



**REPUBLIC OF KENYA**

**ELDORET**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L 541 OF 2012**

**FORMERLY HCC 121 OF 2009**

**FORMERLY KTL HCC 2/2008**

**JOHNAI OKUTOI.....1ST PLAINTIFF**

**PEGGY CHRISTINE OKUTOI.....2ND PLAINTIFF**

**VS**

**NAJIB JIWA.....1ST DEFENDANT**

**STANDARD CHARTERED BANK (K) LTD.....2ND DEFENDANT**

**S. MBUTHIA T/A PRIME AUCTIONEERS.....3RD DEFENDANT**

***(Suit to nullify a sale by chargee; original charge being over a property that was later sub-divided with three portions sold and one portion remaining under charge; sale conducted by public auction; purchaser being the same purchaser of the other three properties; purchaser not having transferred the property; contention that no statutory notice was ever issued, that there was no notification of sale and no advertisement and that purchaser had obligation to notify the plaintiffs of the intended sale; no obligation on any purchaser to notify chargor of any impending sale; no proof that any statutory notice was issued; sale nullified for want of statutory notice; property to remain charged; purchaser entitled to damages at current market value of property)***

**JUDGMENT**

**A. INTRODUCTION AND PLEADINGS**

1. This suit was filed through a plaint filed on 8 January 2008. In the suit, the plaintiffs pleaded that they are the joint registered owners of the land parcel Kitale Municipality Block 4/462 (the suit land). They pleaded that on 28 December 2007, they received a letter from the advocate of the 1st defendant, alleging that the 1st defendant had purchased the property in the year 1998 through a public auction. It is pleaded that the alleged auction was conducted secretly and fraudulently, without the necessary legal procedures being complied with. It is also pleaded that the 1st defendant who had earlier purchased other plots from the plaintiffs, never informed them of the alleged sale, and acted maliciously in purporting to purchase the property.

2. It is alleged that the 1st defendant acted fraudulently by :-

- (a) *Colluding with the 2nd defendant to advertise the property for sale and failing to inform the plaintiff.*
- (b) *Failing to disclose the alleged sale for a period of 9 years from 1998 to 2007.*
- (c) *Failing and/or neglecting to off-set the loan due at the bank, when it had been agreed by the parties that he was to off-set the loan.*
- (d) *Executing the necessary documents for the alleged purchase when he knew he ought not to have done so.*

It is also claimed that the 2nd defendant, Standard Chartered Bank Limited, acted fraudulently, and the following particulars of fraud are pleaded :-

- (a) *Failing to serve the plaintiffs with a statutory notice of intention to proceed to auction the property.*
- (b) *Failing to notify the plaintiffs of intended sale by public auction.*
- (c) *Secretly entering into negotiations with the 1st defendant.*
- (d) *Being aware of the arrangement between the parties for the 1st defendant to off-set the loan and yet going ahead to execute the transfer documents in the 1st defendant's favour.*

It is also pleaded that the 3rd defendant, Prime Auctioneers, acted fraudulently in conducting the sale. The following particulars of fraud are pleaded :-

- (a) *Neglecting to issue a Notice requiring the plaintiffs to pay up or the auction will proceed.*
- (b) *Failing to notify the plaintiffs of the alleged public auction.*

The plaintiffs sought the following principal order :-

*An order declaring the purported public auction of L.R No. Kitale Municipality Block 4/462 on 12 August 1998, null and void and setting aside the same.*

3. The 1st defendant filed Defence and Counterclaim. In his defence he averred that he purchased the suit property in a public auction conducted by the 3rd defendant on 12 August 1998. He has pleaded that he paid the full purchase price and that all that is pending is the registration of the transfer. He has pleaded that the plaintiffs cannot plead ignorance of the sale, as the said auction was advertised and conducted publicly, and that other properties belonging to the plaintiffs were also put up for sale being Kitale Municipality Block 3/255 and 257 and Block 10/128. In his counterclaim, the 1st defendant has repeated that he purchased the suit land in a public auction and has sought orders to have the plaintiffs evicted from the suit land.

4. The 2nd defendant on its part denied the plaintiffs' claim and pleaded inter alia that the auction in issue was conducted properly. It denied all particulars of fraud.

