



Masto Holdings Limited v Njenga & 4 others; Co-operative Bank of Kenya Limited (Interested Party) (Civil Appeal 632 of 2019) [2024] KECA 510 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 510 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 632 OF 2019
F TUIYOTI, LA ACHODE & PM GACHOKA, JJA
APRIL 26, 2024**

BETWEEN

MASTO HOLDINGS LIMITED APPELLANT

AND

JUDITH WANJIRU NJENGA 1ST RESPONDENT

PM NG'ANG'A 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL LANDS COMMISSION 5TH RESPONDENT

AND

CO-OPERATIVE BANK OF KENYA LIMITED INTERESTED PARTY

(Being an appeal from the judgment and decree of the Environment and Land Court at Nairobi (K. Bor, J) dated and delivered on the 8th August 2019 in ELC No. 226 of 2016)

JUDGMENT

1. If this dispute, over the ownership of LR. No. 209/522/2 (the suit property), should suffer one infamy it is the number of court cases litigated in its respect. No less than 9 law suits.
2. The suit property is situated in Upperhill Nairobi and at one time registered in the name of Andrew Njenga (deceased) as proprietor. There are now two title documents in respect to the suit property, one held by Masto Holdings Limited (Masto), the appellant herein, and another in the name of Judith Wanjiru Njenga, the 1st respondent, issued on 15th October 2014. That this is possible is the unseemly legacy of our land system.



3. Before the trial court, the case for Masto was that on or around 13th June 2001, the deceased charged the suit property to Co-operative Merchant Bank Limited, now Co-operative Bank of Kenya Limited (Co-op Bank), to secure repayment of a loan of Kshs.10,000,000.00. There was default and the Bank sought to exercise its statutory power of sale. The deceased instituted High Court of Kenya Civil Suit No. 1095 of 2002 to challenge and restrain the exercise of that power. Those proceedings were short-lived because, on or around 21st November 2002, the High Court (Mwera, J, as he then was) dismissed the challenge.
4. Unhindered, the Bank through its agent conducted a public auction on or around 10th February 2004 in which Masto purchased the property. Two years later, on or about 24th March 2006 Masto presented transfer documents to the Registrar of Titles who apparently neglected, omitted, refused and/or otherwise failed to register it as owner. This forced Masto to institute judicial review proceedings being High Court of Kenya, Nairobi Miscellaneous Civil Application to 487 of 2008 to compel the Registrar of Titles to register it as the new owner of the suit property. On or around 5th February 2009, the High Court of Kenya (Kihara J, as he then was) issued the judicial review orders which were subsequently challenged by Mrs Njenga on or about 10th June 2011. The High Court of Kenya (Musinga, J, as he then was) dismissed Mrs Njenga's objections. The Registrar of Titles had in the meantime registered Masto as the new owner of the suit property. The date of registration attracted some debate at trial, a debate that persists.
5. The proceedings at the High Court being Milimani Land and Environment Court, Civil Suit No. 226 of 2016, from which this appeal lies, were triggered by at least two grievances by Masto. The first is that Mrs Njenga had trespassed into and forcibly occupied the suit property and continually harassed it by claiming entitlement of the suit property by way of transmission. Second, that P. N. Mwangi (the 2nd respondent) issued a parallel title to Mrs Njenga, issuance which Masto asserts was tainted with fraud, irregularity, illegality and complicity. In that suit, Masto sought a plethora of prayers, ten in number, which included annulment, revocation and/or cancellation of the title issued to Mrs Njenga and an eviction order against her.
6. Mrs Njenga's answer to the claim was in a defence and counterclaim filed on 16th February 2017. She contended that she and the deceased who was her husband, purchased the suit property in 1974 through a mortgage loan from Housing Finance Co. Limited but the property was registered in his name only. They built a matrimonial home which has existed to date and is currently occupied by her and her children.
7. In the year 2001, the deceased got involved in an agreement with the late Mr. Anthony Kamundia, the General Manager, Business Division in Co-operative Merchant Bank, wherein he presented his title to the Bank as guarantor to secure a previously borrowed non-secured loan to Gwama Enterprises. The deceased executed a charge document on 13th June 2006 but before any business was conducted in relation to the title and payment of any sums, Mr. Kamundia died. When the deceased learnt of the death of Mr. Kamundia, the deceased wrote to the Bank requesting for return of his title deed. The Bank did not respond. Aggrieved by this failure, the deceased instituted Civil Suit No. 1092 of 2002, Andrew Washington Nyoro Njenga vs. Co-operative Merchant Bank Limited, which suit was decided at an interlocutory stage with the dismissal of the application on 21st November 2002.
8. The Bank issued a notification of sale of the suit property on 12th November 2003, but it was contended by Mrs Njenga that the deceased obtained restraining orders stopping the said auction which never took place as the ruling of court was delivered on 16th January 2004.



