as she admitted in the supplementary affidavit filed on 7th April 2017 that she had been in possession of the suit land with her livestock including cows, goats, sheep and workers till 14th March 2017. The plaintiff denies having used the orders to evict the defendant.

The defendant responded to the plaintiff's defence stating that the defendant has never ceased being the *bonafide* owner of the suit land since time immemorial.

The defendant further contends that the plaintiff herein did not acquire valid title as the lease on the suit land had expired hence the interested party had no capacity to exercise its statutory power of the sale. The defendant states that the interested party acted ultra vires in instructing legacy auctioneers to auction the suit land before renewing the expired lease tenure of the suit land hence the plaintiff did not acquire a better title due to *Nemo dat doctrine* or principle.

The defendant further contends that if the plaintiff indeed participated in the public auction albeit denied, then relinquished his proprietary interest to M/s Spaceler Company Ltd.

The defendant contends that the plaintiff and the Interested Party connived, conspired and in flagrant disregard of the law, legal procedures and constitutional rights of the defendant forcibly entered onto the suit property through a stranger hence a trespasser.

The defendant contends that the plaintiff having not paid the entire purchase price within the 90 days (09.12.2016) he is only entitled to acreage equivalent to the amount paid and received by the interested party.

The defendant further filed a defence to the Interested Party's reply to counterclaim stating that the defendant has never ceased being the *bonafide* owner of the suit land and that the interested party herein did not have the locus standi to exercise its statutory power of sale as the lease on the suit land had expired and if any title passed then it's contrary to *nemo dat doctrine/principle*. The defendant states that the interested party acted ultra-vires in instructing legacy auctioneers to auction the suit land before renewing the expired lease tenure of the suit land.

The defendant reiterates that the plaintiff never participated in the public auction on the 09.01.2016 as there are two contradicting letters dated 09.01.2017 addressed to the plaintiff and M/s Spaceler Company Ltd as the highest bidder.

The defendant further reiterates that since she has been in possession of the suit land since times immemorial there was conspiracy between the plaintiff and the interested party. To buttress mischief and/or conspiracy on the part of the interested party, the defendant states that if the plaintiff indeed participated in the public auction albeit denied, then the amount paid by the plaintiff is only Kshs. 40,000,000.

The defendant contends that the residual interest of the defendant was never extinguished as at the fall of the hammer the interested party's statutory power of sale had extinguished or not accrued as the lease period had expired. The defendant contends that the plaintiff and the interested party conceded, connived, conspired and in flagrant disregard of the law, legal procedures and constitutional rights of the defendant forcibly entered onto the suit property, forced fenced and evicted the defendant using interim orders.

The defendant contends that the plaintiff is only entitled to some acreage of the suit land which is equivalent to the amount paid to the interested party as part purchase price.

When the matter came for hearing, the plaintiff stated that he is a businessman. He is in court in respect of land reference No. 3209/1. In Arbaruch area, Moi Ben, Uasin Gishu County. He saw the sale on the Standard Newspaper. He approached the Auctioneer and he sent him to the interested party offices in Nairobi. The auction took place at Legacy Auctioneers at Wacha House Market. The bidding started at few minutes past 11.00 a.m. He cannot remember the number of people but they were several. He bid the property at Kshs.100,000,000. He was the highest bidder. He paid 25%, Kshs.25,000,000. He got memorandum of sale on the same date. He got the memorandum of sale and agreement. He was declared the highest bidder. He organized himself and cleared the balance. He was given the letter by the interested party to take possession. This was 9.1.2017. He gained possession of the property. He went and started fencing. There were no developments. There was resistance from people. He went to court to get the orders. The occupation was not peaceful. The order was dated 23.3.2017. the order restrained the defendant from interfering with the plaintiff's property. There was resistance on the ground. There were no auctioneers on the ground. He did not evict her. When he bought the property, the defendant was not on the suit property. He did not cause any destruction of property. No killing of animals. He prayed that he be given quiet and peaceful possession. He bought the property for cultivation and agriculture. He has been able to plough the land. He needs possession and title of the land. He produces the documents as exhibits.

On cross examination by Nyachiro, he states that he purchased the land pursuant to an eviction. He paid the entire consideration. The interested party gave a letter of vacant possession. The interested party has not laid any adverse claim against him. He did visit the parcel of land. He states that he has not engaged in any fraudulent activity with the interested party.

On cross examination by Mr. Omboto, he states that he buys and sells land in Eldoret. His source of income is based on land transactions. He is a man of means. He participated in the public auction at Legacy Auctioneers office. The property is in Moiben. Moiben is in Uasin Gishu. The auction was done in Nakuru. He was the highest bidder. He gave Kshs.100,000,000. He was to deposit 25%. He deposited Kshs.25,000,000. He did not have the receipts. His lawyer has the receipts. He gave the receipts to his lawyer. He does not have the receipts. He gave the receipts to the lawyer. He paid Kshs.25,000,000. He has paid the balance of Kshs.75,000,000 in the instalments. He paid Kshs.40,000,000 and Kshs.35,000,000. He paid in November, 2016. He paid Kshs.35,000,000 in December, 2016. He does have the letter claiming the balance. The interested party is a reputable organization. They confirmed that he paid. He has a letter from the interested party confirming payment to him. It authorizes him to take possession. It is dated 9.1.2017. He knows Spaceler Company Ltd. He assigned the property to Spaceler but it wasn't effective. It was his idea to assign the land to Spaceler. There was a deed of assignment to Spaceler. He was transferring his interest of the land. He did due diligence. He went to see the Auctioneer who sent him to the interested party. He did not do a search. The Auctioneers were acting for the interested party. He got information that the land should be sold. He does not know the tenure of the land. The tenure starts on 1.1.1911. He purchased the property on 9.9.2016. He was informed that the lease had expired. An expired lease has to be renewed. The lease had not been renewed. The interested party never disclosed to him that the lease had expired. He does not have title. He has never procured title. The defendant was not in possession. There are two houses and several animals. He is not aware of some facts but states that he bought the parcel of land. He did not see any dead animal on the land when he bought he same. He does not know the number of animals on the land. He has not been cutting trees. Nothing has been destroyed. No construction has been done on the parcel of land. He does not need assistance of the defendant to register title. He prays for peaceful possession of land. He does not have title. The payment receipts are with his lawyer. The cost of one acre of land at Moiben, is between Kshs.500,000 to

Kshs.1,000,000. He did not have a valuation report.

On re-examination he states that It was not his duty to examine the valuation report. The Memorandum of Sale confirms that he paid Kshs.25,000,000. He paid the balance to the interested party who gave him possession. It was his wish to transfer his interest to Spaceler but he did not succeed. On 9.12.2016, he wrote a letter to Spaceler and a deed of assignment but it was not registered. He has the locus standi to sue.

The defendant on her part relied on her statement undated but filed on 11/4/2017 and added on oath that she is an advocate of the High court of Kenya and a farmer. She states that LR NO 3209 is her home in Moiben location measuring 305 acres. She acquired it in 1995 and that the said land is matrimonial property. Her home is on 50 to 100 acres. There is a road round the farm measuring 5 ACRES. Grazing land is about 100 acres and that there are very many big trees on the land.

She purchased the land paid some money being 30% of the purchase price. She was given a loan of Kshs. 10,000,000 in 1996 and a further Kshs. 5,000,000 for farm implements totaling to kshs. 15,000,000. She was given grace period of 2 years. She kept on paying the money and some of her animals were auctioned to recover the money and upto date she has paid 3million. She claims to have given title to the land as security. The property is registered in her name. She is aware that the property was sold pursuant to the charges statutory power of sale. She was aware of the impending sale by public auction. She tried to stop the sale but to no avail. The defendant claims that she was not served with the notification of sale and was never notified where the auction would take place. She has been in occupation of the land and has never seen Mr. Kemboi on the land. According to the defendant the lease was for 99 years since 1911 and was to expire in 2010 but the land was charged to the interested party. The defendant did not know either Evans Kemboi or Speceller and states that it is not clear to know who bought the land and that whether the land was paid for.

On cross examination by Mr. Odoyo, she states that she was aware of the auction but was not served with the 45 days' statutory notice. She admits that she was in arrears and owing money to the interested party. On cross examination by Mr. Nyachiro, she states that there is a pending case before this court being Eldoret ELC No 151 of 2015. She reiterates her statement that the sale by auction did not occur and that the same was cooked up.

The interested party called one witness known as Rashid Ngaira an advocate of the High Court of Kenya and the manager of Legal services with the interested party. He adopted his statement as evidence in chief. He has been handling the case of the defendant. According to this witness, the defendant was advanced a loan by the interested party but she did not pay the same. The state corporation tried to recover the loan through the exercise of the statutory power of sale but the defendant filed several suits stopping the sale. He states that finally when there was no order stopping the sale of the property, the interested party instructed Legacy Auctioneers to sell the property. The corporation was paid the auction sum of kshs. 100, 000,000 by the plaintiff being the highest bidder. On cross examination by Mr. Odoyo he states that the auction took place and that the successful bidder was the plaintiff and he paid all the amount and was granted full possession. On cross examination by Mr. Omboto, he states that the property was held under a leasehold tenure and not freehold and that the lease period was 99 years from the year 2011 and was to expire in 2010. He states further that the term was converted to 999 years on 29th March 2017. It is stated that the plaintiff paid the interested party a sum of Kshs. 100,000,000 as the purchase price.

It is important to note that the plaintiff withdrew the suit before the filing of submissions and therefore what is pending in this court is the counter claim by the defendant, the plaintiff's defence to counter claim and the interested party statement of defence and reply to counter claim.

This court on its own motion requested the parties to avail the lease to assist in making an informed decision to which the parties responded by availing to court the deed of assignment. The lease document was not produced in court but the assignment of lease was availed to court for consideration.

Mr. Omboto learned counsel for the defendant submits that the defendant is the absolute proprietor of the parcel of land namely L.R NO 3209/1 measuring 305 acres and therefore has residual interest on the suitland and therefore is entitled to an order of injunction. Moreover, that the public auction conducted on 09.09.2016 was null and void because it was tainted with illegalities thus that the plaintiff never participated in the auction and that there were two highest bidders. The defendant claims general damages for the wanton destruction of her property and killing of animals. She claims a tune of Kshs. 5,000,000.

Mr. Odoyo learned counsel for the plaintiff submits that the Defendant's Counterclaim as drawn and filed is incompetent, fatally defective and null and void hence the Honourable Court cannot proceed to find out if the Defendant has established her case on a balance of probabilities.

On whether the Defendant has propriety rights on the suit property the plaintiff submits that section 24 (b) of the Land Registration Act No. 3 of 2012 provides, "that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. "

According to this section, the leasehold interest of a Proprietor shall remain for the term of the lease and upon expiry, the property will revert to the Government. Hence, a Party who desires to have the lease renewed has to make an application for the same. A Party who fails to apply for renewal of the lease cannot claim to have proprietary interest on the property

The plaintiff argues that in this case, it is clear that the lease to the subject property expired in the year 2010 as submitted by the Defendant at the time of cross examination. The Defendant produced the Certificate of Postal Search as Defence Exhibit No. 1 to support her claim. As such, it is clear that the Defendant lost proprietary interest on the suit property upon expiry of the lease. She did not produce any document to show that she applied for renewal of the lease immediately upon expiry of the lease.

On whether the Defendant has locus standi to maintain the Counter-claim the plaintiff argues that the Defendant lost proprietary interest on the suit property upon expiry of the lease hence the Court needs to consider whether the Defendant has locus standi in the matter. Locus standi is defined as *"the right or capacity to bring an action or to appear in a Court"*. So that for one to bring an action in Court, he or she has to demonstrate that she has the capacity or right to approach the Court. Such capacity or right would come about if one had an interest in the subject matter of a suit or dispute. In the present case, the Defendant needed to demonstrate that she has proprietary interest in the suit property and by her own evidence, it is clear that she has no interest on the suit property. As such, she cannot bring, initiate and/or maintain a claim against the Plaintiff.

The plaintiff submits that the Defendant has not demonstrated that she has any sufficiency of interest to file, initiate and/or maintain her claim against the Plaintiff hence her Counterclaim is incompetent for want of locus.

On whether the Defendant is entitled to the orders sought the plaintiff submits that the Defendant is not entitled to the orders sought as she has failed to establish that she has any proprietary interest on the suit property the lease having expired in the year 2010.

The interested party submits that the plaintiff was advanced a loan by the interested party but defaulted and there was foreclosure of the suitland and the interested party severally attempted to exercise its statutory power of sale. The defendant filed several suits in various courts to stop the sale culminating in civil suit E & L No. 151 of 2015 Mary Juster Chepleting V Agricultural Finance Corporation which was dismissed with costs. The suit land was finally sold by public auction and that there was no collusion between the interested party and the auctioneer the latter who was not made a party. The interested party submits that there is no evidence that the lease expired and that if it expired there is no evidence of renewal or extension of the reversionary interest. The interested party argues that the defendant is not entitled to an order of injunction because she has come to court with unclean hands as she had sought orders of injunction in Eldoret E&L NO 151 of 2015 Mary Juster Chepleting V Agricultural Finance Corporation which application was dismissed with costs. There is no proof of damage of crops and killing of animals.

I have considered the pleadings by the parties herein, the evidence on record and rival submissions and do find the following facts have been established namely that on the 5th of June 1996, the interested party offered the defendant a loan of kshs.10,100,000 for purposes of purchasing land no 3209/1(kshs.7,800,000) purchase of one ford tractor (Kshs.1,720,000) and farm implements (kshs.580,000). The machinery was to be jointly registered in the names of the defendant and the interested party. The security of the loan was a first charge over the property known as LR NO 3209/1 in favor of the corporation. A chattels mortgage was to be executed and registered by the corporation over all the loose assets of the borrower in favour of the corporation by way of notification. The defendant accepted the offer on the same date. On the 9th July 1996 the defendant and the interested party executed a mortgage deed. The Mortgage deed referred to the assignment dated 14th Day of June 1996 between Francis Ruto and the defendant registered in the Government land registry at Nairobi in volume file 8030 H27 folio 35/30. The property is described as all that parcel of land situate in the Uasin Gishu district of the Naivasha province of the East African Protectorate (now republic of Kenya) comprising of three hundred and five acres or thereabout whereof five acres or thereabouts is a road reserve being Land Reference no 3209/1.

On the 14th of Mach 1997 the interested party offered the defendant, and the defendant accepted another loan of Kshs. 5,893,650 and the suit property was offered as security and a first charge was registered on the land. A mortgage deed was executed on the 26th June 1997. This Mortgage was subject to the mortgage registered earlier as volume H27 Folio 35/30.

On the 29th of September 2000, the interested party wrote to the defendant in respect of the loan account No.115/351 demanding that in view of the infringement of the covenants contained in and / or implied in the loan agreement executed by the defendant in favour of the interested party by nonpayment of instalment the defendant was to make full repayment of the loan and that the total outstanding balance was kshs. 32,6833,023.55.

On the 17th October 2000, the defendant wrote to the interested party acknowledging receipt of the foreclosure notice dated 29th September 2000. The defendant asked for ninety days to make arrangements to transfer the mortgage facility to another institution.

On the 24th October 2001, the defendant wrote to the interested party accepting the arrangement to sell the property by private treaty. The exercise was to take a period of 90 days. The defendant was advised to settle the auctioneers' fees. Nothing came out of the private treaty arrangement and therefore the interested party issued another foreclosure notice on the 23rd July 2002.

The interested party was demanding Kshs. 47,803,717.80 being the principal sum and interest owed by the defendant. The defendant was given 90 days to repay the outstanding money.

On the 6th of September 2001, the interested party wrote to the Jomuki Auctioneers informing them that the total outstanding loan balance was Kshs. 39,964,115.20 as at 30th November, 2001 and therefore they were instructed to inform the defendant of the total outstanding amount. Jomuki Auctioneers gave a 45 Days redemption notice pursuant to rule 15(d) of the Auctioneers Rules 1997.

The defendant by letter dated 16th October 2003 requested for waiver of accumulated interest in her loan account. She also requested for the rescheduling of the account to enable her utilize the farm fully in a more productive manner.

The interested party responded on 3rd March 2004 by reducing the figure to 27,213,676.00 on a without prejudice basis. The defendant was given a period of 90 days.

The money was not paid as conceded and therefore on the 17th day of August 2016 the defendant issued a 45 days' redemption notice pursuant to Rule 15 (d) of the Auctioneers rules 1997.

A notification of sale was issued pursuant to Rule 15(b) of the Auctioneers Rules 1997 by Legacy Auctioneering Services and served on 17th August 2016. The property was described as L.R. NO 3209/1 –ARBABUCH AREA –MOIBEN, UASIN GISHU COUNTY. The land measures 305 acres and was for agricultural purposes. The tenure is described as a leasehold interest for a term of 9911 years with effect from 1st October 1935. The Auctioneer instructed to sell the property, Benjamin Kisoil Sila prepared a certificate under section 15(c) of the Auctioneers Rules, 1997 indicating that the defendant was properly served.

I have looked at the memorandum of sale and do find that there was a sale by public auction on 9th September 2016 of the suit land and that Evans Kemboi Koech emerged as the highest bidder and was declared the purchaser at a price of Kshs.100,000,000 and paid a deposit of Kshs. 25,000,000 and a further Shs.75,000,000 was paid. The interested party has admitted having received kshs.100,000,000 from the plaintiff and the evidence of payment through the receipts indicate that the plaintiff paid the entire amount. The defendant has not enjoined speceller as an interested party and there no is scintilla of evidence that speceller connived with the plaintiff.

To understand the nature of the lease and tenure, this court called for the lease document from the parties but was availed the assignment of lease. According to the assignment of lease availed to court by the interested party and referred to in the mortgage deed, the assignment was made on the 14th June 1996 between Francis Ruto of post office box 1344 Eldoret in the republic of Kenya who was the vendor and Mary Juster Chepleting who was the purchaser.

The property was initially registered by way of an ***indenture dated the 17th of April 1915*** referred to as the lease registered in the Nairobi Registry in volume h.7 Folio 36(1) such made between his last most gracious majesty King George the fifth of one part and John Jay White of the other part. The assignment was in respect of all that parcel of land situate in Uasin Gishu district of Naivasha province of the east African protectorate (now republic of Kenya). The land was demised to the said John Jay White for a period of 9911 years at a yearly rent of kshs. 451.20.

By indenture dated 17th May 1932 registered in the land registry at Nairobi in volume 158/1 file 8030 and made between Oscar Fayle and Abel Hendrick Erasmus all that parcel of land measuring 1551 acres was assigned to Abel Hendrick Erasmus for all the residue of term created by the lease subject to payment of the yearly rent of Kshs. 183.72.

By indenture dated 17th Day of October 1935, registered in the Government land registry in volume H7 Folio 158/4 file 8030 and made between the said Abel Hendrick Erasmus and John Schmoelzll, Esmillie Beresford and Elizabeth Karolina , all that piece or parcel of land reference number 3209/1 comprising 305 acres or thereabouts whereof five acres or thereabouts is a road reserve being part of the land comprised and demised by the lease and which said piece of land is part and of the premises comprised in and assigned by the recitals.

By assignment dated 14th April 1973, registered in the registry in volume 7 folio 159/16 file 8030 and made between Mohamed Ali Ismail and Ali Mohammed Ismail of one part and Francis Ruto of the other part the land described as LR No 3209/1 became vested in the vendor (Francis Ruto) for all the residue unexpired of the said term created by the lease.

On the 14th June 1996, the defendant entered into assignment with Francis Ruto (Vendor) pursuant to agreement and in consideration of Kshs. 5,000,000 paid on execution of the agreement by the purchaser to the vendor as the beneficial owner of the property and the vendor assigned to the purchaser all that parcel of land known as LR 3209/1 comprising 305 acres or thereabout five of which or thereabout is a road reserve which property was described in the first recited indenture of 17th October 1935 and was to hold the same for all the residue expressed in or implied the lease. The upshot of the above is that the term of the lease in respect of the suit property was 9911 years from the 17th Day April 1915.

The defendant produced the certificate of postal search as at 29th March 2017 indicating that the property measures 305 acres and that the tenure was 99years from the 1.1.1911 and that the current proprietor is the defendant but the lease has expired. However, the assignment of lease indicates that the lease was for 9911 years.

The assignment of lease was prepared and registered on 23 July 1996 and therefore has more probative value than the postal search which is supposed to be an extract of the register. The defendant's argument that at the time of the public auction the lease had expired has no basis as the assignment of lease shows that the lease period was for 9911 years and not 99 years.

This court finds that the defendant is the registered owner of the suit property namely L.R. NO. 3209/1 measuring 305 acres, which property is subject to two mortgage deeds the first dated the 9th of July 1996 and the second dated 26th of June 1997. The mortgage deed defines the particulars of the property as in column 1 as comprised of an assignment dated 14th Day of June 1996 between Francis Ruto and the mortgagor which deed indicates that the term of the assignment is the residue of the remainder of the term. Moreover, the property was mortgaged to the interested party as a first charge and therefore the interested party was entitled to exercise its statutory power of sale when the defendant defaulted in her obligations. The interested party followed the process of realization of security and sold the property for kshs. 100,000,000.

The defendant has failed to demonstrate that the public auction was carried out irregularly. The court finds that the defendant still owes the interested party the principal sum and interest more than 20 years since the mortgage deed was executed and therefore it will be unfair to the interested party for this court to issue an injunction against the interested party and the defendant.

The defendant's prayer for injunction cannot be granted as an injunction is an equitable remedy to be issued where the person who seeks it comes to court with clean hands. The defendant does not come to court with clean hands as she has failed to demonstrate that she paid the interested party the money owed.

The upshot of the above is that the suit having been withdrawn by the plaintiff with costs, the counter claim having not been proved on a

balance of probabilities the same is dismissed with costs to the plaintiff and interested party. Orders accordingly.

Dated and delivered at Eldoret this 11th day of January, 2019.

A. OMBWAYO

JUDGE