

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. 47 OF 2019(FORMERLY ELC CASE NO.57 OF
2010)

BETWEEN

PAUL KIBUGI

MUITE.....PLAI

NTIFF

AND

NATIONAL BANK OF KENYA.....1ST

DEFENDANT

UNIKEN MARKETING SERVICES LIMITED.....2ND

DEFENDANT

J. W. GICHEHA.....3RD

DEFENDANT

ELIZABETH NYAMBURA NDIRANGU

t/a EXPRESS SERVICES AGENCY.....4TH

DEFENDANT

THE REGISTRAR OF TITLES.....5TH

DEFENDANT

JUDGMENT

Introduction and Background

1. By the Re-Amended Complaint dated 18th March 2014, the Plaintiff contends the 1st Defendant (“the Bank”) orchestrated a “grand scheme” to defraud him of his 5-acre property in Karen, Nairobi, being title number L.R. No. 12882/35 (“the suit property”) on account of loan arrears. While the Plaintiff admits to being in arrears, he argues the Bank blocked his attempts to redeem the suit property and sold it through an illegal, non-transparent process to the 2nd Defendant (“the Company”) at a gross undervalue of Kshs. 35 million in 2008, despite being valued at Kshs. 40 million twelve years earlier in 1996. He contends that the market value of the suit property was Kshs. 109.5 million in 2008 and rose to Kshs. 338 million by 2018 and that he had presented a better offer to the Bank before the same was sold to the 2nd Defendant.
2. He argues that the Bank varied interest rates illegally and recovered interest exceeding the legal maximum under the **Banking Act**, that it failed to provide certified statements of accounts, that the suit property was never advertised for sale, the Bank failed to issue the mandatory statutory notices required under the repealed **Registered Land Act** and the Transfer document was not executed by the Bank as the transferor, rendering the

entire sale null and void *ab initio*. The Plaintiff further claims that the offer to purchase the suit property was made personally by one Nelson Havi who was by then, a newly admitted advocate, yet the suit property was transferred to the Company, with which he was associated. The Plaintiff states that that the Bank rejected his offer to clear the loan via a facility from *First Community Bank*.

3. The Plaintiff claims that on 10th June 2009, the 4th Defendant (“the Auctioneer”), accompanied by police and youth, violently raided the Plaintiff’s home under a false “levy of distress for rent” pretext and that they damaged the suit property, carted away household goods worth Kshs. 11 million, and attempted an illegal eviction. He states that the Auctioneer obtained the necessary “break in order” from the court by misrepresenting that the Plaintiff was a tenant in rent arrears, while an injunction from the Court of Appeal was allegedly in place. The Auctioneer’s Board later ruled the attachment unlawful and imposed a maximum fine of Kshs. 100,000.00, which was paid without appeal but the goods remain unlawfully held. He accuses the 3rd Defendant (“the Registrar”) for wrongfully registering the void transfer as Entry No. 8 on the title despite it lacking the mandatory execution by the transferor, in breach of the

Registered Titles Act and that this constituted an abuse of office and an ultra vires act.

4. The Plaintiff alleges continued threats and violent attempts by the 2nd Defendant to evict him illegally, creating imminent danger and the Plaintiff mentions three other suits involving overlapping parties and issues namely, **HCCC No. 633 of 2004** which seeks, inter alia cancellation of the transfer of the suit property and rectification of the register to reflect the Plaintiff as owner; **HCCC No. 466 of 2009** which claims damages from the Company for trespass and loss related to the suit property dispute and; **HCCC No. 312 of 2008**, a suit by the Company against the Plaintiff for vacant possession, which was discontinued in September 2009.
5. For the above reasons, the Plaintiff seeks a number of court orders including Declarations that the Company cannot evict him without a court decree, an order for the return of his unlawfully attached goods or summary judgment for the same, Declarations that the sale and transfer are null and void due to non-execution and fraud, a declaration that his right of redemption is still valid, cancellation

of Entry No. 8 and rectification of the land register and prohibitory orders against further dealings with the suit property.

6. The suit is opposed by the Bank through its Statement of Defence dated 26th November 2018. It asserts that the Plaintiff was lawfully indebted to it based on the loan facility that he has admitted and that since he defaulted to honour his obligations under the loan facility agreement, the Bank followed the due process to issue the requisite notices as its statutory power of sale had crystallized upon the said default. The Bank also states that the sale of the suit property to the Company on 15th May 2008 for Kshs. 35,000,000.00 was legally proper, valid, regular and, most importantly, legitimate. That a transfer was duly executed and registered on 22nd May 2008 and upon following the due process, the title to the suit property passed to the Company lawfully, leaving no equity of redemption to the Plaintiff. Therefore, the Bank holds that it did not act fraudulently as misleadingly as claimed by the Plaintiff and fully complied with the law.
7. The Bank avers that the Plaintiff bears the burden of proving fraud, undervalue, procedural irregularity, and illegality but that the

Plaintiff has not discharged this burden. The Bank contends that it properly exercised its statutory power of sale, the Plaintiff approved the sale and the suit property was legally and procedurally sold to the Company at the then prevailing market value. That under **section 69 & 69A** of the **Indian Transfer of Property Act (ITPA)**, which was the statute applicable at the time of the sale, once the power of sale crystallized, the chargee was entitled to sell without reference back to the chargor.

8. The Bank states that the Plaintiff has alleged gross undervaluation, disregard of procedures and a conspiracy to deprive him of the suit property without providing proof as the Plaintiff has produced no credible valuation, no expert evidence, and no proof of collusion to substantiate his claim. It avers that a sale price of Kshs. 35,000,000.00 for the suit property is neither shown nor proven to be an undervalue.
9. The Bank reiterates that once a transfer is registered, title passes to the purchaser, and any challenge requires proof of fraud under **section 26(1)** of the **Land Registration Act**, the only way a title can be challenged include circumstances of fraud and

misrepresentation or illegal and unprocedural acquisition of title or acquisition through corruption. That the Plaintiff failed to prove fraud, and he has not brought himself within the exceptions, either. The Bank states that the suit does not disclose a reasonable cause of action against it, that several prayers are spent, as the suit property has already been sold and transferred and based on the foregoing the Court is invited to dismiss the Plaintiffs' suit against the Bank with costs and interest on the same.

10. The Company and the Auctioneer oppose the suit through their Amended Statement of Defence dated 16th June 2014 contending that the Plaintiff voluntarily executed an Irrevocable Power of Attorney in favour of the Bank authorising it to sell the suit property by public auction or private treaty without further reference to him. That this compounded and reinforced the security created by the charge, giving the Bank both statutory and contractual authority to dispose of the suit property and that the Power of Attorney is a power coupled with an interest and is irrevocable, surviving the Plaintiff's default and authorising the Bank to act in his name.

11.They state that the sale to the Company was conducted by private treaty, which was expressly permitted under both the charge instrument and the Power of Attorney and that the Bank had discretion to choose between public auction and private treaty. That the sale agreement was duly executed and binding, and the purchase price was paid, the Plaintiff's equity of redemption was extinguished upon the execution of the sale agreement between the Bank and the Company. The Company and Auctioneer aver that once the statutory power of sale is lawfully exercised, the chargor's right to reclaim the suit property ends and any claim for irregularity only gives rise to a claim for damages against the chargee, not against the purchaser.

12.They state that allegations of fraud were not specifically pleaded against the Company and have not been proved to the required higher standard and that no evidence has been provided showing that the Company participated in or knew of any fraud. The Company maintains that it is a bona fide purchaser for value without notice, and its title is protected under the repealed **Registration of Titles Act**, that it conducted due diligence, paid valuable consideration, and had no notice of any

defect in title, its registration as proprietor under the repealed **Act** confers indefeasible title, subject only to statutory exceptions such as fraud, which have not been established here. The Bank asserts that as the lawful registered proprietor, it is entitled to vacant possession of the suit property and the Plaintiff's continued occupation after the lawful sale amounts to trespass. They claim that the issues raised by the Plaintiff herein were previously litigated in **HCCC No. 633 of 2004**, where the court dismissed an application for injunction and upheld the validity of the sale and that the Plaintiff is therefore re-litigating a settled matter. For these reasons, the Company and the Auctioneer urge the court to dismiss the suit in its entirety and declare that the Company is the lawful proprietor of the suit property, order the Plaintiff to give vacant possession and award damages or mesne profits for unlawful occupation.

13. The Registrar also opposes the suit through its Statement of Defence dated 22nd June 2012 stating that every action taken by it was carried out in good faith without any irregularities and in accordance with the law. It denies the abuse of office claims and avers that the suit property records were properly maintained and

that the Registrar was not involved in any irregular transfer and/or registration.

14. The Registrar states that the Plaintiff's suit is bad in law, misconceived and incurably defective and that the same has been filed in breach of **section 12** as read together with **section 16** of the **Government Proceedings Act**. It states that the Plaintiff's remedy lies as against the Bank, the Company and the Auctioneer and not against the Registrar who acted statutorily. As such, it prays for the suit to be dismissed with costs.

15. The matter was set down for hearing where the Plaintiff testified on his own behalf (PW 1) where he relied on his witness statement dated 31st January 2019 and he produced the Bundle of Documents dated 12th August 2011 (PExhibit 1). The Plaintiff also called Milton Mugambi Imanyara (PW 2), an advocate, who relied on his undated witness statement; Stephen Gitau Kiarie (PW 3), A Loss Adjustor who relied on his witness statement dated 12th November 2018 and he produced his Report dated 24th August 2009 (PExhibit 2) and; Jane Miriti (PW 4), a Valuer, who relied on her witness statement

dated 12th November 2018 and produced the Valuation Report dated 2nd November 2018(PExhibit 3).

16.The Bank called its Recoveries Manager, Paul Chelan'ga(D1 W1) and he adopted his witness statement dated 16th November 2018 and produced the Bundle of Documents dated 26th November 2018(D1 Exhibit 1). It also called John Muia Mulwa (D1 W2), a Valuer who relied on his witness statement dated 26th November 2018 and his Valuation Reports dated 15th February 2005 and 9th November 2007 found at pgs. 192 and 307 of PExhibit 1 respectively. The Company called its director, Jackson Mwangi Wanjugu (D2 W1) who relied on his witness statement dated 4th June 2013 and he produced the Bundle of Documents of the same date (D2 Exhibit 1). The Registrar called the 3rd Defendant (DW 3) who relied on her witness statement dated 26th June 2013 and; Edwin Munoko Wafula(DW 4) who relied on his witness statement dated 22nd January 2019 and he produced the Bundle of Documents of the same date (D5 Exhibit 1).

17. After the hearing, the Court directed the parties to supplement their arguments by filing written submissions which are now on

record. As the submissions merely reflect the parties' positions already analyzed above, I will not repeat them. I will however, make relevant references to the submissions, pleadings, and evidence in the analysis and determination below.

Analysis and Determination

18. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in **Miller v Minister Of Pensions [1947]2 All ER 372** discussed the burden of proof and he stated as follows:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. 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 in 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.”

19. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in **sections 107 and 108** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provide as follows:

107. Burden of proof.

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

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

108. Incidence of burden.

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

(Also see **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR)**)

20. From the parties' submissions, I find that the court is being asked to determine the following abridged issues:

- a) Whether **Registration of Titles Act** and the **Indian Transfer of Property Act** is the applicable law to the land regime governing the suit property
- b) Whether the Bank failed to comply with the mandatory provisions of Sections 74 and 77 of the Registered Land Act (now repealed)
- c) Whether the security granted to the Bank was compounded by the irrevocable Power of Attorney, and to what extent
- d) Whether the contra proferentem rule applies to the construction of the Power of Attorney
- e) Whether selling the suit property for Kshs. 35 million constituted a gross undervaluation that indicates fraud
- f) Whether the Bank lawfully exercised its statutory power of sale
- g) Whether the Plaintiff's right to redeem his property still exists

- h) What is the legal standing of the initial offer made by Mr. Nelson Havi, the alleged 10% deposit, and the subsequent abandonment of that transaction?*
- i) Whether a valid and legally enforceable contract for sale ever existed between the Bank and the Company*
- j) Whether the sale and transfer of the suit property was fraudulent or irregular*
- k) Whether the sale by private treaty was lawful under the Charge and the Irrevocable Power of Attorney, and the distinction between sale by public auction and sale by private treaty*
- l) Whether the Company qualifies as a bona fide purchaser for value without notice, thereby acquiring good title to the suit property despite the Plaintiff's prior equitable interest*
- m) Whether the Company is entitled to vacant possession by the Plaintiff of the suit property*
- n) Whether the suit discloses any reasonable cause of action against the Bank*

o) Whether the Plaintiff has proved his claim for special damages on a balance of probabilities

The applicable law to the suit property

21. The Company and the Auctioneer have submitted that from the face of the title to the suit property, the same was governed by the repealed **Registration of Titles Act** and the **Indian Transfer of Property Act** and that before the implementation of the **Land Registration Act**, the country had a fragmented system of land registration involving several different statutes. I am in agreement with this position and find that under the *Savings and transitional provisions with respect to rights, actions, dispositions* of **section 107(1) and (2)** of the **Land Registration Act**, the **Acts** applicable before the commencement of the **Land Registration Act** continued to apply to “... any right, interest, title, power, or obligation acquired, accrued, established..” in respect of land. This means that the repealed laws continue to apply to transactions that occurred before the **Land Registration Act** took effect and that **Act** does not invalidate or alter previously established legal rights.

22. Thus, if a transaction, such a sale, transfer or charge was initiated under the old law, it should be completed under that same law. In this case, the Charge and Irrevocable Power of Attorney were executed in 1996 and 2004 respectively whereas the impugned sale to the Company occurred under the repealed **Registration of Titles Act** and the **Indian Transfer of Property Act**. The **Land Registration Act** does not retroactively alter the legal framework governing the creation, enforcement, and transfer of interests in the suit property.

Compliance with sections 74 and 77 of the repealed Registered Land Act

23. The Plaintiff stated that the Bank failed to serve the mandatory statutory notices required before selling the suit property and that because these legal conditions precedent were not met, the sale is null and void *ab initio* and incapable of passing legal title. Even though D1 W1 stated in his testimony that the Bank had served the statutory notices, he admitted that there were no statutory notices produced as evidence, stating that the notices were apparently waived by the Plaintiff's Power of Attorney. It is now trite that once

a chargor claims that a statutory notice was never issued or served upon them, the burden shifts to the chargee to prove otherwise (see **Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others [1996] KECA 205 (KLR)**). As no statutory notices were produced by the Bank despite their evidence that many of such had been issued, it remains that the Bank never issued or served the requisite statutory notices. On whether the Plaintiff's Power of Attorney waived the Bank's obligation to issue the notices, I have gone through the same and I cannot find any provision, express or implied, that waives the requirement for statutory notices before a sale under the charge.

24. The Power of Attorney provides in part that *"I hereby irrevocably authorize NBK to sell L.R 12882/35 by public auction or by private treaty at the best price available to NBK without further reference to me the Donor."* In my view, the phrase ***without further reference to me..*** means the Bank does not need to go back to the Plaintiff for consent or instructions once the Power of Attorney is operative and it relates to procedural steps during the sale process such as choosing between auction and private treaty, signing documents, and completing the transaction. It does

not expressly mention statutory notices under **sections 74** of the repealed **Registered Land Act**. This lends credence to the Plaintiff's position that the Bank improperly exercised its statutory power of sale and I agree with his submission that the Court of Appeal, in **Stephen Boro Gitaha v Nicholas Ruthiru Gatoto & 2 others [2017] KECA 463 (KLR)** stated that "**Section 74(1)** of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title."

25. It is therefore my finding that the Bank's exercise of its statutory power of sale was illegal, irregular and unlawful as the Bank failed to issue and serve the Plaintiff with the mandatory statutory notices and that no proper title passed to the Company and even if I am to say that the Company was an innocent purchaser for value, the

Court of Appeal in various decisions stated that this innocent purchase was not curative of the fundamental defect in the title due to the absence of the requisite notice.

Compounding of the security by the Power of Attorney

26. Since the sale is unlawful from inception due to lack of the statutory notices, the Power of Attorney is rendered irrelevant in validating the sale as it only meant to supplement the Bank's contractual authority but it did not replace or override statutory safeguards. At most, it gave the Bank procedural convenience of signing documents and completing transfers without the Plaintiff's participation and therefore, it did not compound the security in a way that could cure or override the statutory notice requirement.

Application of the *contra proferentem* rule in the construction of the Power of Attorney

27. The *contra proferentem* rule is only applicable in cases of ambiguity or where other rules of construction have failed and it applies in cases of ambiguity in contracts against the party who drew the contract (see **The National Bank of Commerce Ltd v Nabro Ltd & Anor [2008] 1 EA 432** and **Eunice Kamau v AAR**

Insurance (K) Limited [2017] KEELRC 1671 (KLR)]. In this case, the Power of Attorney was drafted by the Bank and presented to the Plaintiff in a lender-borrower relationship. If there was ambiguity as to whether the Power of Attorney waived statutory notices, then such ambiguity must be construed against the Bank as the drafter. The Bank argued the Power of Attorney waived notices, the Plaintiff argued it did not. As I have found, the wording does not explicitly mention waiver of statutory notices, therefore, any ambiguity must be resolved in favor of the Plaintiff. In my view, waiver of statutory rights must be explicit and since it is not explicit, the *contra proferentem* rule reinforces that no waiver occurred and this aligns with the Court of Appeal's strict stance in **Stephen Boro Gituha(supra)** that statutory protections cannot be lightly treated or minimized.

Whether selling the suit property for Kshs. 35 million constituted a gross undervaluation that indicates fraud

28. The Plaintiff stated that the suit property was sold for Kshs. 35 million in 2008,

29. despite having been valued at Kshs. 40 million twelve years earlier in 1996. PW 4 testified and stated in her Valuation Report that the

valuation in the year 2008 was Kshs. 109,500,000.00. On its part, the Bank stated that it received an offer of Kshs. 35 million from Mr. Nelson Havi, which it accepted after previous attempts to find buyers were unsuccessful. In his testimony and Valuation Reports, D1 W2 indicated that the forced sale value of the suit property was Kshs. 32 million in 2005 and Kshs. 50 million in 2007. When asked about the reasons for his valuation of the suit property as he did, D1 W2 stated that the property prices dipped by 30% during the post-election period but he admitted that he did not indicate the same in the Report. He stated that going by his hypothesis, the valuation 1 year before would have been 10% less. The court observed that this witness was evasive in the manner he was answering questions drawing sharp focus on his credibility. He also admitted that he was not able to access the suit property and that they only peeped through the walls and hedges to get a view of the same. He was also not able to explain the Bank's letter of 22nd August 1996 (pg.s104 - 109 of PExhibit 1) that indicated a mortgage value of Kshs. 36 million and an open market value of Kshs. 40 million as at that date. Interestingly, he was not at all

surprised that a property valued in 1996 for Kshs. 40 million was valued at Kshs. 35 million, 11 years later.

30. It is trite law that a valuation report is a product of professional and expert opinion by a duly qualified valuer, conducted based on accepted parameters. Courts are slow to interfere with such expert opinions unless clear and compelling evidence is presented to show that the valuation was conducted in bad faith, was grossly erroneous, or was based on a fundamental mistake (see **Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] KEHC 4811 (KLR)**). Based on my evaluation of the evidence and having observed the demeanour of the witnesses, it is my finding that the Bank's valuation of the suit property was not conducted in good faith and was deliberately undervalued to the detriment of the Plaintiff. This court and other courts of equal jurisdiction have always stated and accepted that the value of land always appreciates and even then, the figures are always constantly rising every other year (see **Riria v Muthuri [2025] KEELC 744 (KLR)**). The Bank was unable to explain the discrepancy in its own valuation over time and how a 1996 valuation could be higher than a later 2008 valuation. The Bank's

witness admitted that he did not have full access of the suit property so it is possible that his valuation was skewed for lack of adequate information that could have fetched a higher valuation. He admitted to omitting key market data that could have explained the claimed 30% post-election dip in his valuation report, he was evasive under questioning which greatly affected his credibility and his hypothesis-based valuation lacked empirical support.

31. It is also my finding that the Bank did not really and substantially challenge PW4's valuation of the suit property as of 2008 and it did not effectively challenge her methodology or credentials. Even if I am to accept the Bank's own forced sale valuation of Kshs. 50 million as at 2007, the sale of the suit property at Kshs. 35 million a year later is still demonstrative of undervaluation. Going by the principles set out in referenced ***Palmy(supra)***, it is clear there was there is strong evidence of bad faith and/or gross errors in Bank's valuation of 2007 based on the lack of accessing the suit property, omission of material market data to explain the claimed post-election dip of 2007, inconsistency with the Bank's own 1996 valuation and evasive testimony of D1 W2 undermining his credibility.

32. Therefore, I have little difficulty concluding that the sale of the suit property at a consideration of Kshs. 35 million constituted a gross undervaluation. I find this undervaluation to be so severe and the valuation process so flawed, that it strongly suggests bad faith, collusion, or intentional deceit which are strong indicators of fraud and this was a calculated design to deprive the Plaintiff of the suit property's true value.

The Plaintiff's equity of redemption

33. The equity of redemption is a fundamental principle in mortgage law, allowing a borrower to redeem their property upon payment of the debt owed. It is extinguished the moment "*a valid contract of sale*" is concluded (see **Gitonga & another (Suing as the Legal Representatives of John Gitonga Kihara) v National Bank of Kenya Limited & 5 others [2023] KECA 370 (KLR)**). Having found that the sale was illegal and void *ab initio* for failure to issue mandatory statutory notices meaning there was no sale in law and that title did not pass to the Company, it follows that the Plaintiff's equity of redemption has not been extinguished. I therefore find

that the Company is not entitled to vacant possession by the Plaintiff of the suit property

34. It should also be noted that the Plaintiff's admitted indebtedness does not affect the revival of the equity of redemption as the debt remains secured by the charge, and the Plaintiff retains the right to redeem the suit property by paying what was lawfully due as at the date the Bank purported to sell the suit property on **22nd May 2008**. The Bank's remedy is to demand repayment and, if unpaid, then it is at liberty to restart the statutory sale process, this time complying with the law.

Mr. Nelson Havi's legal standing and offer of the alleged 10% deposit, and the subsequent abandonment of that transaction

35. Having already found that the sale was illegal and void, I find that it will be moot and academic to determine the status and role of Mr. Nelson Havi in the transaction and whether the same was abandoned.

Special damages pleaded by the Plaintiff

36. The Plaintiff submitted that the raids on the suit properties occasioned substantial loss and damages of over Kshs. 11 million as evidenced by PW 3's Report. It is not in dispute that special damages must be both specifically pleaded and strictly proved, before they can be awarded by the Court. A party claiming special damages must demonstrate that they actually made the payments before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt or invoices endorsed with the word "Paid" meets the test (see **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR)**).

37. From the Report, even though the loss is summarized to be Kshs. 11,725,723.00, the Plaintiff only produced a receipt of Kshs. 120,000.00 being payment for PW 4's assessment of the report. The rest are proforma invoices that have not been paid meaning the Plaintiff's claim for the special damages succeeds but only to the extent of Kshs. 120,000.00.

Conclusion and Disposition

38. In the upshot, I allow the Plaintiff's suit and make the following dispositive orders:

- 1) A Declaration be and is hereby issued that the Transfer by Chargee dated 22nd May 2008, and registered against the Title as Entry No. 8 is null and void on account of non-issuance and non-service of statutory notices.**
- 2) A Declaration be and is hereby issued that the Plaintiff's right of redemption still exists and is exercisable having not been extinguished by the illegal sale and transfer by the 1st Defendant to the 2nd Defendant.**
- 3) Cancellation of the Entry No. 8 in the title in favour of the 2nd Defendant is hereby made together with the rectification of the same on account of nullification of the sale and transfer to the 2nd Defendant**
- 4) A Declaration be and is hereby made that all the dealings in the title subsequent and consequent to the Transfer dated 22nd May 2008, are null and void *ab initio*.**
- 5) A Declaration be and is hereby issued that that any action purported to be carried out by the 2nd Defendant, servants, employees, nominees and or**

agents on account of its purported ownership rights over the suit property on account of purported rights accruing from the registration of Entry No. 8 in the Title Document including eviction of the Plaintiff is null and void.

6) The 4th Defendant is hereby ordered to return the Plaintiff's goods carted away on 10th June 2009 and stored at the Pangani Auction Yard

7) The Plaintiff is awarded Special Damages totaling Kshs. 120,000.00.

8) The Plaintiff is awarded costs of this suit to be borne by the 1st , 2nd and 4th Defendants

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Wangui holding brief for Mr. Ahmed Nassir SC for the Plaintiff
2. Mr. Sichangi for the 2nd and 4th Defendants
3. Mr. Mungai holding brief for Mr. Miller for the 1st Defendant
4. N/A for the 3rd and 5th defendants
5. Amos- Court Assistant