



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC CASE NO. 41 OF 2018**

**JAMES KAMAU NDUNGU.....**  
**.....PLAINTIFF**

**VERSUS**

**NICHOLAS WAWERU WACHIRA.....1<sup>ST</sup>**  
**DEFENDANT**

**KENYA WOMEN MICROFINANCE BANK .....2<sup>ND</sup>**  
**DEFENDANT**

**SAMUEL MACHARIA NDUNGU.....3<sup>RD</sup>**  
**DEFENDANT**

**JUDGMENT**

1. The Plaintiff approached this Court through an Amended Plaintiff dated 6/02/2023 seeking the following Orders:-
  - a) A declaration that the charge dated 25<sup>th</sup> January, 2018 created over Ruiru/Ruiru East Block 2/8048 is void as it was created illegally, irregularly and unprocedurally.
  - b) An order of permanent injunction be issued against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining it from entering into any private treaty or scheme of settlement and which involves alienating, selling or advertising or offering for sale, transferring, laying claim to, trespassing onto and or in any other manner dealing or interfering with the

Plaintiffs peaceful occupation and title to land parcel No. Ruiru/Ruiru East Block 2/8048.

- c) Cancellation of the title for land parcel No. RUIRU/RUIRU EAST BLOCK 2/8048 in the name of Samuel Macharia Ndungu and to revert the same in the Plaintiff's name James Kamau Ndung'u.
  - d) Costs of the suit.
2. The Plaintiff's case is that he has at all material times been the beneficial owner of all the parcel of land situated in Kiambu County and identified as RUIRU/RUIRU EAST BLOCK 2/8048 and that on or about 25/09/2018 the 2<sup>nd</sup> Defendant allegedly offered the 1<sup>st</sup> Defendant a loan facility without the Plaintiff's knowledge and or consent.
  3. The Plaintiff averred that he was not a party to the loan transaction and neither did he stand as a guarantor for the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant allegedly failed to service the loan facility and the 2<sup>nd</sup> Defendant decided to recover its money by exercising its statutory power of sale.
  4. However, the Plaintiff avers that no notice of statutory power of sale was ever served by the 2<sup>nd</sup> Defendant to the Plaintiff. Further the 2<sup>nd</sup> Defendant instructed Garam Auctioneers to sell the suit property by auction. Yet the charge was obtained fraudulently, illegally and unprocedurally and is therefore fatally defective and of no consequence.

5. The Plaintiff has listed four grounds of illegality, fraud and defects to the charge by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in exercise of statutory power of sale;

**“Particulars of illegality, fraud and defects**

**a. The Plaintiff’s signature was forged in the alleged charged document as the Plaintiff never signed any such charge and in any even the Plaintiff was not within Kenya at the material time and was in the United States of America**

**b. The Plaintiff did not execute any charge or letter of offer, neither did he request for any was in material time outside Kenya**

**c. The Plaintiff did not consent to the creation of the charge**

**d. Spousal consent was not sought during the creation of the charge pursuant to Section 93 of the Land Registration Act”**

6. At the same time the Plaintiff averred that the public auction was marred by malice, fraud and illegality by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant in exercise of statutory and alleged power of sale and he listed five instances of malice. Which include but not limited to the fact that the 2<sup>nd</sup> Defendant did not issue notice of default as stipulated under Section 90 (1) and 90(2) of the Land Act, did not issue notice of exercise of statutory power of sell as per Section 96(2) and (3) of the Act, no notice from

the auctioneers to the Plaintiff giving 45 days' notice before sell, the alleged auction was a sham since no action sale was conducted, statutory power over charge was procured through fraudulent means and seeking to sell the property secretly knowing there was a pending suit.

### **1<sup>st</sup> Defendant's Case**

7. The 1<sup>st</sup> Defendant filed a Statement of Defence dated 13/04/2018 and denies most of the averments in the Plaint and puts the Plaintiff to strict proof. He however admits that the Plaintiff is the registered owner of the suit property and he avers that he has been repaying the loan despite the fact that some projects to finance the loan did not go through.
8. He avers that whereas he sought to withdraw the loan application he was warned to either take the loan or still pay costs as they had charged the property already.
9. He states that the security provided for is a matrimonial home belonging to the Plaintiff's family. It is his contention that despite the loan interest being capped at 14% in 2014 the calculations done by the 2<sup>nd</sup> Defendant was done at 21% which was done to clog the redemption.
10. He states that the charge bank should desist from threatening his family and household without following due process as his households are not part of the loan security/collateral.
11. He avers that he is ready to pay whatever is owing if the loan is restructured and if the calculations are done with

reasonable applicable interest rates and they agree on a period.

12. He states that demand and notice of intention to sue was not received. He prays for dismissal of the Plaintiff's suit against him.

### **2<sup>nd</sup> Defendant's Case**

13. The 2<sup>nd</sup> Defendant filed an Amended Statement of Defence dated 27/02/2023 denying all the allegations levelled against it. In response to the Further Amended Plaintiff, the 2<sup>nd</sup> Defendant avers that the Plaintiff executed the charge dated 21/10/2015 consenting to surrendering the suit property as security for the loan advanced to the 1<sup>st</sup> Defendant.
14. That a charge was created over the suit property and duly entered in the encumbrance section on 23/10/2015 and the Plaintiff was fully aware of his legal obligations at the time of creating the charge as evidenced by the Affidavit executed by him. That the borrower has been in perpetual arrears and the bank's statutory power of sale has crystallized.
15. Further the 2<sup>nd</sup> Defendant avers that all the requisite statutory notices were sent to Plaintiff's last known address which is 3793-00506 Nairobi. Which address was provided during the execution of the legal charge. That the first statutory notice was sent on **22/06/2017**, the second notice was sent on **30/10/2017** and it gave Plaintiff and 1<sup>st</sup>

Defendant three months to redeem the outstanding loan, following the default the auctioneers sent the notice on **25/01/2018**, notification of sale was issued via notice from Auctioneers on **11/01/2018** and before the sale proper valuation was done.

16. It is the 2<sup>nd</sup> Defendant's averment that the Plaintiff's spouse executed the spousal consent on 13/10/2015. Thus the 2<sup>nd</sup> Defendant advertised via Quickline Auctioneers the auction vide Standard Newspaper dated 9/05/2022 and the suit property was disposed on 26/05/2022 via public auction to the 3<sup>rd</sup> Defendant at a sum of Kesh 2,600,000.
17. That the charge was validly executed in conformity with the letter of offer dated 25/09/2015 and the Plaintiff understood his legal obligation. It is the 2<sup>nd</sup> Defendant's contention that the Plaintiff and the 1<sup>st</sup> Defendant are in a scheme to defraud the bank its money.
18. That at all time the statements of accounts have been provided to the account holder by the bank. Further that the Plaintiff has not disclosed any cause of action against the 2<sup>nd</sup> Defendant and his claim should be dismissed.
19. It is the averment of the 2<sup>nd</sup> Defendant that the Plaintiff's claim is overtaken by event the suit property having been legally and procedurally transferred to the 3<sup>rd</sup> Defendant. So, the 2<sup>nd</sup> Defendant prays that the suit be dismissed with costs to the 2<sup>nd</sup> Defendant.

### **3<sup>rd</sup> Defendant's Case**

20. In his Statement of Defence dated 17/03/2023, the 3<sup>rd</sup> Defendant denied all the averments contained in the Amended Plaint about illegal/fraudulent transfer of the suit property to him. He has averred that he was a Bonafide purchaser for value without notice of defect and holds good title to Land Reference Number Ruiru/Ruiru East Block 2/8048. Further that following a lawfully conducted public auction the Plaintiff's claim is overtaken by events as subsequent transfer of the suit property has taken place.

21. It is his statement that the sale by public auction was duly advertised on 9/05/2022 in the Standard Newspaper and he was the highest bidder at a bid of Kesh 2,600,000. He further states that he was not made aware of the existence of this suit at the time of auction, sale and transfer of the suit property only becoming aware of the proceedings after being served with the Plaintiff's application dated 18/10/2022 which after registration of the transfer of the suit property in his names on 26/10/2022.

22. He avers to have conducted due diligence on the suit before participating in the public auction. That despite having the suit property registered in his name he has been unable to take possession leading to loss and damage which he has particularized as:

**Particulars of loss and damage**

**a) Purchase price of the suit property**

**Kshs 2,600,000**

**b) Legal Fees and expenses on transfer  
of the suit property Kesh  
74,000**

**c) Stamp duty on the transfer of the suit ppty  
Ksh 120,000**

**TOTAL Kesh  
2,794,000**

23. He also avers to lose return on investment being rental income estimated at Kesh 30,000 per month which he claims from Plaintiff or 2<sup>nd</sup> Defendant depending on success of their claims.

24. It is his contention that the Plaintiff suit is unmerited and should be dismissed and in the alternative he avers that if the Plaintiff's claim is upheld, then he will be entitled to an award of damages as particularized in paragraph 15 of the Statement of Defence against the 2<sup>nd</sup> Defendant upon whose instructions the auction was conducted. He therefore seeks the following reliefs:

**a. That the Plaintiff's suit be dismissed.**

**b. That the Plaintiff be ordered to deliver vacant possession of Land Reference Number Ruiru/Ruiru East Block 2/8048 together with the house erected thereon in the same condition and state at the time of purchase and transfer in the names of the 3<sup>rd</sup> Defendant.**

- c. That the Plaintiff be ordered to compensate the 3<sup>rd</sup> Defendant for the loss of income from the date of transfer of Land Reference Number Ruiru/Ruiru East Block/8048 in his names to the date of taking possession of the suit property as particularized at paragraph 16 above.**
- d. That in the alternative and in the event that the Plaintiff's claim against the 2<sup>nd</sup> Defendant is upheld, the 3<sup>rd</sup> Defendant be awarded the damages particularized at paragraph 15 and 16 above as against the 2<sup>nd</sup> Defendant.**
- e. That the 3<sup>rd</sup> Defendant be awarded costs of this suit.**
- f. That this Honorable Court be pleased to issue such further reliefs that it may deem appropriate and just.**

#### **Evidence adduced by the Plaintiff**

25. The Plaintiff, James Kamau Ndung'u, testified as PW1 in support of his case. He adopted his Witness Statement dated 17/04/2023, as his evidence in-chief. He further adduced the documents on the Plaintiff's List of Documents of even date as PE (a)- (g) in the order therein. He prayed that the orders sought in his Further Amended Plaint amended on the 6/02/2023 be granted as prayed.

26. In cross-examination by Counsel for the 2<sup>nd</sup> Defendant the Plaintiff stated that he has no relationship with the 1 - 3<sup>rd</sup>

Defendants and that the original title was held by himself during title creation of the charge. He testified that he was aware that for a charge to be registered the original title is required. He however stated that he was not in possession of the title since he had left it with his wife in Kenya and that he was not aware how title got into the hands of the 2<sup>nd</sup> Defendant.

27. He testified to have reported to the Police but did not have the OB produced in Court. Further he testified that he disputed the signature on the charge documents. Upon further cross-examination on the signatures, he stated that the signature on the Verifying Affidavit and the Witness Statement are different and the signature on the charge is also different.

28. He also stated that his postal address is P.O. Box 6413 Nairobi and that he had only one address and the one on the Verifying Affidavit was not his. It was his testimony that he was out of the country when the charge was created between 26/02/2014 to 25/12/2017.

29. On further cross examination by the Counsel for the 3<sup>rd</sup> Defendant he stated he was absent from Kenya in 2015 and that he was last in Kenya in November 2022 - June 2023. That he signed the Verifying Affidavit on 6/02/2023 and Witness Summons on 12/03/2023 and that he had filed other documents in 2018 when he had instructed **Gichuki Kimere Advocates**.

30. When asked about the 1<sup>st</sup> Defendant he testified that he did not know the 1<sup>st</sup> Defendant and that he had never met him and neither has he done projects for the Plaintiff. He denied amending the Plaintiff to hide information on collusion with the 1<sup>st</sup> Defendant to defeat the claim of the 2<sup>nd</sup> Defendant.
31. He testified that his wife Zipporah passed away in 2019 February and that he was aware that his daughter Eunice Kamau might have filed an application in Court. It was his testimony that he never gave her any Power of Attorney to his wife or any other 3<sup>rd</sup> party to sign documents on his behalf. He testified having the original title deed which was used to create the charge and that he made a complaint to the Police but had not produced the OB.
32. He stated he was not aware that his title was pledged as security to the 2<sup>nd</sup> Defendant. He informed the Court that Eunice Wanjiku Kamau his daughter lives in the house on the suit property and she told him about the sale of the suit property and that on his part he was not aware about the auction since no notices were served on him.
33. When he was referred to Page 40 of the Trial Bundle he stated that it was a newspaper advert dated 9/05/2022 although according to him there was no advertisement of an auction concerning his land. He further stated that he was not aware the 3<sup>rd</sup> Defendant paid Kesh 2,600,000 in an auction since the value of his house is around Kesh 12 - 15 million. He also stated that he had no niece by the name

Susan, further that he has never taken any loan secured by any of his properties and that he was unaware that the 3<sup>rd</sup> Defendant holds the title to the suit property.

34. Upon re-examination he restated the information about his address and he also stated that he used two different signatures and that his movement in and out of Kenya can be shown through the immigration stamps and that he used the Kenyan Passport to travel to Kenya. He reiterated not receiving any notice with respect to the property.

35. With that the Plaintiff closed his case.

### **Evidence adduced by the Defendants**

36. The 1<sup>st</sup> Defendant after filing the Statement of Defence did not participate further in the hearing.

### **2<sup>nd</sup> Defendant's Evidence**

26. The first Defendant did not adduce any evidence despite filing a Statement of Defence.

27. On its part the second Defendant testified through DW1 Miriam Wasike as head of legal services. In support of their case, she adopted the Witness Statement dated 27/02/2023, as evidence in-chief. She further adduced the documents at pages 15-89 on the 2<sup>nd</sup> Defendant's List of Documents of even date as **DEX Nos 1-11** and she stated that she was confirming that due process was followed in processing the charge in favor of the 2<sup>nd</sup> Defendant.

28. She testified that there was an eviction in 2021 and the Plaintiff filed a case in 2017. Also, Eunice who is not a party to the suit filed an application and that the final auctioneer who sold the land was Quickline although Garam Auctioneers had issued notifications before.
29. She told the Court that the 3<sup>rd</sup> Defendant bought the land and the 2<sup>nd</sup> Defendant received the full purchase price and the original title was released to him. She also stated that she supports the reliefs sought by the 3<sup>rd</sup> Defendant.
30. It is the contention of DW1 that due process was followed in the charging and selling of the land although she admits that they did not disclose the existence of the proceedings. That the property was sold on 26/05/2022 and the suit was filed in 2018 but that there were no orders stopping the sale and that although there was a Ruling dismissing the suit it was vacated and the suit was reinstated on 19/05/2022.
31. That although by 25/10/2021 the suit had been dismissed she stated that she did not inform the auctioneers and the 3<sup>rd</sup> Defendant about the reinstatement of the suit.
32. On cross-examination she stated that as long as there were no orders from the Court stopping the sale one is at liberty to proceed with the sale. She also stated that she was aware that whereas the case had been dismissed it had been reinstated. Further she told the Court that she

did not issue statutory notices to the owner of the land when they gave instructions to the 2<sup>nd</sup> Auctioneer.

33. She testified that the document at page 27 of the 2<sup>nd</sup> Defendant's bundle show that address of the Plaintiff to be 3793-0506 and they used the same address in the recovery process vide certificate posting.

34. On re-examination she reiterated her position that there were no orders barring the sale of the property and that orders of status quo were not granted in 2019. She told the Court that they cannot compensate the 3<sup>rd</sup> Defendant because due process was followed. Further that the address they used was provided by the Plaintiff and that the charge was prepared by their Counsel who is their witness.

35. At this point the Court adjourned and further hearing was fixed for 29/01/2024 and when the matter came up Counsel for the Plaintiff made an application to recall PW1 to testify on issues that were left out without making a formal application. The application was vehemently opposed by Counsel for the 3<sup>rd</sup> Defendant and after considering the oral submissions for both Counsels the Court declined to grant the application and the hearing continued.

36. **DW2 - Samuel Wachira Gichuki** a practicing Advocate in support of his case adopted the Witness Statement

dated 7/06/2023, as evidence in- chief and also adopted the 2<sup>nd</sup> Defendant's bundle on record.

37. It was his testimony that he saw the Plaintiff in his office signing the documents. On further cross-examination by Counsel for the Plaintiff he stated that he was licensed to practice law in 2015 and he reiterated that the Plaintiff went to his office and signed the charge. He however testified that both the Clearance Certificate and the Land Control Board Consent are not attached. He stated that the Land Control Board Application must be applied by the bank and the borrower and both must sign the document. He further emphasized that Land Control Board Consent is mandatory to the registration of the charge.

38. When re-examined he restated that the Plaintiff and the borrower appeared before him and he witnessed them sign the charge and that his colleague **Irene Njenga Advocate** witnessed the spousal consent. He concluded that the charge is a proper charge. With this the 2<sup>nd</sup> Defendant closed its case.

### **3<sup>rd</sup> Defendant's Evidence.**

39. The 3<sup>rd</sup> Defendant testified as DW3 - Samuel Kareithi Rurigi stating that he is an auctioneer. He adopted the Witness Statement dated 29/08/2023, as evidence in- chief. He stated that he will rely on the 3<sup>rd</sup> Defendant's

List of Documents Nos. 4,5,6,7,8,9 and the statements at pages 12 of the 3<sup>rd</sup> Defendant's statements.

40. On cross-examination he stated that he is a licensed auctioneer class B of 30 years and he confirmed that the 2<sup>nd</sup> Defendant followed the procedure.

41. The Counsel for the Plaintiff cross-examined him and he testified that he had not presented to Court his Auctioneers Practising Certificate for the year 2022 but he stated that he conducted the auction on 26/05/2022 and he advertised the property. He also testified that he had not attached a receipt of the advert but he confirmed having paid since the advert cannot run in the newspaper without one paying for the space.

42. He told the Court that there about 20 people in the auction and the higher bidder was the 3<sup>rd</sup> Defendant although he averred not to have provided the list of the bidders and their bids. He stated that the 3<sup>rd</sup> Defendant paid him in cash at Equity Bank and that he had attached the receipt of payment. He stated that he was given Kesh 2.6 million in cash inside the bank but the auction was done outside the bank.

43. DW-3 told the Court that he received Kesh 2.6 million and remitted it to the 2<sup>nd</sup> Defendant, the instructing client although he had not attached and produced a receipt from the 2<sup>nd</sup> Defendant. He testified that he had issued a statutory power of sale which is at page 18 of the 3<sup>rd</sup>

Defendant's bundle and that the said notice was issued by the 2<sup>nd</sup> Defendant.

44. On further cross-examination he stated that he did not sign the statutory power of sale and that he issued a notification of sale but he did not issue the statutory power of sale.

45. At this point in cross-examination Counsel for the Plaintiff told the Court that he was finding it difficult cross-examining the witness who has no documents and the Court allowed the witness to be stood down and for the hearing to resume on 23/07/2024.

46. When cross-examination resumed, the DW3 told the Court that they served the owner of the suit property through his agent a Mr. James Kamau Ndungu and that they followed the process for sale properly by advertising and conducting the auction on due date. That they sold the property within the parameters of the valuation.

47. He further stated that they never contacted the owner of the suit property personally but that they advertised it and the owner ought to have seen the advert.

48. When the Counsel for the 2<sup>nd</sup> Defendant cross-examined DW3, he stated that he is a licensed auctioneer Class B and that he received instructions from 2<sup>nd</sup> Defendant to sell the property and the auction was done according to the law.

49. Upon re-examination he stated that there was no stay either before or after the auction and also that he is the one who issued the receipt to the 3<sup>rd</sup> Defendant as shown at page 24 of the 3<sup>rd</sup> Defendant's bundle. He reconfirmed that he had a list of bidders but it was never asked for and that he received bids from three people. He also confirmed that the bank received the money as attested to by the letter at page 77 of the Defendant's Trial bundle.

50. **DW4 - Samuel Macharia Ndungu** testified that he bought the suit property for Kesh 2.6 million. He stated that he filed a Defence dated 17/03/2023 and he adopted his Witness Statement dated 17/03/2023 as his evidence in chief. He further adduced the bundle of documents as Exhibits DEX 1-28 as per the list dated 17/03/2023.

51. Upon cross examination he testified that he did due diligence and that he bought the suit property for Kesh 2.6 million and that he did not know its cost was for Kesh 5,000,000. He also stated that he did not know there was an order for status quo by the Court. He also stated that when he sought to take possession is when he learnt about a Court case. It was his testimony that he did not conduct a valuation before the purchase.

52. **DW5 - John Irungu Maina** stated that he was a businessman staying at Ruiru. He testified to knowing Samuel Macharia for the last ten years. That in relation to

the suit he stated that he was present at the auction done by Quickline Auctioneers near Equity Bank Ruiru Branch and that the 3<sup>rd</sup> Defendant bought the suit property for Kesh 2.6 million. He adopted his Witness Statement dated 17/03/2023 as his evidence in chief.

53. On cross-examination he testified that the auction was done well and that he went all the way to Embu Office for the auctioneer to verify the documents produced in the auction. He also told the Court that Mr Macharia is his friend and he paid for the suit property when his friend was present although he did not look at the valuation report.

54. With this the 3<sup>rd</sup> Defendant's case was closed.

### **Court's Directions**

55. At close of the hearing, the Court directed parties to file their respective written submissions. Parties complied except for the 1<sup>st</sup> Defendant who did not participate in the hearing and also did not file written submissions. For the submissions filed, the Court has had a chance to read the submissions and considered them in its determination.

### **Analysis and Determination**

56. The Plaintiff denies being a party to the transaction that the 2<sup>nd</sup> Defendant has claimed to have been executed on 21/10/2015. The Plaintiff has produced in this Court exit

stamps which attest to his testimony that he was not in the country from 26/02/2014 to 25/12/2017. This evidence was not controverted by the Defendants. It therefore follows that indeed the Plaintiff was not in the country.

57.If this be the case, then it follows that indeed he did not execute the said charge document, nor was he aware of the offer letter dated 25/09/2015 made to the 1<sup>st</sup> Defendant one Nicholas Wachira for a loan of Kesh 5,000,000. From this offer letter the Plaintiff is identified as guarantor and in the definitions provided the bank does not define a charge but defines a guarantor giving the impression that the Plaintiff was meant to be a guarantor and not a chargor.

58.Be as it may the 1<sup>st</sup> Defendant who was the borrower did not come to Court to clarify what he averred in the Statement of Defence and therefore what he stated is not useful to the Court. I do note though that the 2<sup>nd</sup> Defendant should have at least had him to come as a witness if not for nothing else but to buttress the claim the 2<sup>nd</sup> Defendant's case that he indeed was a guarantor to him.

59.The legal burden of proof is static but the evidential burden of proof keeps shifting during the trial. Once the Plaintiff placed evidence before the Court showing that he was not in the country on the dates referenced above and

that he does not know the 1<sup>st</sup> Defendant thus he did not sign any charge document, the 1<sup>st</sup> Defendant had to answer that evidence. In other words, the evidential burden shifted to the 1<sup>st</sup> Defendant to prove that the Plaintiff indeed signed a charge document dated 21/10/2018. Giving a leeway through statutory power of sale to the 2<sup>nd</sup> Defendant to lay claim to the Plaintiff's suit property.

60. The majority of the Supreme Court in **Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR** stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

***“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced. (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant***

***impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondent to adduce evidence to prove compliance with the law..."***

61. In **Munyu Maina v. Hiram Gathiha Maina**[2013] eKLR, the Court of Appeal stated as follows:

***"We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all***

***interests which need not be noted on the register.”***

62. There were no documents produced to support the process of creation of a charge either by 1<sup>st</sup> Defendant or 2<sup>nd</sup> Defendant evidence of application for consent of the Land Control Board and evidence of such consent having been issued by the Board. In the absence of such evidence, the evidence adduced by the Plaintiff that the charge process was illegal and fraudulent is unrebutted. What other proof of fraud and illegality would the Court require from the Plaintiff? The Plaintiff also testified that he had the title deed in his custody and so it is not possible that it was produced for charging by himself being that he was out of the country.

63. In any event, under Section 107, 108 and 109 of the Evidence Act, it is the Plaintiff who bears the burden of proving his said allegation. The Sections provide as follows:

***“ 107. Burden of proof***

***1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

**2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**108. Incidence of burden**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**109. Proof of particular fact**

**The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

64. It therefore follows that the charge document was allegedly prepared without payment of stamp duty and Land Control Board Consent by the Plaintiff who was not in the country when the charge was prepared and therefore it is illegal, fraudulent, null and void.

65. I have held that the 1<sup>st</sup> Defendant's charge document was illegal and fraudulent thus null and void. Therefore, could the 2<sup>nd</sup> Defendant purport to exercise statutory power of sale over an illegal charge? I do not believe so since there was no charge in existence. It then follows that the 3<sup>rd</sup> Defendant innocent purchaser for value without notice of

any defect in the charge and title held by the Plaintiff purchased what most people have come to refer to in Kenya as “hewa” – meaning he purchased air. In **Mwangi James Njehia v. Janetta Wanjiku Mwangi & Another [2021] eKLR**, the Court stated as follows:

***“37. In Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014 this Court cited with approval the case of Katende v. Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that: -“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, he must prove that:1.he holds a certificate of title;2.he purchased the property in good faith;3.he had no knowledge of the fraud;4.he purchased for valuable consideration;5.the vendors had apparent valid title;6.he purchased without***

***notice of any fraud; and 7. he was not party to the fraud. "We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word "apparent" be done away with altogether. 38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have "purchased" properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the***

**registration systems at the Land Registry in Nairobi.39.The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has “purchased” the property on the basis of an “apparent title” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.”**

66.The Plaintiff who is the legitimate owner of the suit property cannot be divested of the suit property on account of the illegal title that the 3<sup>rd</sup> Defendant obtained through the 2<sup>nd</sup> Defendant vide a public auction that emanated from an illegal transaction.

67.Talking about the auction, it emerges that the 2<sup>nd</sup> Defendant instructed Garam Investment Auctioneers who sent a letter vide registered mail to the Plaintiff dated January 25, 2018 giving 45 days’ notice and they stated that they would conduct a public auction on 03/04/2018.

Later an advertisement was carried in the Standard Newspaper on 9/05/2022 by Quickline Auctioneers.

68.No evidence was laid before the Court of the Certificate of Postage even when examined on this DW3 was not able to produce any Certificate. Infact he told the Court that they served the Plaintiff through his agent.

69.Section 74 of the Registered Land Act (RLA) Cap 300 (Repealed) provides at subsections (1) and (2) thereof 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. Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the charger fails to comply, within three months of the date of service, with a further notice served on him under that sub section” (emphasis provided)**

70. In the case at hand, there are in fact two auctioneers the Garam Investment and Quickline. Eventually it is Quickline who carried out the auction. This in itself is an anomaly. DW-3 a Licensed Auctioneer of Class B of 30 years standing testified and told the Court that they served the 1<sup>st</sup> Defendant through his agent who in this case is the Plaintiff.

