



REPUBLIC OF KENYA



**Njoru & another v Equity Bank Limited & another (Civil Appeal
317 of 2018) [2025] KECA 86 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 86 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 317 OF 2018
SG KAIRU, F TUIYOTT & JW LESSIT, JJA
JANUARY 24, 2025**

BETWEEN

GRACE WANGUI NJORU 1ST APPELLANT

FRANCIS NDEGWA MURAGE 2ND APPELLANT

AND

EQUITY BANK LIMITED 1ST RESPONDENT

AZIZ ATITALA 2ND RESPONDENT

*(An Appeal from the Judgment of the Environment and Land Court of Kenya at
Machakos (C. Ochieng, J.) dated 13th March 2018 in Machakos ELC Case No. 167 of 2008)*

JUDGMENT

1. The question raised in this first appeal is a narrow one. Whether this Court should interfere with the award of damages made by the Environment and Land Court (ELC) (Christine Ochieng, J.) in favour of Grace Wangui Njoru (deceased) against Equity Bank Limited (the 1st respondent – the Bank) for sale at an under value of property known as Land Reference Ngong/Ngong/21469 Upper Matasia (the suit property).
2. Prior to sale of that property at a public auction organised and conducted on 6th July 2007, the deceased was the registered proprietor of the suit property which is situated in Upper Matasia within Kajiado District. The sale of the property was in exercise of the Bank’s statutory power of sale then granted to it by section 74 (2)(b) of the repealed Registered *Land Act* Cap. 300; the suit property was bought by Aziz Atilala (the 2nd respondent).
3. In a suit brought by the deceased and her husband Francis Ndegwa Murage (Murage), also deceased, against the Bank and the 1st respondent being Machakos High Court Civil Suit No. 167 of 2008 (later Machakos ELC No. 167 of 2008), the grievance of the two suitors was, inter alia, that the suit property



was sold at an undervalue. Pledged and reiterated in evidence is that the deceased's valuer, Oleander Limited, had valued the property at Kshs. 9,850,000.00 yet that of the Bank, Paragon Property Valuers Ltd, valued it at Kshs. 6,700,000.00. Further, that at the auction, Murage, as the highest bidder, offered to buy the property at Kshs.5,000,000.00 yet auctioneers acting as agents of the Bank sold it to the 2nd respondent at Kshs. 4,500,000.00. For this grievance, the two plaintiffs sought "compensation based on the true market value".

4. This claim was denied by the Bank.
5. After taking evidence, the trial court rendered its decision on 13th March 2018 in which on the specific issue we are asked to deal with, the learned judge held:

“... I find that the Plaintiffs are indeed entitled to general damages as a pecuniary compensation which will make good the loss they suffered as a result of the wrongdoing from the Auctioneer and 1st Defendant. I will proceed to award them general damages amounting to Kshs. 3,000,000.”

6. Aggrieved by the award of damages and other findings of the trial court, which have since been abandoned, the deceased and Murage brought the current appeal. During the pendency of the appeal, both appellants passed on and the prosecution of the appeal was left to John Murage Ndegwa (the interested party), their son and legal representative who was made a party to the appeal in place of his deceased parents.
7. At plenary, the interested party was represented by Ms. Sebastian, learned counsel, while the respondents, though served, did not appear nor file submissions. It was in the course of highlighting her written submissions that Ms. Sebastian clarified that the only issue before us for determination was what we have set out at the start of the decision.
8. On this matter, counsel contended that there was a huge discrepancy between the values in the two reports and that the valuation report prepared on behalf of the Bank did not give a comparative market analysis, and for that reason the Bank did not compare the prices at which similar properties were being sold in the open market, it being contended by counsel that it was the requirement of section 91(1) – (3) of the *Land Act*.
9. The case for the interested party is simply that in arriving at the general damages, the learned judge should have taken the difference between the value reached by the deceased's valuer and the sale price, to find damages at Kshs. 5,350,000 and not Kshs. 3,000,000 awarded.
10. Although this is a first appeal, the question before us is really one of law as the facts are uncontested. We are asked to interfere with general damages awarded by the trial court and we must pay heed to the limits of our ability to do so as set out in *Butt vs. Khan* [1978] eKLR in which it was held;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

11. Our first observation is that this sale happened on 24th day of April 2007 when the relevant law was the now repealed Registered *Land Act*. Regarding the duty of a chargee exercising his power of sale Section 77(1) reads:

“77.



- (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at the auction and to resell by public auction without being answerable for any loss occasioned thereby, and may himself bid at any auction.”

12. The breath and width of this duty was discussed in various decisions of this Court. In *Martev Guest House Limited v Njenga & 3 others* (Civil Appeal 400 of 2018) [2022] KECA 539 (KLR) (28 April 2022) (Judgment) (with dissent - W Karanja, JA) as per Nambuye JA;

“31. The contracts executed by the bank, the deceased and the 4th respondent forming the substratum of this appeal were subject to sections 65, 69, 72, 74 and 77(3) and (4) of the Registered *Land Act* cap 300 Laws of Kenya (now repealed). Cumulatively, these anchor the chargor’s right of redemption and the bank’s right to realize the security in the event of any default on the part of the chargor to repay the indebtedness to the bank as chargee.

32. When similarly confronted this court in the case of *Elijah Kipngeno Arap Bii v Samuel Mwehia Gitau & another* [2009] eKLR, reviewed and took into consideration this court’s own decision in the case of *Mbutia v Jimba Credit Finance Corporation & another* [1988] KLR 1, as well as foreign jurisprudence on the rights, obligations and duties of a chargee in the exercise of its statutory power of sale and set out guiding principles with regard to the obligation of a mortgagee in the exercise of a statutory power of sale. These may be summarized as follows: a mortgagee has a duty to act in good faith, have regard to the interests of the mortgagor, obtain the best price for the property realized to pay off the debt for the benefit of both the mortgagor and the mortgagee, ensure that its power of sale is not exercised fraudulently, ensure that the mortgagors right of redemption is only lost pursuant to a valid sale. In sum, the mortgagee has a duty to ensure that the exercise of the statutory power of sale is not tainted by some kind of impropriety.”

13. The statutory expectation in section 77(1) is that the sale shall be subject to a reserve price. The reserve price need not be the market price but must be the best price obtainable at date of the auction. Indeed, the statute that came after the Registered *Land Act* codified the interpretation reached in case law. A chargee is expected to obtain the best price reasonably obtainable at the time of sale and it being expressly provided that a price of below 75 per centum of the market price is not acceptable. Section 97 of the *Land Act* reads:

“97.

- (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.



2. A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
3. If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
 - a. There shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and
 - b. The chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).
4. It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection
 - (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.
5. A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).
6. The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.
7. Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.”

14. Now, whilst the interested party seeks to rely on a valuation which fixes the market price at Kshs.9,850,000, that report does not return an opinion as to what would be the forced sale value. It does not therefore suggest what would have been the best price obtainable on 24th April 2007, the date of the auction, it being considered that the sale was a forced one. The report does not assist the Court to determine whether the award made by the trial court was manifestly low so as to warrant interference. Simply put, absent a forced sale value, there is nothing for us to work with so as to reach the result proposed by the interested party.

15. Ultimately, the appeal has no merit and is for dismissal. It is hereby dismissed but with no order as to costs as the respondents did not participate in the appeal.

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

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

