



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 296 OF 2013

LYDIA NYAMBURA MBUGUA.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT

JOHN KIGUTHI KIMANI KIBE.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiff seeking to nullify a sale by chargee; bank as chargee alleging that it sold the property through a public auction to one N, who in turn sold it to K, the 2nd defendant and the bank then transferred the property directly to K; evidence demonstrating beyond doubt that there was never a public auction held as alleged by the bank; K having two sale agreements one with N and the other with the bank over the same property; K could not be an innocent purchaser for value; K passing on before the conclusion of the case; property transferred by the administrator of K, to Mrs. K as beneficiary; Mrs. K filing a counterclaim for vacant possession of the property; transfer to Mrs. K could not sanitize the illegal process that ensued there before; title of Mrs. K nullified and her counterclaim dismissed; property to revert back to the position that it was before the purported sale by chargee; bank also barred from loading interest on the loan account for the duration of the case; costs to the plaintiff)

Part A : Introduction and Pleadings

1. This suit was commenced through a plaint which was filed on 7 May 2003 in the High Court of Nakuru and registered as Nakuru HCCC No. 68 of 2003. Following the creation of the Environment and Land Court pursuant to the provisions of Article 162 (2) (b) of the Constitution of 2010, the case was transferred to the Environment and Land Court and registered as Nakuru ELC No. 296 of 2013.

2. The plaintiff was the registered proprietor of the land parcel Njoro/Ngata Block 1/478 (hereinafter referred to as "the suit land"). Her husband, one Isaac Mbugua Ngethe, sought and was granted financial facilities by Diamond Trust Bank, the 1st defendant (hereinafter also simply referred to as "the bank" or "the chargee") which monies were secured through a charge registered against the suit property. There was default, and in March 2002, the bank sold the suit property and transferred the title to John Kiguthi Kimani Kibe (Mr. Kibe) who was sued as the 2nd defendant. Prior to this sale, the bank, through a plaint filed on 21 June 2001, had sued the plaintiff and her husband in the case *Nakuru HCCC No. 213 of 2001, Diamond Trust of Kenya Limited vs Isaac Mbugua Ngethe & Lydia Nyambura Mbugua*, for recovery of the money then owing which was quoted at Kshs. 11,150,435.10/= and interest that may accrue. It is the plaintiff's contention that having chosen to file this suit, the bank could not in law have proceeded to realize the security hence the purported sale of the suit property is illegal, wrongful and null, and thus the bank could not pass a good title to Mr. Kibe. The plaintiff has also contended that the bank and Mr. Kibe colluded to defraud her of the suit property at a very low price not commensurate with its then market value, and that the sale was secretly carried out and was not in fact conducted at a public auction. The plaintiff has further claimed that she was never served with a statutory notice and the statutory right of sale had not crystalized. She has averred that she was thus denied the right to redeem the property and that she is now facing imminent eviction. In the plaint she has asked for the following prayers :-

(a) A declaration that the purported sale of Njoro/Ngata Block 1/478 by the 1st defendant to the 2nd defendant is and was for all purposes and intent inequitable, illegal, irregular, wrongful and null and void, and as a result the court cancels the entire sale of 28 March 2002.

(b) A permanent injunction restraining the 2nd defendant by himself his agents and servants from claiming any ownership on Njoro/Ngata Block 1/478 and from evicting the plaintiff from the said parcel of land.

(c) *Costs of this suit.*

3. In its statement of defence, the bank pleaded that at the time the suit Nakuru HCCC No. 213 of 2001 was filed, numerous attempts had been made and were continuing to be made to dispose off the suit property by way of public auction, and they did not see anything wrong with the filing of the said case. The bank denied colluding with the 2nd defendant to defraud the plaintiff as alleged and denied that the sale price was not commensurate with the market price. The bank also denied that the sale was secretive as contended. It denied that it had not served the plaintiff with the statutory notice. It was also pleaded that the issues raised in this suit ought to have been raised in the suit Nakuru HCCC No. 213 of 2001.

4. The original 2nd defendant (Mr. Kibe) on his part pleaded in his defence that he innocently purchased the suit property from one Cosmas Kipkirui Ngetich and that the suit property was sold to the said Mr. Ngetich by the bank in a proper and regular exercise of its statutory power of sale. He pleaded that the pendency of the suit Nakuru HCCC No. 213 of 2001 was not a bar to the sale of the suit land. He also contended that the plaintiff ought to have filed a counterclaim in the said suit rather than create another suit, or ought to have obtained a stay of sale in that case, if she thought she had any right in respect of the suit land. He pleaded that the plaintiff had sought to purchase the property at Kshs. 2,500,000/= or be a tenant paying Kshs. 20,000/= per month and despite him accepting this offer, the plaintiff has refused to do either. He also filed a counterclaim seeking vacant possession with costs.

5. Mr. Kibe died on 14 November 2004 and was substituted by his wife and legal representative Phyllis Wanjira Kibe. She amended the defence and counterclaim on 31 January 2018 to seek the following prayers :-

(i) *Dismissal of the plaintiff's suit;*

(ii) (a) *Vacant possession of Njoro/Ngata Block 1/478; or (b) alternatively the true value of the suit premises;*

(iii) *General damages;*

(iv) *Mesne profits;*

(v) *Costs of defending against the plaintiff's claim;*

(vi) *Costs of the counterclaim;*

(vii) *Interest on (ii)(b), (iii), (iv), (v), and (vi) at court rates.*

6. She averred that she has lost the benefit of the property whose value is approximately Kshs. 30,000,000/= and would have attracted rent at Kshs. 25,000/= per month.

7. There was a preliminary objection to the jurisdiction of this court which was raised by the plaintiff, but I dismissed it through a ruling delivered on 20 September 2018.

Part B : Evidence of the parties

8. The plaintiff testified that her husband was granted a loan in the 1990s and she charged the suit property to guarantee the loan. When she charged the property, the same was already developed with a storey residential house where they lived. She believed that her husband paid over Kshs. 900,000/= to pay off the loan although she did admit that he defaulted at some point. She did state that whenever there was default they would negotiate with the bank, which sometimes would accommodate them, but at times threaten to sell the property. The loan was not cleared and the property was sold but she did state that the same was sold without them being informed. All she had received was a notice dated 19 April 1997 from Orbit East Africa, a firm of Auctioneers, that the house would be sold on 30 April 1997, and prior to this, there had been an advertisement in the Daily Nation newspaper of 15 March 1997 that the property would be sold on 26 March 1997 by public auction. She stated that she is not aware of any sale that took place on 26 March 1997 nor any sale that took place on 30 April 1997. She stated that she was not served with any subsequent notice that the property would be sold at a later date and did not see any other newspaper advertisement. She later came to learn that the property had been sold after being served with a notice dated 12 April 2002 from M/s Karigo Thuo & Company Advocates, that she vacates the house. In the said letter, it was mentioned that the property had been sold on 28 March 2002. The buyer was not indicated in the said letter but it was said that the property had been sold by Planmore Auctioneers.

9. She testified that this was the first time that she came to learn that the suit property had been sold. She went to the bank and tried to see the manager but she was not allowed to see him and it remained that way until she filed this suit. She asserted that there was no auction for the sale of the property, and despite trying to get the documents of sale, she could not get any. She however had a sale agreement dated 13 March 2002 between the bank and Mr. Kibe and she wondered how the notice that she got from M/s Karigo Thuo & Company Advocates mentioned 28 March 2002 as the date of sale of the property. She also got hold of another sale agreement between Cosmas Kipkirui Ngetich (Mr. Ngetich) and Mr. Kibe with the buyer being Mr. Kibe. That agreement provides that the vendor (Mr. Ngetich) purchased the suit land in a public auction held by Plancustody Auctioneers and that he is now selling the land to Mr. Kibe at Kshs. 1.8 Million. The date of that agreement is 13 March 2002, the same date as the agreement between Mr. Kibe and the bank. The agreement is witnessed by Mbage N. Nganga Advocate, the same advocate who is also noted to have witnessed the sale agreement between Mr. Kibe and the bank. She testified that she never got any notice that the property would be sold on 13 March 2002.

10. She had a letter dated 2 May 1997 from Orbit East Africa (Orbit EA), addressed to M/s Sheth & Wathigo Advocates, the lawyers of the bank, which stated that her property had been sold on 30 April 1997 with one Samuel Koigi Kimemia who offered Kshs. 1,503,000/= as the highest bidder. She averred that she now cannot tell when her property was sold, where the auction was held, who sold it and who bought it,

and for how much. She contended that in the year 2002, her property was valued at Kshs. 2,450,000/=. She wondered what to make of Mr. Kibe as he held two agreements, one with Mr. Ngetich, and the second with the bank. She blamed the bank and Mr. Kibe for the loss of her property. She added that there was no consent from the Land Control Board given to the sale.

11. Cross-examined by Mr. Kisilah for the bank, she did concede that in her plaint, she mentions a sale of 28 March 2002 which is what she contests. She acknowledged that her husband applied for the loan on 18 October 1994 and the loan was to be paid over 5 years in monthly instalments of Kshs. 50,787/=. Her husband issued post-dated cheques which were to be cashed but they were dishonoured. She could not recall an auction sale scheduled for 29 June 1996 or that it was stopped because of a case Nakuru CMCC No. 1602 of 1996 that she filed. She stated that sometimes her husband would file cases without her knowledge. She was however aware that Orbit EA put up the property for sale on 26 March 1997. There were also several other auction attempts but which were shelved when she or her husband went to plead with the bank. She mentioned that she herself was willing to pay but her attempts were frustrated. She acknowledged that her husband had petitioned to be declared bankrupt. She stated that she would have had no problem if the auction was conducted properly. She insisted that she got no notice that her property would be sold and was not served with any statutory notice.

12. Cross-examined by Mr. Kagucia for the 2nd defendant, she acknowledged that there was default but did not agree that the property was sold because of the default. There is still money owed. She also acknowledged that she still resides in the suit property but she does not pay rent to the 2nd defendant.

13. PW-2 was one David Ntara Arimi. He is a practising registered valuer in Nakuru with over 30 years of experience. He testified that he did a valuation of the property in the year 2009 upon the instructions of the plaintiff. He gave the then market value and a retrospective value as at April 2002. He testified that on 12 April 2002, the property was discharged by the bank and on the same day transferred to Mr. Kibe. On 25 February 2004, it was charged to Trans National Bank Limited. He gave Kshs. 4,800,000/= as the value of the suit property as at 2009, and a retrospective value of Kshs. 2,450,000/= as at 2002. Cross-examined, he gave a value of between Kshs. 10 and 12 Million as the value at the time that he gave evidence. He gave a rental estimate of between Kshs. 35,000/= and Kshs. 40,000/= per month.

14. With the above evidence, the plaintiff closed her case.

15. DW-1 was Phyllis Wanjira Kibe, the 2nd defendant. She testified that her late husband purchased the property from the 1st defendant. She stated that the property was sold through an auction and that the property was sold between the years 2002 and 2003. In her opinion, the auction sale was conducted properly. She had the original of the sale agreement between her late husband and Mr. Ngetich dated 13 March 2002 which her husband held. She stated that she does not know Mr. Ngetich. She also had the original agreement dated 13 March 2002 between her husband and the 1st defendant. She however could not explain how there existed these two sale agreements.

16. The property was purchased with the plaintiff and her family resident in it and her late husband and herself have never got to utilize the property. She stated that she wants to have possession of the property and if the plaintiff has any issue she should pursue the bank and not affect her. She gave the current value of the property as between Kshs. 25,000,000/= and Kshs. 30,000,000/= and an estimated rental income of Kshs. 25,000/= per month. Her late husband had done a valuation of the property on 5 December 2003, which gave a value of Kshs. 2,500,000/=. It did emerge in the course of her evidence that the title to the suit land had now been transferred to her by transmission after the estate of her late husband was distributed. She is now the current registered owner.

17. Cross-examined by Mr. Karanja Mbugua, for the plaintiff, she could not recall whether the property was sold through a public auction or directly from the bank. She was also not sure whether her late husband purchased the property while in Nairobi or Nakuru. He was at that time working in Nairobi but living in Nakuru with his family. She was not conversant with the sale agreements as she only gathered them after her husband died. She herself was not present when the sale agreements were drawn. She thus could not tell if the property was first sold to Mr. Ngetich before being sold to her late husband. Re-examined, she could not tell how the two agreements were done in Nakuru and Nairobi but acknowledged the difficulty in having a person execute a document in Nakuru and Nairobi on the same day. She thought that her husband bought the property from the bank.

18. DW-2 was Lwanga Mwangi, the Debt Recoveries Manager with the 1st defendant. He is an advocate by profession and his duty entails recovery of bad debts and stopping debts from going bad. He is based in Nairobi and has been in this position for 4 years. There before he was working with a parastatal. He thus gave evidence purely based on the documents that he could find. He did in fact mention that their office file got lost and he obtained copies from their advocate on record. He testified that the loan application was made on 18 October 1994 by the plaintiff's husband. The application was considered and a letter of offer made on 24 October 1994. The loan advanced was Kshs. 1.6 Million. A charge was then registered on 31 October 1994, over the suit property. The borrower issued cheques to pay the loan but it turned out that he issued cheques on an account that was already closed and they were all dishonoured. Several letters were written to the borrower informing him of the non-payment but the loan account was not regularized. The bank then issued the statutory notice to the plaintiff on 11 October 1995. The property was prepared for sale and a notification of sale issued on 19 April 1997 by Orbit EA, a firm of auctioneers. Prior to this, the plaintiff had filed the suit Nakuru CMCC No. 1602 of 1996 seeking a permanent injunction to restrain the bank from selling the suit land. The case was dismissed thus paving the way for the bank to sell the property. He stated that Orbit EA advertised the property several times in the dailies. He had six advertisements although he could only identify dates on two of them, being the advertisements dated 6 September 1996 and 15 March 1997. He stated that due to the bank's inability to sell, the bank filed the case Nakuru HCCC No. 213 of 2001 on 21 June 2001. The bank was then claiming the sum of Kshs. 11,150,435.10/=-.

19. He stated that the property was eventually sold by way of auction on 28 February 2002. He testified that in this auction, there were three bidders, and that Mr. Kipkirui Ngetich was the highest bidder. He stated that he placed a deposit of 25% immediately and signed the Memorandum of Agreement. He stated that Mr. Ngetich was however unable to complete payment of the balance and what he did was that he got Mr. Kibe to offset this balance, and through his request, the property was then transferred to Mr. Kibe.

20. He testified that the loan account was not liquidated by the sale and the bank still wishes to pursue the balance in the other suit.

21. Cross-examined by Mr. Kagucia for the 2nd defendant, he averred that the bank did not conduct itself fraudulently or illegally. He stated that the bank had the choice to sell the property or sue for the money and they pursued both avenues. He offered that the bank was ready to pay damages to the plaintiff if there was anything it did which was irregular.

22. Cross-examined by Mr. Karanja Mbugua, for the plaintiff, he testified that the property was sold by public auction on 28 February 2002. He however did not know where the auction took place. He did not have any record of where the auction took place. He stated that the auction was conducted by Planmore Enterprises under the bank's instructions issued through their advocates, M/s Sheth & Wathigo Advocates. He testified that the law firm wrote to instruct the auctioneers. He however did not have the letter of instruction. What he had was a letter dated 6 January 2000 from Planmore to the advocates enclosing a Notification of Sale dated 22 December 1999. He did not know if it was ever received by the plaintiff and he acknowledged that it did not give a date for an auction. He stated that it was this Notification of Sale that led to the auction. It did not however have a date, time and place of the auction. The said Notification of Sale provided that there will be an advertisement in the newspaper for the sale.