9. Upon the death of the deceased, Mrs Njenga applied and was granted letters of administration to the estate which were confirmed and issued on 22nd November 2010. In her attempt to secure title to her matrimonial home, she made inquiries from the Bank who informed her that the Bank sold the property to Masto on 10th February 2004. The Bank supplied copies of the charge but denied her access to the offer letter and to a statement relating to the loan. A search at the lands office revealed that the deed file was missing but there was a correspondence file which indicated that the property was still in the deceased's name.
10. Regarding the judicial review orders, Mrs Njenga stated that her attempt to be enjoined to the judicial review proceedings was "thwarted" and she appealed against that decision in Court of Appeal, Civil Appeal No. 177 of 2016 which had not been heard by the time she filed her pleadings. Further, that on learning that the judicial review orders had not been effected and the correspondence file was still in the name of the deceased, she applied and obtained a provisional title on 31st March 2015.
11. In her counterclaim, she reiterated the averments in her defence and further asserted that a photocopy of the title presented by Masto for transfer was fake, fraudulent and not genuine as it does not tally with the duplicate title registered at Ardhi House. She set out the various differences. Ultimately, she sought a permanent injunction restraining Masto from encroaching upon, harassing, eviction, trespassing upon, demolishing or in any other manner whatsoever inferring with the suit property.
12. M. Nganga (the 2nd respondent) was at all material times a public officer under the provisions of section 12 of the *Land Registration Act*, 2012. He, together with the Chief Land Registrar (the 3rd respondent) and the Attorney General (the 4th respondent) filed a joint Statement of Defence in which they sided with Mrs Njenga.
13. The trial was short, two witnesses testified. Mr. Paul Mungai Kamau a director of Masto for Masto, and Mrs Njenga. There was no evidence on behalf of the other parties. We shall re-evaluate the evidence as shall be relevant to resolving the issues that arise in this appeal.
14. In finding in favour of Mrs Njenga, the learned trial judge (Bor, J) held:

"The plaintiff only relied on the charge and transfer by charge without showing evidence of any payment if made of the purchase price for the suit property. The registration of the charge against the suit land was challenged by the defendant. There is also uncertainty over the purchase price the plaintiff could have paid the suit property with the transfer by charge indicating the consideration of Kshs.13,000,000 while the plaintiff's director stated in court that the plaintiff paid Kshs.4,000,000 for the suit property. The discrepancies on the entries on the copy of the tile relied on by the plaintiff also raise doubts as to whether the plaintiff purchased the suit property at an auction as it claimed. The plaintiff did not call a witness from the co-operative Bank of Kenya limited to give evidence on the actual conduct of the auction. No bank statements were produced to show the loan sum advanced and actual receipt of the sale proceeds by the bank."
15. The appeal before us was condensed and argued under following headlines:
 - a. The trial court failed to appreciate that once Masto had been registered as proprietor of the suit property on 24th March 2006; it became the sole and indefeasible owner thereof.
 - b. The trial court distorted and or misapprehended the evidence.
 - c. The trial court made findings of fact that were unsupported by evidence.



