



REPUBLIC OF KENYA



Muritu (Suing as the legal representative of John Muritu Kigwe) & another v Rao & 3 others (Civil Appeal 571 of 2019) [2025] KECA 99 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 99 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 571 OF 2019
S OLE KANTAI, P NYAMWEYA & JM MATIVO, JJA
JANUARY 24, 2025**

BETWEEN

SUSAN WANJIRU MURITU (SUING AS THE LEGAL REPRESENTATIVE OF JOHN MURITU KIGWE) 1ST APPELLANT

KELLY PETROLEUM LIMITED 2ND APPELLANT

AND

PVR RAO 1ST RESPONDENT

EAST AFRICAN BUILDING SOCIETY 2ND RESPONDENT

CANPAN INVESTMENT LIMITED 3RD RESPONDENT

JUJA FORTY-NINE LIMITED 4TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya, Nairobi (F. Tuiyott, J.) dated 27th September 2019 in Civil Suit No. 411 of 2007)

JUDGMENT

1. The facts which triggered the litigation before the High Court which yielded this appeal are fairly straightforward and essentially common ground or uncontroverted. Briefly, on 21st June 2002, the 2nd appellant (Kelly Petroleum Ltd), a company trading in petroleum products entered into a guarantee agreement pursuant to which the 1st respondent (East African Building Society (EABS)) agreed to provide the 2nd appellant with working capital to the tune of Khs.37,000,000.00. As security for the said facility the following instruments were created:

- (i) a charge in favour of EABS registered over LR Nos. 209/8871 and 10823/54 (the Thika property);
- (ii) a debenture over the 2nd appellant's assets in favour of the EABS was registered;



- (iii) personal guarantees executed by the directors of 2nd respondent namely John Muritu Kigwe-deceased, Susan Wanjiru Muritu, Kelly Walter Karanja and Titus Mwirigi. Mrs. Susan Wanjiru Muritu is the administratrix of the deceased's estate.
2. The appellants' case was that despite complying with all the terms and conditions set out by the 1st respondent, on or about 7th February 2003, the 1st respondent illegally, in bad faith, capriciously, maliciously and unlawfully appointed PVR Rao (the 2nd respondent) as a Receiver Manager over the 2nd appellant's business without prior demand or notice or warning thereby breaching the 2nd appellant's equity of redemption. The 1st appellant further averred that on 18th January 2005, the 1st respondent purported to exercise its statutory power of sale and sold LR. No.10823/54 to Canpan Investment Ltd (the 3rd respondent) and Juja Forty-Nine Ltd (the 4th respondent) for Kshs.6,000,000.00 when its true value was more than Kshs.40,000,000.00. The 1st appellant maintained that at the time of the purported sale, the Receiver Manager appointed by the 1st respondent was still in control of the assets of the 2nd appellant including L.R No.209/8872.
3. Aggrieved by the appointment of the receiver and the EABS's exercise of its statutory power of sale, the 2nd appellant filed High Court Civil Suit No. 411 of 2007 against the EABS and the Receiver Manager. It prayed for:
- (a) a declaration that the appointment of the receiver over its petroleum business was unlawful;
 - (b) a declaration that the purported sale of LR. No. 10823/54 was null and void;
 - (c) an order that the respondents do provide full accounts of all transactions between the 2nd appellant and EABS from the commencement of the guarantee and loan facilities;
 - (d) an order that the respondents do provide a full account of all the trading and transactions undertaken by the Receiver Manager on the 2nd appellant's petroleum business since 7th February 2003;
 - (e) a permanent injunction restraining the defendants from disposing the 2nd appellant's interest in L.R. Nos. 10823/54-IR No. 75763, 10823/54-IR No. 75763, and 209/8872-IR No. 59627;
 - (f) a permanent injunction restraining the Receiver Manager from continuing to occupy, run and control or in any other way manage and control the 2nd appellant's petroleum business and depot;
 - (g) damages on account of lost business; (h) mesne profits; (i) as an alternative to
 - (h) above, general damages;
 - (j) costs of the suit, and,
 - (k) such other and further reliefs that this Court may deem just and expedient to grant.
4. The 1st appellant suing as the legal representative of the Estate of John Muritu Kigwe-deceased filed High Court Civil Suit No. 665 of 2008 against EABS, Canvan Investment Limited and Juja Forty Nine Limited in which she sought the following orders against the respondents jointly and severally:
- (a) a declaration that the purported sale of the suit property by the EABS to the 3rd respondent, the subsequent assignment thereof by the 3rd respondent and transfer to the 4th respondent, and the registration thereof in favour of the 4th respondent were irregular, illegal, null and void, and of no effect, and the same be set-aside; (b) an order that the registration of the transfer by the 1st respondent to the 3rd respondent be set-aside, cancelled and reversed, and the requisite land register be amended and/or



- rectified accordingly; (c) a declaration, in any event, that the purported Land Control Board consent obtained by the 1st and 3rd respondents was a nullity in law, and/or null and void for all purposes; (d) a permanent order of injunction restraining the respondents, whether acting jointly or severally, or through their successors, assignees, servants, or agents, or the successors, assignees, servants or agents or any of them, from interfering with the estate of John Muritu Kigwe (deceased) rights, title and interests in the suit property and his possession of the same; and/or restraining them from trespassing upon the suit property; and (e) costs of the suit, together with interest thereon, calculated at Court rates.
5. In its defence, the 1st respondent averred that the 1st appellant was a guarantor and chargor for financial accommodation granted to the 2nd appellant in the sum of Kshs.37,00,000.00. That the facility was in form of a Guarantee for Kshs.15,000,000.00 and a demand loan facility of Kshs.22,000,000.00. The facilities were duly disbursed. However, there was default and the EABS issued demand letters dated 13th January 2003 to Kelly and its guarantors who included the deceased. The 1st respondent maintained that the statutory notices dated 13th January 2003 were issued in respect to LR. Nos. 209/8872 and 10823/54. Subsequently, LR. No. 10823/54 was sold to the 3rd respondent who subsequently assigned all its rights and interests in LR. No. 10823/54 in favour of the 4th respondent. However, by an order of 27th October 2007, the High Court barred the 1st respondent from selling LR. No. 209/8871. In addition, the 1st respondent stated that it exercised its power under the debenture to place to 2nd appellant under receivership.
 6. On 8th October 2012, the two suits were consolidated and heard together. In the impugned judgment dated 27th September 2019, Tuiyott J. (as he was then) determined the following issues: (i) was Kelly in default?; (ii) did the bank serve demands and or notices as required by law?; (iii) was the appointment of the Receiver Manager in breach of the law or the contract?; (iv) did the Receiver Manager breach his duty in managing Kelly?; (v) was the sale of the charged property at an undervalue?; (vi) was the transfer of the land to Juja 49 in breach of the provisions of the Land Control Act?; (vii) is Juja 49 an innocent purchaser for value without notice?; and (viii) what are the appropriate orders to make?
 7. The learned Judge held that the 1st respondent had duly served the demand on the 2nd appellant and its directors and the default having persisted the 1st respondent was entitled to act on the debenture it was holding by virtue of clause 7 (c) (iii) of the Debenture dated 2nd August 2002 and exercise the power to appoint a receiver. Nevertheless, the learned Judge held that the receiver failed in his duty to account to the 2nd appellant for the period it managed its affairs.
 8. Regarding the exercise of the bank's statutory power of sale, the learned Judge held that service of the statutory notice upon the appellants in regard to the LR. No. 10823/54 (Thika Property) was not proved. Therefore, the sale was contra- statute for want of a statutory notice and that the said property was sold at a gross under value.
 9. The learned Judge also found that the deed of assignment of the Thika Property to the 4th respondent was void for lack of consent of the Land Control Board. However, the learned Judge found that the appellant failed to prove collusion between the 3rd and the 4th respondents in the transaction for the purchase of the Thika Property on account of lack of statutory notice or the alleged under value of the property. Accordingly, the learned Judge held that the appellant's equity of redemption was effectively extinguished the moment a binding contract was entered into between the Bank and the 3rd respondent notwithstanding the unlawful consent of the Land Control Board. Accordingly, the only remedy available to the appellants was recovery of damages which they had not pleaded.
 10. Aggrieved by the said verdict, vide memorandum of appeal dated 21st November 2019, the appellants are now before this Court seeking to overturn the said decision citing 31 grounds of appeal. They pray



that the said judgment be set aside and their claims as pleaded in their respective amended complaints in their consolidated suits, namely, HCCC No 411 of 2007 and HCCC No 665 of 2008 be allowed.

11. In summary, their grounds of appeal are: (a) whether the placing of Kelly Petroleum Limited (the plaintiff in HCC No. 411 of 2007) on 7th February 2006 under receivership by the EABS was lawful? If the answer is in the negative, what are the consequences?; (b) what duties did the EABS and PVR Rao owe the appellants on 7th February, 2006 when they set out to purportedly exercise their respective rights as chargees, debenture holders and receiver manager?; (c) what duty of care did PVR RAO owe Kelly Petroleum Limited as a receiver manager?; (d) did the EABS lawfully exercise its rights as chargee over L.R. No.10823/54 between 2006 and 2008? If the answer is in the negative, what are the consequences? (e) does the purported sale of LR No. 10823/54 for Kshs.6.1 million in 2008, when its market value was Kshs.43 million, evidence fraud? If the answer is in the affirmative, what are the consequences on the purported sale?
12. At the hearing of the appeal on 24th April 2024, learned Senior Counsel Mr. Kamau Kuria SC. appeared for the appellants, learned counsel Mr. Donald Kipkorir appeared for the 1st respondent, while learned counsel Mr. Wambugu appeared for the 4th respondent. The appellants' submissions together with their case digest are dated 13th August 2020 and 14th August 2020 respectively, the 1st respondent's submissions are dated 28th October 2020, while the 4th respondent's submissions and case digest are both dated 4th December 2020. The 2nd and 3rd respondents did not file any submissions nor did they participate in this appeal.
13. Regarding the sale of the Thika property, the appellants' argued that the 1st respondent could only lawfully sell the said property to either the 3rd and 4th respondent by complying with the provisions of the Indian Transfer of Property Act (ITPA), the Land Control Act and the doctrines of equity as they apply to genuine sales of land, which requirements were never complied with. To bolster the above argument, the appellants submitted that section 69G (1) (a) of the ITPA provides that a mortgagee cannot exercise its powers of appointment of a receiver until he has become entitled to exercise the statutory power of sale. They contended that the notice contemplated under section 69 A (1) of the ITPA was never issued and therefore the 1st respondent never gave its intention to exercise its statutory power of sale.
14. Expounding the contestation that the Thika property was grossly undervalued, the appellants submitted that it sold for a paltry Kshs.6.1 million which was an extremely low price compared to its valuation of Kshs.43 million at the time of the sale. To augment this argument, the appellants cited the predecessor of this Court in Gikumbu Mbuthia vs. Jimba Credit Ltd [1986-1989] EACA, 340 in support of the proposition that a sale can be set aside if it is established that the property was fraudulently undervalued. On the strength of the said decision, they contended that the purported sale of LR. NO. 10823/54 was null and void on grounds that it was undervalued, therefore, the 3rd respondent could not purport to assign an interest to the 4th respondent as one cannot pass a better title to property than he himself has. Thus, the appellants' right of redemption still existed.
15. The other ground urged by the appellants is that there cannot be a binding or an enforceable contract of sale of agricultural land where the mandatory provisions of section 69 A (1) of the ITPA has not been complied with by issuance of the mandatory 90 days' notice and where the mandatory consent of the Land Control Board under section 6 of the Land Control Act has not been obtained. It was also argued that the property was not only undervalued as stated above, but the purported sale was fraudulent.
16. The appeal was strenuously opposed by the 1st and 4th respondents. On its part, the 1st respondent addressed three issues:



- (i) whether the appellants had the equity of redemption;
 - (ii) whether the 1st respondent had the right to exercise statutory power of sale; and
 - (iii) whether the appellants are entitled to damages.
17. Regarding whether the appellants had the equity of redemption, the 1st respondent maintained that the appellants admitted owing the bank money during their testimony and no evidence was tendered to demonstrate efforts made to settle the outstanding loan amount. Therefore, in so far the appellants received the demand and remained in default, the 1st respondent properly exercised its right to appoint a receiver and in exercising its statutory power of sale. Consequently, the equity of redemption remained in the mortgagor until the date of registration of the transfer in the name of the buyer and once that happened, the appellants' rights to redeem the property were extinguished.
18. Regarding whether the 1st respondent had the right to exercise statutory power of sale, it was submitted that the right to exercise statutory power of sale by the 1st respondent accrued the moment the appellants defaulted in repayments and once a statutory power of sale is exercised and the property transferred to the purchaser, the title becomes unimpeachable as provided under section 69(B)(2) of the ITPA. Therefore, the prayers seeking to direct the land registrar to cancel the transfer of the property and restore the status quo ante was not tenable because the only remedy available to the appellants is a claim for damages. In support of this submission the 1st respondent cited the case of Nancy Kahoya Amadiva vs. Export Credit Limited & Another [2015] eKLR where this Court held that the remedies available for sale arising out of an invalid statutory notice is damages directly suffered.
19. On whether the appellants are entitled to damages, the 1st respondent submitted that since the appellants did not plead for damages, it is trite law that a court cannot grant that which has not been pleaded and/or sought since the court itself is bound by the parties' pleadings, and it is not the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon specific matters in dispute which the parties themselves have raised by the pleadings.
20. The 4th respondent in its submissions in opposition to the appeal, combined grounds 1, 2, 3, 4, 5, 6 and 7 of the memorandum of appeal and maintained that the appellants defaulted in repaying the loan, necessitating the 1st respondent to exercise its statutory power of sale as provided under the law. Consequently, once the 1st respondent exercised its statutory power of sale and the suit property was transferred to the purchaser, then the reliefs sought by the appellants were not available from the onset and therefore the appellants ought to have sought damages under the law. To support this submission, the 4th respondent cited this Court's decision in Patrick Kanyagia and another vs. Damaris Wangechi and 2 Others [1995] eKLR in support of the finding that the equity of redemption terminates upon the signing of the contract of sale and not later.
21. Addressing grounds 11, 12, 13, 14, 15, 16, 17, 18, 19 and 21 of the appellants' appeal, the 4th respondent maintained that the sale of the suit property to the 3rd respondent in exercise of the 1st respondent's statutory power of sale was done in accordance with the law and consequently the assignment in its favour by a deed of assignment dated 28th November 2007 cannot be vitiated because it was a bona fide purchaser for value, and it acquired a good title protected by law because the appellants failed to prove fraud and/or collusion. Therefore, the appellants' recourse lies in damages.
22. Responding to grounds 25, 26, 27, 28, 30 and 31 of the memorandum of appeal, the 4th respondent contended that the learned Judge found that the 2nd appellant was entitled to accounts from the 2nd respondent and upon receipt thereof the court would delve into whether damages are payable and quantum thereof. Accordingly, by filing this appeal, the appellants never exhausted the reliefs available



to them in the High Court. Consequently, the instant appeal lacks merit and the same ought to be dismissed with costs.

23. This being a first appeal, it is basically a re-trial, and therefore our duty is to analyze and re-assess the evidence on record and arrive at our own independent conclusions. (See *Selle vs. Associated Motor Boat Co.* [1968] EA 123). However, as it was held by this Court in *Jabane vs. Olenja* [1986] KLR 661, 664 this Court will not lightly differ from the findings of fact of a trial Judge who had the benefit of seeing and hearing all the witnesses. This Court will only interfere with such findings if they are based on no evidence, or the Judge is demonstrably shown to have acted on wrong principles in arriving at the findings. (See also this Court's decision in *Ephantus Mwangi vs. Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).
24. We have carefully considered the appellants' grounds of appeal and the entire record of appeal. It is not disputed that there was default in the repayment of the loan facility advanced to the 2nd appellant by the 1st respondent, which led to the appointment of the 2nd respondent as a receiver. The learned Judge found in favour of the appellants and ordered the 1st and 2nd respondents to provide a full account of all trading and transactions undertaken by the receiver manager on the 2nd appellant's petroleum business since 7th February 2003. After receipt of the accounts which were to be provided in compliance with the said order, the trial court was to make further orders as to whether damages in that regard are due and if so the quantum thereof. It is important to mention that the learned Judge clarified that the said order only applied to the claim by 2nd appellant as against the EABS and the Receiver Manager, and not the claim by the estate of the late John Muritu Kigwe as against the bank and the other defendants. There is nothing the entire record before us to show that the full accounts of all trading and transactions carried out by the 2nd respondent on the 2nd appellant's petroleum business since 3rd February 2003 were provided as per the trial Court's judgment, and whether the appellants were satisfied with the accounts provided, if any.

Consequently, we are not in a position to determine the question whether damages are awardable to the appellants and the quantum thereof in absence of the said information. In any event, during the hearing of this appeal in response to a question from the Court, the appellant's counsel stated that the appellants were not keen on pursuing the damages, maintaining that the exercise of the statutory power of sale by the EABS was illegal and added that nothing good can come out of an illegality.

25. It is important to mention that the trial court held that the sale of the Thika property was contra statute because there was no proof that the requisite notice was served upon the charger, to warn the chargor of the sale of the property if default persisted after 3 months from the date of service and receipt of the letter. Despite this finding, the respondents did not file a notice of cross-appeal as required by rule 93 of the Court of Appeal Rules, 2010 to challenge it. It is such a notice of cross-appeal which would grant us the jurisdiction to delve into the question. In *Margaret Njeri Mbiyu vs. David Njunu Mbiyu Koinange & 13 Others*, [*CA No. 47 of 2016*](#), this Court emphasized the importance of the notice of cross-appeal as follows:

“Rule 93 (1) of the Rules of this Court obliged any respondent who wished to challenge any aspect of the findings of the learned Judge to file and serve a notice of cross-appeal. The purpose of such notice is to give the other parties due notice and an opportunity to prepare to answer the issue or issues raised in the cross-appeal. A respondent who has indicated that he is happy with the judgment cannot, out of the blue, start attacking aspects of it without any notice.”



26. In the circumstances, we do not have any basis for questioning the finding by the learned Judge that the sale of the Thika Property was contra statute. The critical question that begs for an answer is whether the prayers sought by the 1st appellant in regards to the Thika property were available to her in light of the sale of the Thika Property on 18th January 2005 at Kshs.6,100,000.00 to the 3rd respondent, who by a deed of assignment dated 18th November 2007 assigned the rights acquired through the sale to the 4th respondent.
27. From the evidence tendered before the trial court, the charged property was registered under the Registration of Titles Act (repealed). Therefore, the ITPA was the governing substantive law. The ITPA defined land interests, how they could be created, and how they could be transferred. The ITPA was repealed in 2012, along with the Registration of Titles Act. Relevant to the issue at hand is Section 69 of the ITPA which provided that the mortgagee's power to sell the mortgaged property without the intervention of the Court arose when the mortgage-money became due, when either the day fixed for repayment thereof, or part thereof by the mortgage instrument had passed, or some event occurred which according to the terms of the mortgage instrument rendered the mortgage- money, or part thereof, immediately due and payable.
28. Before the mortgagee could exercise the power of sale, section 69A of the ITPA required the following actions to be undertaken:
- a. notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
 - b. some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
 - c. there has been a breach of some provision contained in the mortgage instrument or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.
29. Under the Registered *Land Act* (repealed), where a property is sold by a chargee without serving a valid statutory notice, the sale was not only irregular, but it was a nullity. However, under the ITPA, the position was different. Section 69(B)(2) of the said ITPA provided as follows:
- “(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-
- a. that no case had arisen to authorize the sale; or
 - b. that due notice was not given; or
 - c. that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”



30. We agree with the trial Judge that the protection under section 69 (B) (2) of the ITPA applies to the 3rd respondent and by extension to the 4th respondent, that the 1st appellant lost the right of redemption upon the execution of a private treaty between the 1st respondent and the 3rd respondent, that the conduct of the bank with regard to failure to serve the mandatory statutory notice is insulated by section 69 (b) (2) of the ITPA, and that the absence of consent of the Land Control Board would not in any way be of any help in the appellants' case since clearly their remedy lies in damages.
31. The appellant's counsel Mr. Kamau Kuria SC contended that an illegal contract cannot be enforced and that which the law prohibits, no amount of innovation can help breathe life into it as was held by this Court in *Mapis Investment (K) Ltd vs. Kenya Railway Corporation Civil Appeal No. 14 of 2005*. As mentioned earlier, the trial Judge was categorical that the sale of the Thika Property was contra-statute. However, he proceeded to hold that the appellants remedy lied in damages which were not pleaded. This Court in *Nyangilo Ochieng & Another vs. Fanuel B Ochieng & 2 Others [1996] eKLR* held that sale was null and void ab initio for want of proof of postage of the statutory notice. However, a reading of this decision clearly shows that unlike the instant case, the property in question was registered under the Registered *Land Act* which did not have a provision similar to section 69(B) (2) of the ITPA.

Much as we sympathize with the appellants' predicament, under the ITPA the only recourse available to them was an award of damages, which remained the law up to the time the said statute was repealed in 2012.

32. Our above finding leads us to the next pertinent question, which is whether the appellants herein prayed for damages. We have re-analyzed the record. We also earlier reproduced the reliefs sought by the 2nd appellant in HCCC No. 411 of 2007. It will suffice for us to state that the 2nd appellant never prayed for damages for wrongful exercise of statutory power of sale. In fact, the appellants at paragraph 13 of their submissions dated 17th October 2018 clarified that the general damages they were seeking were in relation to trespass to chattels against the 1st and 2nd respondents who converted to their use the stock in trade being petrol and petroleum products as at 7th February 2006.
33. Regarding HCCC No. 665 of 2008, we also earlier reproduced the prayers the 1st appellant sought in the said case. The appellants submitted that in their amended plaint, they pleaded both general and special damages and therefore the holding by the learned Judge that damages could not be awarded was wrong and in utter disregard of the pleadings and submissions on record. Respectfully, we do not think so. Having reconsidered the record, and the prayers in HCCC No. 665 of 2008 reproduced earlier, we find that the appellant herein never prayed for damages for the unlawful sale of the Thika property. Its trite law that parties are bound by their pleadings. Accordingly, we affirm the finding by the learned trial Judge that the appellants did not pray for damages for violation of section 69A of the ITPA in selling the Thika property via private treaty to the 3rd respondent. In any event, the issue concerning the alleged undervaluation of the property has been rendered academic by the appellants' failure to plead damages for the unlawful sale of the Thika property.
34. In view of our analysis of the issues discussed above and the conclusions arrived at, we find that the trial Judge did not err in his findings. Accordingly, we find no reason to fault the judgment the subject of this appeal. The upshot is that this appeal has no merits and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

