

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 34 OF 2013**

**JACK KAGUU GITHAE.....**  
**PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**

**JOHN PATRICK MACHIRA.....2<sup>ND</sup>**  
**DEFENDANT**

**AMY WAIRIMU GITHAE.....3<sup>RD</sup>**  
**DEFENDANT**

**JUDGMENT**

1. The plaint dated 20<sup>th</sup> April, 2013 prays for judgment against the defendants for;

- i. An Order annulling and setting aside the sale of the plaintiff's property L.R. No. Nyandarua/Karati /151 pursuant to an unlawful public auction purported to have been conducted on the 18<sup>th</sup> December, 2008.***
- ii. An Order directing the Land Registrar - Nyandarua to cancel all the titles excised from L.R. NO. Nyandarua/Karati/151 being L.R. NO. Nyandarua /Karati/5301, L.R. No. Nyandarua/Karati/5302, L.R. No.***

**Nyandarua/Karati/5303, L.R. No. Nyandarua/Karati/5304 issued to the 2<sup>nd</sup> defendant and L.R. No. Nyandarua/Karati/5305 issued to the 3<sup>rd</sup> defendant and the said properties to and the same be restituted and/or restored in the Plaintiff's favour with the original boundaries and / or acreage being reinstated.**

- iii. A permanent injunction do issue against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants restraining them whether by themselves, their authorized agents, servants, employees, workers or otherwise howsoever from trespassing on, wasting, alienating, selling, transferring, charging and / or in any other manner whatsoever dealing with or interfering with the Plaintiff's use and quiet possession of the properties Known as L.R. No. Nyandarua /Karati/5301, L.R. No. Nyandarua/Karati/5302, L.R. NO. Nyandarua/Karati/5303, L.R. No. Nyandarua/Karati/5304 and L.R. No. Nyandarua /Karati/5305 excised from the original L.R. No. Nyandarua/Karati/151.**
- iv. That in the alternative the 1<sup>st</sup> defendant be ordered to recompense the plaintiff damages for the wrongful, unauthorised and irregular exercise of its statutory power of sale and / or for conversion of the plaintiff's property**

***pursuant to an unlawful public auction and also for having sold the plaintiff's property at a grossly undervalued price, the measure of the said damages being the difference between the true market value of the plaintiff's property sold as at the 26<sup>th</sup> April, 2010 when the valuation was conducted by M/S Lotus Valuers less the just and true loan sum recoverable from the plaintiff as at 11<sup>th</sup> May, 2010 when the 1<sup>st</sup> defendant rendered its statement of account on the proceeds of sale realized. Alternatively, this honourable court orders for an independent valuation in assessing the true value of the property.***

***v. That the 1<sup>st</sup> defendant be condemned to pay the costs of this suit, interest at commercial rates on any damages awarded and all incidentals thereto.***

***vi. Any other or further relief that this honourable court may deem fit to grant.***

2. The plaintiff filed a witness statement dated 20<sup>th</sup> April 2013 where he stated that sometime back in 1992, he approached the 1<sup>st</sup> defendant, borrowed and was granted an overdraft facility all amounting to Kshs.750,000/=. The purposes for the same was to undertake several farming and herbal medicine research projects on his respective farms being properties L.R. No. Nyandarua/Karati/151; L.R. No.11306/2 Kiremanditi Estate in Rumuruti and L.R.

No.10024/4 West of Rumuruti in Ngarua. Further, that he tendered L.R. No. Nyandarua/Karati/151 as security for the loan advanced with the intention that the said loan would be serviced through income derived from the said farms.

3. He further stated that he initially serviced the loan advanced promptly but unfortunately in the course of time tribal related clashes imploded at his Kiremanditi farm in Rumuruti and he suffered heavy financial losses and was unable to meet loan obligations on time. Thereafter, on 26<sup>th</sup> November, 2008 received by way of registered post a notification of sale from M/s Watts Enterprises informing him that they had instructions from the 1<sup>st</sup> defendant to sell his property that was charged as security.
4. He asserted that on 17<sup>th</sup> December, 2008 he filed a suit Nakuru HCCC NO.383 of 2008 against the 1<sup>st</sup> defendant and M/S Watts Enterprises and an injunction order was issued by Lady Justice Mugo. The suit was later withdrawn on the 22<sup>nd</sup> April, 2010. He added that despite the existence of the said orders the 1<sup>st</sup> defendant and M/s Watts Enterprises purported to sell the aforementioned property to the 2<sup>nd</sup> defendant in purported exercise of the 1<sup>st</sup> defendant's statutory power of sale to realize its security. He urged the court to intervene and issue appropriate orders since the sale of his property was tainted with fraud, illegalities, transgressions and inequalities.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their statements of defence dated 16<sup>th</sup> July 2013, 10<sup>th</sup> June 2013 and 1<sup>st</sup> July

2013 respectively where save for their description, they denied the contents of the plaint and the plaintiff was put to strict proof. However, the 1<sup>st</sup> defendant admitted the contents of paragraphs 6 and 7 of the plaint which is in respect of the loan advanced to the plaintiff plus the security given.

6. During the hearing, the plaintiff testified as PW1. He adopted his witness statement and bundle of documents dated 23<sup>rd</sup> October 2022 as his evidence in chief.
7. In cross-examination he admitted to having charged his property to the bank and signed a letter of offer when taking the loan. He also admitted to having fallen in arrears but regularized the position as required by the 1<sup>st</sup> respondent, though he had no evidence to prove the same. He confirmed receiving a letter for statutory power of sale and a notification form (see bundle of documents for the 1<sup>st</sup> defendant page 43 43 and 47) and not a valuation report by the bank. He stated that the court order was served upon the 1<sup>st</sup> defendant but it did not sign confirming receipt. He added that he knew that the property would be sold if he did not pay the loan.
8. In further cross examination, he stated that HCCC 383/2008 Nakuru is where the order arose from and he could not remember if he made any payment between 2010 and 2013 after withdrawing the said case. He further stated that his representative was at the auction scene but no auction took place and the 2<sup>nd</sup> defendant was in attendance. He added that the 2<sup>nd</sup> defendant participated

- in the auction. He denied owing the 1<sup>st</sup> respondent any money and instead that it was him who was owed money.
9. In re-examination, he stated that he had been living on the land which measured 67 acres since 1971 and its value was kshs 30 million but it was sold for ksh 4.5 million.
  10. PW2, Lilian Njeri Njehia, who is a valuer by profession with 34 years' experience stated that the total value of the whole land was 30 million. However, the whole sale value on auction would have been 18 million. Thus, the auction value of the property when sold was too low in her opinion given the advantages of opening up of the area giving it unique features. She produced her report (PEXB 3).
  11. In cross-examination, she confirmed that valuation was done in 2002 which was about 14 years since the auction and she had two sets of values. She stated that the report at page 8 A was a general methodology in which she had annexed several sale agreements. She further stated that she did not have the 2022 certificate but she was registered. She added that the copy (PEXB 3) in court did not bear the Nishani Management company's seal and there was nothing showing the connection between her and the said company.
  12. The defence called two witnesses, DW1 being Linet Ambenge the relationship manager KCB Malindi and previously the Credit Administration Manager KCB Naivasha. She adopted her witness statement and bundle

of documents dated 4<sup>th</sup> July 2022 (DEXB1) as her evidence in chief.

13. In cross examination she stated that the plaintiff's allegations were not true as the auction was carried out on 18<sup>th</sup> December 2008. She further stated that the plaintiff was supplied with bank statements for January, 2006 to October, 2008. She confirmed that the suit property was transferred after the auction and the letter dated 18<sup>th</sup> December 2008 explained the same. She further confirmed that the property was sold at kshs 4.6million.
14. She referred to page 29-30 of her bundle of documents which contained a document where counsel informed the plaintiff that the bank was not in contempt of court orders issued in HCC No.383/2008 which was withdrawn by the plaintiff. She stated that the transfer of land to the 2<sup>nd</sup> defendant was lawful and there was no collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the transfer of the land. She added that the valuer was approved by the bank. The sale price was within the limits in the valuation report.
15. DW2 was the 2<sup>nd</sup> defendant and he adopted the witness statement dated 24<sup>th</sup> June 2013 as his evidence in chief. He also produced his bundle of documents dated 26<sup>th</sup> June 2012 as exhibit DEXB 2 and the supplementary bundle dated 3<sup>rd</sup> June 2015 as DEXB 3. While relying on section 35 Evidence Act he produced witness statement (DEXB 4) by Richard Ng'ang'a W. who passed away on 3<sup>rd</sup> March 2023. He stated that he did not collude with the 1<sup>st</sup>

defendant at the auction and that he had been in possession of the land throughout.

16. He further stated that PW2 never visited the property as entry to the said land was restricted since it has a steel gate and well fenced land. He added that after the auction the 1<sup>st</sup> defendant availed all necessary documents to transfer the land to him and the plaintiff was nowhere when all that was done.

17. Parties were directed to file their written submissions which they did

### **Plaintiff's submissions**

18. These were filed by the firm of Anthony Gikaria & Company Advocates and are dated 15<sup>th</sup> May 2025. Counsel gave a brief background of the case and submitted that the plaintiff was not able to pay the outstanding sum owed to the 1<sup>st</sup> defendant since he was not supplied with properly reconciled accounts. She asserted that the debt sought to be recovered by the 1<sup>st</sup> defendant amounted to kshs. 2, 988, 871.50 which exceeded the principle sum of kshs. 750,000/= . He submitted that pursuant to section 44 of the Banking Act lenders are restrained from seeking to recover interest or other bank charges in excess of what is permitted by legislation. Thus, the interest visited upon the plaintiff by the 1<sup>st</sup> defendant was unconscionable and usurious and the doctrine of in duplum applied in this instance.

19. The court's attention was drawn to the decision in **Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR**, the Court stated:

***“The conduct of the bank as summed up above mirrors the conduct of another bank in the case of Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR. On the issue of charging interest, (increased from 14% to 45% in that case) this Court examined comparative jurisprudence and came to the conclusion that, even where a lending institution has a written clause permitting it, in its sole discretion from time to time to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission, commitment charges, and other usual bank charges and other costs and expenses incurred or to be incurred by the Bank in relation to the customer’, the discretion was not absolute. It cannot be exercised willy nilly to charge exorbitant interest.***

***It was held:***

***“the discretion on the Respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower,***

***especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as to what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower”.***

20. Counsel further submitted that the 1<sup>st</sup> respondent was in contempt of court having sold the charged property yet there were injunctive orders in place. Further, that the said property was sold through a regular public auction conducted on the 18<sup>th</sup> December 2008 at 11.00 am. He added that the valuation report which the 1<sup>st</sup> defendant relied upon in disposing the suit property was a total undervaluation of the market value and forced sale valuation of the suit property.

21. In conclusion, counsel submitted that the borrower's equity of redemption could not be extinguished by the unlawful sale of a charged property. He cited section 99 (4) of the Land Act, 2012 which provides as follows;

***“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”***

22. He urged the court to allow the suit as prayed with costs to the plaintiff. On costs, the court's attention was drawn to the several decisions among them **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 Others [2014] eKLR.**

**1<sup>st</sup> defendant's submissions.**

23. These were filed by the firm of Mburu Maina & Company Advocates and are dated 26<sup>th</sup> September 2025. Counsel gave brief facts of the case and identified five issues for determination.

24. The first issue is whether the 1<sup>st</sup> defendant exercised its statutory power of sale legally, contractually and without deceit or malice. Counsel submitted that the 1<sup>st</sup> defendant did not receive any order of injunction from the plaintiff or his agents at any time during the auction. That it was after the auction had been concluded that the 1<sup>st</sup> defendant became aware the plaintiff had obtained injunction in Nakuru HCCC No. 383 of 2008.

25. Counsel further submitted that from the material on record, the said property was not undervalued and the 1<sup>st</sup> defendant ensured that a valuation was undertaken by a valuer in accordance with the law. That the 1<sup>st</sup> defendant had discharged its duty of care to the plaintiff. Additionally, the valuation report by Applecross Surveyors dated 5<sup>th</sup> November 2008 as per the 1<sup>st</sup> defendant represented the true state of affairs of the said property in the year 2008. Thus, the counter-valuation reports presented by the plaintiff are not credible since they are

marred with errors, unsubstantiated facts, hearsay and over-exaggerated figures. She urged the court to disregard the same and find that the 1<sup>st</sup> defendant's valuation to be the correct one.

26. The court's attention was drawn to the decision in **Nancy Kahoya Amadiva v Expert Credit Limited & another [2015] KECA 373 (KLR)** the court held as follows: -

***“There is a general duty for a mortgagee to act in good faith in exercising the power of sale. This duty stems more from equity than statute. This argument is backed by the proposition that the fact that a sale has been effected at a properly conducted auction is a strong prima facie evidence that no unfair advantage has been taken either by the vendor or purchaser. Indeed, it has been argued that there is no better or more reliable method of determining the true and fair market value of property than by sale at public auction. To this end, Lord Macnaghten in Frewen\_v Hayes 1912 106 LT 516 stated that***

***“the prices which the public are asked to pay (i.e at an auction) are the highest prices which those who bid can be tempted to offer by the skill and tact of the auctioneer and under the excitement of open competition.” From the foregoing, and having found that the 1<sup>st</sup> respondent was not obliged to sell by public auction, we are convinced that the 1<sup>st</sup> respondent acted in good faith towards realizing***

***the security following the default by the appellant. The appellant was silent all along during the proceedings on any efforts she made towards repaying the loan or seeking indulgence on her borrowing despite aggressively coming out in seeking to impede the 1<sup>st</sup> respondent's exercise of its statutory duty. These actions by the appellant did not augur well in her attempts to seek our positive consideration in the circumstances."***

27. Counsel asserted that the plaintiff had failed to discharge his burden as to cause a determination by this court to impute fraud and/or misrepresentation on the part of the 1<sup>st</sup> or 2<sup>nd</sup> defendant. Reliance was placed on several decisions among them **Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others [2020] KECA 516 (KLR)** where the Court set out the standard to be applied where fraud has been alleged in paragraph 42 and 43 of the decision as follows:

***"42. It is trite that where fraud is alleged, it is not enough to simply deduce it from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR Tunoi JA (as he then was) pronounced himself as follows: -***

***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that***

***these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."***

28. On the second issue as to whether the 1<sup>st</sup> defendant charged interest at a rate higher than allowed by the law, counsel submitted that the interest charged was in line with the terms of the letter of offer which was signed voluntarily by the plaintiff on 22<sup>nd</sup> June 1993. He placed reliance on the decision in **Nancy Kahoya Amadiva v Expert Credit Limited & Another** (supra) and urged the court to uphold the freedom of parties to a contract and dismiss the plaintiff claim.

29. On whether the 1<sup>st</sup> defendant rendered the true facts of the plaintiff's account, counsel submitted that the plaintiff was made aware of the amount owed together with the interest as evidenced by the correspondences between him and the 1<sup>st</sup> defendant. That even though the 1<sup>st</sup> defendant's bank system was decommissioned in 2006 it was able to supply bank statements from 2006 -2008.

30. On whether the plaintiff is entitled to the orders being sought in the plaint, counsel submitted that the 1<sup>st</sup> defendant exercised its statutory power of sale and the auction carried out 18<sup>th</sup> December 2008 was done legally. He further submitted that once a property was 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 and the duties and obligations arising from the charge are extinguished. Therefore, the only remedy for a chargor who is dissatisfied with the conduct of the sale is that of general or special damages only.

31. The court's attention was drawn to the provisions of sections 72 and with 77 (1) (2) (3) (4) of the Registered Land Act Cap 300 and the decision in **Downhill Limited v Harith Ali El-Busaidy & Another [2000] KECA 214 (KLR)** where the court held as follows: -

***“As far as we can glean from the pleadings, affidavits and the ruling itself, the borrower's case was that the statutory power of sale had been improperly and irregularly exercised. Even assuming without deciding that these allegations were true, they could not give rise to any claim against the appellant by the borrower. The law gives him only one remedy against the mortgagee (the Bank) and for the specific relief of damages. He is not entitled to any other relief.”***

32. Lastly, on who should bear the costs of the suit counsel cited the decision in **Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others [2014] eklr** and urged the court to award the same to the defendants.

### **2<sup>nd</sup> defendant's submissions**

33. These were filed by the firm of Anthony Gikaria & Company Advocates and are dated 15<sup>th</sup> May 2025. Counsel gave a brief background of the case and submitted that pursuant to the provisions of section 4(2)

of the Limitation of Actions Act the plaintiff's fraud claim against the 2<sup>nd</sup> defendant was time barred.

34. He placed reliance on **Peter Kimani Njenga v Mugo Kamabuni Mugo & 3 others 2023 KECA 18 KLR** where the Court of Appeal was faced with a similar problem and after reciting Section 4(2) of the said Act, the Court proceeded to state at paragraph 22 and 23 as follows:

***“We therefore find no impropriety on the part of the learned Judge of the ELC in finding that the cause of action herein was that to which section 4(2) of the Limitation of Actions Act was applicable. The appellant’s case was not one of adverse possession but one based on fraud. Having said so, it therefore follows that the period within which the appellant ought to have put in motion his cause of action was 3 years as provided for under section 4(2) of the Limitation of Actions Act. The next question however is when the time started running.”***

35. Counsel submitted that the 2<sup>nd</sup> defendant had demonstrated that he bought the suit property legally and regularly, having observed and obeyed the necessary and relevant laws. He drew the court's attention to the 2<sup>nd</sup> defendant's supplementary list of documents pages 1 to 11. Counsel also referred to sections 33 and 35 of the Evidence Act Cap 80 of the Laws of Kenya and the decision in **Parkar & Another v & 2 Others [2023] eKLR**.

36. Counsel asserted that the plaintiff's prayer seeking injunctive orders was dismissed by Emukhule J on 31<sup>st</sup> October 2014. Further, that the valuation report is over exaggerated, defective, unreliable and was made specifically to tarnish and impeach the public auction sale which took place on 18<sup>th</sup> December 2008. He cited the decision in **Downhill Ltd Vs Harith Ali El-Busaid & Another [2000] eKLR** where the Court of Appeal dealt with the issue of allegations by the Chargor vis-a-vis the Purchaser in a Public Auction. At page 2 paragraph 4, their Lordships stated thus:

***“Even assuming without deciding that these allegations were true, they could not give rise to any claim against the appellant by the borrower. The law gives him only one remedy against the mortgagee (the Bank) and for the specific relief of damages. He is not entitled to any other relief. In issuing a temporary injunction against the Bank and the appellant it is plain beyond a peradventure that the learned Judge wrongly exercised his discretion and we are bound to interfere. This ground of appeal accordingly succeeds. The complaint in grounds of appeal is that the learned Judge erred in law and fact by finding that the purchase price of kshs. 7.5m was low and because of that fraud could not be ruled out. As the law stands even if this allegation was found to be true it would only give***

***the borrower a cause of action in damages against the Bank.”***

37. In conclusion, he urged the court to dismiss the plaintiff's suit with costs.

**Analysis and Determination**

38. Upon analyzing the facts, evidence and the submissions tendered by the parties in this case, it is my view that the issues arising for determination are as follows;

***i. Whether the statutory power of sale was unlawful and if so,***

***ii. Whether the plaintiff is entitled to the orders sought in the plaint.***

**i. Whether the statutory power of sale was unlawful**

39. The plaintiff in his plaint seeks among other orders, that an order be issued annulling and setting aside the sale of his property L.R. No. Nyandarua/Karati /151 pursuant to an unlawful public auction purported to have been conducted on the 18<sup>th</sup> December, 2008. Further that an order be issued directing the Land Registrar Nyandarua to cancel all the titles excised from the said property.

40. It is not disputed that the plaintiff was advanced a loan facility of KShs.750,000/= by the 1<sup>st</sup> defendant vide the letter of offer dated 22<sup>nd</sup> June 1993, with the property known as L.R. No. Nyandarua/Karati /151 as security. It is equally not disputed that the plaintiff defaulted in repaying the said loan. In his witness statement he stated that due to tribal related clashes imploded at his

Kiremanditi farm in Rumuruti he suffered heavy financial losses and was unable to meet the loan obligations on time. As a result the same accrued interest and was subsequently sold to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> respondent through a public auction in order to secure the amount advanced.

41. It is the said sale that the plaintiff has challenged claiming that the same was done unlawfully since there were in force injunctive orders stopping the sale. He contends that he was not able to pay the outstanding sum owed to the 1<sup>st</sup> defendant since he was not supplied with proper reconciled accounts. He further contends that the debt recovered by the 1<sup>st</sup> defendant amounted to kshs. 2,988,871.50/= which exceeded the principle sum of kshs. 750,000/=.

42. It is the 1<sup>st</sup> defendant's case that it did not receive any order of injunction from the plaintiff or his agents at any time during the auction. Further, that the suit property was not undervalued and it ensured that a valuation was undertaken by a valuer in accordance with the law. The 2<sup>nd</sup> defendant on his part argued that he had demonstrated that he bought the suit property legally and regularly, having observed and obeyed the necessary and relevant laws.

43. Section 90(1) of the Land Act, 2012 provides as follows:

***If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the***

**performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**

44. Section 96(1) of the Land Act provides as follows:

**Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.**

45. The evidence from the 1<sup>st</sup> defendant is respectively very clear that the plaintiff defaulted and continued to default from meeting his obligation for an extended period of time triggering the purpose and the power of statutory power of sale. The 1<sup>st</sup> defendant without doubt issued notices in writing for the plaintiff to pay the loan due and owing together with interest and to perform such other covenants as created in the loan agreement. This was not a decision made by the defendant bank at the spur of the moment but there were a series of inquiries and concerns on the propriety and regularity of the loan repayment.

46. Notwithstanding the allegations by the plaintiff that the statutory power of sale was irregularly exercised there is documentary evidence in form of letters that the plaintiff had experienced financial difficulties in meeting his part of

the bargain to resolve and alleviate the default in repaying the loan and other payments towards their arrears. The principles in Halsbury Laws of England, 4<sup>th</sup> Ed which explains the duty of a mortgagee, reads as follows:

***“Duty of mortgagee on exercise of power of sale: a mortgagee is not a trustee for the mortgagor as regards the exercise of the power of sale. He is not obliged to exercise the power of sale even if advised to do so, or if the asset is depreciating, however advantageous a sale might be on the mortgagor, He is not obliged to delay in the hope of obtaining a higher price, or if redemption is imminent. He can decide if and when to sell on the basis of his own interests. He owes a duty in equity to exercise the power in good faith for the purpose of obtaining repayment and to take reasonable precautions to secure a proper price. This duty is owed to the mortgagor, subsequent mortgagees and a surety but not to others such as beneficiaries under a trust of the mortgaged property. The duty cannot be replaced or supplemented by liability in negligence. It can however be excluded by agreement. If the mortgagor seeks relief promptly, a sale will be set aside if there is fraud, or if the price is so low as to be in itself evidence of fraud, but not on the ground of undervalue alone, and still less if the mortgagor has in some degree sanctioned the proceedings leading up to the sale*”**

***or if it would be inequitable as between the mortgagor and the purchasers for the sale to be set aside. However, if the mortgagee does not sell with proper precautions, he will be charged in taking the accounts with any loss resulting from it.”***

47. The main complaint in this claim is that the statutory power of sale exercised by the 1<sup>st</sup> defendant and subsequent instructions issued to M/s Watts Enterprises was tainted with illegality, fraud, misrepresentation, and impropriety calling for this court to annul and revoke the sale and have the title revert to the plaintiff. The effect of any sale arising out of the mortgagor and mortgagee covenants was addressed in **Gabriel Ndungu Githua v National Bank of Kenya & 2 Others [2009] eKLR** held as follows:

***“The only remedy available to the plaintiff, if he was aggrieved by the said exercise of the statutory power of sale, is to sue for damages. As regard whether (sic) the plaintiff’s equity of redemption is still in existence, I need not look further than to cite with approval the decision of Nyamu J (as he was then) in Nairobi HCCC No.9 of 2003 Ze Yu Yang vs Nova Industrial Products Ltd (unreported) where at page 9 of his ruling he held as follows:***

***“Turning to the issue of the equity of redemption where there is a valid contract of sale in existence, there is a galaxy of cases starting with celebrated case of George Mbuthia & Jumba Credit Corporation***

***Civil Appeal 111 OF 1986. In that case the decision of Chief Justice Apaloo at pg. 5 clearly states that the equity of redemption is extinguished by a valid contract under S.60 of the Transfer of Property Act...”***

48. The 1<sup>st</sup> respondent issued a notice in accordance to section 74 of the Registered Land Act, to the plaintiff to settle his arrears vide letters dated 13<sup>th</sup> October, 2003 and 5<sup>th</sup> February, 2004. From the reminders to pay the arrears and the fact that the plaintiff went to renegotiate the payment of the same, it is clear that he received the notices. Thereafter, M/s Watts Enterprises issued a notice to the plaintiff, dated 3<sup>rd</sup> December 1999 giving him 45 days to settle the arrears failure to which the property would be sold. After the lapse of the said period the plaintiff was served with a notification of sale and he admitted to having received the same. Upon the failure of the plaintiff to settle the arrears, his property was advertised for sale in the dailies after which the auction was conducted and the property duly sold to the 2<sup>nd</sup> defendant.

49. It is not in dispute that the law provides that the advertisement for sale of the mortgaged property is necessary. In my opinion the object of a sale in a public auction is to secure a fair price for the property offered by means of competitive bids between the probable purchasers. The auctioneer is mandated to go for the best price from the bids received from the public. On the other

hand, the object of giving public notice of a sale by auction whether by advertisement or posters is to bring the subject of the sale to the notice of the public to invite probable purchasers and to induce such competitive bids for the property likely to secure a fair price. There is no sufficient evidence that such a duty was not carried out diligently by the auctioneers in this case.

50. The statutory power of sale is given to the mortgagee for purposes of realizing its security in the event the loan repayment falls due and no steps are taken to regularise the arrears and continuum of keeping the payment on schedule. It is now well settled in law that the 1<sup>st</sup> defendant bank when realizing the mortgaged property by sale offered as security by the plaintiff has to behave in conducting such realization of the proceeds of sale as a reasonable man would have in the realization of his or her own property.

51. In **Maithya vs Housing Finance Co. of Kenya & Another [2003] 1 EA 133 at 139** Nyamu J (as he then was) stated as follows: -

***“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly***

***insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities....Loss of the properties by sale is clearly contemplated by the parties even before the security is formalised. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the respondent cannot pay damages should it become necessary.” (Emphasis mine)***

52. I have considered the process of the statutory power of sale. There is no evidence that such a duty was not carried out diligently by the 1<sup>st</sup> defendant. One of the main issues raised by the plaintiff was that the 1<sup>st</sup> defendant bank should be held liable for the negligence of its agents one of them being the auctioneers and the 2<sup>nd</sup> defendant. However, the burden of proof vested with the plaintiff has not been discharged to make this court hold the defendants jointly and severally liable for the issues raised in the plaint to warrant grant of any reliefs therein in his favour. I note that the timelines set out in the Land Act on the statutory power of sale, valuation the intended sale and service of the statutory notices, were all complied with as stipulated in the act. Thus, it is considered view that the statutory power of sale was properly exercised.

53. The plaintiff raised the issue of the in-duplum rule, which came into force in 2006 way after the plaintiff had taken

the loan over the suit property. Therefore, the same is not applicable to the present suit.

54. Lastly, the plaintiff did not avail any evidence of service of injunctive orders allegedly obtained in Nakuru HCCC No. 383 of 2008 on the 1<sup>st</sup> defendant. Without such proof there is no way the 1<sup>st</sup> defendant would have been aware of any such orders. The said orders are alleged to have been issued on 17<sup>th</sup> December, 2008 while the auction was conducted on 18<sup>th</sup> December, 2008.

55. The upshot is that the plaintiff has failed to prove his claim against the defendants to the required standard. The same is dismissed in its entirety with costs to the defendants.

56. Orders accordingly.

**Delivered, virtually, dated and signed this 28<sup>th</sup> day of November, 2025 in open court at Nakuru.**

**H. I. ONG'UDI**  
**JUDGE**