71. In **Moses Kibiego Yator vs Eco Bank Kenya Limited [2014) eKLR** where Munyao J stated at follows:-

**“... but I am unable to see the certificate of postage of the Postal Code via which the letter was sent. It could be very well that it was sent to the wrong postal address and benefit of such doubt must be given to the Plaintiff. In instances where a chargor alleges that he did not receive the statutory notices, the burden shifts to the chargee, to demonstrate prima facie, that the statutory notice was served ...”**

72. Similarly in **Nicholas Ruthiru Gatoto v Ndarugu Merchants & 2 Others [2014] eKLR** which finding was upheld by the Court of Appeal in **Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 Others [2017] eKLR**, it was held as follows:

***“34. ... It was his testimony that a notice had been posted to the Plaintiff’s address. However, he did not produce a certificate of posting or any documentary evidence to show that the Statutory Notice was indeed served on the Plaintiff. See: Ochieng and Another vs Ochieng and Others, Civil Appeal No. 148 of 1995 EALR [1995-98] at pg 260. In the circumstances, it is plain that the Plaintiff was not served in terms of section 153 of the Registered Land Act (Cap. 300). 35 It is trite law that non-service of a statutory notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor’s equity of redemption. In essence without service of valid statutory notice, the power of sale does not crystallize and any act done by the bank to dispose the suit property amounts to an illegality.”***

73. From the foregoing and being guided by the Court of Appeal in **Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 Others** (supra) and **Ochieng's case** cited in it with approval, the failure by the 2<sup>nd</sup> Defendant and DW3 to exhibit a Certificate of Posting or any documentary evidence to show that the statutory notice was indeed served on the Plaintiff meant that the statutory notices were not proved to have been served upon the Plaintiff. Therefore, the evidential burden on the 1<sup>st</sup> Defendant shoulders was not discharged.

**74.** The failure to serve statutory notice as required under Sections 90(1) and 90(2)(b) of the Land Act 2012 renders the whole process of auction a nullity. The onus is upon the Defendants to prove service of the said notices as was stated in the case **Nyangilo Ochieng' & Another vs Kenya Commercial Bank**. The 2<sup>nd</sup> Defendant failed to serve the Applicant with a notice to sell as required under Section 96(2) and (3) of the Land Act. Further a notification of sale under Rule 15 of the auctioneers was not served upon the Applicant. Neither the 2<sup>nd</sup> Defendant nor DW3 swore any Affidavit of Service to prove the service of the same and there is no certificate from the auctioneer attached to state that the registered owner refused to sign the notification of sale as was stated in the case of **Moses Kibiego Yator vs Eco bank Kenya Ltd [2016] KEELC 177 (KLR)**.

75. Non-service of a Statutory Notice is a fundamental breach of the provision of Section 90(1) of the Land Act which derogates from the chargor's equity of redemption and consequently, the 2<sup>nd</sup> Defendant's power of sale does not crystalize and any act done by the 2<sup>nd</sup> Defendant to dispose the suit property amount to an illegality and thus unenforceable.
76. It is unenforceable because the unshakeable grounded position of the law is that the Court by its stature and innate and intrinsic nature never renders succor to violation of the law and what is done contrary to the law must be viewed to be against the collective interest of the society subject to the law.
77. When the Court ignores the enforcement of the law on the terms of the statute enacted by the Legislature, it can only attract for itself rogue and contra public policy and common good of the polity. It shall have fertilised the ground for governance outside the rule of law and invited anarchy to prevail. It is a demand of the rule of law that Courts discourage contra-statute actions and conduct and therefore anything done contrary to the law cannot be enforced. In this case therefore having found that the 2<sup>nd</sup> Defendant failed to prove that it met its statutory duty to serve a notice mandated by law, a sale conducted and concluded in furtherance of such failure must itself be

identified and recognized for being contra-statute and must be set aside and cancelled.

78. In **Stephen Boro Gitaha v Nicholas Ruthiru Gatoto & 2 Others (supra)** the Court of Appeal in underscoring the value and effect of service of the statutory notice held as follows:

***“The case at hand is on all fours with that decision in (Ochieng and Another vs Ochieng and Others, Civil Appeal No. 148 of 1995 EALR (supra)) and the conclusions the learned Judge arrived at were therefore correct in law. Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the Courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title. The learned Judge was right to find and hold that innocence of Gitahi’s purchase was not***

***curative of the fundamental defect in the title due to the absence of the requisite notice.***

***78. The Court of Appeal's decision in OCHIENG & ANOR vs. OCHIENG & OTHERS, (in which I had the privilege of appearing for the appellant), cited with approval in Gitiha's case (supra) the Court emphasised that the need for service was not a trivial irregularity but a fundamental and deviation therefrom was fatal as the subsequent sale would be rendered 'unlawful, null and void, and incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.'***

79. I am duly guided and bound by these decisions and I find that the sale to the 3<sup>rd</sup> Defendant was grounded upon false and null foundation and it must now be allowed to crumble. Let it stand cancelled and with it goes the 3<sup>rd</sup> Defendant's title premised upon.

80. Having found that the 2<sup>nd</sup> Defendant failed to prove service on the Plaintiff of the three months' statutory notice as required under Section 74(1) of the Registered Land Act, which was and remains the cornerstone of exercise of the power of sale by a chargee, any subsequent notices issued and actions taken in

furtherance of the 3<sup>rd</sup> Defendant's exercise of its Statutory Power of Sale were therefore invalid and could not confer any right on any of the Defendant to proceed as such.

81. It is my opinion and understanding upon reading the decisions of the Court of Appeal in this area I get the learning that the law remains that the Court will not countenance failure to comply with the law nor reward a party for own violation of a statute by allowing a perverter of the law to keep a benefit thereby obtained. This Court has all along held it strongly that to depart from this path would defeat the very purpose of a justice system based on the rule of law.

82. The Plaintiff accuses the 1<sup>st</sup> and 2<sup>nd</sup> Defendant of fraud which being a serious charge, it is trite law that it must be pleaded and strictly proved to the standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the Court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.

83. In Alberta **Mae Gacie v. Attorney General & 4 Others [2006] eKLR** the Court stated as follows:

***“Cursed should be the day when any crook in the streets of Nairobi or any town in this***

***jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this Court would be called upon to defend such crooks, has not come and shall never come...”***

84. The title held by the 3<sup>rd</sup> Defendant given the flawed process that led to the auction cannot stand the charge process was a nullity. In **Wambui v. Mwangi & 3 Others, (Civil Appeal 465 of 2019) [2021] KECA 144 (KLR)** the Court of Appeal stated as follows:

***“70. Sixth, the title was also tainted with nullity in that the Court process on the basis of which the title to the suit property was anchored was subsequently declared null and void ab initio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title***

***allegedly vested in the 3rd Respondent and subsequently passed on to the appellant having stemmed from Court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.***

***71. Seventh, Section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3rd Respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.***

***72. In light of all the above, we reiterate that the Judge's reasoning as to why appellant's title to the suit property was vitiated was***

***well founded both in fact and in law and is therefore unassailable.”***

85.It is my finding from the foregoing that the 3<sup>rd</sup> Defendant has no lawful interest in the suit properties. The lawful and legitimate owner of the suit property is the Plaintiff.

86.The remedy available to the 3<sup>rd</sup> Defendant against the 2<sup>nd</sup> Defendant Bank will be to obtain a refund of the price paid for the suit property. The 3<sup>rd</sup> Defendant laid that issue before the Court and stated:-

***“g. .... the 3<sup>rd</sup> Defendant be awarded the damages particularized at paragraph 15 and 16 above as against the 2<sup>nd</sup> Defendant”***

87.Although this claim was not made in the form of a Counter-claim. Therefore the 3<sup>rd</sup> Defendant can pursue his claim as he deems fit. On the other hand, the 2<sup>nd</sup> Defendant is at liberty to pursue the 1<sup>st</sup> Defendant to pay off the loan facility and the 3<sup>rd</sup> Defendant is at liberty to pursue the 2<sup>nd</sup> Defendant for a claim of damages and refund for monies paid for a non-existent title.

88.At the very onset of writing this Judgment I set out the reliefs sought by the Plaintiff in his Amended Plaint. I am satisfied that the Plaintiff has proved his case against the Defendants and as such is entitled to the reliefs sought. Therefore, in conclusion, I hereby enter Judgment for the Plaintiff against the Defendants jointly and severally by issuing the following Orders:-

**a. A declaration is hereby made that the charge dated 25<sup>th</sup> January, 2018 created over Ruiru/Ruiru East Block 2/8048 is void as it was created illegally, irregularly and unprocedurally.**

**b. An order of permanent injunction is hereby issued against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants restraining it from entering into any private treaty or scheme of settlement and which involves alienating, selling or advertising or offering for sale, transferring, laying claim to, trespassing onto and or in any other manner dealing or interfering with the Plaintiff's peaceful occupation and title to land parcel No. Ruiru/Ruiru East Block 2/8048.**

**c. An order is hereby issued for cancellation of the title for land parcel No. RUIRU/RUIRU EAST BLOCK 2/8048 in the name of Samuel Macharia Ndungu and to revert the same in the Plaintiff's name James Kamau Ndung'u.**

**d. Costs of the suit are awarded to the Plaintiff.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 13<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....  
**MOGENI J**

**JUDGE**

**In the presence of:-**

Ms. Murage holding brief for Mr. Wachira for the Plaintiff

1<sup>st</sup> Defendant - Absent

Ms. Maina for the 2<sup>nd</sup> Defendant

Mr. Githinji for the 3<sup>rd</sup> Defendant

Melita - Court Assistant

.....  
**MOGENI J**  
**JUDGE**

ORIGINAL