- d. The trial court ignored previous court judgments, rulings and orders that dispossessed Mrs. Njenga claim over the suit property and affirmed the appellant's right to title and interest in the suit property
16. It is opportune to highlight one important development after the filing of the appeal. In a ruling dated 2nd December 2022, this Court (Asike-Makhandia, M'Inoti & Omondi, JJ.A) permitted the Bank to join this appeal as an interested party and granted it leave to adduce additional evidence contained in an affidavit of Sisto Macharia sworn on 22nd July 2020. In a nutshell, the evidence is that: the deceased and one John Muchemi trading as Gwama Enterprises (Gwama), through a letter dated 4th June 2011, accepted an offer from Co-operative Merchant Bank for a loan facility in the sum of Kshs.10,000,000.00 to be secured by a legal charge over the suit property; and in compliance with instructions of Gwama, the Bank disbursed the loan as follows:
- a. USD. 30,000 to El Kerald of Arab Bank PLC.
 - b. Kshs.4.2 million to the deceased by a cheque.
 - c. Kshs.400,000.00 to Commerz International Consultants by cheque.
17. The Bank took over all the assets and liabilities of the Merchant Bank vide Gazette Notice No. 6404 of 2002.
18. There was default and the Bank exercised the statutory power of sale, after serving the statutory notice, in an auction sale on 10th February 2004, in which it sold the suit property to one Peter Kamuru Kibera for Kshs.13,000,000.00, payment of which was made in full. The Bank discharged the suit property and executed a transfer dated 16th November 2004 in favour of Masto having been nominated by Mr. Kibera and the transfer registered on 24th March 2006. The Bank asserts that various court decisions were to the effect that Mrs Njenga had no legal, equitable, property or any other right or interest over the suit property.
19. In arguing the appeal, on behalf of Masto, Mr. Githu Muigai, senior counsel and Mr. Njoroje Regeru learned counsel submitted that a purchaser of land pursuant to the exercise of a chargee's statutory power of sale acquires a conclusive and indefeasible title over such property pursuant to the provisions of section 23(1) of the Registration of Title Act. This provision, derived from the Australian Torrens System of Registration, emphasizes the principle of sanctity of the register of titles. Under the system, the government, as custodian of all land records, guarantees indefeasibility of title against the entire world. The decision in *Charles Karathe Kiarie & 2 others vs. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR, is cited in support of the argument that the statutory presumption of indefeasibility of Masto could only be challenged through fraud or misrepresentation that Masto had participated in.
20. A further argument is made that it is well established that in instances of double allocation of land, the first title in time prevails (*Wreck Motors Enterprises vs. Commissioner of Land, Civil Appeal No. 71 of 1997* (unreported)). It was contended, for Masto, that the 2nd respondent issued a parallel title document to Mrs Njenga when he knew or ought to have known that: Masto had been registered as the sole proprietor of the suit property on 24th March 2006 and issued with a title document to that effect; previous court judgment, rulings and orders consistently denied Mrs Njenga's claim over the suit property; and of existence in the register of titles concerning the charge of the suit property to the chargee, the statutory sale and transfer of the suit property to Masto by the Bank and registration of Masto as the owner of the suit property.



21. It is also argued that despite no evidence being provided to the contrary, the trial court in holding that numerous litigations surrounded the suit property and the questionable manner in which Masto had acquired it, disregarded the fact that those suits were determined in favour of the appellant and the charge. The conclusion that Mrs Njenga had proved that the suit property had never been auctioned was not available to the trial court in view of the previous judicial decisions on the matter and provisions of sections 23(1) and 69B (2) of the RTA and ITPA respectively and was also based on the unproved assertion that the deceased had obtained orders stopping the auction of the suit property. On the contrary, Masto's evidence showed that the deceased did not succeed in stopping the injunction since the application for interim injunction was dismissed on 21st November, 2002. Furthermore, the trial court ignored the testimony of Mrs Njenga that; the deceased had charged the suit property to Cooperative Merchant Bank and handed over the original title; had unsuccessfully moved court to stop the auction; and could not prove repayment of Kshs. 10,000,000.00.
22. Counsel contends that it was the Registrar of Titles who had backdated the registration date to the date of presentment of the transfer documents on 24th March 2006.
23. On the issue of Masto's sole witness failing to remember the exact purchase price of the suit property, it is argued that the trial court ignored the cardinal rules of evidence which gives priority to documentary evidence and the trial court erred in making adverse findings against the witness for failing to bring the original title when the Torrens system of registration under the RTA notes that it is the register that constitutes evidence of ownership. Lastly, in reiterating that the trial court ignored multiple court judgments and rulings that disproved Mrs Njenga's claim over the suit property, Masto lists the relevant suits regarding the suit property that have been determined over the years, that is:-
 - a. an interlocutory Ruling by Justice Mwera in HCCC No. 1095 of 2002, delivered on 21/11/2002;
 - b. an interlocutory Ruling by Justice Mohamed Ibrahim in HCCC No. 1095 of 2002, delivered on 16/01/2004;
 - c. a final Judicial Review Order by Justice Kihara Kariuki in Misc. Application No. 467 of 2008, made on 13/02/2009;
 - d. an interlocutory Ruling by Justice Daniel Musinga in Misc. Application No. 467 of 2008, delivered on 10/06/2011;
 - e. a final order by the Court of Appeal (Makhandia, Ouko and Murgor JJ.A) in Civil Appeal No. 177 of 2011, made on 15/05/2017;
 - f. a rent distress order by Honourable Roseline Oganyo in Milimani CMCC No. 397 of 2011, made on 16/06/2011;
 - g. an interlocutory Ruling by Justice Pauline Nyamweya in HCCC No. 46 of 2011, delivered on 15/11/2011;
 - h. a second interlocutory Ruling by Justice Pauline Nyamweya in HCCC No. 46 of 2011, delivered on 16/11/2011;
 - i. a final order by Honourable Oganyo in Milimani CMCC No. 397 of 2011, made on 09/01/2012;
 - j. a final Judgment by Justice David Majanja in Constitutional Petition No. 124 of 2011, delivered on 20th January 2012; and



- k. an eviction order by Honourable T S Nchoe in Milimani CMCC No. 1399 of 2015, made on 26th May 2015.
24. The Bank supported the appeal and made similar arguments to those of Masto and it is needless to repeat them. Of importance however, the Bank argues that the trial court erred in placing evidentiary burden upon Masto to provide bank statements proving the loan sum was disbursed and that the sale proceeds were received by the Bank while Masto was not privy to such information. In addition, in considering and determining issues raised in the counterclaim, on whether the loan was disbursed, the exercise of the statutory power of sale and auction process, the trial court arrogated to itself a non-existent jurisdiction determining a commercial dispute which is a preserve of the High Court as observed in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR. That the proceedings therefore arising from the counterclaim are null and void ab initio and the trial court had no jurisdiction to consider those issues arising.
25. Mbichire learned counsel appeared for Mrs Njenga. He submitted that the charge document was only signed by the chargor and borrower alone and not the lender bank and is therefore incomplete on the face of it. The said charge was allegedly presented and registered at the lands office on 15th June 2001 under entry no. 3254/32 which was actually a notification of charge by the Commissioner of Income Tax for Kshs. 1,000,000. Further, the charge document allegedly registered against the title document by Masto does not state the amount that was allegedly secured. Counsel also argues that a valid search done against the title confirmed the details of Mrs Njenga's title. That in absence of a valid charge therefore, the statutory power of sale could not arise as envisaged under section 69 B(2) of the ITPA.
26. On whether there was a valid transfer, it is argued that there was no auction held on 10th February, 2004 as the instructions issued by the Bank to the auctioneer were issued on 20th August 2003 and the 45 days' redemption notice indicated that the date of auction was on 12th November 2003 and no auction was held on that date. Similarly, no other advert was placed for the auction held on 10th February 2004. Therefore, Masto cannot claim to be a purchaser under section 69 B(2) of the ITPA.
27. In addition, counsel argues that the doctrine of *Lis Pendens* applied as at the time the deceased had secured an interlocutory judgment against Masto and the matter was pending before Justice Mohamed Ibrahim. Similarly, the only document Masto purports to present is a transfer dated 16th November 2004 between the Bank and itself which is not genuine as it does not exist nor was it registered at lands at entry no. 33 since that entry number indicates to be a discharge of charge by KRA. The said transfer is fraudulent as it was issued by an entity which did not exist at that date since there was a gazette notice dated 4th October 2002 when the then Co-operative Merchant Bank Limited approved transfer of all its assets and liabilities to Co-operative Bank of Kenya Limited. That the title also held by Masto issued in 2006 is unsupported by the alleged transfer registered on 24th March 2010 and Masto does not explain why it filed Misc. App. No. 467 of 2008 *Masto Holdings Ltd vs. The Principal Registrar of Titles*, where it sought for orders of mandamus to compel the Principal Registrar to complete the registration of transfer on 19th March 2006.
28. Lastly, on the issue raised by Masto that the trial court ignored previous court decisions, counsel argues that the trial court heard the matter in its original jurisdiction and did not sit on appeal on any of the said decisions and cannot therefore be faulted for going into the root cause of the dispute. Further, that the statutory notice introduced by the Bank was in the additional evidence was issued by an entity that ceased to exist on 4th October 2002 and cannot be relied on as there was no fresh notice issued in 2004 when the alleged transfer was being effected. Similarly, the contents of the bank statements although not subjected to examination raise so many queries on the exact sum guaranteed and owed.



29. The role of the Court in a first appeal is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify. This position was stated in the case of *Selle & Another vs. Associated Motor Boat Company Ltd. & Others* [1968] EA 123 as follows:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.

Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955) 22 EACA 210).”

30. There was evidence before the trial court that in his lifetime the deceased executed a charge dated 13th June 2001 in favour of Cooperative Merchant Bank limited over the suit land to secure a facility to himself and John Muchemi trading as Gwama Enterprises for a sum not exceeding Kenya Shillings 10,000,000. The charge was registered on 15th June 2001. The existence of the charge was expressly admitted by Mrs Njenga in paragraph 3(b) of the defence she filed before the trial court. Indeed, at trial Mrs Njenga produced a copy of the duly registered charge as document number 5.
31. The thrust of Masto’s case before the trial court, and now, is that it obtained ownership of the suit property after the Bank sold the property in exercise of its statutory power of sale. The trial court however found as follows:

“The issue for determination is who between the plaintiff and the 1st defendant had a valid title over the suit property. The plaintiff did not adduce evidence of the auction at which it claimed it purchased the suit property on 10.2.2004. Such evidence would have included the statutory notification of sale served on the registered owner. The advertisement of the auction in a newspaper with nationwide circulation the memorandum of sale upon the successful auction and most important evidence of payment of the purchase price by the plaintiff.”

32. The finding by the trial court that there was no evidence that a statutory notice had been issued by the Bank flies in the face of the concession in Mrs Njenga’s written statement that the failure by the Bank to respond to the demands for release of the title by the deceased and upon him being served with a statutory notice dated 27th September 2001 led the deceased to institute Civil Suit No. 1095 of 2002, *Andrew Washington Nyoro Njenga vs. Co-operative Merchant Bank Limited*.
33. In the same statement, Mrs Njenga alluded to a notification of sale dated 28th August 2003 served upon her deceased husband. Whilst this notification was for a proposed sale on 12th November 2003, the case by Masto was that it purchased the property on 10th February 2004. That Mrs Njenga was well aware of this sale is evident in the Ruling of 15th November 2011 in *Milimani ELC Civil Suit No. 46 of 2011, Judith Wanjiru Njenga vs. Co-operative Bank of Kenya Limited, Masto Holdings Limited*,



John Mwaniki Mucheru, Ephraim Mundu t/a Gwama Enterprises. There, Mrs Njenga had sought to have the sale to Masto cancelled. In declining that order Nyamweya, J (as she then was) observed;

“Despite this finding, I do recognise that the 2nd Defendant purchased the suit property pursuant to the exercise of a power of statutory sale by the 1st Defendant by a public auction, and is the registered owner. In the circumstances in the event that there were lapses in the procedures followed in the exercise of the power of sale and at the said auction, the Plaintiff can only have recourse as against the 1st Defendant, under whose authority the auctioneers were also acting.”

34. Mrs Njenga did not produce any evidence to debunk that finding by the learned judge that Masto had bought the property in a public auction. As to the question of the validity of that sale, reference need only be made to the judgment of the High Court in Milimani Law Court Constitutional & Human Rights Petition No. 124 of 2011, Judith Wanjiru Njenga vs. The Attorney General & 5 Others where Majanja J. held:

“Its not disputed that the sale and transfer of the suit property was pursuant to a charge. It is also not disputed that the sale of the suit property and subsequent registration of the property in the name of the 4th respondent has been the subject of litigation namely; HCCC No. 1095 of 2002, HC. Misc. No. 467 of 2008 and ELC No. 46 of 2011. These proceedings and the decision made therein are lawful and valid.”

35. That decision was not appealed against and was, like the other many rulings, before the trial court. With respect, there was nothing to warrant the trial court’s holding that Masto needed to prove the sale and purchase. The sale and transfer of the suit property had been found as a fact in various court decisions. As to the transfer, there was evidence of a transfer by the chargee, the Bank, in favour of Masto duly registered on 24th March 2006. At any rate it is doubtful that Mrs Njenga could fault the sale and transfer as fraudulent without joining the Bank as a defendant to her counterclaim yet she had made damning allegations against it.

36. One other matter had swayed the trial court to doubt the case for Masto. The learned Judge held at paragraph 30 of her decision;

“The Plaintiff only relied on the charge and transfer by chargee without showing evidence of any payment it made of the purchase price for the Suit Property. The registration of the charge against the suit land was challenged by the Defendants. There is also uncertainty over the purchase price the Plaintiff could have paid for the Suit Property, with the transfer by chargee indicating the consideration as Kshs. 13,000,000/= while the Plaintiff’s director stated in court that the Plaintiff paid Kshs. 4,000,000/= for the Suit Property. The discrepancies on the entries on the copy of title relied on by the Plaintiff also raise doubts as to whether the Plaintiff purchased the Suit Property at an auction as it claimed. The Plaintiff did not call a witness from the Cooperative Bank of Kenya Limited to give evidence on the actual conduct of the auction. No bank statements were produced to show the loan sum advanced and actual receipt of the sale proceeds by the bank.”

37. It is true that Mr Kamau testifying for the Masto stated that the company bought the land for “Kshs.4 million”. This is at variance with the price of Ksh.13,000,00.00 stated in the transfer instrument. This, in our view, would have been of significance had it not been the decision of the High Court (Majanja, J), a decision not appealed against, in which he upheld the validity of the sale and transfer in a final judgment of the court.



38. Regarding the transfer, the trial Judge had made the following findings:

“The Plaintiff did not produce evidence to show that it was registered as proprietor of the Suit Property in 2006. In any event the transfer by chargee dated 16/11/2004 was registered as I.R. 3254/33 on 24/3/2010, which means the Plaintiff could only have been registered as proprietor of the Suit Property after the land had been discharged on 24/3/2010 and not on 24/3/2006 as the Plaintiff claimed.”

39. Masto’s case was that it presented the transfer document to the Registrar of Titles on 24th March 2006 but the registrar neglected, omitted, refused or failed to regularise it as a new owner. It was therefore forced to institute High Court of Kenya Miscellaneous Civil Application No. 482 of 2008 to compel the Registrar to do so, orders which were granted on 5th February 2009 by Kihara, J. (as he then was). Mrs Njenga was aware of those proceedings. In her written statement she states;

“It was at the said case that I learnt of the Plaintiff’s attempt to get Mandamus orders against the Principal Registrar of Titles. The Plaintiff had filed MISC AOO NO. 467 OF 2008, Masto Holdings Ltd vs The Principal Registrar of Titles, where the Plaintiff sought orders to compel the Registrar of Titles to register a transfer by a charge in its favour and also issue a provisional title for the suit property.”

40. Our understanding of this evidence is that Masto first presented the transfer for registration on 24th March 2006 but actual registration happened later at the force of the mandamus order. It is plausible that at this later stage, the Registrar back dated the registration to the date of presentation. In the circumstances of this case there is nothing curious and untoward about this sequence of events.

41. The evidence before the trial court sufficiently proved that: the deceased duly executed a charge in favour of the Bank; there was default in the sums secured; the bank exercised its statutory power of sale; the Bank executed a transfer by chargee in favour of Masto and that transfer was duly registered. In reaching this outcome we have deliberately overlooked Mrs Njenga’s current contention that the sale and transfer run afoul the doctrine of *lis pendens* as civil suit HCCC No. 1095 of 2002 was pending at the time of sale. This is because the doctrine was not pleaded by Mrs Njenga before the trial court and it was never part of her defence or case in the counterclaim and is therefore not available at appeal.

42. The additional evidence allowed by this Court simply reinforced what was before the trial court. In addition, we now have the memorandum of sale in respect of the auction and evidence of payment of the purchase price of Kshs.13,000,000.00.

43. Once there was transfer, then the proprietorship of Masto over the suit property was protected by the provisions of section 23(1) of the Registration of Titles Act:

“S.23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

44. The manner in which Masto acquired its title must be contrasted against how Mrs Njenga had the provisional title processed. First, she obtained the provisional title on the basis that the original title was lost yet she was fully aware that the original title had been charged to the Bank and subsequently



transferred to Masto, matters she sought to reverse through various unsuccessful civil suits. Second, when she was unable to get her way through the courts, she, through an unlawful application at the land registry, obtained a provisional title.

45. We have said enough as to why we must conclude that the decision of the trial court cannot stand. The judgment issued and delivered on 8th August 2019 is hereby set aside. Instead, there shall be judgment in favour of the appellant as against the respondents in terms of prayers 1, 2, 3, 4, and 5 of the Plaint dated 26th February 2016.
46. For clarity judgment is entered for the appellant against the respondents for:
- i. An order for the annulment, revocation and/or cancellation of the title document fraudulently, irregularly and/or illegally issued to the 1st respondent over the suit property;
 - ii. An order for the rectification of the register in respect of any transfer, lease, mortgage, charge, dealing, transaction and/or alienation of any interest in the suit property made at the behest or in favour of:
 - a. The 1st respondent;
 - b. anyone representing or acting on behalf of the 1st respondent;
 - c. anyone acting under the authority of the 1st respondent; and
 - d. anyone claiming any right, title or interest under or through the 1st respondent.
 - iii. A permanent injunction restraining the 2nd, 3rd, 4th and 5th respondents, whether acting directly or through their agents, servants, subordinates and/or successors, from recognising or registering any transfer, lease, mortgage, charge, dealing, transaction, and/or other alienation of any interest in the suit property made at the behest or in favour of:
 - a. the 1st respondent;
 - b. anyone representing or acting on behalf of the 1st respondent;
 - c. anyone acting under the authority of the 1st respondent; and or,
 - d. anyone claiming any right, title or interest under or through the 1st respondent;
 - iv. An order to be enforced by the OCS Central Police Station (Nairobi) securing the removal, eviction and/or ejection of the 1st respondent from the suit property;
 - v. An order to be enforced by the OCS Central Police Station (Nairobi) securing the forcible break-in and the doing of any and all such other acts as may be necessary to put the appellant, or such other person as the appellant may appoint, into possession of the suit property.
47. Yet bearing in mind that the 1st respondent has occupied the suit property for a considerable period of time, we hereby grant her 60(sixty) days from the date of this judgment to vacate the land, failing which the appellant shall be at liberty to enforce the orders we have just made in the preceding paragraph.
48. The appellant shall have costs both here and at the superior court below.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

F. TUIYOTT

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

L. GACHOKA, CIArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED DEPUTY REGISTRAR