5. The 3rd defendant never entered appearance nor filed defence. When the matter first came before me on 6 June 2013, it emerged that the 3rd defendant had never been served with summons to enter appearance. Given the position in Order 5 Rule 2 (7), I dismissed the suit against the 3rd defendant. The suit thereafter proceeded only against the 1st and 2nd defendant.

## **B. EVIDENCE OF THE PARTIES**

### **(i) Plaintiffs' Evidence**

6. Johnai Okutoyi Onyango, the first plaintiff, testified as the sole witness for the plaintiffs. He is a

businessman in Kitale. He testified that the suit land was originally comprised in a land L.R No. 2116/11/13 which was later sub-divided into four plots, being Kitale Municipality Block 4/459, 460, 461 and 462 . The suit land No. 462, is still registered in the name of the plaintiffs. He had taken a loan with the parent title as security, prior to the sub-division, and opted to sub-divide the land so that he can sell portions of it to the 1st defendant to help him in paying the loan. He thus sold the parcels No. 459, 460 and 461 to the 1st defendant, Najib Jiwa, and his two brothers, Munir Jiwa and Amin Jiwa. He remained with the parcel No. 462. The purchase price was Kshs. 8 Million and the agreement was written on 28 December 1996. The agreement was later altered through a Memorandum of Understanding so that Kshs. 6 Million will be paid directly to the bank, and Kshs. 2 Million to be paid directly to the 1st plaintiff. The bank was paid the sum of Kshs. 6 Million and the Jiwases got title to the three parcels of land. The parcel No. 462 remained in the name of the plaintiffs.

7. The 1st plaintiff testified that at that time, the amount due to the bank was Kshs. 8 Million. He stated that he was never paid the balance of Kshs. 2 Million by Najib Jiwa to enable him clear the balance, but that he looked for other sources and later cleared the balance. He asked that the 1st defendant be ordered to pay this sum of Kshs. 2 Million as balance of the purchase price. He stated that when the suit property was sold, the bank never informed him of the balance due. He was later surprised to get a demand letter dated 29 January 2008 asking him to move out of the premises. He testified that it was improper for Najib Jiwa to enter into an agreement with the bank to purchase the suit land yet he had not paid him the balance of Kshs. 2 Million. He stated that he was never given any notice before the sale.

8. In cross-examination, the 1st plaintiff agreed that he had taken a loan with the bank. He agreed that after the sub-division of the suit land, the suit land remained charged to the bank because there was still some money owing. He stated that the bank also sold his house (presumably another property) for Kshs. 1.5 Million. He admitted that the bank was not a party to the agreements that he had with the 1st defendant over the other properties. He asserted that he never saw any advertisement, in the dailies, where the suit land was advertised for sale, and that he was never served with a notification for sale. He also admitted never having demanded the claimed balance of Kshs. 2 Million from the 1st defendant.

### **(ii) Evidence of the 2nd defendant**

9. The 2nd defendant's witness was Samuel Njoroge Wangunyuu, a Small Business Portfolio Manager, at the Eldoret Branch. His evidence was that the bank loaned money to the plaintiffs secured by the property L.R NO. 2116/11/13 which belonged to the plaintiffs jointly. In the course of business, the plaintiffs had difficulties in paying the loan. Notices were sent to them through letters dated 11/10/1995 and 4/11/1996. The plaintiffs then proposed to sub-divide the land, which was agreed, and the land was sub-divided into four portions. The bank reserved interest in the parcel No. 462, which was charged to the bank, and the other three portions were sold. There was still default and the bank then instructed Prime Auctioneers to sell the property, and a Notification of Sale dated 28 May 1998 was issued. The auctioneers then advertised the property for sale in the Daily Nation of 23 July 1998, and scheduled the sale for 12 August 2008. The auction was a public auction, and it proceeded, as scheduled with Najib Jiwa being the highest bidder. He paid the consideration of Kshs. 1.4 Million. The Bank drew a transfer form and a discharge of charge instrument, and without dating them, forwarded them together with the Certificate of Lease to Najib Jiwa for registration. It was his evidence that the bank followed proper procedure in selling the property. There were also other properties charged to the bank being Kitale Municipality Block 3/255 and 257 and Kitale Municipality Block 10/128 which were similarly advertised and sold on the same day.

10. In cross-examination, DW-1 stated that the plaintiffs were still indebted in the sum of Kshs. 8,275,626/= as at the time the Notification of Sale was issued. This figure he derived from the Notification of Sale. He did not know the amount of money that was owing at the time of the sale of the sub-divided portions. Four properties owned by the plaintiffs were put up for sale on 12 August 2008 to offset the amount owing but the witness could not tell whether the sale of the parcel No. 462 cleared all the money due. He stated that the charge on the original parent parcel was transferred to the parcel No. 462. He did not have postal certificates that the letters were posted to the plaintiffs.

### **(iii) Evidence of the 1st defendant**

11. The 1st defendant on his part testified as the sole witness. He is a businessman in Kitale. He stated that he saw the suit land advertised in the newspapers and developed an interest in purchasing it. He attended the auction on 11 August 1998 and he was declared the highest bidder at Kshs. 1.4 Million. He paid a 25% deposit of Kshs. 350,000/= immediately and later cleared the balance. He received the requisite transfer documents, although he has not yet effected the transfer. He made a demand directed at the plaintiffs asking them to move out of the premises but the plaintiffs failed to move out. He denied having colluded with the bank to purchase the property. As to his earlier transactions with the plaintiffs, he denied owing them any money. In cross-examination, he admitted that he did not inform the plaintiffs of the advertisement in the newspaper.

#### **PART C : SUBMISSIONS OF COUNSEL**

12. In his submissions, counsel for the plaintiff submitted that the Search Certificate produced in evidence by the 2nd defendant showed a charge for Kshs. 4, 293,250/= registered on 7 April 1997. He submitted that the purchase price for the three plots that were sold to the 1st defendant was enough to pay off this amount. He submitted that the 1st defendant deliberately and fraudulently failed to pay the Kshs. 6 Million to the bank, so that the loan will appear as not paid, and so that he can later purchase the suit land. He submitted that the 1st defendant colluded to buy the suit land when there were no loan arrears. He submitted that it was "ironical" that the 1st defendant never informed the plaintiffs of the impending sale despite being friends with the plaintiffs. He contended that the sale was not a public auction but was actually a private treaty sale done secretly. He submitted that that is the reason why the transfer forms remained undated and that they are therefore void. He averred that there was no proof of postage of any notices and that none were issued. He also faulted the advertisement in the newspaper as not conforming with the requirements of the law. He submitted that the property was undervalued and sold at a much less amount. He submitted that the sale was fraudulent for want of a valuation report and further that the Notification of Sale did not include the value of the property. He also submitted that the charge itself was void for want of consent to charge.

13. Counsel for the 2nd defendant after reviewing the evidence, submitted that a statutory notice was issued on 17 November 1995 and that a suit, Kakamega HCCC No. 210 of 1996, was filed, which resolved the issue of whether the bank was entitled to exercise its statutory power of sale. He submitted that no second notice was necessary. He submitted that there was default, and that when the 2nd defendant tried to exercise its statutory power of sale, the plaintiffs proposed to subdivide the parent title that was charged. He submitted that default persisted and a notice was issued and served upon the plaintiffs by way of registered post. He submitted that the auction was then conducted and a transfer issued to the 1st defendant. He submitted that there was no fraud as the bank was never a party to the arrangements between the plaintiffs and 1st defendant. It was his view that the burden of proof with regard to fraud has not been proved.

14. Counsel for the 1st defendant, drew several issues and submitted that according to Section 17 (4) of the Auctioneers Act (probably meant the rules), the highest bidder at an auction is to be the purchaser. He submitted that once the property was knocked down, the equity of redemption became extinguished and the only remedy is damages. He further submitted that fraud had not been proved. He pointed out that several of the plaintiffs' properties were to be auctioned on the day, but the plaintiffs have only raised issue on this one property. He submitted that the plaintiffs never took steps to stop the auction, or bar the 1st defendant from participating, and that for over 10 years, the plaintiffs never raised issue on the sale. He submitted that the 1st defendant is entitled to have title in his name.

All parties relied on various authorities which I have read.

#### **D. DECISION**

15. It is with the above pleadings, evidence and submissions of the parties that I need to make a decision in this suit.

16. The plaintiffs' pleading is that they came to know of the sale when they were issued with a letter

dated 28 December 2007 asking them to vacate the suit land. It is their contention that the sale was fraudulent based on the particulars that they have pleaded. The case of the 2nd defendant is that there was default and the property was put up for sale by way of public auction. The position of the 1st defendant is that he saw the property advertised, and proceeded to purchase it, and that he is an innocent purchaser.

17. It is not in dispute that the plaintiff took a loan with the 2nd defendant bank. The property charged was LR No. 2116/111/13. The plaintiffs no doubt encountered difficulties in servicing the loan and proposed to sub-divide that land into four, so that three portions of it could be sold, to help in clearing the loan. The property was duly sub-divided into four, and three out of these four portions were sold to the 1st defendant, on a private arrangement, between the plaintiffs and the 1st defendant. The agreement between the plaintiffs and 1st defendant quoted a price of Kshs. 6 Million, although there is a later Memorandum of Understanding, which has quoted the sum of Kshs. 8 Million. Irrespective of this discrepancy, which unfortunately was not adequately addressed in evidence, it is not in contention that the parties agreed that Kshs. 6 Million would be paid directly to the 2nd defendant bank. There does not seem to be a dispute as to whether the Kshs. 6 Million was paid to the bank. The only point of departure is whether the plaintiffs were paid Kshs. 2 Million which is alleged to be a balance. I do not think that it is necessary for me to make any determination of whether this alleged sum, which is of course disputed by the 1st defendant, was ever paid. I do not have any pleadings before me, claiming the sum of Kshs. 2 Million from the 1st defendant. Even assuming that the said sum was due and owing, there is no agreement that the said sum was to be paid to the bank. I have looked at the Memorandum of Understanding and it states that the said sum of Kshs. 2 Million was to be paid directly to the purchasers. There was no obligation, that the 1st defendant do pay this money to the bank, so that even if there was any default in paying that sum, the non-payment has absolutely no relation on the obligation that the plaintiffs always had to offset the loan. The non-payment of the balance of Kshs. 2 million, if at all it existed, is therefore a non-issue in this case.

18. It is not disputed that when the plaintiffs sub-divided the original title into four, one of them, which is Kitale Municipality Block 4/462 was charged to the bank to secure the monies still owing. It was argued by counsel for the plaintiff that at this time, the money owing was Kshs. 4, 293, 250/= and that the Kshs. 6 million paid out of the sale of the other three properties that arose out of the sub-division, must have offset the loan, so that there was no balance due. I do not agree. Although it was never disclosed by the witness of the bank what the balance was when the three properties were sold, it seems to me that it is after offsetting the amount then owed, with what was received out of the sale proceeds of the other three properties plus any other deposits made, that there remained a balance of Kshs. 4, 293, 250/= which then became the subject of the charge over the suit land. I say so because the sale of the other three properties that arose out of the sub-division of the parent title was on 28 December 1996. The charge over the suit land was registered on 7 April 1997 to secure the sum of Kshs. 4,293,250/=. Unless the plaintiffs provide evidence that the loan was finalized by this time, which they have not, the only logical conclusion that one can reach is that this was the balance left, and that is why a charge was registered for this sum over the only parcel that remained unsold. At this time, the plaintiffs must have known the amount that they owed, and if at all the sale proceeds obliterated the debt, no doubt, they would have been up in arms, and they would not have allowed the suit land to be charged. The plaintiffs have therefore failed to prove that there was never any money owing to the bank when the suit land was charged.

19. It has not been disputed by the plaintiffs that they were in default. They were certainly aware that they owed the bank. They have however raised issue that they were never served with any statutory notice prior to the sale. The 2nd defendant on his part has contended that a statutory notice was issued on 17 November 1995, and counsel for the 2nd defendant in his submissions, submitted that the issue of a statutory notice was settled in a case Kakamega HCCC No. 210 of 1996. The bank did not adduce any evidence of the said statutory notice of 17 November 1995. Neither did they adduce any evidence of the existence of a suit Kakamega HCCC No. 210 of 1995. In fact the bank witness did not even mention this case in his evidence. I am indeed at a loss where counsel for the 2nd defendant obtained this evidence, for no such evidence was led. There was instead adduced a letter dated 11 October 1995 and a letter dated 4 November 1996. The letter dated 11 October 1995 was a letter advising the plaintiffs to regularize their overdraft on or before 28 October 1995. The letter dated 4 November 1996 was one by M/s Nyairo & Company Advocates and I think I better set it out for full import. It states :- "*We regret that in spite of our statutory notice dated 17th November 1995, you have not responded positively by making payment as*

*demanded. We are therefore left with no alternative but to proceed to have your properties sold by public auction."*

20. It will be seen that the letter refers to another of 17th November 1995, with the latter being the alleged statutory notice. But this letter dated 17th November 1995, which is the alleged statutory notice, was never produced as an exhibit and neither was any letter from the plaintiffs produced, to demonstrate that they duly received the statutory notice. Moreover, even if the statutory notice was sent on 17 November 1995, this statutory notice could only apply in respect of the property LR No. 2116/111/13 which was then under charge, and could not apply to the suit land which was not in existence at the time that that statutory notice was said to have been issued. The charge in issue was registered on 7 April 1997; a statutory notice issued prior to that date can of course not bind such charge. There needed to have been issued a statutory notice in respect of the charge registered on 7 April 1997, and it was upon the bank, to demonstrate that indeed a statutory notice was duly issued and dispatched to the plaintiffs. Such statutory notice could only come after 7 April 1997 and not earlier. The defendants neither adduced evidence of a valid statutory notice and neither did they adduce evidence of postage of any such notice. Once a chargor alleges that he has not been issued with a statutory notice, the burden of proof must shift to the chargee, to demonstrate that indeed, a statutory notice was issued. This position was indeed affirmed in the case of ***Nyangilo Ochieng & Another v Kenya Commercial Bank, Court of Appeal at Kisumu, Civil Appeal No. 148 of 1995 (1996) eKLR*** where the Court of Appeal stated as follows :-

*"It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent."*

21. Further, it is not enough to show that there was a statutory notice written. It must also be proved that the notice was sent. In the case above, the Court of Appeal had this to say :-

*"Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya."*

22. I am afraid that on the question of whether or not the statutory notice was issued, the bank has hopelessly failed to demonstrate that any was written, and they have also failed to prove that any was posted. The only conclusion I can reach is that no statutory notice was ever issued to the plaintiffs and none was posted to the plaintiffs.

23. The statutory notice is the very base upon which a proper sale by chargee is founded. The chargee's power of sale can only arise after a valid statutory notice is issued. If no statutory notice is issued, then the chargee's power of sale cannot arise, and it follows that even other subsequent notices, such as those required to be issued under the Auctioneer's Rules, are of no effect, for their substratum is the Statutory Notice. If no statutory notice is issued, the chargee cannot purport to be exercising his power of sale, for no such power has arisen, and any such sale as may be held, may be declared null and void.

24. The provisions of the Registered Land Act (CAP 300) (repealed) under which the suit land is registered, and which law was operative at all material times, are relevant to the facts of this case and they affirm the position that I have stated above. Section 74 thereof provided as follows :-

**S. 74. (1)** *If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.*

*(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -*

*(a) appoint a receiver of the income of the charged property; or*

(b) sell the charged property:

*Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.*

25. It will be seen from the above that it is only after non-compliance with the statutory notice, that a chargee can proceed to sell the charged property. There cannot be said to have been a non-compliance on a document that was never issued.

26. In the case of ***Nyangilo Ochieng v KCB***, no statutory notice was proved to have been posted and the Court of Appeal held that the auction sale was void. The consequence of such void sale was stated to be as follows :-

*“In our view, a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land so sold. It is therefore clear that the second respondent did not acquire proper titles to the suit properties. Her remedy is against the bank primarily to obtain a refund of the consideration paid.”*

27. In this case, the 1st defendant as purchaser has not yet registered the suit land in his name. The instruments of discharge of charge and transfer by chargee have not yet been registered. The question that arises is whether the subject sale must be protected. The provisions of Section 77 of the Registered Land Act (repealed), are operative in my view. The section where relevant, provided as follows :-

*S. 77 (3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.*

*S. 77 (4) Upon registration of the transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee has consented in writing).*

28. The position in the Registered Land Act, as to the time that the equity of redemption is extinguished has been rather unsettled. I have seen the case of ***Bomet Beer Distributors Ltd v Kenya Commercial Bank Limited (2005) eKLR*** relied upon by counsel for the 1st defendant, in which it was held that the equity of redemption under the Registered Land Act, is extinguished by the fall of the hammer and the only remedy lies in damages. But again that decision cannot be reconciled with that of ***Nyangilo Ochieng v KCB***, for in the latter case, the Court of Appeal nullified a sale not only after the fall of the hammer, but after it had been transferred to the purchaser.

29. My interpretation of the provisions of Section 77 of the Registered Land Act, is that it is only after the registration of the transfer by chargee, that the remedy of any person suffering from any irregular exercise of the power, lies solely in damages. It will be seen that it is after registration, that the interest of the chargor passes to and vests upon the transferee. In our case, it cannot be said that the interests of the plaintiffs have passed on to the 1st defendant, and it cannot therefore be argued that the plaintiffs' only remedy lies in damages. This indeed appears to have been the position taken by the Court of Appeal in the case of ***Mbuthia v Jimba Credit Corporation & Another (1988) KLR 1*** where Platt JA, had this to say on the provisions of Section 77 of the Registered Land Act. at p8:-

*"Sec. 77 (4) of the Registered Land Act provides that the title of the mortgagor does not pass until registration. Bare title though it may be, it aids the mortgagor in his quest for a sale at a true market value. Once he has lost his title, it may be more difficult to set aside the sale. He must act promptly..."*

Masime Ag JA in the same case stated as follows at p 11 :-

*"In view of this provision it is my view that the legislature must have meant to delay the extinction of the equity of redemption by the provision in Section 77 (4) of the Registered Land Act."*

30. Probably, matters would have become a little bit more complicated if the sale had been registered and the property transferred to the 1st defendant. But this has not yet materialized, and I find it difficult to hold that the only remedy of the plaintiffs, given the provisions of Section 77 of the Registered Land Act, lies in damages. In my view the sale is subject to nullification for want of a statutory notice.

31. The plaintiffs of course raised several other complaints; that they were not issued with a Notification of Sale and that there was no advertisement. In my view, these complaints hold no water, since I have seen the Notification of Sale, and I have also seen the advertisement in the newspaper. Once an advertisement is placed in a newspaper of wide circulation, it matters not that the chargor fails to see the advertisement. It is assumed that he has had adequate notice of it. Neither do I take the position of the plaintiffs that the 1st defendant had an obligation to inform them of the impending sale. A purchaser is a purchaser, and it matters not what relationship such person has with the chargor. It matters not that the purchaser is a friend or relative of the chargor. Neither does it matter that the purchaser may have declared an earlier interest to the chargor to purchase the property. Immediately, a property is put up at a public auction, such property becomes a commodity for sale, available for any able person to purchase. It is not only strangers or persons unknown to the chargor who are entitled to purchase. Any person is free to purchase it. There can also never be any obligation on the part of any purchaser to inform a chargor of an impending sale. I am unable to import any such obligation on the part of the 1st defendant as alleged by the plaintiffs. Neither do I think that the sale was entered into through collusion between the bank and the 1st defendant. It is difficult to prove collusion in a sale held by public auction, unless it can be shown that the property was not only not knocked down to the highest bidder, but that such highest bidder also abided to the letter, to the terms of the sale. There was no collusion in this case. But my holdings above do not matter, for I have already held that there was no statutory notice that was drawn nor sent to the plaintiffs.

32. In his submissions counsel for the plaintiffs also raised issues that the land was sold at an undervalue, that there was no valuation of the property, nor consent to transfer. These in my view are afterthoughts, as they never arose in the pleadings nor in the evidence. I am unable to consider the said allegations.

33. I have already held that the sale is subject to nullification for want of a statutory notice. The 1st defendant in my considered opinion, ought not to proceed to register the instrument of discharge of charge and instrument of transfer by chargee. He ought therefore not to be registered as owner of the suit land. What then should happen to the 1st defendant? What remedy should he get? He obviously cannot get the remedy of eviction of the plaintiffs that he has asked for in his counterclaim, for I have already held that the sale was a nullity.

34. There is no doubt that the 1st defendant is an innocent purchaser for value. He was not a party to any of the issues that have caused the subject sale to be nullified. The problems were caused by the bank, who failed to issue a statutory notice. The 1st defendant was of course looking for a bargain when he purchased the property at the auction. He would have been entitled to be the owner of the property if it were not for the actions of the 2nd defendant bank. If I order that he gets a refund of what he paid in the year 1998, that will be scant compensation to him as property values have no doubt gone up. If he had not bought the property, he would have probably, invested his money elsewhere and got some return out of it. If all had gone well, he would have had the suit land as his own, and would be the richer, in line with the current value of the property. In my view, the proper remedy of the 1st defendant lies in him getting damages which are an equivalent of the current market value of the suit property. I therefore order and direct that a valuation of the property be made by a valuer to be agreed and appointed by both 1st defendant and 2nd defendant, and that the 2nd defendant, do pay to the 1st defendant the value noted thereof. If a valuer cannot be agreed, then the property to be valued by the Government Valuer, and the 2nd defendant to pay the 1st defendant the value noted thereof. The 2nd defendant is also to compensate the 1st defendant for any fees that he may have incurred arising out of the said sale. These amounts are to be tabled by the 1st defendant and be assessed by the Deputy Registrar if the parties are unable to agree.

35. The register of the suit property has to remain as it was prior to the auction sale. That means that title remains with the plaintiffs but the same remains charged to the 2nd defendant bank. It follows that the original certificate of lease which the 1st defendant holds, must be handed over to the bank, for the bank still holds a charge over the suit land. The amount that ought to be deemed as owing by the plaintiffs, and for which the charge is still securing, is the same amount that was owing at the time the subject auction was held, assuming that no cent was raised out of the subject auction sale. I cannot allow the bank to load any interest from that time to the date of this judgment, for if I am to allow that to happen, then the bank will benefit from their own faults. The bank also has to give credit for any money paid as auctioneers or other fees that may be attached to the impugned auction sale.

36. I am aware, and it has been raised, that the plaintiffs filed suit about 10 years after the subject auction sale. Yes, that is late, but still it is my view that it is within the 12 years limitation period set out for actions to recover land. They may have come rather late in the day, probably at dusk, but darkness is yet to fall, and they are still within time.

37. I think I have dealt with all issues in this suit. For the above reasons, I make the following final orders :-

(a) That it is hereby declared that the auction sale of 12 August 1998 of the property Kitale Municipality Block 4/ 462 is null and void for want of a statutory notice.

(b) That the property Kitale Municipality Block 4/462 remains charged to Standard Chartered Bank Limited to secure the sums of money that were due at the time of the auction sale of 12 August 1998, assuming that no auction took place and no cent was received from the said auction. No interest is chargeable on such sum from the date of the auction to the date of this judgment but such sum can start accruing interest from the date hereof at the bank rates chargeable by the 2nd defendant.

(c) That the 1st defendant must not register any discharge of charge or transfer by chargee and must hand over the certificate of lease to the land parcel Kitale Municipality Block 4/ 462 to the 2nd defendant bank since the said title remains charged to the 2nd defendant. Such title to be handed over to the Bank within 15 days from the date hereof.

(d) That the bank do give credit to the plaintiffs for any moneys debited into the plaintiffs' account arising from the auction sale of 12 August 1998 of the property Kitale Municipality Block 4/462.

(e) That the 2nd defendant bank do pay to the 1st defendant, a sum in damages, being the equivalent of the current market value of the property Kitale Municipality Block 4/462 and reimburse the 1st defendant any fees and expenses that he may have incurred arising out of the auction sale of 12 August 1998. The 1st defendant to tender such fees and expenses within 21 days for assessment by the Deputy Registrar. The 1st and 2nd defendants to agree on a valuer within 21 days and in default of an agreement, the property to be valued by the Government Valuer. The damages herein, and monies to be paid within 30 days of the valuation of the property and/or tabling of the fees and expenses.

(f) The 2nd defendant shall bear the costs of this suit.

(g) Any party is at liberty to apply so as to enforce the above orders.

It is so declared and ordered.

**DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF JULY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Mr. H.O. Areso of M/s Gicheru & Co Advocates for the plaintiffs.***

***Mr. M.K. Rop holding brief for Mr. Kidiavai of M/s Kidiavai & Co Advocates for the 1st defendant.***

***Mr. A.K. Songok holding brief for Mr. Kisila of M/s Sheth & Wathigo Advocates for the 2nd defendant.***