23. He did not have any record of an advertisement prior to the sale of 28 February 2002. He had nothing with him to show that the plaintiff was notified that there would be a sale on 28 February 2002. He stated that prior to this sale, the property was valued, but he did not have a valuation report. He however asserted that the selling price was above the forced sale value. He however did not have communication on what the forced sale value was. He stated that Planmore Enterprises did write a letter dated 28 February 2002 that an auction was conducted that morning and the highest bidder was noted to be Mr. Kipkirui Ngetich who offered Kshs. 800,000/=. There was no indication of the second or third highest bidder. He had no evidence that 25% was paid. He stated that this is usually paid through a Banker's Cheque but he had none. He acknowledged that in the year 1997, the same property had been put up for sale by Orbit EA and there was a bid of Kshs. 1,503,000/= which they considered as the highest bid (though there appears to have been another bid of Kshs. 1,700,000/=). He could not tell the value of the property when the loan was advanced as he had no valuation report but he confirmed that the sum advanced was Kshs. 1,600,000/=. He did not have the Memorandum of Agreement between Planmore and the said Mr. Ngetich. He had no record of a Certificate of Sale. The only record he had of the sale was the letter from Planmore Enterprises which gave the name of the purchaser at the auction.

24. He said that the bank accepted this offer of Kshs. 800,000/= and did not query the offer despite there having been a higher offer therebefore when Orbit EA conducted an auction in 1997. He had no record that the balance of Kshs. 600,000/= was ever paid as the bank statements he had only went up to the year 2001. He acknowledged that the property was sold barely two weeks later for Kshs. 1,800,000/= to Mr. Kibe. He thought that Mr. Ngetich was probably a broker. He stated that the bank entered into an agreement with Mr. Kibe because Mr. Ngetich informed them that he was selling the property to Mr. Kibe but stated that the bank did not know for how much Mr. Ngetich had sold the property to Mr. Kibe. The agreement between the bank and Mr. Kibe did not have a purchase price. He did not think that it was abnormal that the property was sold at more than twice the auction price barely two weeks later. He had no proof that the proceeds of the auction sale were ever credited into the loan account.

With the above evidence, the defendants closed their respective cases.

Part C : Submissions of Counsel

25. Mr. Karanja Mbugua, learned counsel for the plaintiff submitted that there was outright fraud in the manner in which the property was sold. He wondered how the bank could sell the property at Kshs. 800,000/= which same property was used to advance a loan of Kshs. 1,600,000/= in 1994. He also pointed out that the same property was sold barely two weeks later at 125% of the purchase price. He wondered why the bank could accept this bid when the same property attracted a bid of Kshs. 1,700,00/= in 1997, 5 years earlier. He thought that this was an outright fraud on the part of the bank in collusion with Mr. Ngetich and that no good title could pass from Mr. Ngetich to Mr. Kibe. He also wondered why the bank entered into an agreement with Mr. Kibe which agreement does not have the consideration or the date and place of the auction. He advanced the theory that the bank must have given Mr. Ngetich some blank transfer forms which were handed over to Mr. Kibe who sanitised the fraud and he cannot now claim to be an innocent purchaser for value. He asked this court to declare the purported sale as illegal, null and void, and the subsequent title a nullity. He relied on various authorities all of which I have considered.

26. Mr. Kisilah, learned counsel for the 1st defendant, submitted that there was ample evidence that there is admission that the plaintiff owes money to the bank. On the plaintiff's claim that she was not served with a statutory notice, he submitted that there is evidence of the statutory notice and that the plaintiff's claim that she was not served with the statutory notice is preposterous. On the allegation that the sale was not done properly, he inter alia submitted that the requirement for a valuation is a new requirement which came with the Land Act, 2012 and was not there before. He was also of opinion that the only remedy of the plaintiff, if any, would be a claim for damages. He referred me to several authorities which support this position.

27. Mr. Kagucia, learned counsel for the 2nd defendant, inter alia submitted that the plaintiff did not plead any particulars of fraud and considered it far-fetched to claim that there was collusion between his client and the bank. He further submitted that failure to enjoin the auctioneer makes the case baseless and also the Court Brokers' rules do not apply, for this was not a sale through a court order. He submitted that the plaintiff delayed in prosecuting her case and this led to loss of critical evidence which would have aided in the determination of this case. He submitted that the plaintiff is guilty of delay in prosecuting the case and this should be visited upon her by finding that the 2nd defendant got a good title to the suit land. He also submitted that the 2nd defendant got title for value and without notice of any irregularities and thus her title should be protected. He was of the view that the only remedy of the plaintiff is in damages. He also referred me to several authorities which I have considered.

Part D : Analysis and Decision

28. There is no contest that the plaintiff was the registered proprietor of the suit land and that she charged it to the 1st defendant. That property was transferred, by chargee, to Mr. Kibe of whom the 2nd defendant is legal representative. It seems as if in the course of these proceedings, the 2nd defendant transferred the property to herself through transmission. What the plaintiff wants in this case is for her title to be reinstated as she is of the opinion that the transfer of the property to Mr. Kibe was illegal. Firstly, she has said that the property ought not

to have been sold, as the bank had a pending suit, being Nakuru HCCC No. 213 of 2001; secondly that the defendants colluded to defraud her of her property by selling the land at a very low price not commensurate to its market value; thirdly, that the disposal was by secret and not conducted in a public auction; and finally that there was no statutory notice issued. The bank on the other hand insists that the sale was lawful and the 2nd defendant has played the card of the innocent purchaser for value without notice.

29. The pith and core of this matter revolves around the question whether there was a proper, sale of the suit property, and if the sale was not proper, what its effect would be upon the parties. To start with, the plaintiff has claimed that she was not served with any statutory notice of sale and that the power of sale had therefore not crystalized. On my part, I am not persuaded that she was never served with a statutory notice. I have seen the notice to the plaintiff which was issued by the advocates of the bank which is dated 11 October 1995. It was sent by way of Registered Post and the letter and the Certificate of Posting to the address that the plaintiff provided were tendered as exhibits. That being the case, I do not see how the plaintiff can now allege that she was never served with the statutory notice. I don't think I need to say anything more on this, for I hold that on the facts before me, the plaintiff was indeed served with the statutory notice.

30. The main issue is the contention of the plaintiff that the suit property was sold secretly. The position of the bank is that the property was sold at a public auction on 28 February 2002. I need to determine whether on the facts there was such a sale as asserted by the 1st defendant. Now, I really have no evidence of any auction sale that was ever conducted on 28 February 2002. There is no advertisement in the newspaper of any auction scheduled for 28 February 2002. If ever there was such an advertisement, there would have been nothing easier than to present it before the court. Neither did the defendant call the auctioneer, or Mr. Cosmas Ngetich, the alleged buyer at the auction, or indeed anyone who may have witnessed such an auction. Ordinarily, banks do send representatives to witness how auctions are conducted and the bank did not offer any of its employees or representatives who may have witnessed such a sale on behalf of the 1st defendant.

31. DW-2 stated that Planmore Enterprises, a firm of auctioneers, are the ones who conducted the auction having been so instructed in writing by their lawyers. No such letter of instruction was produced, and again, if ever there was such a letter, nothing would have been easier than to simply tender it as an exhibit. The law firm which is said to have instructed the auctioneer, is M/s Sheth & Wathigo Advocate, and I do note that it is the same firm of advocates, who are acting for the bank in this matter. It follows that if there was such a letter of instruction as alleged, the same would have been readily in their possession and there would have been no complications in availing it as an exhibit. As I have said, no such letter was produced. The result is that there is absolutely nothing before this court that would suggest that there was ever a public auction held on 28 February 2002 or thereabouts which led to the sale of the suit property to either Mr. Ngetich or to Mr. Kibe.

32. I am convinced beyond any shadow of doubt that there was never a public auction that was ever conducted on 28 February 2002 by Planmore Enterprises or any other firm of auctioneers which led to the sale of the suit property to Mr. Ngetich or to Mr. Kibe. The fact of the matter is that this property was not sold by the bank to Mr. Ngetich through a public auction. It is a blatant lie, and the bank should be ashamed of itself, for trying to claim that there was conducted a public auction on 28 February 2002 which led to the sale of the property to Mr. Ngetich or to Mr. Kibe. There was never one.

33. The property herein was registered under the Registered Land Act, (repealed) and it is this statute which was operative at the time of the alleged sale. Section 77(I) thereof provided for the manner in which the chargee was to exercise its statutory power of sale. It provided as follows :-

77. (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby, and may himself bid at any auction (emphasis mine).

34. It will be seen from the above, that the law provided that the sale by chargee, for land registered under the Registered Land Act, be by way of public auction. Unless the defendants demonstrate to this court that there was a public auction, and they have not, it cannot be argued that the sale by chargee, was a lawful sale, unless probably the chargor himself had given consent to the bank to transfer the land to a buyer without the necessity of a public auction sale. I have no such consent and it thus remains that the purported sale by the bank was contrary to the provisions of Section 77(1) of the Registered Land Act, and therefore unlawful.

35. Apart from there not being any evidence of a public auction, the 1st defendant did not adduce any evidence to demonstrate how the property was sold to Mr. Ngetich, if at all. There was never produced by any of the defendants, a Memorandum of Sale or any sort of sale agreement between the bank and Mr. Ngetich. Even assuming that the property was sold by private treaty you would expect to see something evidencing such a sale. There was a letter dated 28 February 2002, from Planmore Auctioneers which DW-2 alluded to as evidencing a sale to Mr. Ngetich. Putting aside the fact that the said letter was never produced as an exhibit, all that the letter said (picking from the oral evidence of DW-2) was that the suit property has been sold by the auctioneer to Mr. Ngetich for Kshs. 800,000/= and that there is a banker's cheque of Kshs. 200,000/= annexed. There is nothing before me from the bank which confirms that the bank ever signed any agreement of sale to Mr. Ngetich as no Memorandum of Sale was ever produced. Neither was there any evidence adduced that the bank received this sum of Kshs. 200,000/= constituting 25% of the purchase price. If at all a banker's cheque was forwarded, what was so hard in making a copy of it ? Or if the same got misplaced, the 1st defendant cannot say that it was unable to obtain the accounts to demonstrated that the sum of Kshs. 200,000/= was deposited, on this day or shortly thereafter, into the loan account that the plaintiff guaranteed. The bank exhibited nothing to show that it had any contract of sale with Mr. Ngetich and I do not see how the bank can claim that it sold the property to Mr. Ngetich. There was absolutely no sale agreement between the two, and if at all there was any, then I have no evidence of it, and my only conclusion is to say that there is no proof of sale of the suit property to Mr. Ngetich.

36. How then did the title to the suit land move from the plaintiff to Mr. Kibe ? The 2nd defendant was not very clear on this, but to be fair to her, she may not have known much about the transactions that Mr. Kibe involved himself in. She however believes that Mr. Kibe purchased the suit property from the bank. She of course held two sale agreements, both dated 13 March 2002. In one of them, Mr. Kibe is said to be purchasing the suit property from the 1st defendant, and in the second agreement, Mr. Kibe is buying the property from Mr. Ngetich.

37. On the first agreement, that with the bank, Clause 1 states as follows :-

The Vendor as chargee hereby agrees to sell and the Purchaser hereby agrees to purchase the property for a consideration of a value determined by the Public auction contacted (sic) by Planmore Auctioneers based in Guilder Centre Bld.3rd Floor.

38. Now, before I turn to the second agreement, it will be noted that this agreement between Mr. Kibe and the bank does not provide when the purported public auction was held or how much the price the property fetched. That buttresses my holding that there was never any public auction. If ever there was one, the agreement would have mentioned the date of the public auction and the price that the auction fetched.

39. The second agreement is between Mr. Kibe and Mr. Ngetich, the former being the purchaser and the latter the vendor. Here the suit land is being sold at a consideration of Kshs. 1,800,000/=, the mode of payment being Kshs. 500,000/= to be paid to the 1st defendant; Kshs 300,000/= to Housing Finance Company of Kenya (HFCK); and trade of two motor-vehicles which are mentioned.

40. The presence of these two agreements begs the question, whether Mr. Kibe was buying the property directly from the bank or from Mr. Ngetich, for I am unable to reconcile the two agreements. If the bank knew that it had sold the property to Mr. Ngetich, why then is it entering into another sale agreement with Mr. Kibe ? . Why doesn't their sale agreement acknowledge that the property was sold to Mr. Ngetich in a public auction ? And if it is the case that Mr. Kibe was buying the property directly from Mr. Ngetich, why then does he need to have another sale agreement with the 1st defendant ? I just cannot reconcile the above. There was certainly something that was solely within the knowledge of Mr. Kibe and Mr. Ngetich, which we may never know. DW-2 mentioned that Mr. Ngetich was unable to raise the balance of the purchase price and that he asked the bank to transfer the property directly to Mr. Kibe. I have no such communication by Mr. Ngetich and I cannot assume that it exists.

41. I have already held that there was never any sale agreement to Mr. Ngetich in any public auction or at all. That being the case, Mr. Ngetich could not then proceed to sell what he had not purchased to Mr. Kibe. If the position is that the property was sold directly to Mr. Kibe as evidenced by the agreement that he executed with the bank, how could the bank sell property at a price which is not disclosed and citing a public auction which was never held ? Whichever way you look at it, it is difficult to see how it can be urged that Mr. Kibe properly purchased the suit property.

42. It has been argued by both defendants that Mr. Kibe was an innocent purchaser for value without notice. I am not persuaded. If he was innocent, why was he entering into two sale agreements? Neither can it be plausibly argued that he may not have known that there was never any public auction held. A public auction is preceded by an advertisement in a newspaper and is a notorious exercise which cannot be missed. If he had asked for details of the public auction, for the same is mentioned in his sale agreement (without particulars being disclosed), he would have discovered that there was never a public auction. He therefore either knew that there was never a public auction, or he did not exercise due diligence which would have led him to discover that there was never any public auction in the first place, and that the claim that there had been a public auction was false. Mr. Kibe does not therefore pass the test of an innocent purchaser for value without notice. Certainly, Mr. Ngetich, and somebody from the bank must have hatched a scheme to stage-manage an auction that never was. Mr. Kibe was either a party to this scheme, or must have known about this. If he never was privy to the scheme, or did not know about it, due diligence would have led him to discover that there was a corrupt scheme which was aimed at taking away the suit property from the plaintiff.

43. My holding is that the sale of the suit land, and the subsequent transfer of the property to Mr. Kibe, was a total fraud. It was aimed at unjustly enriching Mr. Kibe, Mr. Ngetich and/or somebody from the bank.

44. Even assuming that the sale was actually conducted, the price that was fetched, Kshs. 800,000/= is so low as to be itself evidence of fraud. Eight years before the purported sale, the property was used to secure the sum of Kshs. 1,600,000/=. In the ordinary course of business, banks do take security that is of more value than the money being advanced. It means that at the very least, the property was valued at Kshs. 1,600,000/= in the year 1994. In the year 1997, there was a bid of Kshs. 1,700,000/= at a public auction held by Orbit EA but which never led to completion of any sale. It means that there were people willing to purchase the property at the very least for Kshs. 1,700,000=, if the property was sold at an auction, and we are talking the year 1997. I do not see how, in light of the fact that there were people willing to bid at this price, the property can be argued to have been sold above board at Kshs. 800,000/= five years after an auction sale had attracted a bid of Kshs. 1,700,000/=. The evidence from the plaintiff's valuer is that the property at the time of sale was valued at Kshs. 2,450,000/=. This is not denied by the defendants. In fact, the 2nd defendant had a valuation report giving the value of Kshs. 2,500,000/= in the year 2003. This is not too far from the value tendered by the plaintiff's valuer. In as much as there is no requirement that the auction price must be the market price, and in most instances, it certainly will not be the market price since many people go to auctions to find a bargain, that price of Kshs. 800,000/= , being just about 1/3rd of the value of the property at the time, and considering all surrounding circumstances, leads one to the presumption that the said price was itself plucked from the air and was not obtained through any auction, hence itself a fraudulent price obtained through collusion.

45. It follows from my above holding that the transfer of the suit property to Mr. Kibe was tainted by fraud. I have held that Mr. Kibe was either party to the fraud or was not an innocent purchaser himself.

46. It was argued by Mr. Kagucia that the plaintiff has not pleaded fraud and therefore no holding of fraud can be made. I do not agree. In her complaint, the plaintiff pleaded that the property was sold in secret and she has also pleaded that the property was sold at an undervalue. To me that is sufficient pleading of fraud against the defendants. The defendants were notified in advance about the allegations that they will face at trial and they cannot now claim that no particulars of fraud were pleaded. Mr. Kagucia also argued that the plaintiff's suit is misconceived because the auctioneer was not enjoined to this suit. Firstly, how could the plaintiff enjoin an auctioneer that she knows nothing about since the auction was not publicized? Secondly, and more importantly, I do not hold the view that one must sue the auctioneer instructed by a chargee in order to obtain judgment against the chargee. The auctioneer is an agent of the chargee, and being an agent, a person aggrieved by the actions of the auctioneer can as well sue the principal, that is the chargee himself. I see no problem with the suit as presented by the plaintiff without suing the auctioneer. Neither am I persuaded by Mr. Kagucia that the plaintiff delayed this case and therefore cannot get any

order for damages in her favour. There are reasons why this case delayed, including the fact that Mr. Kibe died, and the recusal of a judge. Where the case was adjourned, the court gave reasons for allowing adjournment and where it was felt necessary, the other party was compensated by way of costs. I do not see anything wrong in the conduct of the plaintiff that was not covered by the above and which would not entitle the plaintiff to damages or any of her prayers in this suit.

47. Having held that the sale of the suit land was a fraud, what remedies are available to the parties ?

48. It was argued by the defendants that the only available remedy to the plaintiff is one for damages and I was referred to Section 77 (3) of the Registered Land Act which provided as follows :-

77. (3) A transfer by a chargee in 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 the power.

49. I was also referred to several authorities including the cases of **Kitur & Another vs Standard Chartered Bank & 2 Others (2002) I KLR 640**; **Nancy Kahoya Amidiva vs Expert Credit Limited & Another (2015) eKLR**; **Jashvantsingh L. Solanki vs Diamond Trust Bank (2013) eKLR**; **Amos Kipkorir Buttiti & 2 Others vs Bank of Africa Kenya Ltd (2017) eKLR**; **Caltex Oil vs Rono Limited (2016) eKLR**; **John Kuria Mathenge T/A Aberdare Filling Station v Caltex Oil (2015) eKLR** and **Bomet Beer Distributors vs Kenya Commercial Bank (2005) eKLR**. In the case of **Kitur v Standard Chartered Bank** what was in issue was an application for injunction. The applicant was contesting a sale that was conducted by private treaty and complained that he had not been given opportunity to redeem and that the price was at an undervalue. The court was of the view that the applicant could be compensated by damages and cited Section 77 (3) above and the application for injunction was thus denied.

50. In the case of **Nancy Kahoya Amadiva v Expert Credit**, the property of the appellant was sold by the 1st respondent, as chargee, to the 2nd respondent. She filed suit to inter alia declare the sale null and void. It emerged in evidence that the appellant was in default and that the 1st respondent sold the property by private treaty. The court did find some irregularities, inter alia failure to comply with the Auctioneers Rules, but it held that the property in issue was a Registration of Titles Act (repealed) (RTA) property and therefore the 1st respondent was not bound to sell by public auction and the sale was not subject to the Auctioneer Rules. The court also stated as follows at paragraph 26 :-

We find it necessary to consider the remedies available for sale arising out of non valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under RLA and ITPA.

The appeal was thus dismissed.

51. The case of **John Mwenja Ngumba v Kenya Commercial Bank** involved an application for injunction. There had been a sale by chargee and the plaintiff complained that the auctioneer's notices had not been served and that the sale was at an undervalue. From the facts, the court noted that the parties had a previous suit where a consent was recorded to the effect that if there was default, the property could be sold and there was indeed default. The court was not persuaded that there was any evidence of fraud. Neither did it believe that the sale was at an undervalue and the injunction application thus failed. **Solanki v Diamond Trust** was also a case for an injunction vide which the plaintiff sought to stop an auction sale. The applicant complained of failure of service of notices and that there was no valuation. The court was not persuaded that notices were not served or that there was not going to be a valuation and dismissed the application. Since the sale was not faulted the court noted that he could be compensated by damages.

52. The case of **Amos Kipkorir Buttiti v Bank of Africa** does not help the defendants, for in that case, the court gave an injunction as the court was not persuaded that the requisite statutory notices had been issued. The case of **Caltex Oil v Rono Limited** was not one relating to a sale by chargee, but an ordinary sale, and the respondent filed suit for specific performance, which was granted, with the judge further making an order for assessment of damages which was contested and proceeded to the Court of Appeal. This case was cited to press the point that the plaintiff does not deserve damages for none were pleaded. There shouldn't be a problem with that, for the plaintiff indeed has not asked for damages, although I do not think that the court's discretion to award damages, if the justice of the case so demands, so long as they are not special damages, is completely fettered. The case of **John Kuria Mathenge vs Caltex Oil**, does not help the defendants. In the said case, property was sold in an auction but the court was not persuaded that the sale was proper and set it aside. The last case, of **Bomet Beer Distributors** again concerned an application for injunction where the applicants sought to stop the transfer of property sold in a public auction. The court did not see anything wrong with the way the auction was conducted and was further of the view that the remedy of a chargor is in damages. The court stated as follows :-

“What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

53. On the other hand, Mr. Karanja pointed me to several authorities which appear to hold the view that an illegal sale cannot be upheld. In the case of **Musk Deer Limited vs Benjamin Kipkurui & Another (2018) eKLR** a sale was conducted by the local authority but it was apparent that the sale was an illegality. The appellant claimed that he is protected as an innocent purchaser for value without notice. The court set aside the sale as it was void. On appeal, the Court of Appeal held that the sale was void, and that being the case, the sale could not entitle the purchaser to proprietorship the innocence of the purchaser notwithstanding. In the case of **Stephen Boro Githa vs Nicholas Ruthiro Gatoto & 2 Others (2017) eKLR**, the appellant purchased property at a public auction. The chargor filed suit claiming that the sale was illegal as he was not served with a statutory notice. The High Court found that no statutory notice had been proved and set aside the sale. On appeal the Court of Appeal held that an auction sale not preceded by a statutory notice was not a mere irregularity and such sale was incapable of passing effective and proper title. The innocence of the purchaser was not curative of the fundamental defect in the title owing to the absence of the requisite notice. A similar holding was arrived at by the Court of Appeal in the case of **DNM vs Ma K & 4 Others (2014) eKLR** where the court set aside a sale for want of proper service of the statutory notice. A secondary sale by the purchaser at the auction to a

second purchaser was also nullified.

54. It is thus apparent that there are two schools of thought on whether an irregular sale can be set aside or whether the chargor should pursue his remedy in damages. On my part, I do not for one moment believe that the irregularity that was meant to be covered by Section 77(3) of the RLA addressed a non-existent sale or a fraudulent sale. An irregularity in terms of Section 77(3) must be restricted to something not correct, but inconsequential, considering the circumstances, and which does not go against any specific provision of the law. I would maybe give the example of the wrong spelling of the purchaser at the auction, which can be rectified, for the identity of the purchaser is not in doubt. I cannot of course provide all instances of what would be regarded as inconsequential, for this would depend on the circumstances of each case. But as I have said, I am, not at all persuaded that a sale by charge, that has been conducted in total disregard of clear provisions of statute, or the rules directing how such a sale should be undertaken, should be considered an “irregularity” that only entitles the person aggrieved to damages.

55. I am not persuaded that a chargee can stage manage a sale, or put aside all statutory provisions that prescribe the manner in which a sale by chargee should be held, then claim that the sale is only “irregular” and seek protection under Section 77 (3) of the Registered Land Act. No person should be deprived of property unless such deprivation is clearly in line with the law. Neither do I believe that the transfer of such property to another party sanitizes the initial faulty title and I am not persuaded that a good title can pass if the initial purchaser never held a good title. Such persons if they can demonstrate that they are innocent purchasers for value, without notice, can seek to be compensated by those from whom they purchased the property, but it would be an injustice to have a person’s property taken away from him without due process being followed. The rule of law should always be upheld.

56. In our case, there was no sale whatsoever. The bank proceeded to stage-manage a sale and the transfer of the property to Mr. Kibe cannot be upheld. That transfer to him was fraudulent and is hereby set aside. There being no title that could pass to Mr. Kibe, the estate of Mr. Kibe could not proceed to pass a good title to the 2nd defendant. The sin that stained the title of Mr. Kibe, is not washed away because of the transfer of the title to the 2nd defendant. That stain is carried forward to the 2nd defendant’s title, and thus her title is equally blemished. Her title must be cancelled and I hereby cancel it. I order that the title do revert back to the position that it was before the transfer to Mr. Kibe. That means that title must revert back to the plaintiff as registered proprietor with the 1st defendant as chargee. It follows that the 2nd defendant, not having a good title, cannot have judgment in her favour as prayed for in her counterclaim. Her counterclaim is hereby dismissed.

57. I am alive to the fact that the plaintiff is yet to pay her loan and there may be interest accrued during the duration of this case. The bank cannot benefit from its own fraudulent activities. So that the plaintiff is not prejudiced for the duration of time that she spent pursuing her rights, any interest that may be accumulated from the time the purported auction sale took place, to the time of this judgment, ought not to be loaded into the account of the plaintiff. I am aware that there is a dispute over what is owed which is the subject of the suit Nakuru HCC No. 213 of 2000. That case can proceed and the amount due determined in that suit, but as I have said, no interest or charges should be loaded into the plaintiff’s account from 28 February 2002 to the date of this judgment.

58. If I had found Mr. Kibe to be an innocent purchaser, I would have ordered the bank to pay his estate, or the 2nd defendant as beneficiary of the property, the full current value of the property, but I have found that Mr. Kibe was not innocent and therefore all that his estate will get is the money that was paid to the 1st defendant.

59. Given my above findings, it is not really necessary for me to determine whether in light of the case Nakuru HCCC No. 213 of 2000, the bank still had the power to sell before the conclusion of that case.

60. The only issue left is costs. The plaintiff will have the costs of her case jointly and/or severally against the defendants, and she will also have the costs of the counterclaim against the 2nd defendant.

60. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 27th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Karanja Mbugua for the plaintiff.

Ms. B.C Maiya holding brief for Mr. D.G Kisilah for the 1st defendant .

Mr. J.G Kagucia present for the 2nd defendant

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU