



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANGA

ELC NO 498 OF 2017

JANE WAIRIMU NGURE (suing as administratrix of the estate of

Peter Tharao Ngure (deceased).....PLAINTIFF

VS

THE NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

DAVID WAIGANJO NGURE.....2ND DEFENDANT

GRACE NJERI GITHUKA.....3RD DEFENDANT

JUDGMENT

1. The parties to this suit are related. The Plaintiff and the 2nd Defendant are brothers while the 3rd Defendant is the wife of the 2nd Defendant.
2. The Plaintiff avers that he was the registered owner of the suit land measuring 8.14 acres. He states that he guaranteed a loan to his brother, the 2nd Defendant secured from the 1st Defendant. The 2nd Defendant defaulted in repaying the loan. He claims that the 1st Defendant sold the suit land to the 3rd Defendant in a fake public auction. He alleges that the 1st Defendant did not issue the statutory 3 months' notice and in the alleged auction no bids were allowed from the public, him included. He pleaded fraud on the part of the Defendants under para 10 of the Plaintiff.
3. He avers that he discovered the fraud in the year 2010 whereupon he took action and reported the matter to the police who advised him to file a civil suit.
4. On the 27/8/13 the Plaintiff filed this suit against the Defendants seeking the following orders;
 - a. A declaration that the sale of parcel Land No LOC20/GITHURI/937 and the subsequent transfer of it to the 3rd Defendant is illegal and fraudulent null and void.
 - b. An order for the cancellation of title in the name of the 3rd Defendant in land parcel No LOC 20/GITHURI/937 and the restoration of the Plaintiff's name as the owner of the said land.
 - c. The costs of the suit
 - d. Interest
 - e. Any further relief the Court may find just.

5. The 1st Defendant denied the Plaintiffs' claims in a statement of defence filed on the 10/10/13. It averred that the Plaintiff was the owner of the suit land, which he charged to the 1st Defendant to secure a loan. It stated that the chargor was the Plaintiff and not the 2nd Defendant as alleged by the Plaintiff. The Plaintiff being the owner of the land and the sole chargor was therefore under a duty to repay the loan advanced to him by the 1st Defendant together with all the accruing charges and interest. The Plaintiff defaulted in the repayment of the loan. The 1st Defendant averred that the auction of the land was carried out legally which included the issuance of the statutory notice, redemption

notice and due notification to the Plaintiff. The 1st Defendant denied the particulars of fraud as stated in para 10 of the plaint and sought to put the Plaintiff to strict proof thereof.

6. The 1st Defendant stated that it did not know the 2nd and 3rd Defendants at the time of the sale by auction. The 3rd Defendant became known to the Defendant only as a successful bidder in the auction of the land. Further it averred that the plaint discloses no cause of action against it and sought to strike it out.

7. The 2nd and 3rd Defendants averred in their statement of defence that the sale of the suit land in exercise of the 1st Defendant's statutory power of sale took place following the default of the loan by the 2nd Defendant. The 3rd Defendant turned out to be the highest bidder in the auction. She acquired the property in good faith and at the correct forced sale value. They categorically denied the particulars of fraud in para 10 of the plaint. Further, the 2nd and 3rd Defendants averred that the suit is time barred pursuant to section 7 of the Limitations of Actions Act as the alleged cause of action arose 18 years ago.

8. The original Plaintiff Peter Tharao Ngure passed on the 27/7/15 and was substituted by his wife Jane Wairimu Ngure on the 14/3/17. Consequently, the plaint was amended on the 21/3/17 following the said substitution.

9. At the hearing, the Plaintiff adopted the contents of her written statement dated the 14/8/18 and stated that at the request of the 2nd Defendant, her husband Peter Ngure guaranteed a loan to his brother in the sum of Kshs 400,000/- from the 1st Defendant using the suit land as security. That the said loan was not repaid by the 2nd Defendant and the bank wrote to her husband on the 18/10/89 demanding payment. She confirmed to the Court that the said loan was never repaid. Further that on the 29/11/89 the bank sent a second demand letter demanding payment. In the said letter the bank stated that if payment was not received within 10 days it would re-advertise the property for sale. On receipt of the said letter, her husband wrote to the 2nd Defendant asking him to pay the loan. The 2nd Defendant did not respond. It was her testimony that after this letter there was no further communication from the bank and she and her husband assumed that the loan was repaid by the 2nd Defendant since the notices were also copied to the 2nd Defendant.

