



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.7 OF 2016

MAKATIAT LIMITED.....PLAINTIFF

VERSUS

LIQUIDATON AGENT TRADE BANK LTD (IN LIQUIDATION)...1ST DEFENDANT

PETER N. GICHUKI T/A SPOTLIGHT INTERCEPTS.....2ND DEFENDANT

JIMPATSAM HOLDING COMPANY LTD.....DEFENDANT

JUDGMENT

(Suit by plaintiff challenging a sale by chargee in a public auction; declared purchaser not having abided by the conditions of sale; auctioneer topping up from his funds money to enable purchaser raise 25% deposit; auction being adjourned to an afternoon session not declared to the public; auction sale set aside; dispute over money owing; parties holding opposing positions and accounts not provided for the court to determine whether what the chargee claims to be owing is justified; parties directed to negotiate, arbitrate or file suit specifically for determination of the amount owing).

1. This suit was commenced through a plaint which was filed on 19 January 2016 which plaint was later amended owing to events that occurred while this suit was still ongoing. In the original plaint, the plaintiff only sued the Liquidation Agent, Trade Bank Limited (in Liquidation). It averred that it owed a debt to Trade Bank Limited (in liquidation) and that through negotiations with the named defendant, they arrived at the figure of Kshs. 16.3 Million as the money owing, and further, that it was a term of their agreement that the debt would not attract any further interest until payment is made in full. It was averred that in the year 2012, the plaintiff tendered a reasonable proposal to pay the debt by way of instalments and made a deposit of Kshs. 5.9 Million, but because the plaintiff was given the wrong account number by the defendant, this payment was returned, and the plaintiff was not notified until December 2015, when he discovered an intention to sell one of the securities. It was pleaded that the plaintiff having been furnished with the correct account number, transferred an amount of Kshs. 5,934,580/= to the defendant and made a further reasonable proposal on the balance but the defendant informed the plaintiff to wait for a resolution from the relevant committee which the plaintiff suspected was a delay tactic so that the property in issue, Nakuru/Githiriga/124, may be sold. In the original plaint, the plaintiff asked for orders to have the defendant permanently restrained from selling the said land parcel Nakuru/Githiriga/124 (hereinafter referred to as the suit land).

2. Together with the plaint, the plaintiff filed an application for injunction to stop an intended sale of the suit land by M/s Sportlight Intercepts Auctioneers. I gave interim orders of injunction subject to deposit of the sum of Kshs.2 Million which was duly deposited. The application was opposed and when it came up for inter partes hearing on 28 June 2017, neither the applicant nor her counsel appeared, and I dismissed the said application and vacated the interim orders which essentially paved way for the sale of the suit land. Given that position, the Liquidation Agent gave instructions to its auctioneer to sell the property and a sale was scheduled for 3 November 2017. On the day of sale, the plaintiff moved this court for an injunction to stop the sale. The court did grant an injunction but was careful to note that the order has been issued at 11.45am. When the application came up for inter partes hearing, there was no consensus from the parties as to whether or not a sale had taken place, the plaintiff being of the view that no sale took place on 3 November 2017, and the Liquidation Agent, insisting that the property was sold by Sportlight Intercepts to M/s Jimpatsam Holdings Company Limited. Perhaps given that contested position, the plaintiff moved to amend its plaint and added Peter N. Gichuki T/A Sportlight Intercepts as 2nd defendant and Jimpatsam Holdings Limited as 3rd defendant. The amended plaint was filed on 18 May 2018.

3. In the amended plaint, the plaintiff has pleaded that in the year 1992, it was granted financing of Kshs. 5,000,000/= by Trade Bank Limited and offered the suit land, which is land measuring 45.6 Ha, as security. It is pleaded that in the year 2000 or thereabouts, the plaintiff and 1st defendant (Liquidation Agent of Trade Bank Limited) agreed on an all inclusive figure of Kshs. 34,288,087.50/= and further agreed that this amount would not attract interest. It is pleaded that the plaintiff paid the sum of Kshs. 25,634,980/= leaving a balance of Kshs. 8,653,107/=. It is pleaded that on 31 October 2017, the 1st defendant secretly advertised the suit land for a sale scheduled for 3 November 2017, the intention being to give the plaintiff little time to seek legal redress. It is contended that no sale took place on that day despite the

1st defendant claiming to have sold it to the 3rd defendant. It is the view of the plaintiff that the sale was fraudulent, in that the advertisement for sale only gave a 3 day notice; that there was collusion to sell the property by private treaty; that no money was paid by the 3rd defendant; that no statutory notice was issued to the plaintiff; that the purported public auction was conducted in a private office contrary to law; that purchasers who did not meet the conditions set in the advertisement for sale were entertained; that the 2nd conducted himself in an unprofessional manner, and that the land being a matrimonial home, was sold without spousal consent contrary to law. It is averred that if any sale took place, the same is illegal and contrary to law and hence null and void ab initio. It is further contended that the purchase price was way below the market value, the plaintiff claiming that the property is worth Kshs. 182,677,600/=. It is also pleaded that the 1st defendant is demanding a sum of Kshs. 418,235,582.20/= which sum is claimed to be fraudulent.

4. In the amended plaint, the plaintiff has asked for the following orders :-

(a) A declaration that the interest rate applied for the secured amount over all that parcel of land known as Nakuru/Githiriga/124-Kuresoi is illegal and unjustified;

(b) An order for cancellation of sale of all that parcel of land known as Nakuru/Githiriga/124 – Kuresoi conducted on 3/11/2017.

(c) An order of injunction restraining the defendants by themselves, their servants, agents and/or employees from selling, advertising for sale, alienating, completing process of sale and/or in any other way interfering with all that parcel of land known as Nakuru/Githiriga/124-Kuresoi.

(d) Costs of the suit.

(e) Any other relief that the Court may deem fit to grant.

5. The 1st and 2nd defendant filed a joint statement of defence. It is contended that the plaintiff took various loan facilities with Trade Bank Limited and Trade Finance Limited (both in liquidation), and that in the year 2000, the respective balances outstanding were Kshs. 198,923,467.60/= and Kshs. 95,875,940.85/= thus a total of Kshs. 294,799,408.45/= exclusive of interest and penalty charges. It is averred that this amount of money continued to accrue interest at 15% per annum and further that these monies were secured by a charge over the properties Nakuru Municipality Block 16/45, Nakuru Olenguruone/Kiptagich/949, Nakuru /Githiriga/124 and LR No. 584/281 (IR No.50538). It is pleaded that a statutory notice was issued on 5 May 2000 after which the plaintiff and 1st defendant entered into negotiations and that it was mutually agreed that the plaintiff would pay the 1st defendant the sum of Kshs. 52,000,000/= as full and final settlement and that the plaintiff committed itself to pay the sum of Kshs.300,000/= per month for 6 months and then pay off the balance. It is averred that the plaintiff failed to pay the agreed sum of Kshs. 52,000,000/=. On 7 November 2001, it pleaded that the loan was re-negotiated culminating into the agreed figure of Kshs. 34,288,087.50/= and that between the year 2001 and 2009, the plaintiff paid Kshs. 17,700,000/= leaving a balance of Kshs. 16,256,510.70/=. Due to the default, the 1st defendant wrote a letter dated 6 September 2013, demanding the balance, failure to which it would claim the entire outstanding amount of Kshs. 418,235,582.20/=. It is averred that the plaintiff paid Kshs. 5,934,980/= on 23 December 2015 and the additional Kshs. 2,000,000/= that this court ordered as a condition for stay thus leaving a balance of Kshs. 8,653,107.50/=. Owing to failure by the plaintiff to pay the negotiated balance, the 1st defendant caused the suit land to be advertised for sale to recover the amount of Kshs. 418,666,702.20/=. It is contended that the advertisement and sale of the suit land was done in strict compliance with the law and that the sale is complete. They have asked that the plaintiff's suit be dismissed.

6. The 3rd defendant also filed a statement of defence where it pleaded inter alia that it purchased the suit land through a public auction which was carried out in accordance with the law. It is pleaded that the 3rd defendant purchased the property at Kshs. 24,900,000/= and that a sum of Kshs. 6,225,000/= was paid as 25% at the fall of the hammer.

7. PW-1 was Levi Kipkemboi Sirma, an Advocate of the High Court of Kenya practising in the law firm of M/s Kipkenei & Company Advocates which is also the same firm of advocates acting for the plaintiff in this matter. He testified that he is well conversant with what transpired on 3 November 2017. He had on the previous day been instructed by his employer to travel to Nairobi to confirm if the sale would take place. He stated that he proceeded to Nairobi and at 8am was in the offices of the 2nd defendant. He met the auctioneer and he presented himself as being a representative of youth from Molo who wished to buy the suit land. He was then asked to make a deposit of Kshs. 2,000,000/= in cash or make a banker's cheque of Kshs. 2,000,000/= so that he could be given a bidding number. He did neither and he was not given a bidding number but he nevertheless sat in the office. He stated that while he was seated there, one person left the auctioneer's office and the auctioneer represented that he was one of the bidders. At about 12.30pm, two men came into the office, who PW-1 later came to know that they were Mr. Ombasa and Mr. Milimo from the bank. Shortly, the auctioneers came out into the reception area with a list of what PW-1 assumed was a list of properties due to be sold and he began ringing a bell. The bell was rung for about 5 minutes after which the auctioneer said that the auction is over. He insisted that there was no bidding. He did not see one George Tanui who was listed in the list of attendants on behalf of the 3rd defendant. He stated that there were only three people at the reception area, himself, Mr. Ombasa and Mr. Milimo. He testified that at about 2.30pm, the order stopping the sale was served upon the auctioneer, and upon the lawyers of the 1st defendant at 3.10pm. He asserted that no sale had taken place before the order was served. He pointed at two cheques drawn by the 2nd defendant on 3 November 2011 for Kshs. 900,000/= and Kshs. 825,000/= and an RTGS of 4,500,000/= which he faulted as it was done after the court order. He also pointed at some cheques of Kshs. 1 Million, tabled by the defendants, which he faulted for the reason that cheques of over Kshs. 1 Million are not allowed. He also pointed out that these cheques are drawn by M/s Muyundo & Company but could not qualify one to bid. He also referred to the attendance list offered by the 2nd defendant, which had the names of George Tanui of Jimpatsam Limited, Stanley Milimo and John Ombasa, and Peter Gichuki (the auctioneer) and complained that his name is not noted while George Tanui was not present. He also thought that what the bank was claiming was illegal and that the sale was at an undervalue. He stated that he is aware that an acre of land in the area cannot sell for less than Kshs. 1,000,000/=. He also faulted the auction for being conducted in Nairobi and not in Molo where the property is situated.

8. Cross-examined, he admitted that he was not familiar with the history of the case, nor was he privy to the interest rate that was payable on

the loan. He did state that the suit property was listed as No. 6 in the newspaper advertisement and according to the advertisement there was a condition that one was required to make a deposit of Kshs. 2 million. He acknowledged that he did not make the deposit and thus not entitled to participate in the auction and his name would not appear in the list of bidders. He did not know the identity of the person who left the auctioneer's office when he (PW-1) walked in. He could identify in court the auctioneer (Mr. Gichuki) and another person who he said was in the auction, which person turned out to be Mr. Milimo. He insisted that the court order was served at 2.30 pm despite the auctioneer having stamped it has received at 4.45 pm. He himself left the auctioneer's office at 1.30 pm when the office closed for lunch. He stated that the auctioneer stopped ringing the bell at around 1.00 pm before the order was served and that nobody had made a bid.

9. PW-2 was Hosea Mundui Kiplagat, the Chairman of the Plaintiff Company and shareholder. He testified that he took a loan from Trade Bank Limited on behalf of the company and secured the money with a charge over the suit land which is his personal home. He described the property as being of 82 acres and well developed with his house, servants quarters, a water tank and planted with trees. He borrowed Kshs. 5,000,000/= against this property but the total amount he borrowed from Trade Bank was about Kshs. 170,000,000/=. He also charged other properties. He stated that what is unpaid is just about Kshs 8,000,000/= having paid about Kshs. 170,000,000/=. He did acknowledge that through a letter dated 28 November 2001, he agreed with the 1st defendant that he would pay the sum of Kshs. 170,000,000/= all inclusive to clear his debt with the bank. He wondered why the bank was now claiming over Kshs.400 Million and why it was keen on selling his property when he is just about to clear his debt. He claimed that no notice was sent to him for the auction sale.

10. Cross-examined, he testified that apart from the Kshs. 5,000,000/= noted in the charge over the suit land, he also borrowed other monies from Trade Bank, and he acknowledged that in the year 2001, there was agreement that he can pay Kshs. 170 Million to clear all his indebtedness with the bank. This amount was a negotiated figure and he could not recall exactly what was owing. He acknowledged that the suit property was among that the properties that secured the Kshs. 170 Million. He believed that out of this negotiated amount, what is pending is just about Kshs. 8.5 Million. He did not dispute receiving a letter dated 5 May 2000. He insisted that an acre of land in the area sells at least for Kshs. 1 Million although he did not have a valuation report.

11. With the above evidence, the plaintiff closed his case.

12. DW-1 was Mr. Peter Kitonyo, the Assistant Liquidation Agent for Trade Bank and Trade Finance Limited which institutions came down in the year 1993. He testified that the plaintiff had taken loans and overdrafts of Kshs. 170,020,958.50/= and had paid Kshs. 114,472,835.55/= but the money was accruing interest. As at 5 May 2000, the balance that was owed by the plaintiff was Kshs. 198,923,467.60/= in respect of monies owed to Trade Bank Limited and Kshs. 95,875,940.85/= in respect of monies owed to Trade Finance Limited, and as at 30 September 2001, what was owed was a total of Kshs. 366,990,000/=. In the same year, 2001, the plaintiff came and negotiated with the Liquidation Agent and they agreed to waive all interest and bank charges which left just about Kshs. 55 Million for the plaintiff to pay, but the figure was revised to Kshs. 52 Million. There was subsequent negotiations and on 7 November 2001, it was agreed that the plaintiff could pay the sum of Kshs. 34,288,087.50/= to liquidate his full indebtedness, but this was subject to the following conditions :-

(i) The offer was valid for 14 days.

(ii) Kshs. 16,353,274/= was to be paid within 14 days of 7 November 2001.

(iii) The balance of Kshs. 17,934,783.50/= was to be paid within 6 months of 7 November 2001.

(iv) If this was not adhered to the bank would demand full payment of Kshs. 366,990,000/=.

13. He testified that the plaintiff did not adhere to the above terms and only started paying in the year 2003, when he was allowed to sell the property Nakuru Municipality Block 16/45 and Kshs. 5,500,000/= was deposited from the proceeds of the sale. The other payments were of Kshs. 5,934,980/= and the Kshs. 2,000,000/= ordered to be deposited by court. He testified that owing to the default they rescinded the agreement and demanded the whole amount owing which is now Kshs. 418,666,702/=. He testified that earlier on 5 May 2000, they had issued a statutory notice which was served upon the plaintiff, and thereafter, the plaintiff approached them for negotiations. It is those negotiations which led to the subsequent agreement to pay much reduced monies but this was rescinded owing to the plaintiff's default. They therefore appointed the 2nd defendant to sell the suit land. He testified that the sale was advertised in the Daily Nation newspapers of 17 October 2017 and 31 October 2017. They had also done a valuation of the property and he had a report dated 27 September 2017, by M/s Gallant Valuers. He testified that on the day of the auction, the bank was represented by Mr. John Ombasa Masega and Mr. Stanley Milimo, and as far as he is concerned, the property was sold to the 3rd defendant for Kshs. 24 Million. He testified that a sum of Kshs. 4,500,000/= was paid on 6 November 2017 by RTGS which was three days after the auction. On 9 November 2017, they received two cheques totalling Kshs. 1,725,000/=.

14. Cross-examined, he testified that he is an employee of Central Bank of Kenya, seconded to undertake the liquidation process and he joined the Kenya Deposit Insurance Corporation as liquidation agent in July 2015. He testified that the money that the plaintiff owed was borrowed over time although he did acknowledge that this information would be contained in bank statements which he did not have. He stated that there were four accounts held by the plaintiff and the exact amount in each account was contained in a letter dated 7 November 2001 which was produced as D-exhibit No. 4. He reiterated that the principal borrowed was Kshs. 170,020,958.50/= and what had been paid as at 2001 was Kshs. 114,472,835.55/=. He explained that when a bank collapses the law allows them to amalgamate the accounts and that the plaintiff was aware that his accounts were amalgamated and they were negotiating figures on the amalgamated accounts. He explained that they negotiated with the plaintiff to pay the sum of Kshs. 34,288,087.90/= which was basically to have the plaintiff pay the principal of Kshs. 170,020,958.50/=:, and very minimal interest, for the plaintiff had by then paid a sum of Kshs. 24,277,134.35/= to reduce its indebtedness. He testified that the amount they claim is Kshs. 418 Million or so, and this amount does not include any interest from the year 2005.

15. On the auction, he testified that the same was advertised to be held at the auctioneer's office and he did not see anything wrong with that. He did not agree that this was a private treaty sale. He thought that the bidder had met all the conditions to enable him bid. He acknowledged

that among the conditions of sale was that one needed to deposit Kshs. 2 Million either in cash or by banker's cheque. He did affirm that cheques in excess of Kshs. 1 Million are no longer accepted. He was shown the two cheques of Kshs. 1 Million each drawn by M/s D.W Muyundo Advocates and he confirmed that they could not be honoured because they exceeded Kshs. 1 Million. The two cheques were also not banker's cheques. He believed that there were two bidders at the auction, the 3rd defendant, and the depositor of the two cheques of Kshs. 1 Million.

16. DW-2 was Peter Njoroge Gichuki, a licenced auctioneer and the proprietor of Sportlight Intercepts Auctioneers, the 2nd defendant. There before he traded as Sportlight Intercepts Kenya. He testified that he was instructed to sell the property in the year 2015, and on 23 January 2016, he personally served PW-1 with a Notification of Sale giving him 45 days to redeem the property. The letter of instruction gave the amount owing as Kshs. 418,667,702.20/=. The intended auction of 2016 did not take place as it was stopped by court. In the year 2017, he was instructed to recommence the sale process and he prepared two advertisements which were placed in the Daily Nation newspaper of 17 October 2017 and 31 October 2017, the auction being scheduled for 3 November 2017, which was a Friday. The auction was scheduled to take place in his offices within Shankardass building in Moi Avenue, Nairobi. He testified that for the suit property, the condition was that one needed to deposit Kshs. 2 Million in cash or banker's cheque before the auction. He stated that the only person who met the conditions of sale was the 3rd defendant. He testified that the 3rd defendant was represented by an advocate, a Mr. Mburu, whose agent came with three cheques. He displayed three cheques drawn by M/s John Mburu & Company but which were not allowed to be exhibited as they had not been discovered before.

17. He testified that on the day of the auction, he was in the office and he waited for the bank representatives to arrive and Mr. Ombasa and Mr. Milimo duly arrived. He stated that other persons also came to inquire on the conditions of sale. On the day, he had other properties for sale but since the bank representatives were present for this property, he opted to start with the sale of the suit land. He did acknowledge that there was a person who claimed to represent a youth group in Molo but he did not allow him to participate in the auction as he did not meet the conditions of sale. He mentioned that a representative of the 3rd defendant came into his office at around 11.15am. He explained that he has a room within his office which is meant for holding auctions and only those who have met the conditions of sale are allowed into this room. He averred that in a situation where the auction has only one participant, and it is the first auction, he takes the bid of the person, and shows it to the bank representative, but he will not confirm it. He will wait for other persons to come, because in his words, sometimes they can come late. He thus waits, until around 2.00pm or 2.30 pm to see whether other people will come and make a higher bid. He stated that in this instance the 3rd defendant was represented by one Mr. Tonui who was present before the auction started. He mentioned that since he was the only participant, he waited until 2.30pm, and in the meantime sold other properties, but nobody else came. He called the bank so that the purchaser could make the RTGS payment and one was made for Kshs. 4,500,000/=. The 3rd defendant had made a bid of Kshs. 24,900,000/= and the requirement was that the successful bidder needed to make a deposit of 25% which in this instance was Kshs. 6,225,000/=. He stated that the 3rd defendant had already deposited Kshs. 2 Million with him and he thus drew cheques of Kshs. 1,725,000/= so as to arrive at the figure of Kshs. 6,225,000/=. and he refunded the balance to Mr. Tonui. He prepared a Memorandum and Certificate of Sale. He was subsequently served with a court order at around 4.45 pm. According to him, he completed the auction at 2.30 pm.

18. Cross-examined, he testified inter alia that on that day, he had 7 properties for sale. He acknowledged that he held some cheques drawn by M/s Muyundo & Company Advocates, and that he (probably Mr. Muyundo) had come into his office in the morning and wrote the two cheques which he gave to his secretary. He however instructed his secretary to return them because they could not be presented as they were for Kshs. 1 Million. Nevertheless, Mr. Muyundo did not participate in the auction of the suit land, as his interest was on another property. He reiterated the practice that when only one person attends, he takes that person's bid, then waits to see if any other person will emerge with another bid. In this instance, nobody else came by 2.30 pm. He mentioned that George Tonui bid for the 3rd defendant and it is not a person that he had known there before.

19. Cross-examined by Mr. Kipkeni for the plaintiff, he acknowledged that PW-1 was the gentleman who represented himself as coming from Olenguruone (Molo). He insisted that there was only one bidder, although he was put to task that his witness statement and an affidavit that he swore on 25 January 2018, provides that there were two bidders, Mr. George Tonui and Mr. Donald Muyundo. He acknowledged issuing receipts to Mr. Muyundo. He also issued a receipt to Mr. Tonui although he did not have a copy. He stated that the cheques drawn by M/s John Mburu & Company Advocates were deposited on behalf of the 3rd defendant. He had no receipt issued to the 3rd defendant nor any cheques from the 3rd defendant. He stated that despite the conditions of sale providing that one needed to deposit Kshs. 2 Million, either in cash or banker's cheques, he does make exceptions for lawyers and that he accepts their cheques. He however does not accept personal cheques from individuals. He testified that he held the lawyer's cheques for Kshs. 2 Million. These cheques were of M/s John Mburu & Company Advocates and were dated 3 November 2017. They were not banker's cheques. He deposited these cheques, and being confident that they would be cleared, he wrote his own cheques to the 1st defendant as part of the 3rd defendant's deposit. He testified that by the time he got the court order, he had already written his cheques and had forwarded his returns to the bank. He insisted that what he conducted was a public auction and not a private treaty sale.

20. DW-3 was Martin Runo Ndichu, a valuer by profession. He testified that he valued the suit land which he gave a market value of Kshs. 32,000,000/= and a forced sale value of Kshs. 24,000,000/= which is 75% of the value. He did not believe that an acre in the area goes for Kshs. 1 million, his view being that an acre sells for between Kshs. 300,000/= and Kshs. 400,000/=. He himself used the value of Kshs. 400,000/= per acre and did not value the crops on the land.

21. DW-4 was Mr. George Tonui, the general manager of the 3rd defendant. He testified that he saw the suit property advertised in the Daily Nation newspaper of 17 October 2017 and 31 October 2017 and developed an interest to purchase on behalf of his company. He visited the property and attended the auction on 3 November 2017. He stated that he paid Kshs. 2 Million to qualify to bid and he was ushered into the board room in the auctioneer's office. This money was paid through their advocate M/s John Mburu & Associates. There was no other bidder and he was declared the purchaser. He then made an RTGS payment of Kshs. 4,500,000/= meaning that he had overpaid by Kshs. 275,000/= and was issued with a certificate of sale. He stated that he did not see PW-1 on that day.

22. Cross-examined, he stated that his company, through its directors, deposited money with its lawyers M/s John Mburu & Company Advocates. He had no receipt to demonstrate this deposit. He stated that it was John Mburu who also did the RTGS through his law firm. For them to qualify to bid, Mr. Mburu had drawn three cheques in favour of the auctioneer.

23. With the above evidence, the defendants closed their case.

24. I invited counsel to file written submissions which they did.

25. In his submissions, Mr. Kipkenei, learned counsel for the plaintiff, first attacked the 1st defendant for claiming the sum of Kshs. 418,666,702.20/= and submitted that the 1st defendant should not claim any more than it negotiated with the plaintiff. He submitted that there was no service of a statutory notice under the Land Act, 2012 and the Auctioneers' Rules and submitted that Sections 90 (1) and (2) (a) and (b) of the Land Act 2012, requires the chargee to serve a 3 month statutory notice before exercising its power of sale and argued that no such notice was ever produced. He further pointed at the evidence of PW-1, that no auction was conducted. He did not believe the auctioneer's evidence and referred me to what he had stated in his affidavit sworn on 25 January 2017, that there were two bidders. He further submitted that there was nothing to show that the 3rd defendant paid anything to qualify to bid. He also faulted the auctioneer for not issuing a notice under Rule 15 (d) of the Auctioneers' Rules. He referred me to the cases of **Maina Wanjigi & Jane Nduta vs Bank of Africa Kenya Ltd, Garam Investment Auctioneers & Michael Matu; Palmy Company Limited vs Consolidated Bank of Kenya Limited (2014) eKLR; John Kiprugut Kurgat & Set Limited vs Transnational Bank Limited & Purple Royal Auctioneers (2017) eKLR and Rajab Kipkoskei Magut vs K-Rep Bank & 2 Others (2013) eKLR.**

26. Ms. Akong'a for the 1st & 2nd defendants, inter alia submitted that the plaintiff was served with a statutory notice dated 5 May 2000 under Section 74 of the Registered Land Act (now repealed) and did not need to reissue a new notice under the Land Act, 2012. She pointed at the subsequent negotiations where the amount owed was reduced and submitted that the plaintiff defaulted on the terms thereof and thus the 1st defendant was entitled to claim the whole of the money owing. She pointed out that the 1st defendant was entitled to sell the suit land, and that a 45 days' notice to redeem was issued and the property advertised. To support her position, she referred me to the case of **St. Elizabeth Academy- Karen Limited vs Housing Finance Corporation of Kenya Limited (2013) eKLR; DNM vs Ma K & 4 Others (2014) eKLR; Executive Curtains and Furnishings Limited vs Family Finance Building Society (2007) eKLR; James Otiang Okoth & Another vs NIC Bank Limited (2017) eKLR.** She did not agree that the auction herein was conducted in parts or postponed to enable persons attend which is what arose in the case of **Maina Wanjigi & Another -vs- Bank of Africa** cited by counsel for the plaintiff. She did not think that the plaintiff had adduced any evidence of collusion between the 2nd and 3rd defendant.

27. Mr. Kamau for the 3rd defendant, rehashed the evidence adduced and basically asked the court to find that the property was duly advertised for sale; that a public auction was conducted; and that the 3rd defendant met all the terms of sale.

28. The issues herein principally revolve around three questions as follows :-

(i) Whether the plaintiff owes money to the 1st defendant and if so how much ?

(ii) Whether the 1st defendant's right of sale by chargee had arisen;

(iii) Whether the sale of 3 November 2017 can be upheld.

29. On the first issue, the position of the 1st defendant as put forth by DW-1 is that as at 5 May 2000, the 1st defendant was owed the sum of Kshs. 198,923,467.60/= in respect of loans and overdrafts due to Trade Bank Limited (in liquidation) and Kshs. 95,875,940.85/= in respect of monies owed to Trade Finance Limited (in liquidation) thus in total, that the sum of Kshs. 294,799,408.45/= was owing. It was further said that the interest rate applicable was 15%. This amount was indeed what was displayed in the letter dated 5 May 2000, written by M/s Macharia Njeru Advocates, addressed to PW-1, and which letter was also said to be the Statutory Notice issued pursuant to the provisions of Section 74 of the Registered Land Act (repealed in the year 2012 by the Land Registration Act, Act No. 3 of 2012). That letter was to be hand delivered to PW-1. I will come back to this letter when addressing the second issue, that is, if the statutory right of sale has arisen, and for now I will restrict myself to the question of the amount owing.

30. It does appear that later in the same year, Mr. Kiplagat and the 1st defendant engaged in some negotiations so as to agree on what the plaintiff was to pay. I have seen a letter dated 3 October 2000 written by the 1st defendant, where the 1st defendant declines a proposal, presumably by Mr. Kiplagat, to pay the sum of Kshs. 52,000,000/= in full and final settlement. There is another letter dated 19 October 2000 written by Mr. Kiplagat, where he has asked that he be given 6 months to pay off the debt and in the same letter, he impresses that his indebtedness is Kshs. 52,000,000/= less a sum of Kshs. 2,300,000/= which he claimed to have paid, thus leaving a balance of Kshs. 49,700,000/=. On 7 November 2001, the 1st defendant wrote to M/s Omar K. Amin & Company Advocates, who were acting for Mr. Kiplagat. From the tone of that letter, it does seem that Mr. Kiplagat had made a proposal to pay Kshs. 20,000,000/= to clear his debt and that of the plaintiff, which in the said letter, the bank declined. In the same letter, the 1st defendant avers that it made an offer to the plaintiff and Mr. Kiplagat to pay Kshs. 34,288,087.50/=. That letter provides further as follows:-The conditions of the offer are as follows :-

(i) The offer is without prejudice and remains valid for fourteen (14) days from the date of this letter.

(ii) The amount of Kshs. 16,353,274.00 your client deposited with your should be paid promptly but no later than fourteen (14) days from (sic) the date of this letter.

(iii) The balance of Kshs. 17,934,783.50 to be paid in full within six (6) months from the date of this letter.

You are reminded that the negotiated settlement of the debt at Kshs. 52.0 million which was accepted by your client in 1999 has since elapsed due to none performance. In case the offer is not accepted, your client is hereby put on notice that he will be required to pay the full amount of debt which stood at Shs. 366.99 million as at 30th September 2001.

Yours faithfully,

J.O Ogundo

Director, DPFB.

31. There followed another letter dated 28 November 2001, again from the 1st defendant addressed to M/s Omar K. Amin & Company Advocates. That letter is a reply to a letter dated 19 November 2001 written by the said law firm (but which letter was not disclosed in these proceedings).

The letter states as follows :-

RE: MAKATIAT LIMITED AND MR. HOSEA KIPLAGAT

INDEBTEDNES TO TRADE BANK LTD (IL) AND TRADE FINANCE LTD (IL)

Thank you for your letter of 19th November 2001 which I hereby respond to as follows :-

1. The amount of Shs. 34,288,087.50 was DPFB's counter offer to your client's proposal to pay Shs. 20.0 million as full and final settlement of the debt of Shs. 366.99 million outstanding as at 30th September 2001. Our letter of 7th November 2001 explains in detail how DPFB arrived at the amount, which I repeat as follows :-

(i) That your clients obtained Shs. 170,020,958.50 as loans and overdrafts from the two institutions, and to date they have paid Shs. 114,472,958.50, leaving an outstanding principal amount of Shs. 55,548,122.95, excluding accumulated interest.

(ii) DPFB after due consideration and thorough investigation in the transactions of your clients (sic) accounts allowed Shs. 24,227,134,35 to be deducted from the outstanding principal amount of Shs. 55,548,122.95. The net balance of the principal amount repayable is Shs. 31,170,988.50 to which a token interest of 10% or Shs. 3,117,098.85 was charged to arrive at Shs. 34,288,087.50. As good gesture, DPFB waived all the interests and penalties.

(iii) DPFB was unable to accept your client's proposal to pay Shs. 20.0 million because some Shs. 11,181,574.80 adjusted to the principal amount outstanding was not accepted. These are ...(not relevant).

2. Having failed to remit Shs. 16,353,274.00 which was one of the conditions in our letter of 21st August 2001, the proposal of your client to settle the debt at Shs. 20.0 million could not be considered further. The delay was certainly not on our part as the letter under reference was never responded to.

3. There is no contradiction at all between the total amount of Shs. 170,020,958.50 obtained as loans and overdrafts, and the outstanding amount of Shs. 80,111,332.95 at the time when Trade Bank Limited and Trade Finance Limited were put in liquidation. The difference was caused by repayment and interest.

We trust, from the above analysis, that you will guide your client accordingly to reconsider the unfortunate position that he seems to have taken. Please let us have the final decision within seven (7) days from the date of this letter.

Yours faithfully,

J.O Ogundo

Director, DPFB.

32. I do not know what happened after this letter for I have not seen any further correspondences exchanged between the parties and I have no idea whether the plaintiff and Mr. Kiplagat accepted to pay the amounts noted in the said letter. It does however appear from the above correspondences that there was a dispute about what the plaintiff and Mr. Kiplagat owed, and Mr. Kiplagat made an offer to pay some Kshs. 20,000,000/= which the 1st defendant declined and instead stated that it was willing to accept the sum of KShs. 34,288,087.50/=, which offer was valid for 14 days of 7 November 2001, and subject to the sum of Kshs. 16,353,274.00 being paid within 14 days of the said date, and the balance of Kshs. 17,934,783.50/= being paid within 6 months. If these monies were paid as directed, it does appear that the 1st defendant was ready not to insist on the payment of what it thought was actually owed by the plaintiff and Mr. Kiplagat, which was claimed to be about Kshs. 366.99 million as at 30 September 2001.

33. There is a letter dated 5 September 2003, forwarding the sum of Kshs. 5,500,000/= which DW-1 acknowledged was paid by the plaintiff after the plaintiff sold the property Nakuru Municipality Block 16/45. After this date, I have no other correspondence, until the letter dated 6 September 2013 addressed to the plaintiff. That letter is drawn by M/s Macharia-Mwangi & Njeru Advocates and in part states as follows :-

"... we hereby require you to pay immediately to us ..the outstanding balance of Kshs. 16,256,510.70cts failure whereof our client will rescind the negotiated settlement agreement and claim a sum of Kshs. 418,235,582.20 being the entire sum outstanding as at 31/05/2013 and which continue (sic) to accrue interest at the rate of 15% p.a until full payment.

TAKE NOTICE that unless we receive in our chambers the said amount herein demanded within fourteen (14) days of the date hereof, our strict instructions are to proceed with the realization of the above properties that is to say Nakuru Olunguruone/Kiptagich/949, Nakuru Githiriga/124 and LR NO. 584/281 (IR NO. 50538) to recover the entire sum outstanding against yourselves without further reference to you and to your risk as to attendant costs and other consequences arising therefrom.”

34. Again, I have no correspondence that replies to the above letter, but I have seen the letter dated 12 January 2016, written by M/s Kipkenei & Company, on behalf of the plaintiff, and addressed to the 1st defendant, where it is said that a sum of Kshs. 5,934,580/= has been transferred to the 1st defendant. The same letter requests the 1st defendant to adopt the previously negotiated figure of Kshs. 16.3 Million and states that the balance would be Kshs. 10,365,420/- which the plaintiff proposed to pay Kshs. 200,000/= every month. I have not seen any reply to this letter.

35. According to DW-1 the plaintiff did not pay in accordance with their offer and they therefore rescinded the offer and demanded the sum of Kshs. 418,666,702.20/= which he stated was the full amount of money that was owed as at the year 2005.

36. Now, I really have nothing before me that will lead me to the conclusion whether this demand of Kshs. 418,666,702.20/= is justified. This amount is what the 1st defendant claims to be owed, but without statements of accounts, which would go to show how this money was arrived at, this court cannot with finality affirm that what the plaintiff owes is what is demanded by the 1st defendant. I have already mentioned that there appears to have been a dispute over what the plaintiff actually owed, and if the 1st defendant wished this court to affirm that what is owed is actually Kshs. 418,666,702.20/= it needed to provide the basis for this, which would be the statements of accounts which were never presented.

37. On the first issue therefore, I am unable to state with finality what is owed. So that it may be clear what the plaintiff owes, I direct the plaintiff and 1st defendant to embark on negotiations, and if their negotiations do not bear fruit, then they ought to either appoint an arbitrator, or file a suit for a case stated in court, so that what is owed may be resolved once and for all.

38. The second issue is whether the 1st defendant's statutory power of sale ever arose. On this point, the plaintiff claims in its pleadings that no statutory notice has ever been issued, and the position of the 1st defendant is that it did issue a statutory notice which is in the letter dated 5 May 2000. That letter provides that it is a statutory notice issued pursuant to Section 74 of the RLA (Registered Land Act) Cap 300. I do not think that there is any question that the said letter intends to issue the statutory notice as was required by Section 74 of the Registered Land Act, and indeed it does give Mr. Kiplagat the notice of 3 months upon service of the notice to pay the monies noted therein. The letter of 5 May 2000 provides that the same was to be hand delivered. There is absolutely nothing wrong with that.

39. Despite the plaintiff pleading that no statutory notice was issued, when Mr. Kiplagat was cross-examined on the letter dated 5 May 2000, he did acknowledge receipt of it, and he in fact stated that it was upon its receipt that he embarked on negotiations with the 1st defendant on the amount payable. That acknowledgment by Mr. Kiplagat in his evidence, that he received the said notice, puts to rest the question of whether a statutory notice was issued and whether the same was served. My finding is that the statutory notice was indeed issued.

40. A statutory notice is only issued once, and there is no requirement to issue a second notice. I therefore do not agree with the submissions of Mr. Kipkenei, that the 1st defendant needed to issue another notice now under the Land Act, 2012, after the repeal of the Registered Land Act. That position has indeed been affirmed in several decisions, including the case of *Executive Curtains and Furnishings Limited -vs- Family Finance Building Society (2007) eKLR*, cited by Ms. Akong'a.

41. The statutory notice aside, it should be appreciated that sales of properties by auction are governed under the Auctioneers Act. The Auctioneers' Rules, 1997 provide at Rule 15 for a 45 redemption notice.

42. Now, the plaintiff does confirm at paragraph 8 that there was service of a notice on 4 January 2016 fixing an auction for 29 January 2016. In the affidavit in support of the application for injunction which was filed with this suit, Mr. Kiplagat did display the said notification of sale, and I note that it does give 45 days to redeem the suit land. I see no problem with this notice.

43. There was also argument that the sale was held only 3 days after the advertisement. This is not true for there was an advertisement of 17 October 2017 and a second advertisement of 31 October 2017. The property was therefore properly advertised in accordance with the rules.

44. From the above, the plaintiff cannot complain that it was not served with the requisite notice and cannot complain that the 1st defendant's statutory power of sale has never arisen. The finding of this court is that all requisite notices required in order to allow the 1st defendant sell the suit land in exercise of its statutory power of sale were properly issued and the right of sale had arisen.

45. This brings me to the last issue, that is whether the sale of 3 November 2017 should be upheld.

46. The plaintiff complains that what was held was a sale by private treaty and not a public auction. There appeared to be attack that the sale was held in Nairobi yet the property is in Molo and further that the sale was held in the office of the auctioneer, but on these points, I see no substance, for there is no requirement in law that the auction sale must be held where the property is located or that a sale by public auction cannot be held in an office. My view is that so long as the public is invited and the public is allowed to access the office or location where the auction is to be held, there shouldn't be a problem.

47. The only issue that arose in these proceedings which I feel I need to address is the practice by the 2nd defendant of having a room for "bidders" only. I do not think that would conform to the word "public". In my view, the "bidding room", if ever there is one, must also be accessible to any member of the public for a member of the public is entitled to attend and see how the auction is being conducted, this being

a “public auction”. I however see no problem with the requirement to have one make a deposit to be allowed to bid, for this, I believe, is intended to separate the serious bidders from those whose intention may only be to frustrate the sale. But, where conditions are set, these conditions must apply to everyone, and not to some, for a public auction sale must be on level ground for everyone. All participants in a public auction must be subjected to the same rules and no one ought to be given preferential treatment or some rules bent in such person’s favour.

48. The conditions for the sale of the suit land which were noted in the newspaper advertisements were as follows :-

1. *All interested buyers are requested to view and verify the details for themselves as these are not warranted by the auctioneers or the chargees.*
2. *All interested bidders will be required to first make a refundable deposit of Kshs. 1,000,000/= by way of cash or bankers (sic) cheque to be allowed to bid and Kshs. 2,000,000/= for property No. 6 (the suit land).*
3. *A deposit of 25% of the purchase price must be paid in cash or bankers (sic) cheque at the fall of the hammer and the balance paid within 90 days to the chargees or their advocates.*
4. *The sale is subject to a reserve price and land control board consent where applicable.*
5. *The auctioneer reserves the right to accept or refuse any bid without giving a reason.*
6. *Conditions of sale are available at our offices on request and further clarification of directions to the properties can be availed.*

49. Now, before I go far, I find condition 5 interesting, if not outright illegal, for you cannot have an open public auction where the auctioneer reserves the right to accept or refuse a bid without giving a reason. There is no provision in law for an auctioneer to refuse a bid if the bidder has met the bidding conditions and is actively bidding to purchase the suit land. Does it mean that if I am the highest bidder and I fulfil the conditions of sale, the auctioneer can without reason still reject my bid? Certainly not and I think it is time that chargees and auctioneers stopped putting up such conditions for they do not meet the test of law. Indeed Rule 17 (4) of the Auctioneers’ Rules 1997 provides that “the highest bidder shall be the purchaser subject to compliance with the conditions of sale.” That however is beside the point, for it is not one of the matters that has arisen in this case, but nonetheless it is point to be considered in future lest the same invites unnecessary litigation.

50. The challenge in this case is that the person who was declared the successful purchaser, that is the 3rd defendant, did not meet the above conditions and therefore there was no proper sale of the suit land. It is further claimed that there was no bidding at all and that the property could not have been sold in a public auction on the scheduled date.

51. To begin with, there is the question whether or not there was one or two bids. In his evidence, Mr. Gichuki, the auctioneer, stated that only one person, that is the 3rd defendant, met the conditions of sale, and thus there was only one bidder. This is contested by the plaintiff who has pointed to documents presented by the defendants in response to an application for injunction filed by the plaintiff seeking a stay of completion of the impugned sale. The plaintiff has pointed at the affidavit that Mr. Gichuki swore on 25 January 2018 which contradicts his evidence given in court that there was only one bidder. I have gone through the said affidavit and paragraph 6 thereof is relevant for it states as follows :-

“That two (2) interested bidders George Tonui and Donald Muyondo complied by paying the refundable Kshs. 2,000,000/= which amount was paid to Sportlight Intercepts and they were issued with official receipts confirming payment of the amount. Annexed hereto and marked PNG 13(a) and PNG 13 (b) are copies of the official receipts confirming the same.”

52. Now, what was annexed were two cheques both dated 3/11/017 drawn by M/s D.W Muyundo & Associates both being cheques of Kshs. 1,000,000/=, and a receipt dated 3/11/2017 issued to Donald Muyundo Wekesa, for Kshs. 2,000,000/=. The two cheques, being Cheques Nos. 111361 and 111362 are quoted in the said receipt, which is receipt No. 1524. This receipt shows that is issued in respect of Bid No. 2 and on it is recorded as follows , *“being payment for Bid No. for auction to be held on 3/11/2017 LR Nakuru/Githiriga/124.”* The other document annexed appears to me to be the account for the 1st defendant which reflects an RTGS of Kshs. 4,500,000/= on 6 November 2017 and on 9 November 2017, Kshs. 1,725,000/= paid through a cheque.

53. In his evidence, Mr. Gichuki contended that Mr. Muyundo never intended to bid for the suit land, his interest being for another property. I don’t believe Mr. Gichuki. The receipt annexed to his affidavit is too elaborate and I do not believe him when he states that Mr. Muyundo’s interest was for another property. I am persuaded that he did accept the two personal cheques of Mr. Muyundo and he recognized him as bidder No. 2. It could very well be that Mr. Muyundo never bid but he was giving a bidding number 2. If this was not the case, Mr. Gichuki would not have annexed all these documents in his said affidavit. Be that as it may, there is no record of Mr. Muyundo having bid, and it may very well be that despite depositing his two cheques, he did not attend to bid. But in accepting his two cheques, Mr. Gichuki was going contrary to the rules of the auction, for no personal cheques were to be accepted.

54. Let me now turn to the 3rd defendant and how he was allowed to bid. Mr. Gichuki in his supporting affidavit never annexed any proof that the 3rd defendant deposited with him cash of Kshs. 2,000,000/= or a banker’s cheque of Kshs. 2,000,000/= before he allowed DW-3 to bid. In his evidence in court, Mr. Gichuki indeed conceded that the 3rd defendant never deposited with him Kshs. 2,000,000/= in cash and never deposited with him a banker’s cheque of Kshs. 2,000,000/=. According to Mr. Gichuki, what happened is that the advocate of the 3rd defendant, deposited with him his (the Advocate’s) personal cheques amounting to Kshs. 2,000,000/=. In as much as these cheques were objected to and were never produced as exhibits, Mr. Gichuki confirmed that these were indeed personal cheques, and were handed over to him on the same date of the auction. There is no proof that a receipt was ever issued against these cheques. It is therefore apparent that the 3rd

defendant never deposited the sum of Kshs. 2,000,000/= either by cash or by way of banker's cheque and therefore never qualified to bid as he had not complied with the conditions of sale. It is important that auctioneers when holding public auctions be fair to all potential bidders and treat all potential bidders the same. There should be no preferential treatment, and if there exists evidence of such preferential treatment, this may lead to a presumption of collusion between the bidder and the auctioneer which will defeat the essence of a public auction, that is, that the public are invited and they are all treated equally at the auction. If there was no prior discussion or collusion, how was the 3rd defendant allowed to bid without having deposited the sum of Kshs. 2,000,000/= or having a banker's cheque of the same amount prior to the auction? The only conclusion I can reach is that the 3rd defendant was being given special treatment that was not available to others and I am persuaded that there was an element of collusion between the auctioneer and the 3rd defendant. If PW-1 was denied the chance to bid because he did not have a bankers cheque of Kshs. 2,000,000/= or cash of the same amount, then similarly, the 3rd defendant ought not to have been allowed to bid, for its representative presented neither. Mr. Gichuki tried to wriggle out of this anomaly by stating that he makes exceptions for cheques from advocates and that is how he considered the cheques from M/s John Mburu & Company Advocates as being sufficient to enable the 3rd defendant place a bid. If this was the case, then it should have been advertised that the alternative to depositing Kshs. 2,000,000/= or carrying a banker's cheque of Kshs. 2,000,000/= was for one to have a cheque or cheques from an advocate for this sum. As I have said, these conditions of sale must apply to all and not only to a category of bidders. If one bidder is allowed to carry an advocate's cheque and the same is accepted, all bidders must be notified that they can also carry such cheques, and if they do so, their cheques should be allowed to enable them bid. There was certainly a failure by the auctioneer to follow the publicised rules of the auction when he allowed the 3rd defendant to bid without him having deposited cash of Kshs. 2,000,000/= or a banker's cheque/cheques of equivalent value.

55. The other requirement in the conditions of sale was that the successful bidder needed to pay a 25% deposit after the fall of the hammer. Now, Mr. Gichuki himself confirmed that he drew the cheques for Kshs. 1, 725,000/= from his own account, and this was even before he had deposited the two cheques that he got from the 3rd defendant's lawyer. Again something is amiss. How does the auctioneer pay using his own money if he does not know the bidder or if he has not had some sought of preferential communication with such bidder? Why is the auctioneer using his own money to pay on behalf of a bidder that he purports not to know? Assuming that PW-1 was a successful bidder, would the auctioneer have paid any balance that remained from the RTGS payment on his behalf? I think not. Again, it does appear to me that the auctioneer waived the requirement that 25% be paid in cash or banker's cheque at the fall of the hammer. Certainly, what was paid in cash was Kshs. 4,500,000/= which was not 25% and there was no banker's cheque deposited for the balance. Neither had the auctioneer's account been credited before the auction date with this amount of money. I cannot in any way fault the plaintiff for believing that the auction was a fraud and that there was collusion between the 3rd defendant and the auctioneer, and further that the auctioneer acted unprofessionally to give an advantage to the 3rd defendant which advantage was never going to be given to anybody else.

56. Apart from the above, the auction was not properly conducted, for Mr. Gichuki adjourned it without giving notice of such adjournment to the public. This is what Mr. Gichuki stated :-

“ in a situation where the auction has only one participant, and it is the first auction, we take his bid and show it to the bank representative but we will not confirm it. We will wait for other persons to come because some can come late. We wait until around 2.30 to 2.30 p.m to see whether other people will come to make a higher bid. In our instance, the highest bidder was Jimpatsam (the 3rd defendant). Their representative was a Mr. Tonui. Mr. Tonui was present before the auction started. Since he was the only participant, I waited until 2.30 p.m as we were selling other properties. By 2.30 p.m nobody else came. We called the bank so that the purchaser can make an RTGS because it is the bank which gives the RTGS account not us.”

57. It is apparent from the foregoing that there was an adjournment of the auction to the afternoon but this is not the manner in which a proper auction ought to be conducted. Once an auction of an item has started, it should not be adjourned unless such adjournment is notified to the public in the same way that the auction itself was notified to the public. An auction starts once a bid is taken or recorded, and once this process has started, it should not be adjourned until the highest bidder who has fulfilled all conditions is declared purchaser. Alternatively the auction will abort for there not being a bidder whose bid qualifies to be taken, either because there is no person who qualifies to bid or that the bid is below the reserve price, or that the highest bidder does not meet the conditions of sale, or such other related reasons. But you cannot take a bid, then say, *“I put aside the auction so that I can see whether some other people will emerge with higher bids”*. That is not how to conduct an auction and I am surprised that the auctioneer, who mentioned that he has over 30 years of experience, can employ such a method in an auction. Once the first bid is taken, there should be a continuum, without break, until the auction for that particular item is finalized, or the sale abandoned for want of sufficient bids or other reasons.

58. This is not the first time that courts are castigating auctioneers for such practice. It happened in the case of **Maina Wanjigi & Another vs Bank of Africa Kenya Limited & 2 Others (2015) eKLR**, cited by counsel for the plaintiff. In the said case, the auctioneer took bids at the time when the auction was scheduled but these bids were below the reserve price. The auction was then called off. Later, another person emerged with a higher bid, and the auctioneer purported to call back the bidders in the afternoon to proceed with the auction and knocked down the property to the new bidder. The first two bidders challenged that auction and this was upheld. In his ruling, Ogolla J, stated as follows at paragraph 32 :-

“ Under Rule 17 (1)(b) an auction of immovable property may take place between 10.00am and 10.00pm. This means that an auction of immovable property advertised to take place at 11.00 a.m may proceed up to 10.00 p.m. That, in my view, however, necessarily implies that the auction process must be one uninterrupted transaction. The moment the chain of causation is interrupted, rather than in the normal course of proceedings for example to break for tea, if that were possible in a single transaction, the entire process must commence afresh. An auction process cannot purport to wait for bidders, or to pick bidders en route. The process once started must retain its integrity. The conduct thereof must not leave room for speculation. The auctioneer cannot conduct an auction in a manner to leave the impression that he expects hitherto none present bidders to offer better bids.”

59. It is more or less what is said to have happened in this case. The auctioneer himself confirms that he adjourned the proceedings to the afternoon session to see if there will be a better bid. It means therefore that the property was never knocked down to the 3rd defendant after the auction had commenced. The hammer, if at all it fell, did fall in the afternoon session, a session that the public were not informed of, and

were not aware of. Indeed, I now appreciate why the plaintiff holds the position that there was never an auction and no fall of the hammer. Certainly, there wasn't any fall of the hammer for the duration of time that PW-1 was in the auction venue, and since the public were not informed that there would be fresh bidding in the afternoon, the knocking down of the property in the afternoon session interfered with the integrity of the auction and this court is unable to hold that the said auction was a proper auction. This coupled with the fact that the 3rd defendant never met the conditions of sale that the public were required to meet before bidding, and the somewhat cloudy manner in which the auctioneer topped up his funds to enable the 3rd defendant raise the required 25% of the auction price, leads me to the conclusion that the sale of the suit land was fraudulent and liable to be set aside. I do indeed set the same aside for the above reasons.

60. Having set aside the auction, it follows that the plaintiff is entitled to the order of cancellation of the sale of the suit land pursuant to the purported auction of 3 November 2017. The parties have to go back to the position that they were in before the auction sale.

61. I am however unable to issue the order of permanent injunction to forever bar the 1st defendant from selling the suit land. What I have found improper was the auction sale of 3 November 2017, but since the 1st defendant is still owed, it can proceed to employ another auction which ought to be properly staged to avoid it being nullified. My own view of the matter however, is that this should be done after it has been made clear what the plaintiff owes the 1st defendant in the manner that I have set out earlier in this judgment.

62. On costs, it is my view that the sale has been nullified because it was poorly conducted by the 2nd defendant. He is an agent of the 1st defendant and therefore the plaintiff deserves costs jointly and/or severally against both the 1st and 2nd defendants. I make no orders for or against the 3rd defendant on costs.

63. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 19th day of June 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Akang'o holding brief for Mr. Kipkenei for the plaintiff.

Ms. Ogange holding brief for Ms. Akong'a for the 1st and 2nd defendants.

No appearance on the part of M/s Kamau Mwangi & Company Advocates for the 3rd defendant.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU