

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E046 OF 2018**

**NAKURU MACHINERY SERVICES LIMITED.....1<sup>ST</sup>**  
**PLAINTIFF**

**MARY WANJIRU CHEGE.....2<sup>ND</sup>**  
**PLAINTIFF**

**VERSUS**

**ECOBANK KENYA LIMITED.....**  
**DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed a suit against the Defendant vide the Plaint dated 9<sup>th</sup> July 2018 seeking the following orders:
  - i. Compensation equivalent to the current market value of the 2<sup>nd</sup> Plaintiff's property in the sum of Kshs. 34,000,000/=*
  - ii. Damages of Kshs. 20 Million for wrongful auction*
  - iii. Payment of Kshs 3,017,169/= allegedly due to the 2<sup>nd</sup> Plaintiff*
  - iv. A declaration that the purported auction conducted on 24<sup>th</sup> January 2018 is null and void*
  - v. Any other orders that this court deems fit*
  - vi. Costs of the suit.*
2. The 1<sup>st</sup> Plaintiff is a limited liability company incorporated in the Republic of Kenya, dealing with industrial accessories

and construction. The 2<sup>nd</sup> Plaintiff is an adult person, of sound mind.

3. The Defendant is a Limited Liability Company incorporated in Kenya licensed to carry our Banking business throughout the Republic
4. At all material times relevant to this suit the 1<sup>st</sup> Plaintiff was an account holder with the Defendant under Account No. 0158005008604801.
5. The Plaintiffs' case, as gleaned from the Plaint is that the 1<sup>st</sup> Plaintiff, a construction company, maintained a banking relationship with the Defendant and, in or about April 2015, obtained credit facilities comprising an existing performance bond and a contract finance facility of Kshs. 15,000,000/= to finance the construction works of Navemit Irrigation Scheme Phase 1-Turkana County Tender No. NIB/T/035/2013-2014 awarded by the National Irrigation Board (NIB) and a performance loan of Kshs. 2 million.
6. It is the Plaintiffs' position that all payment received by way of certificate and Invoice discounted were paid to the Defendant through the 1<sup>st</sup> Plaintiff's bank account to liquidate the debt and as security, the 2<sup>nd</sup> Plaintiff offered her property known as L.R. No. Nakuru/Municipality Block23/48. Prior to the advancement of the facility, the Defendant commissioned a valuation of the said property on 20<sup>th</sup> April 2015 to Acumen Valuers Limited which returned a market value of Kshs. 30,000,000/= and a forced sale value of Kshs. 22,500,000/= as per the valuation report dated 21<sup>st</sup> April 2015.

7. The Plaintiffs contend that despite requiring the 2<sup>nd</sup> Plaintiff to charge the said property, the Defendant failed and/or refused to provide a duly executed charge instrument, thereby concealing the applicable terms, particularly those relating to interest and other charges. It is their case that this omission enabled the Defendant to levy unlawful, unconscionable and non-contractual charges to the detriment of the Plaintiffs.
8. The Plaintiffs further aver that on 9<sup>th</sup> November 2016, the Defendant through Valley Auctioneers issued a 45 days notification of sale in respect of the charged property, premised on a significantly reduced valuation of Kshs. 20,000,000/= (open market) and Kshs. 15,000,000/= (forced sale). The Plaintiffs dispute this valuation, asserting that no proper valuation was undertaken at the time, that no valuer visited the property, and that the property had, in any event, appreciated in value since the 2015 valuation.
9. It is the Plaintiffs' case that the Defendant subsequently purported to sell the property by public auction on 24<sup>th</sup> January 2018. However, the Plaintiffs contend that no lawful auction took place. They allege that there were no bidders, no compliance with the Auctioneers Act and Rules, and that the process was a mere façade designed to facilitate a pre-arranged private sale to a predetermined purchaser.
10. The Plaintiffs further contend that the property was grossly undervalued and sold at Kshs. 15,450,000/=, notwithstanding that an independent valuation undertaken on 30<sup>th</sup> January 2018 placed its market value at Kshs.

34,000,000/=. They maintain that the Defendant deliberately disposed of the property at a gross undervalue, thereby defeating the 2<sup>nd</sup> Plaintiff's equity of redemption.

11. It is also the Plaintiffs' case that the purported purchaser failed to comply with the mandatory requirements governing auction sales, in that the balance of the purchase price was not paid within the stipulated 90 days. Notwithstanding this default, the Defendant is said to have irregularly accepted late payment, thereby rendering the entire transaction unlawful, null and void.
12. The Plaintiffs further allege that the Defendant engaged in systematic financial impropriety, including the levying of illegal and uncontracted interest, penalties and fees, the imposition of undisclosed commitment charges, and the operation of multiple bank accounts without the Plaintiffs' knowledge or consent. An analysis conducted by the Interest Rates Advisory Centre (IRAC) is said to have revealed substantial overcharging.
13. On the basis of the foregoing, the Plaintiffs assert that the Defendant's actions were fraudulent, unlawful and in breach of both statutory provisions and the contractual relationship between the parties. They contend that the purported sale of the suit property was invalid and incapable of conferring any lawful interest upon the alleged purchaser.
14. The Defendant filed a statement of defence and counterclaim dated 16<sup>th</sup> August 2018. The Defendant generally denies the Plaintiffs' claim. It avers that the 1<sup>st</sup> Plaintiff has no locus in the suit and is improperly joined.

15. The Defendant admits the existence of the banking relationship and the advancement of credit facilities to the 1<sup>st</sup> Plaintiff, but contends that the facilities were granted for the purpose of facilitating issuance of a performance bond and financing construction works under the tender contract.
16. It is the Defendant's position that the terms of repayment were clearly stipulated in the letter of offer dated 28<sup>th</sup> April 2015, including that the facilities were repayable on demand, with the contract finance facility to be liquidated from proceeds of the project or invoice discounting arrangements, and interest payable monthly.
17. The Defendant further avers that the 2<sup>nd</sup> Plaintiff voluntarily offered her property, L.R. No. Nakuru/Municipality Block 23/48, as security for the facilities and executed the requisite charge instrument with full knowledge of its terms and implications, in the presence of her advocate. It is contended that the 2<sup>nd</sup> Plaintiff was furnished with the charge documents and that allegations to the contrary are afterthoughts.
18. The Defendant maintains that it complied with its statutory duty under section 97(2) of the Land Act by instructing independent valuers, Keriasek & Co. Ltd, who undertook a valuation in October 2016 and returned an open market value of Kshs. 20,000,000/= and a forced sale value of Kshs. 15,000,000/=. The Defendant asserts that it is entitled to rely on professional valuers and that any disparity between valuations reflects differences of expert opinion.

19. The Defendant disputes the Plaintiffs' contention that no proper valuation was undertaken, and further asserts that valuers are professionally obligated to physically inspect property, failing which liability would lie against the valuer and not the Defendant.
20. It is the Defendant's case that a lawful public auction was conducted on 24<sup>th</sup> January 2018, at which the highest bidder was declared the successful purchaser. The Defendant denies that the auction was fictitious or irregular and maintains that a valid contract of sale arose at the fall of the hammer.
21. The Defendant further avers that any post-auction arrangements, including payment terms, were lawful variations permissible in contract, and did not vitiate the validity of the sale. It contends that the entire purchase price was ultimately received and applied towards the Plaintiffs' indebtedness, and that the transfer of the property to the purchaser was duly effected.
22. It is further the Defendant's position that the Plaintiffs were in default of their repayment obligations, that valid statutory notices were duly issued, and that the statutory power of sale properly accrued and was lawfully exercised.
23. The Defendant denies allegations of fraud, undervaluation, collusion, and unlawful charges, asserting instead that it acted in good faith, took reasonable steps to obtain the best price reasonably obtainable, and conducted the sale in accordance with the law.

24. The Defendant also challenges the jurisdiction of this Court, contending that the suit property is situated in Nakuru County.
25. By way of Counterclaim, the Defendant avers that despite applying the proceeds of sale, a sum of Kshs. 2,837,858.92 remains outstanding on the loan account, which it seeks to recover from the Plaintiffs jointly and severally, together with interest at 14% per annum and costs.
26. At the hearing, the Plaintiff called 3 witnesses while the Defence called 2 witnesses.
27. The first witness Mary Wanjiru Chege testified as Pw1. She adopted her witness statement filed on 11<sup>th</sup> July 2018 dated 9<sup>th</sup> July 2018 and the bundle of documents dated 9<sup>th</sup> July 2018. She told the court that the company was awarded a tender by the National Irrigation Board worth Kshs. 15 million. The Company sought financial accommodation from the Defendant which she secured with her matrimonial property. She testified that as per the valuation report by Acumen, the property was valued at Kshs. 30 million.
28. She testified that the property was auctioned at Kshs. 15,450,000/= which was an undervaluation. She told the court that the buyer failed to pay the purchase price within 90 days and neither was there a valuation report conducted prior to the sale.
29. She testified that she engaged an independent valuer who valued the property at Kshs. 34 million.

30. During cross examination she told the court that she is a director of the 1<sup>st</sup> Plaintiff, who borrowed the loan facility from the Defendant. She told the court that the 1<sup>st</sup> Plaintiff defaulted in the repayment of the loan facility, and according to the bank, the outstanding loan facility was Kshs. 22 million. That the default was occasioned by the delayed payment by the government as the loan facility was to be paid from the proceeds of the tender.
31. She further told the court that the valuation reports showed the land was valued at Kshs. 8 Million in 2016, Kshs. 8.4 Million in 2017 and Kshs. 10 Million in 2018.
32. She was aware that the house was sold in 2018 for Kshs. 15 Million. She testified that she is not indebted to the bank but the bank owes her money. She told the court that she initially had a performance bond facility of Kshs. 2,417,822/= and later took a loan facility of Kshs. 15 Million, bringing the total loan facility to Kshs. 17,417,822/=.
33. Pw2 David Arimi, testified that he is a registered, licensed valuer practising as an ADN Advisory Valuer. He told the court he did a valuation report attached at pages 31-44 for the property known as Nakuru Municipality block 23/48 Naka Estate. That he visited the property on 20<sup>th</sup> January 2018 on instructions from the 2<sup>nd</sup> Plaintiff. He testified that depreciation of a property is not common unless there is a serious downturn of the economy. That there was a house on the property and a servant quarter with 3 rooms and amenities. He opined that the property was valued at Kshs. 34 Million - the land being Kshs. 10

Million, and the improvement valued at Kshs. 24 Million, with an allowable variance of 15% to 20 %.

34. During cross-examination, he told the court he was not aware the property had been auctioned. He maintained that he could not give another valuation report for this case.
35. Pw3 - Wilfred Abincha Onono, a certified Public Accountant adopted his witness statement dated 31<sup>st</sup> March 2021. He testified that he compiled a report on the loan facility held by Nakuru Machineries Ltd with Ecobank, where he found that some accounts had balances and others had been closed down. The total difference overcharge is Kshs. 5,327,551.90. The bank difference as outstanding is indicated as Kshs. 2,567,169.29.
36. In the reconciliation, they relied on the bank statement, banking facility letter dated 28<sup>th</sup> April 2018 and offer facility letters that were given to the governor.
37. During cross-examination, he stated that he did not factor in the additional interest nor the default rate of 10%. He testified that he has the re-calculation report clause 9.2 account ending with 0001 period 16<sup>th</sup> July 2015 to 10<sup>th</sup> September 2015, there is a credit of 16<sup>th</sup> July 2015 of Kshs. 5,214,440/=. He told the court he was not aware that the amount was for refinancing. On 10<sup>th</sup> September 2015, an amount of Kshs. 4,995,570.42 is shown as settled in the report. On 29<sup>th</sup> September 2015, a credit of Kshs. 4 Million is described as an amount settled. He told the court it means that the borrower paid some Kshs. 4 Million.
38. That closed the Plaintiffs' case.

39. Dw1 - Edith Wanjiku adopted her witness statement dated 16<sup>th</sup> August 2018. She told the court that the Plaintiff was a customer of the bank. The bank had advanced a credit facility to the borrower - Nakuru Machineries - which was secured with two securities. The borrower defaulted and the charged properties were sold through a public auction. The properties were valued before sale and as per the valuation report was Kshs. 15,450,000/= the forced sale value.
40. The bank has a counterclaim of Kshs. 2,837,858.92/= plus interest thereon at 14% p.a. which is the outstanding balance after the public auction.
41. During cross examination she told the court that the bank valued the property on 21<sup>st</sup> April 2015 through Acumen Valuers Limited who confirmed the value of the property at Kshs. 30 Million and the forced value at Kshs. 22.5 Million.
42. The valuation by Kewasek & Co. Ltd on 31<sup>st</sup> October 2016 valued the property at Kshs. 20 Million market value and Kshs. 15 Million forced value. The instructions to Kewasek was for a general purpose. The instructions given to Acumen were for the purpose of mortgage. She denied the fact that the bank needed a lower valuation for their own benefits. She told the court that it is mandatory that a valuation be done before a loan is approved. That the valuation is meant to perform due diligence and comes first in the charge instrument. The charge instrument is dated 19<sup>th</sup> May 2015 the valuation by Kewasek is dated 31<sup>st</sup> October 2016.

43. The suit property was sold to Simon Kamau Wahome at Kshs. 15,450,000/=. The balance of the purchase price was not paid within 90 days as the buyer was given an extension period to pay the balance.
44. Dw2 - Michael Mwangi Ndolo testified that he is a licensed valuer working with Keriasek valuers. He told the court that the company prepared 2 valuation reports in 2016 and 2017. In the valuation report of 31<sup>st</sup> October 2016, the property had a market value of Kshs. 20 Million with a forced value of Kshs.15 Million while the report of 20<sup>th</sup> November 2017 the property had an open market value of Kshs. 16,500,000/= and a forced value of Kshs. 15,450,000/=.
45. During cross-examination, he told the court the condition of the house was well maintained. He told the court that in most cases, land appreciates, and in some cases, depreciates. He stated that he did not go to the property in this case, though according to him the location of this property was prime.
46. That marked the close of the Defence case.
47. At the close of the trial, parties thereafter filed written submissions which I have considered.

### **Plaintiffs submissions**

48. The Plaintiffs submit that the Defendant's exercise of its statutory power of sale was unlawful, irregular, and in breach of the Land Act, and that the impugned auction of 24<sup>th</sup> January 2018 is null and void.

49. It is their case that although the 1<sup>st</sup> Plaintiff was advanced a loan facility secured by a charge over L.R. No. Nakuru/Municipality Block 23/48, the Defendant failed to comply with the statutory preconditions to the exercise of the power of sale, particularly the issuance of valid statutory notices under section 90 of the Land Act.
50. The Plaintiffs further contend that the Defendant breached its duty of care under section 97 of the Land Act by disposing of the suit property at a gross undervalue. They point to the disparity between the 2015 valuation (Kshs. 30,000,000/=), their independent valuation of January 2018 (Kshs. 34,000,000/=), and the eventual sale price of Kshs. 15,450,000/=, which they submit evidences a deliberate undervaluation.
51. The Plaintiffs argue that no proper valuation was undertaken prior to the sale, and that the Defendant's reliance on earlier valuations was insufficient to discharge the statutory obligation to obtain the best price reasonably obtainable at the time of sale.
52. The Plaintiffs submit that no lawful public auction took place. They contend that the process was a sham, devoid of competitive bidding, and in reality amounted to a pre-arranged private sale. They further assert that the purchaser failed to comply with mandatory auction conditions, including payment of the balance within 90 days, thereby rendering the transaction void.
53. The Plaintiffs also fault the Defendant for failing to furnish the 2<sup>nd</sup> Plaintiff with a duly executed charge

instrument, in violation of section 84 of the Land Act. They contend that this omission concealed the applicable terms and facilitated the imposition of unlawful and unconscionable charges.

54. On the issue of interest and bank charges, the Plaintiffs submit that the Defendant levied illegal, and excessive charges, including commitment fees and penalties not provided for in the contractual instruments. They rely on the IRAC report to demonstrate overcharging and maintain that such conduct was designed to defeat the 2<sup>nd</sup> Plaintiff's equity of redemption.
55. The Plaintiffs further submit that the Defendant acted fraudulently and in bad faith, pointing to alleged collusion with the purchaser, concealment of material information, and manipulation of the sale process to achieve an undervalued disposition of the suit property.
56. It is their contention that the Defendant's conduct violated settled principles that a chargee must act in good faith and take reasonable steps to obtain the best price reasonably obtainable at the time of sale, and that failure to do so renders the sale impeachable.
57. On relief, the Plaintiffs urge the Court to grant compensation equivalent to the current market value of the property assessed at Kshs. 34,000,000/=, damages for wrongful auction in the sum of Kshs. 20,000,000/=, and reimbursement of Kshs. 3,017,169/= allegedly due on account, together with a declaration nullifying the auction.

58. The Plaintiffs submit that the Defendant's counterclaim is untenable, being founded on an unlawful and tainted transaction, and ought to be dismissed with costs.

### **Defendant's submissions**

59. The Defendant submits that the Plaintiffs' claim is wholly unmerited and ought to be dismissed with costs. It contends that the 1<sup>st</sup> Plaintiff was duly advanced credit facilities pursuant to a Letter of Offer dated 28<sup>th</sup> April 2015, secured by a legal charge over L.R. No. Nakuru/Municipality Block 23/48 belonging to the 2<sup>nd</sup> Plaintiff, together with guarantees and indemnities by the 1<sup>st</sup> Plaintiff's directors.

60. It is the Defendant's case that the Plaintiffs fell into persistent default in servicing the facility, a fact admitted in evidence, thereby entitling the Defendant to exercise its statutory power of sale upon issuance of the requisite notices under the Land Act.

61. The Defendant maintains that the sale of the suit property by public auction on 24<sup>th</sup> January 2018 was lawful, regular, and conducted in compliance with the law. It submits that a valid contract of sale arose at the fall of the hammer, and that the purchase price was fully paid and duly credited to the Plaintiffs' loan account, with transfer effected in favour of the purchaser.

62. On the allegation of undervaluation, the Defendant submits that it discharged its statutory duty under section 97(2) of the Land Act by commissioning a valuation prior to the sale. It relies on valuations undertaken in October 2016 and November 2017 which informed the forced sale value,

and contends that the auction price reflected the best price reasonably obtainable at the time.

63. The Defendant further submits that the Plaintiffs' valuation report is unreliable, having been procured after the auction, and fails to reflect prevailing market conditions. It argues that allegations of undervaluation must be proved by cogent evidence, and not mere assertions or post-sale valuations.
64. On the issue of interest and charges, the Defendant contends that all charges levied were strictly in accordance with the Letter of Offer, which expressly provided for contractual interest, default interest, and commitment fees. It dismisses the IRAC report as inconclusive and incapable of displacing the contractual terms agreed by the parties.
65. The Defendant invokes the settled principle that parties are bound by their contracts and that the Court cannot rewrite the terms thereof, absent proof of fraud, misrepresentation, or illegality, none of which has been established.
66. It is further submitted that the Plaintiffs have failed to discharge the burden of proof under sections 107-109 of the Evidence Act, particularly in relation to allegations of undervaluation, fraud, and unlawful exercise of the statutory power of sale.
67. On the reliefs sought, the Defendant contends that the claim for compensation at an alleged market value of Kshs. 34,000,000/= is unsupported, speculative, and legally untenable, as the sale was lawfully conducted. Similarly, the

claim for damages for wrongful auction is said to be unproven, no illegality having been demonstrated.

68. Conversely, the Defendant maintains that its counterclaim is merited, the Plaintiffs having admitted default. It submits that after application of the sale proceeds, a balance of Kshs. 2,837,858.92 remains outstanding, which it seeks together with interest and costs.

69. The Defendant urges the Court to dismiss the Plaintiffs' suit in its entirety and to allow the counterclaim as prayed.

### **Analysis and determination**

70. I have considered the pleading, evidence and submissions by parties. I have also perused the exhibits and considered the decisions cited. The following issues arise for determination:

- i. Whether the statutory power of sale accrued and was lawfully exercised;*
- ii. Whether the suit property was undervalued;*
- iii. Whether the auction was lawful and valid;*
- iv. Whether unlawful interest and overpayments were proved;*
- v. Whether the Defendant's counterclaim is merited; and*
- vi. What orders should issue.*

### *Whether the statutory power of sale accrued and was lawfully exercised*

71. It is not disputed that the 1<sup>st</sup> Plaintiff obtained financial facilities from the Defendant secured by a charge over the

suit property. The 2<sup>nd</sup> Plaintiff admitted executing the security and that the 1<sup>st</sup> Plaintiff fell into default.

72. The charge document has been provided in the Defendant's bundle of documents. The assertion that the Defendant has failed to provide furnish the same, is misplaced.

73. Under Section 90 of the Land Act, a chargee is entitled to issue a statutory notice upon default, and upon non-compliance, the right to sell accrues under Section 96 of the Land Act.

74. The Plaintiffs challenged the issuance and validity of statutory notices but did not tender cogent evidence demonstrating non-service or invalidity. The evidential burden lay with them under Sections 107-109 of the Evidence Act, which provide that he who alleges must prove.

75. It is trite law that once default is established, the chargee is entitled to exercise its statutory remedies provided the statutory requirements are complied with. The assertion that the property is matrimonial property does not bar the lender from exercising its statutory power of sale. Any property which is properly and lawfully given as security for a loan becomes a commodity for sale. And so, any ground based on those arguments does not in itself prove of *prima facie* case of the possibility of suffering irreparable damage.

76. In the case of **C.A Civil Appeal No. 114 of 2009, Nyanza Fish Processors Limited Vs Barclays Bank of Kenya Limited**, where the court held that:

***“The applicant itself has offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The Respondent is a bank and there is no gainsaying that it will be able to satisfy the loss”***

77. On the material before the Court, I am satisfied that default was admitted and the statutory power of sale properly accrued

*Whether the property was undervalued*

78. The gravamen of the Plaintiffs’ case is that the suit property, L.R. No. Nakuru/Municipality Block 23/48, was sold at a gross undervalue of Kshs. 15,450,000/= at the auction conducted on 24th January 2018. They contend that this price was manifestly below the property’s true market worth, which they place at Kshs. 34,000,000/=, and that such disparity is indicative of breach of the Defendant’s statutory duty, bad faith, and collusion..

79. The Defendant, for its part, maintains that it discharged its statutory mandate and obtained the best price reasonably obtainable at the time of sale through a public auction process. It contends that the sale price was consistent with the prevailing forced sale value and was reached following due process.

80. The legal framework governing this issue is settled. Under section 97(1) a chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
81. This duty is complemented by section 97(2) of the Land Act, which requires a chargee, before exercising the power of sale, to ensure that a forced sale valuation is undertaken by a valuer.
82. The provisions of Section 97 of the Land Act makes it mandatory for the Plaintiff herein to undertake a statutory valuation and thereafter be guided by the statutory valuation in terms of what constitutes the best price available, taking into account the interests of the Chargor.
83. The duty is not to obtain the highest possible price, but a *reasonable price in the circumstances*. (See Court of Appeal in **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] eKLR**).
84. The evidence before the Court discloses three competing valuation positions. First, the Defendant commissioned a valuation by Acumen Valuers Limited in April 2015, which returned a market value of Kshs. 30,000,000/= and a forced sale value of Kshs. 22,500,000/=. Secondly, the Defendant relied on subsequent valuations by Keriasek & Co. Ltd, which assessed the property at Kshs.

20,000,000/= (market value) and Kshs. 15,000,000/= (forced sale value) in October 2016, and later at Kshs. 16,500,000/= (market value) and Kshs. 15,450,000/= (forced sale value) in November 2017. Thirdly, the Plaintiffs produced a valuation report dated January 2018 placing the market value at Kshs. 34,000,000/=.

85. It is common ground that the suit property was sold at Kshs. 15,450,000/=:, which corresponds precisely with the forced sale value indicated in the Defendant's November 2017 valuation report. On the face of it, this lends *prima facie* support to the Defendant's contention that the sale price reflected the prevailing forced sale value proximate to the date of auction.

86. However, the Court must interrogate not merely the figures, but the integrity and probative value of the valuation process itself. In this regard, the testimony of Dw2, the Defendant's valuer, is instructive. Under cross-examination, he conceded that he did not personally visit the suit property in the course of preparing the valuation reports. That admission, in the Court's view, materially diminishes the evidential weight of the valuation reports relied upon by the Defendant.

87. A valuation intended to guide the exercise of a statutory power of sale must, at the very least, be grounded on a proper factual foundation, including inspection or verifiable data as to the condition, location, and attributes of the property. Where a valuer disclaims personal inspection,

the Court is entitled to approach such valuation with circumspection.

88. Further, the Defendant's valuation trajectory reflects a significant downward shift from a market value of Kshs. 30,000,000/= in 2015 to Kshs. 16,500,000/= in 2017. While fluctuations in property values are not uncommon, no satisfactory explanation was tendered to account for this sharp decline, particularly in light of the evidence that the property was situated in a prime location and that the improvements thereon were well maintained.
89. On the other hand, the Plaintiffs' valuation report, though proximate to the date of sale, is not without its own limitations. Pw2 conceded that he was not aware that the property had already been auctioned, and his report does not sufficiently address prevailing market conditions or the constraints typically attendant to forced sale scenarios.
90. I have to strike a balance between these two competing evidentiary positions. The mere fact that the Plaintiffs' valuation is significantly higher than the Defendant's does not, *ipso facto*, establish undervaluation.
91. In the present case, the Defendant did commission valuations prior to the sale, as required under section 97(2) of the Land Act. The sale price realized was consistent with the forced sale value indicated in the most recent valuation report. These facts weigh in favour of a finding that the Defendant acted within the statutory framework.
92. Nevertheless, the shortcomings in the Defendant's valuation evidence, particularly the lack of personal

inspection by the valuer and the unexplained depreciation in value raise legitimate concerns as to the robustness of the valuation process. These concerns, however, do not, in the Court's considered view, rise to the level of proving that the property was sold at a gross undervalue or that the Defendant acted in bad faith.

93. Ultimately, the burden lay on the Plaintiffs to demonstrate, on a balance of probabilities, that the Defendant failed to obtain the best price reasonably obtainable at the time of sale. That burden has not been discharged. While the Plaintiffs have shown that a higher valuation was possible, they have not demonstrated that the Defendant's reliance on its valuer was so unreasonable as to amount to a breach of statutory duty.

94. Accordingly, the Court finds that the allegation of undervaluation has not been proved to the requisite standard.

*Whether the auction was unlawful*

95. The Plaintiffs impugn the validity of the auction conducted on 24<sup>th</sup> January 2018, contending that the process was a sham, devoid of competitive bidding, and designed to facilitate a pre-arranged sale. They further argue that the purchaser failed to comply with the conditions of sale, particularly the requirement to pay the balance of the purchase price within ninety (90) days, thereby rendering the transaction null and void.

96. The Defendant, on its part, maintains that a lawful public auction was conducted, that the highest bidder was

declared the successful purchaser at the fall of the hammer, and that a valid contract of sale thereby arose. It further contends that any extension of time granted for payment of the balance was a permissible contractual variation that did not vitiate the sale.

97. It is trite law that a sale by public auction becomes binding at the fall of the hammer, at which point a valid and enforceable contract arises between the chargee and the highest bidder. Such a sale cannot be impeached merely on account of post-sale arrangements, unless it is demonstrated that the process was tainted by fraud, collusion, or other. (See **Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd [2005] eKLR**).

98. The Plaintiff's equity of redemption was extinguished at the fall of the hammer.

99. The Plaintiffs did not adduce cogent evidence to demonstrate that no auction took place or that the process was pre-arranged. Pw1 testified that she had been given a chance to redeem the property at the auction but she told the court that on the day of the auction she was late and found that the auction had taken place. Thus, I am of the view that the Plaintiff's assertions remained largely speculative and were not supported by independent evidence, such as proof of the absence of bidders, irregularities in the advertisement, or non-compliance with the Auctioneers Act and Rules.

100. Conversely, the Defendant led evidence that the property was exposed to public auction and that the highest

bidder was declared the purchaser. There is no material placed before the Court to displace that evidence.

101. With regard to the complaint that the purchaser did not pay the balance of the purchase price within the stipulated ninety (90) days, the evidence shows that an extension of time was granted. The question is whether such extension invalidates the sale.

102. The Court is of the considered view that it does not. The grant of additional time for completion, in the absence of fraud, collusion, or prejudice to the chargor, is a matter falling within the realm of contractual arrangement between the parties to the sale. It does not, without more, vitiate a sale that was otherwise lawfully conducted.

103. The Plaintiffs did not demonstrate that the extension of time was actuated by fraud, bad faith, or collusion, nor did they show that it resulted in any prejudice beyond what would ordinarily arise from a completed sale.

104. In the premises, the Court finds that the Plaintiffs have failed to discharge the burden of proof placed upon them under sections 107-109 of the Evidence Act in respect of the allegation that the auction was unlawful.

105. Accordingly, the challenge to the validity of the auction fails.

*Whether unlawful interest and charges were proved*

106. The Plaintiffs contend that the Defendant levied unlawful, excessive interest and charges on the loan facility, thereby inflating the outstanding debt and precipitating the impugned sale. In support of this claim, they relied

principally on a report prepared by the Interest Rates Advisory Centre (IRAC), which allegedly revealed overcharges in the sum of Kshs. 5,327,551.90.

107. Pw3, a Certified Public Accountant who prepared the report, testified that his analysis was based on bank statements and facility letters. However, under cross-examination, he conceded that he did not factor in certain contractual provisions, including default interest and other charges stipulated in the lending instruments. That omission, in the Court's view, significantly undermines the probative value of the report.

108. The relationship between the parties herein was governed by contractual instruments, including the Letter of Offer and the Charge. The law is settled that parties are bound by the terms of their contract, and the Court will not interfere with such terms in the absence of illegality, fraud, coercion, or undue influence. In **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KECA 362 (KLR)** the Court of Appeal stated:

***“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract...”***

109. The Plaintiffs argued that the Defendant failed to furnish them with a duly executed charge instrument, thereby concealing the applicable terms. However, the record shows that a copy of the charge document was produced by the Defendant. The Plaintiffs did not specifically challenge the authenticity or contents of that document, nor

did they demonstrate that the impugned charges fell outside the scope of the contractual provisions therein.

110. It is also instructive that the charge document expressly provided for the accrual of interest, including default interest, as well as other ancillary charges. In the absence of evidence demonstrating that the Defendant levied charges not contemplated by the contract, the Court is unable to find that the charges were unlawful.

111. The Court further reiterates the settled principle that a dispute as to the amount due, or the rate of interest charged, does not, without more, constitute a basis for impeaching the exercise of a chargee's statutory power of sale. As was held in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR**, a mortgagee will not be restrained from exercising its statutory power of sale merely because the amount due is in dispute, unless it is shown that the amount claimed is excessive, illegal, or unconscionable.

112. In the present case, while the Plaintiffs alleged overcharging, they did not demonstrate, with precision, that the charges levied were illegal, usurious, or outside the contractual framework. The IRAC report, having failed to incorporate key contractual variables, cannot, standing alone, discharge that burden.

113. Consequently, the Court finds that the Plaintiffs have failed to prove, on a balance of probabilities, that the Defendant levied unlawful interest or charges.

114. This claim therefore fails.

*Whether the counterclaim is merited*

115. The Defendant, by way of counterclaim, sought recovery of the outstanding loan balance following the realization of the charged property. The evidence on record demonstrates that after application of the proceeds of sale, a sum of Kshs. 2,837,858.92 remained due and owing.

116. The Plaintiffs, while disputing the legality of the sale and the interest charged, admitted that they were in default of their repayment obligations. They did not, however, place before the Court a cogent or alternative computation to controvert the Defendant's statement of account or to demonstrate that the sum claimed was erroneous.

117. In the absence of such rebuttal, the Court is satisfied that the Defendant has proved its counterclaim on a balance of probabilities.

118. As regards interest, Section 26 of the Civil Procedure Act vests the Court with discretion to award interest at such rate and for such period as it deems reasonable. In this case, the Defendant has prayed for interest at the rate of 14% per annum, which appears to be anchored in the contractual relationship between the parties. There being no basis laid to depart from the contractual rate, the Court finds the same reasonable in the circumstances.

119. In the premises, and having considered the entire record, the Court makes the following orders:

- i. The Plaintiffs' suit is hereby dismissed in its entirety.***

- ii. The Defendant's counterclaim is hereby allowed as follows:**
- a. Judgment is entered for the Defendant against the Plaintiffs jointly and severally in the sum of Kshs. 2,837,858.92.**
- b. The said sum shall attract interest at the rate of 14% per annum from the date of filing suit until payment in full.**
- iii. The Plaintiffs shall bear the costs of the suit and the counterclaim.**

Orders accordingly.

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

This **30<sup>th</sup>** day of **April** 2026.

**P.M. MULWA**  
**JUDGE**

**In the presence of:**

*Ms. Atieno h/b for Mor. Koceyo for Plaintiffs*

*Ms. Wetunga h/b for Mr. Nyaanga for Defendant*

*Court Assistant: Lispa*