10. That sometime in September 2009, her husband conducted a search at the lands office only to find that the property had been registered in the name of the 3rd Defendant, who is the wife of the 2nd Defendant.

11. She informed the Court that she and her husband were aggrieved at the turn of events because at no point did the 1st Defendant issue any requisite notices prior to the sale of the property and neither the property was advertised in the newspaper prior to the auction. That it was not clear to them how the property was transferred to the 3rd Defendant without the consent of the Land Control Board yet it is agricultural land. She stated that the Defendants colluded to transfer the property through fraud to the 3rd Defendant. She wondered how his brother in law would take a loan, default and the property, which was the security for the loan, ends up in the name and ownership of his wife, the 3rd Defendant as an alleged highest bidder in a ghost auction.

12. She produced in evidence the letters from the 1st Defendant dated the 29/9/89, 18/10/89 and 29/11/89 and a copy of the title in the name of Peter Ngure in respect to the suit land. Inter-alia, she produced an official search dated the 22/9/09 and copy of the green card showing the changes in the title from 1976 -1995 when the 3rd Defendant became registered as owner of the suit land.

13. On cross examination she informed the Court that though she did not know when the property was sold by public auction, according to the search dated the 22/9/09, the same was sold in 1995. As to the reason why the case was filed 18 years later, she explained that her husband was out of the country for about 5 years and only came back in 2007. She admitted that this evidence was not pleaded in her pleadings. That it was upon carrying out a search in 2009, that Mr Ngure discovered that the land had been transferred to the 3rd Defendant. That he did not know that the land had been sold from 1995-2013. She informed the Court that there was no advertisement in respect to the sale of the land by public auction.

14. Further she testified that the land was undervalued and sold at a pittance of Kshs 315,000/- then. Challenged to state the value of the land, she admitted that she did not produce any valuation report to support her claim. Needless she informed the Court that she did not understand the meaning of market values as well as forced sale value.

15. Asked whether the signatures on the letter dated the 29/9/89 belonged to her husband, she became hesitant to answer the question only stating that she had no comment. She however confirmed that from the wording of the said letter it follows that the bank had advertised the property for sale in exercise of its statutory power of sale before the 29/8/89.

16. She stated that at the time of the sale of the property, the 2nd and 3rd Defendants lived together as husband and wife.

17. The 1st Defendant through its Counsel on record Mr Kiprono informed the Court that it would not be calling any evidence to controvert the Plaintiff's claims.

18. DW1 – David Waiganjo Ngure testified and informed the Court that Peter Ngure was his brother. That in 1982 his brother approached him to do a joint venture of horticultural farming on the suit land. At the time he informed the Court, he was an employee of Central Bank of Kenya and was not interested or able to participate in the venture. However, after persuading him he went ahead and borrowed the loan from the 1st Defendant in the sum of Kshs 400,000/- as his brother, being unemployed could not qualify for a loan from the bank. With his pay slip and a letter of employment from Central Bank of Kenya coupled with his brother's land as a guarantor he borrowed the loan. He informed the Court that his brother used the monies but did not repay the loan leading to default. The bank advertised the property for sale by public auction severally in 1988, 1989, 1990, 1991 and 1995 in the national newspapers and in Murang'a town but being a rural property, it did not attract successful bids. These adverts and loan defaults embarrassed him as a senior manager of the bank, he informed the Court. That he

directed one of her colleagues, the 3rd Defendant, who showed interest in the property through the said adverts to the land and upon being interested she successfully bid for it in a public auction.

19. In cross-examination by the 1st Defendant's Counsel, he stated that he did not repay the loan at all. He stated that the bank did send demand letters to him and his brother to repay the loan but not a penny was paid.

20. DW2- stated that she purchased the property in a public auction in 1995 by the 1st Defendant in exercise of its statutory power of sale. She informed the Court that the 2nd Defendant is her husband. The property was advertised for sale in the newspaper and the auction was held at Murang'a bus stop where she was present. She informed the Court that there were 4 bids for the property for which she emerged the highest and successful bidder in the said auction upon which she proceeded to pay the purchase price in the sum of KShs 315,000/- to the bank. She informed the Court that though the property was transferred to her by the bank upon her successful bid she was not aware whether the Land Control Board consent was obtained.

21. Further, she informed the Court that the Plaintiff is not in possession of the suit land although she has trespassed severally and each time she has been repulsed successfully with the help of the local chief. That at one time she placed a caution on the land but the same was removed by the Land Registrar at the instigation of the 3rd Defendant.

22. At the close of the hearing on the 8/11/18, parties elected to file written submissions which I have read and considered.

23. The Plaintiff submitted that the issue of time bar raised by the 2nd and 3rd Defendants was determined by this honourable Court on the 7/6/15 and therefore the same is res-judicata. Placing it again before this Court offends the provisions of section 7 of the Civil Procedure Act. The ruling of the honourable Court was not appealed and the Defendants are therefore estopped from pleading that the suit is time barred as it amounts to res-judicata.

24. As to whether the 2nd Defendant was indebted to the bank and how much, the Plaintiff submitted that the 2nd Defendant deviated from his pleadings in his evidence when he stated that the loan was advanced to Peter Ngure and not him and therefore was not required to repay the monies to the 1st Defendant. Relying on the case of **Dakianga Distributors (K) Ltd Vs Kenya Seed Company Limited [2005] eKLR**; where the Court held that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or which is at variance with the averments of the pleadings goes to no issue and must be disregarded. The Plaintiff submitted that the evidence from the 2nd Defendant that he did not receive any monies from the bank should be disregarded.

25. The Court received submissions that once a borrower refuses service with the requisite notices by the bank, the burden of proof shifts to the bank to prove so. Quoting the case of **Nyangilo Ochieng & Another Vs Fanuel B Ochieng & 2 Others (1996) EKL**R where the Court of appeal held that 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 on any way 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.

26. The Plaintiff pointed out to the Court that in this case Peter Ngure the chargor was not served with a notice to pay the amount owing under section 74(1) nor the statutory notice required under section 74(2) of the Registered Land Act. There was no evidence produced by the bank to support any of this and to that extent the failure is fatal as it goes to the root of the case.

27. Was the property advertised? Was there a public auction? The Plaintiff submitted and quoting extensively from Rule 11 (b) and 15(d) of the Auctioneers Rules, that the bank failed to; effect service of the redemption notice usually served by the auctioneer, provide valuation of the property; provide documentation of the actual sale by public auction such as certificate of sale, memorandum of sale in favour of the 3rd Defendant; and /or provide evidence of payment of the purchase price. More curiously, the bank averred that the sale took place in 1994 when the 2nd and 3rd Defendants averred that it took place in 1995. This contradiction she submitted puts the sale by auction in doubt. The Plaintiff submitted that the Defendants colluded to have the property fraudulently transferred to the 3rd Defendant.

28. As to whether the 2nd and 3rd Defendants conspired to perpetuate a fraud, the Plaintiff submitted that the allegations of fraud have not been controverted or challenged by the bank and the same should be taken as the truth. The 2nd Defendant took a loan guaranteed by his brothers' property and defaults to service the same and conveniently shows his wife the property to buy in a non-existent auction where it is alleged, she emerges the successful bidder. The 1st Defendant did not comply with the statutory process and does not adduce evidence on trial. The 3rd Defendant failed to adduce evidence on how she acquired the property which failure goes to support the fraudulent dealings of the Defendants. All these actions of the Defendants, she submits are fraudulent acts meant to deprive the Plaintiff her right to property.

29. Finally, the Plaintiff urged the Court to find that indeed fraud was present and the title in the name of the 3rd Defendant be cancelled and the register in the land's office be rectified under section 143 of the Registered Land Act and revert the title to the Plaintiff.

30. The 1st Defendant submitted on the background of the case as thus; the 2nd Defendant took a loan from the bank and the property registered under the name of the Plaintiff was used as collateral to secure the said loan; the 2nd Defendant defaulted in paying the loan; the bank exercised its statutory power of sale and sold the property to recover the loan. It submitted that the bank issued the statutory notice before the intended sale. The bank submitted that the loan predates back to 1982, 40 years ago and therefore the bank is unable to obtain the documents from its system because the said documents then were in manual format unlike the digitised form that they are today.

31. The 1st Defendant while relying on the Plaintiffs bundle of documents submitted that the statutory power of sale was exercised legally as seen in the letters dated the 29/9/89, 18/10/89 and 29/11/89. In the latter letter the bank wrote to the Plaintiff giving him an ultimatum to pay the loan after the expiry of the period of 10 days in default the bank would re-advertise the property for sale by public auction to recover the

entire outstanding amount plus interest. That this demand was not heeded and the bank proceeded rightly to exercise its statutory power of sale. Further, that the Plaintiff has not denied that the address used in the notices was the address given in executing the charge documents. The 1st Defendant submitted that the Plaintiff has produced documents that should be implied to include the notice of redemption. It queried how the Plaintiff got the notices aforementioned even after denying they received them. It urged the Court to infer from the conduct of the Plaintiffs that the notification of sale was issued to them.

32. Relying on the cases of **Trust Bank vs Eros Chemists Ltd (2002) 2EA 50 (CAK)** and **Albert Mario Cordeiro & Anor Vs Vishram Shamji (2015) EKL R**, the 1st Defendant submitted that Courts have been consistent in upholding statutory notices regardless of the absence of prescribed forms so long as the provisions of the Act have been met. That the statutory notice contained in the letters was valid as to the nature and extent of the default, the amount of money that had to be paid to remedy the default and the time period then registered in his name to guarantee a loan of Kshs 400,000/- borrowed by his brother the 2nd Defendant. That the loan was not repaid and the bank sold the charged property in exercise of its statutory power of sale.

33. The 2nd and 3rd Defendants submitted that the suit is time barred under section 7 of the Limitations of Actions Act as the suit has been filed 18 years after the cause of action that is to say the sale of the property in 1995. They urged the Court to so dismiss the case on this ground.

34. They further submitted that a proper statutory notice was issued by the bank and made reference to the two letters aforesaid dated the 29/11/89 and 18/10/89 as constituting due notice.

35. In respect to the Land Control Board consent, they submitted that no such consent was required in exercise of statutory power of sale under both the Registered Land Act and Land Control Act.

36. Was the land auctioned at a throw away price? In response to the Plaintiffs' claims that the land was sold at an undervaluation, the Defendants submitted that this is a mere allegation in the absence of a valuation report by the Plaintiff to challenge the valuation of the property. In any event if the Plaintiff believes the land was sold below its forced sale value the chargor would have sued the bank for damages upon discovering it.

37. In respect to the relationship between the 2nd and 3rd Defendants, they submitted that there is no law under the Registered Land Act that forbids a spouse of a borrower from bidding for and buying land at an auction sale. That such an act cannot be said to constitute fraud. In any event, section 77 of the Registered Land Act mandates the chargee to recover its loan through an auction sale at the best price and even allows the chargor to attend and bid at the sale.

38. In respect to the alleged fraud the 2nd and 3rd Defendants maintain that the particulars of fraud have not been proved by the Plaintiff to the required standard as set out in the case of **R G Patel Vs Lalji Makanji (1957) EA 314** where the Court stated that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

39. It is common ground that the suit land was registered in the name of her husband the later Peter Ngure, deceased. It is also commonly admitted by all the parties that the suit land was charged to the 1st Defendant to secure Kshs 400,000/-. The point of departure is who was the borrower of the loan. Was it the Plaintiff's husband or the 2nd Defendant? According to the Plaintiff the loan was borrowed by the 2nd Defendant and secured or guaranteed by the Plaintiff using the suit land. According to the evidence and the pleadings of the 2nd and 3rd Defendant under para 2 the 2nd Defendant defaulted in servicing the loan prompting the 1st Defendant to sell the property by public auction in exercise of its statutory power of sale. The interpretation of this pleading is that the borrower was the 2nd Defendant. However, in his evidence in chief the 2nd Defendant stated that he borrowed the monies for the Plaintiff in 1982 for purposes of starting a horticultural venture on the suit land. That he borrowed the money on behalf of the Plaintiff as the Plaintiff then though owned the land was unemployed and therefore used his (2nd Defendant) payslip and an introduction letter from the Central Bank of Kenya where he worked to secure the funds for the Plaintiff. He was categorical that the Plaintiff used the funds and he defaulted to repay leading the bank to sell the security. He was tacit that not a penny of the loan borrowed was repaid at all. The Court takes this to be a deviation of the 2nd Defendant's pleadings to the extent that it being trite law that parties are bound by their pleadings, the Court will disregard this evidence in toto. For avoidance of doubt the Court will hold the 2nd Defendant on his pleadings.

40. It is to be noted that according to the bank, para 5 of its defence state that the borrower was the Plaintiff and that the Plaintiff's assertion that the 2nd Defendant was responsible for the repayment of the loan is baseless as it is not founded on contract nor any arrangement. It goes on to state under para 6 that the Plaintiff as the sole chargor and owner of the suit land was under a duty to ensure that the loan advanced to him was repaid together with all the accruing charges and interest. It is to be noted that at the trial the 1st Defendant did not present any witness or evidence to afford the Court the chance to evaluate its part of the evidence in relation to the questions in controversy and therefore the Plaintiff's case as pleaded is uncontroverted and unchallenged by the 1st Defendant. I have seen on record the demand letters dated the 29/11/89 and 18/10/89 addressed to Peter Ngure demanding the repayment of the loan arrears in the sum of Kshs 60,000/-. The letter dated the 18/10/89 was addressed to Peter Ngure and it refers to the letter dated the 29/9/89 advising him that his proposal was declined on the basis that the debt had been outstanding in the bank's books for too long and were keen to have it cleared. At this time the loan arrears stood at Kshs 48,000/- and the bank warned that unless the arrears were cleared and the monthly repayments remitted the bank would realize the security.

41. The Court notes that there are no documents presented before the Court to ascertain with exactitude who the borrower was. None of the documents that constitute the contracting covenants between the parties such as the letter of offer, acceptance, the loan agreement and charge/mortgage documents have not been placed before the Court. Neither the protagonists in the case nor the bank have adduced the evidence in respect to the loan documentation. The bank has offered an explanation in its submissions that the documents were lost and unavailable as the loan was given in 1982, long before the digital age. This is a submission and not evidence.

42. I have perused the green card of the suit property and I note that the charge to the 1st Defendant was registered on the 6/12/82 to secure KShs 400,000/- . It does not indicate in whose favour the charge was registered against. Be that as it may and based on the Pleadings of the parties it is safe to say that a loan was advanced secured by the title of the suit land registered in the name of the Plaintiff.

43. Having considered the pleadings, evidence adduced on trial, the written submissions of the parties, the issues that fall for determination are;

- a. Whether the suit is time barred.
- b. Whether the 1st Defendant gave a loan; and if so to who on the security of the suit land; whether there was a valid charge in favour of the 1st Defendant.
- c. Whether the 1st Defendant issued the requisite notices prior to the sale of the suit land.
- d. Whether the suit land was advertised and whether there was a public auction.
- e. Whether the 1st, 2nd and 3rd Defendant's colluded to fraudulently sell and cause the 3rd Defendant to acquire the suit land
- f. What orders should the Court give?
- g. Who meets the cost of the suit

44. The 2nd and 3rd Defendants have invited the Court to look at the issue of whether or not the suit is time barred. The matter was heard and determined by my brother Justice Ombwayo on the 7/6/15. It is not useful to deal with it further. It is resjudicata.

45. I have reviewed all the authorities presented by the parties in this case and note that most refer to instances where the chargor was served with statutory notices and the presence of a charge was not in question.

46. In respect to issue No b above, based on the evidence on record the Plaintiff and the Defendants seem to concur that the Applicant for the loan was the 2nd Defendant and the security provided for the loan was the suit land. The 1st Defendant did not tender any evidence to show that it gave any loan to the Plaintiff or to the 2nd Defendant. But in its pleadings, it said that it gave the loan to the Plaintiff. In its submissions it states that it gave the loan to the 2nd Defendant. It did not tender any documents or evidence to show that it gave any loan to the Plaintiff and/or to the 2nd Defendant. Such evidence for example would have contained the following documents; an application for a loan, letter of offer, loan agreement, land control board consent to charge, charge itself which would contain the covenants applicable in respect to the obligations of the borrow, the lender and the guarantor. The question as to who the lender, borrower and the guarantor and their contractual obligations would have been identifiable from those documents. The event of default would have been spelt out as to the consequences whether the security of the guarantor would have been auctioned before recovering the monies from the borrower or, whoever that may have been.

47. The Court finds that the 1st Defendant has not proved a loan given to the Plaintiff as alleged or at all. In the absence of the above documents it is not safe to conclude that the bank indeed advanced any loan to the Plaintiff or to the 2nd Defendant. The Court finds that there was no valid charge to afford the 1st Defendant to exercise any statutory power of sale in the circumstances.

48. The provisions of Section 74 of the Registration Land Act (which is replica of section 90 of the current Section 90 of the Land Registration Act) was the applicable regime in 1994/95 when the sale was allegedly procured. It provided as follows;

“74. (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;”

49. It is trite that the chargee has power to exercise statutory power of sale within the said provisions. However, such sale must be done within the legal limits set out and the chargee must comply with mandatory terms of statute failure which the sale becomes void.

50. In the case of **Obel Omuom –Vs- Kenya Commercial Bank Ltd, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996)eKLR** the Court of Appeal held that in instances where a chargor alleges that he did not receive the statutory notice, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served. If there is material to show that the notice was received or acknowledged, say, through an acknowledgement letter, that will clearly demonstrate that the notice was duly served and received. If the notice was served by way of registered post, the chargee ought to place before the Court sufficient material to demonstrate prima facie, that the document was duly dispatched to the proper address of the chargor, and that in the ordinary course of events, the notice must have

reached the chargor.

51. In **Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien’g Civil Appeal No. 114 of 1991**, the Court of Appeal held that:

“Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance, they must serve on the chargee three months’ written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family.....”

52. The Registered Land Act CAP 300 of the Laws of Kenya did not exclude the statutory notice. It also defined the period as 3 months notice. In the case of **Trust Bank Ltd v Eros Chemists Ltd [2000] 2 EA 550 (CAK)** where Appeal judges stated as follows:

“In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under section 69(A) (1) of the Transfer of Property Act.”

The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That clearly must render the notice invalid. In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid. That being so, it seems to us that in failing to have the notice to say so, the Bank failed to give a valid notice, with the result the right of sale did not accrue under such a notice.

Without any hesitation, the notice in the Russell case threatening a sale of the charged property on a 14 days' notice was an invalid notice for accrual of a right of sale. It is, however, of interest to add that Mulla on The Transfer of Property Act (8th Edn.) at page 602 states as follows:-

"No form of notice is prescribed. It is sufficient that the notice gives the mortgagor the prescribed period of warning."

53. The burden of proof that the sale was within the legal framework is upon the chargee. In the case of **Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR** where the Court of Appeal stated as follows :-

“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”.

54. The import of the above case law cited is that failure to issue a statutory notice is tantamount to clogging the chargors equity of redemption. The chargor’s rights must always be protected despite default. He must be afforded reasonable opportunity to settle the debt and redeem his land. He is at liberty to attend the auction and can even bid as other purchasers. Equity of redemption can only be extinguished at the fall of the hammer.

55. In this case the Plaintiff has averred that no statutory notice was issued as provided by the law. The 1st Defendant has attempted to explain off by stating that the correspondences on record dated the 18/10/1989 and 29/11/1989 served as the statutory notices. With due respect these letters did not refer to the mandatory 90 days statutory period. They seem to be mere demand notices.

56. In this case the Court agrees with the decision in the case of **Martha Khayanga Simiyu vs. Housing Finance Co. of Kenya & 2 Others Nairobi HCCC No. 937 of 2001 [2001] 2 EA 540 Ringera, J** (as he then was) when he stated that;

“A statutory notice which does not give the Plaintiff a period of three months from the date of service to redeem the charged property as required by Section 74(2) of the Registered Land Act is defective...The chargee has no lawful power to sell the charged property for default in payment of charge debt unless and until the chargor has been served with a notice in writing demanding such payment and the chargor has failed to comply within three months of the date of service of such notice...The irregularities in the exercise of the power of sale, which are remediable in damages, do not in the premises comprehend failure to serve adequate statutory notice...Service of both an adequate statutory notice and notification of sale are necessary conditions precedent for the valid exercise of the statutory power of sale under the Registered Land Act and without compliance with those statutory commands, there can be no valid exercise of the power of sale and therefore it cannot be said that the chargor’s equity of redemption is extinguished in any sale conducted in breach thereof. Neither can it properly contended that the chargor’s remedies if any such sale has taken place is in damages as provided in Section 77(3) of the Act. Without compliance with those conditions precedent, the purported sale would be void and liable to be nullified at the instance of the chargor...Once a property has been charged to secure financial accommodation it ipso facto becomes a commodity for sale and there is no commodity for sale whose loss cannot be compensated in damages but the law is not that an interlocutory injunction can never issue where damages would be an adequate remedy and the Respondent is in a position to pay them. That is the normal course but not the invariable course. The Court has to

take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged otherwise it would confer a carte blanche on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons. The rich do not fear to pay damages and they must be compelled to submit to the authority of the law by being put to other perils”.

57. In the instant case it is clear that no statutory notices were issued by the 1st Defendant and any sale purportedly conducted is null and void.

58. As to the issue whether the suit land was advertised and whether there was a public auction, the Plaintiff has stated that the land was not advertised before the auction and indeed has cast doubt as to whether indeed the auction did take place. The 3rd Defendant has stated that the auction was advertised through the newspapers and that is where she saw the advert. The 2nd Defendant stated in evidence that on inquiries by the 3rd Defendant who had intimated interest to purchase the land, he gave directions on the location of the land so that she would go and inspect for herself. The 3rd Defendant gave evidence and stated that there were 4 bidders at the auction that took place at a bus stop at Murang'a Town, whereupon she emerged the highest bidder.

59. The Defendants had an obligation to show that the suit land had been advertised for sale under a public auction. More so because the Plaintiff had denied that the sale took place. The 1st Defendant was a seller, the 2nd Defendant had an interest going by his evidence that he prompted the 3rd Defendant who is his spouse to attend an auction of the suit land. The 3rd Defendant going by her evidence had an interest as a participant at the auction. It bears upon the Defendants to give by way of evidence details of an advertisement and conduct of such auction. Section 21 of the Auctioneers Act No 5 of 1996 states that the date, time and place of every sale by auction shall be advertised in the prescribed manner and such sale shall take place on the date, at the time and at the place so advertised. The prescribed manner includes a newspaper advertisement. That notwithstanding amongst documents produced by the Plaintiff is a certificate of sale purportedly issued by an auctioneer who allegedly conducted the sale by way of public auction of the suit land. This certificate even if it were acceptable, which is not, is not evidence of advertisement of the sale of the suit land. It only gives an account if at all the sale was made. None of these were produced as evidence by Defendants.

60. The Court finds that there is no evidence that a public auction or advertisement was conducted of the suit land.

61. Whether the 1st 2nd and 3rd Defendant's colluded to fraudulently sell and cause the 3rd Defendant to acquire the suit land, the **Black's Law Dictionary, 10th Edition** defines collusion at page 321 as the an agreement to defraud another or to do or obtain something forbidden by law. The 2nd and 3rd Defendant do not explain how the land of the Plaintiff got charged and yet there is admission that the loan was given to the 2nd Defendant. They have also not explained how the 3rd Defendant became the highest bidder as stated in her evidence in an alleged auction that no advertisement was conducted. The Court has already placed significant doubt on whether or not there was an advertisement of the property and whether indeed there was an auction that took place to afford the 3rd Defendant the opportunity to participate in the same.

62. Fraud is defined as a knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. In John Willard, A treatise on equity jurisprudence 147 (**Platt Potter ed, 1879**), fraud has been defined to be any kind of artifice by which another is deceived. Hence all surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is to be considered as fraud.

63. In the case of **In R. G. Patel v. Lalji Makanji** (supra), the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

64. The Plaintiff has set out the particulars of fraud under para 10 of the plaint. The Court has already held that the 1st Defendant did not prove the existence of a charge and had no basis in law to purport to be exercising a statutory right over the suit land. There was no statutory notice issued and the sale allegedly conducted by way of a public auction is null and void.

65. According to his evidence of the 2nd Defendant he was a senior manager in Central Bank of Kenya while the 3rd Defendant was his colleague and a spouse. He admitted that he is the one who interested and directed the 3rd Defendant to the suit land upon which the 3rd Defendant alleges to have been the highest bidder in an auction that has been proved to have been non-existent. The 3rd Defendant did not have the requisite memorandum of sale and evidence of payment pursuant to the alleged auction and it cannot be known how she ended up bringing the successful bidder. These set of facts coupled by the absence of proof by all the Defendants raise the possibility of a high chance of collusion between the Defendants in concert to defraud the Plaintiff.

66. This could have been rebutted if the Defendants availed valid documents to show the Court that the sale existed and that it was based on a legal public auction under Section 17 and 18 of the Auctioneer's Act.

67. The conduct of the 2nd Defendant, he having been a manager in the banking industry for over 26 years has not been explained why he would take a loan using his brother's land as security and elect not to pay even a penny. The plot thickens when the said security lands in the hands of his wife, the 3rd Defendant in yet another unexplained circumstances. Would be a coincidence that finally when the alleged default fell, it was in his favour?

68. It is the Courts finding that the Plaintiff has established fraud and collusion on a balance of probability and based on the findings in the preceding paras.

69. Having held that there was no valid sale, valid statutory notices, valid auction and that the Plaintiff has proved fraud and collusion on the part of the Defendants, the justice of the case necessitates proper orders. Section 143 of the Registered Land Act states as follows;

“(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 or substantially contributed to it by his act, neglect or default”.

70. The Court in the preceding paras has held that the transaction was shrouded in fraud and illegalities. The 3rd Defendant did not produce any evidence of the public auction, the advertisement and even the payments she tendered as purchase price. She did not therefore prove how as a proprietor she acquired the suit land for valuable consideration. She has not exonerated herself from the fraud and collusion discussed earlier.

71. It would be noted that damages is not available in the instant case because the Court found that no statutory notice was issued. The justice of this case is to cancel the title and revert it to the original owner.

72. Final orders;

a. It is hereby declared that the sale of parcel Land No LOC20/GITHURI/937 and the subsequent transfer of it to the 3rd Defendant is illegal, fraudulent, null and void.

b. It is hereby ordered that the title held by the 3rd Defendant be and is hereby cancelled and the register be rectified to revert the parcel No LOC 20/GITHURI/937 in the name of PETER THARAO NGURE.

c. The costs of the suit shall be met by the Defendants in favour of the Plaintiff.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF FEBRUARY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Otieno HB for Kenneth Wilson for the Plaintiff

1st Defendant – Absent

Kabaru for the 2nd and 3rd Defendants

Irene and Njeri, Court Assistants