

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E398 OF 2022

ELIAS **PETER**
MBAU.....PLAINTIFF

VERSUS

EQUITY BANK(K) LIMITED.....1ST
DEFENDANT

STEPHEN KARANJA KANG'ETHE
T/A DALALI TRADERS.....2ND
DEFENDANT

DAY BY DAY HOLDINGS LIMITED.....3RD
DEFENDANT

JUDGMENT

Introduction and background

1. The Plaintiff filed this suit through a plaint that was amended on 19th October 2022 where he stated that sometime in 2016, he obtained a loan of Kshs. 15,000,000.00 from the 1st Defendant Bank to complete construction of a four-storey residential flat on his property NAIROBI/BLOCK 83/1764 (the suit property). The loan was secured by a Charge over the suit property and a Deed of Assignment of Rental Income. On 12th October 2022, the 2nd Defendant (the Auctioneer), acting for the Bank, sold the property via public auction to the 3rd Defendant (the Purchaser).

2. The Plaintiff claims the sale was illegal because the Bank failed to issue the mandatory statutory notices under sections 90 and 96(2) of the Land Act and the 40-day notice to him and his spouse, that the Bank did not provide a current valuation report to ascertain the market value before the sale, that the outstanding loan is only approximately Kshs. 5 million, but the suit property is worth Kshs. 60 million and the Plaintiff state that it is unreasonable to sell the whole suit property instead of appointing a receiver to collect the rental income of Kshs. 300,000.00 per month to pay off the debt, as provided for in the Charge.
3. The Plaintiff states that he fell into arrears due to the economic effects of COVID-19 as many tenants vacated the suit property premises and for this and the reasons stated above, he urges the court to declare that the Bank's power of sale had not yet crystallized due to lack of due process, that the public auction of the suit property should be canceled and if the title has already been transferred to the purchaser, then the transfer should be cancelled and the Plaintiff be reinstated as the owner.
4. The Bank opposes the suit through the Statement of Defence dated 10th November 2022. It denies the Plaintiff's allegation that the statutory power of sale had not crystallized and asserts that the suit property was lawfully sold to the purchaser through the public auction and that title has since passed to it and the purchaser is now the registered owner. The Bank strongly refutes the claim that no notices were issued and states that on 17th January 2020, a 90-day statutory notice under section 90 of the Land Act was issued, on 13th January 2022, a 40-day notice to sell under section 96(2)

was issued and thereafter, the Auctioneer issued a 45-day redemption notice, which the Plaintiff acknowledged. Further, that the Plaintiff's spouse, who executed a spousal consent, was also served with all required notices.

5. The Bank denies selling the suit property at a throwaway price and claims that it obtained a current valuation report from *Transcounty Valuers Limited*, which set the Forced Sale Value at Kshs. 26,250,000.00. Regarding the appointment of a Receiver, the Bank advances that Clause 10.1 of the Charge gives it a choice of remedies including a sale and since it followed the proper legal process, the sale was valid. Regarding COVID-19, the Bank claims the Plaintiff was defaulting on the loan before the pandemic began, making his excuse of COVID-19 false and irrelevant. For these reasons, the Bank urges the court to dismiss the Plaintiff's case with costs, maintaining that its statutory power of sale had properly crystallized and was exercised lawfully.
6. The Purchaser also responded to the suit through the defence and counterclaim dated 15th November 2023 asserting that it is now the registered owner of the suit property having purchased it at the public auction and having the transfer registered in its name on 26th July 2023. It contends that upon the "fall of the hammer" at the auction, the Plaintiff legally lost his interest in the suit property. Regarding the Plaintiff's claims of the sale being illegal, the Purchaser states it is a stranger to those allegations and joins issue with the Bank's response and argues that if the Plaintiff succeeds in proving the sale was illegal, his remedy lies against the Bank for damages, not in recovering the suit property from the purchaser.

7. In its counterclaim, the Purchaser reiterates that it bought the suit property, paid a deposit, and financed the balance with a loan from the Bank and the suit property was subsequently charged to the Bank for Kshs. 20,300,000.00. The Purchaser claims that after the transfer, it instructed the tenants to pay rent to it. However, the Plaintiff ignored this, told the tenants not to comply, and has been collecting the rent of approximately Kshs. 286,000.00 per month himself. The Purchaser claims that the Plaintiff is unjustly enriched because he received the sale proceeds from the auction or had his loan settled and yet he is still collecting the rental income from the suit property, that he refused to give the Purchaser possession and that he is trespassing and infringing on the Purchaser's proprietary rights.
8. As such, the Purchaser urges the court to order the Plaintiff to relinquish possession and stop interfering with the suit property, pay Kshs. 286,000.00 per month for every month since November 2022 when he allegedly began collecting rent illegally and pay general damages and costs of the suit.
9. The Plaintiff responded to the Purchaser's defence and counterclaim through his reply dated 2nd February 2024. He emphasizes that at the time he filed this suit on 19th October 2022, the suit property was still registered in his name and that the transfer to the Purchaser happened later in July 2023, after the case had already begun. The Plaintiff claims the Purchaser breached the Memorandum of Sale dated 12th October 2022 as the agreement required the Purchaser to pay the balance of the purchase price and complete the sale within 90 days but by 10th

January 2023, the 90-day period had lapsed, and the Purchaser had neither paid the balance nor completed the sale. Therefore, the Plaintiff states that the purported sale became null and void *ab initio* and consequently, the subsequent transfer of title to the Purchaser and charging of the suit property to the Bank was irregular and should not have happened.

10. The Plaintiff responds to the Purchaser's claim that he is trespassing and wrongfully collecting rent. That since the sale is allegedly void, the Purchaser has no right to claim for rent or any proceeds from the suit property and the Plaintiff implies that he was entitled to continue collecting rent because the ownership never legally transferred. For these reasons, the Plaintiff prays that the court strikes out the Purchaser's defence, dismisses the Counterclaim with costs and that it enters judgment in his favor as requested in the Amended Plaint.

11. When the matter was set down for hearing, the Plaintiff testified on his own behalf (Pw1) relying on his witness statements dated 19th October 2022 and 9th February 2023. He also produced the Amended List and Bundle of Documents dated 19th October 2022, Supplementary List and Bundle of Documents dated 9th February 2023 and Further Supplementary List and Bundle of Documents dated 2nd August 2023.

12. The Purchaser called its director, Esther Wambui Mbugua (Dw1) who relied on her affidavit sworn on 15th November 2023 and she also produced the List and Bundle of Documents of the same date. On its part, the Bank called its Credit Manager, Suleiman Murunga

(Dw2), who relied on his witness statement dated 23rd September 2025 and produced the List and Bundle of Documents dated 31st January 2023.

13. After hearing, the court directed the parties to file and exchange written submissions which are now on record. The evidence and submissions is a mirror of the parties' positions as already summarized above, and hence I will not rehash the same but I will make relevant references in my analysis and determination below.

Analysis and determination

14. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in **section 107 (1) and (2)** of the **Evidence Act** which provides that:

“Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that ***“When a person is bound to prove the existence of any fact the burden of proof lies on that person.”***

15. In **Miller v Minister of Pensions 1947 ALL E.R 372**, Lord Denning aptly summarized the application of the standard in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as

is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

16. The Court of Appeal in **James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)** simply put it that *"Courts will make a finding based on which party's version of the story is more believable."*

17. From the parties' submissions, I find that the following are the abridged issues for determination:

- 1) *Whether the Bank and the Purchasers' witnesses had authority to testify and adduce evidence.*
- 2) *Whether the Bank's statutory power of sale had crystallized.*
- 3) *Whether the Bank and the Auctioneer followed due process in exercising the statutory power of sale.*
- 4) *Whether the Bank had the obligation to enforce the Deed of Assignment of Rental Income or appoint a receiver of the rental income from the suit property.*

- 5) *Whether the Purchaser was in breach of the Memorandum of Sale.*
- 6) *Whether the Purchaser is a bona fide purchaser for value.*
- 7) *Whether the Plaintiff's proper remedy, if any, lies in damages against the Bank and not in impeaching the Purchaser's title.*
- 8) *Whether the Plaintiff is trespassing on the suit property*
- 9) *Whether the Plaintiff has been unjustly enriched by collecting rent and retaining the sale residue.*
- 10) *Who should bear the costs of the suit and counterclaim*

Authority of the Bank's and Purchaser's witnesses to testify

18. The Plaintiff submits that because the Bank's and the Purchaser's witnesses, Dw1 and Dw2 failed to provide written authority under company seal as required by Order 9 Rule 2(c) of the Civil Procedure Rules, their entire testimony and produced documents should be expunged. While it is indeed correct and admitted that neither of the two witnesses attached either of their companies' letters of authority to testify on their behalf or in the alternative company resolutions, courts have held that a statement made on oath should be expressly denied on oath, otherwise if not challenged, it remains a fact and the truth [see **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] KEHC 5590 (KLR)**].

19. The witnesses filed a verifying affidavit and a statement on oath swearing that they were duly authorized to give evidence on behalf of the Purchaser and Bank respectively. These averments were not formally challenged or objected to by the Plaintiff and have only been substantially raised in his submissions. It therefore remains that the witnesses' assertions that they are duly authorized by the Bank and the Purchaser to adduce evidence on their behalf remains uncontroverted [see **Kiautha & another t/a Briaton Bookshop v Longhorn Publishers PLC [2024] KEHC 15846 (KLR)**].
20. In the foregoing, I am satisfied that the Bank's and the Purchaser's witnesses had the requisite authority from their respective entities to produce evidence on their behalf. This ground of objection by the Plaintiff is dismissed.

Crystallization of the Bank's statutory power of sale

21. The Plaintiff submits that the Bank continued to accept loan repayments for two years after issuing the initial 90-day statutory notice which conduct waived the Bank's right to sell and necessitated the issuance of fresh notices. He claims that the 90-day notice lacked legible proof of posting, the 45-day redemption notice was served to a caretaker rather than the Plaintiff or his spouse personally, which is legally insufficient.
22. On its part, the Bank submits that all mandatory statutory notices were correctly served. The 90-day statutory notice was issued on 17th January 2020, to the Plaintiff and his spouse via their registered postal address P.O. Box 8512-00200, Nairobi, the 40-day notice to

sell was issued on 13th January 2022, and posted on 21st January 2022 to the same address. And the 45-day redemption notice was issued by the Auctioneer on 14th June 2022, in accordance with the Auctioneers Rules.

23. The Bank produced these documents in its evidence (pgs. 57-59; 60-62 and 84-85) and certificates of postage are also annexed with the notices. The Plaintiff admitted in his testimony that the stated address belongs to him and that the certificate of posting indicates his name and the said address at entry No. 11. It is now settled that a certificate of postage is *prima facie* proof that the statutory notices were served and received [see **Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others [1996] KECA 205 (KLR)**] and the Plaintiff's testimony all but confirms that the statutory notices were served upon him.

24. A chargee's statutory power of sale generally accrues when a default occurs and the chargee has complied with the notice requirements under sections 90 and 96 of the Land Act. The Plaintiff's default and indebtedness to the Bank is admitted in his pleadings and evidence. The 90-day notice was served in January 2020, the 40-day notice was served in January 2022, more than 40 days lapsed without the debt being cleared and by the time the auction was scheduled for October 2022, the Bank's statutory power of sale had already crystallized and I so find.

Process of exercising the statutory power of sale

25. My findings above answers this issue in the affirmative that the Bank followed due process in exercising its statutory power of sale.

Obligation to enforce the Deed of Assignment of Rental Income or appoint a receiver of the rental income from the suit property

26. The Plaintiff submits that the Bank was obligated to first enforce the Deed of Assignment of Rental Income or appoint a receiver before resorting to an auction and that the suit property generated Kshs. 300,000.00 monthly, enough to cover the Kshs. 215,000.00 monthly loan installments. The Plaintiff argues that bypassing the Deed for an auction was unconscionable and disproportionate.

27. In response, the Bank submits that it was not legally obligated to appoint a receiver before selling the suit property and that under section 90(3) of the Land Act and Clause 10.1 of the Charge, it had the discretion to choose between remedies of suing, appointing a receiver, leasing, or selling and that there is no legal requirement to pursue these remedies in a specific chronological order. It further submits that once property is charged as security, it becomes a commodity for sale that the chargee can dispose of to recover the debt.

28. **Section 90(3)** of the **Land Act** provides that:

If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may -

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

- (d) enter into possession of the charged land;***
or
(e) sell the charged land.

29. **Clause 10.1** of the **Charge** also provides that:

At any time after the occurrence of any of the events specified in Clause 9, the Bank may serve notice on the Chargor in accordance with Section 90 of the Land Act demanding payment of the monies secured by this Charge and if the Chargor does not comply with the notice served under Section 90 of the Land Act the Bank may -

- (a) sue the Chargor for any monies due and owing under this Charge;***
(b) appoint a receiver of the income of the Charged Property;
(c) lease or sub-lease the Charged Property;
(d) sell the Charged Property.

30. From the above provisions, it is clear that the statute and the contract provide for discretionary rather than mandatory ways in which the Bank can exercise recovery of its debt. Going through Clause 10.1 of the Charge above, I am in agreement with the Bank that it provides a list of options available to the chargee upon default. It does not create a hierarchy or a sequential order of for example first appointing a receiver, then if that fails, selling the suit property. The Bank is entitled to pick any of the listed remedies based on its assessment of the situation.

31. Whereas the Plaintiff argues that because a Deed of Assignment existed, the Bank was obligated to use it, the Deed is an additional security, not a replacement for the primary security which is the suit property. I come to this conclusion based on my reading of Clause 5 of the Charge which states that the Plaintiff charges the suit property itself as a continuing security.
32. The Deed of Assignment at Clause 2.1 explicitly states it is a "continuing security" and is in addition to the Charge, not in substitution of it. Therefore, the Bank holds both securities of the suit property and the rental income and can choose which enforcement mechanism to trigger. My reading of the Land Act also indicates that neither sections 90(3) nor 96(1) mandate that a chargee must exhaust other remedies like appointing a receiver or collecting rent before selling. As stated, the power of sale is a statutory right that accrues once the proper notices have been served and not complied with.
33. Further, while the Plaintiff's argument that selling a Kshs. 60 million property for a Kshs. 5 million debt seems harsh, the law generally gives the chargee the right to realize its security. The duty of the chargee is to act in good faith and obtain the best price reasonably obtainable under section 97 of the Land Act, not to choose the least severe remedy for the chargor. While the Plaintiff initially stated that no valuation was conducted on the suit property, he admitted in his testimony that the Bank had produced a valuation report indicating a forced sale value of Kshs. 26,250,000.00. The Plaintiff did not produce any other valuation challenging the one done by the Bank and the court can only presume that the value

indicated therein is the best price reasonably obtainable in respect of the suit property.

34. It is therefore my finding that the Bank was not obligated to enforce the Deed of Assignment of Rental Income or appoint a receiver of the rental income from the suit property prior to selling the suit property.

Breach of the Memorandum of Sale

35. The Plaintiff submits that the Purchaser was required to pay the balance of the purchase price within 90 days from the date of the auction which was 12th October 2022, that the payment of the balance is a fundamental term of the Memorandum of Sale, and the Purchaser's failure to complete the payment within the stipulated timeframe constitutes a material breach. That due to this breach, the Plaintiff contends that the sale is null and void, and the Purchaser cannot claim to be a *bona fide* purchaser for value since they failed to fulfill the contractual obligations of the auction.

36. The Plaintiff further suggests that the failure to pay the balance on time points to potential collusion between the Bank and the Purchaser to unlawfully deprive the Plaintiff of the suit property despite the contractual default by the Purchaser.

37. The Purchaser and the Bank did not deny that the balance of the purchase price was paid outside the 90-day period set out in the Memorandum of Sale. The reason given was that the Bank was processing the loan by the Purchaser to finance the balance of the purchase price. I am in agreement with the *dicta* of Mwita J., (as he then was) in **David Isoe Ayubu v I&M Bank Limited & another; Kipsosion Rerimoi Kipkorir (Interested Party)**

[2020] KEHC 633 (KLR) that failure to pay the bid price as per the terms of the sale does not invalidate a sale or revert property to the chargor.

38. The suit property having been knocked down at the fall of the hammer during the auction, the Plaintiff's equity of redemption was extinguished and failure to pay the balance of the purchase price within time could not revert the suit property to him [see **Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited [2002] KECA 109 (KLR)** and **Bomet Beer Distributors Ltd, Wilson Maritim Lasoi v Kenya Commercial Bank Ltd & 4 others [2005] KEHC 2932 (KLR)**].

39. This position was fortified by the Court of Appeal in **Euro Bank Limited (In Liquidation) v Twictor Investments Limited, Chamгаа Company Limited & Tesha (K) Limited [2020] KECA 516 (KLR)** where it was held as follows:

“The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the Amadiva case (supra), if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed.”

40. It is therefore my finding that the Purchaser did not violate the Memorandum of Sale neither did it vitiate the sale so long as it was processing to finance the balance of sale and the Bank was willing to accommodate him. I am in agreement with the Purchaser that

the Plaintiff's recourse, if any, lies in damages against the Bank and not the Purchaser who I find to be a *bona fide* purchaser for value.

Plaintiff's trespass of the suit property

41. The Purchaser stated that even after the transfer of the suit property, the Plaintiff continued to collect rent from the premises in violation of the Purchaser's proprietary rights under section 25(1) of the Land Registration Act, which entitles it to exclusive possession and quiet enjoyment of the suit property. The Plaintiff does not deny that it continued to collect rent from the suit premises after concluding that the sale was illegal and void *ab initio*. The collection only stopped after the parties consented before the court on 19th February 2024 that the Purchaser be granted possession as from 1st March 2024 and that rent be remitted to it.

42. Whereas the Plaintiff argued that he continued collecting rent because he believed the sale was illegal and void *ab initio*, it is not for him to determine that a sale was illegal; that is the function of the court. Until a court sets aside the sale, the sale stands, and the Purchaser is entitled to any rent to be collected from the premises. The fact that the Plaintiff only stopped collecting rent after the consent order on 19th February 2024 confirms that his actions prior to that date were without legal basis. He was, in fact, a trespasser holding over the suit property and unlawfully diverting the Purchaser's income and I so find.

Unjust enrichment

43. My findings above confirm that by continuing to collect rent after the suit property had passed to the Purchaser, the Plaintiff was

retaining income due to the Purchaser and the sale surplus after the loan was settled. I am in agreement with the Purchaser's submission that these acts constitute unjust enrichment and the Plaintiff must account for and remit all rent collected from November 2022 at least to February 2024, at Kshs. 286,000.00 per month as per the market rental value indicated in the valuation report with interest as *mesne* profits [see **Julius Gitonga Njoroge v Embakasi Ranching Co. Ltd & another [2017] KEELC 2908 (KLR)**].

Costs of the suit and counterclaim

44. As the Plaintiff has been unsuccessful in his suit and the Purchaser successful in the counterclaim, it follows that the Plaintiff shall bear the costs of both.

Conclusion and disposition

45. In the upshot, I make the following dispositive orders:

- a) The Plaintiff's suit is dismissed.***
- b) The 3rd Defendant's counterclaim dated 15th November 2023 is allowed.***
- c) An order be and is hereby issued that the Plaintiff relinquishes possession and is hereby restrained either by himself or agents from trespassing and/or interfering with the quiet possession of the 3rd Defendant's property Title No. NAIROBI/BLOCK 83/1764.***
- d) An order be and is hereby issued that the Plaintiff pays the 3rd Defendant Kshs.***

286,000.00 collected rent each month since November 2022 until February 2024.

- e) The 3rd Defendant is awarded interest on (d) above at the rate 14% as mesne profits from the date of filling suit until payment in full.**
- f) The Defendants are awarded costs of the suit and the counterclaim to be borne by the Plaintiff.**

JUDGMENT delivered virtually, dated and signed at **NAIROBI**

This **26th** day of **February** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Oguye h/b for Mr. Kimani for Plaintiff

Mrs. Karanu for 1st Defendant

Ms. Odhiambo h/b for Mr. Ngugi for 3rd Defendant

Court Assistant: Carlos