Four Farms Limited v Agriculture Finance Corporation & 20 others (Civil Appeal E018 of 2023) [2024] KECA 1802 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1802 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E018 OF 2023

AK MURGOR, JW LESSIT & GV ODUNGA, JJA

DECEMBER 20, 2024

BETWEEN

FOUR FARMS LIMITED ..... APPELLANT

AND

AGRICULTURE FINANCE CORPORATION ..... 1ST RESPONDENT

MILFAN DEVELOPERS LIMITED ..... 2ND RESPONDENT

REGISTRAR OF TITLES ..... 3RD RESPONDENT

PATBON INVESTMENTS LIMITED ..... 4TH RESPONDENT

ALICE GITHERE ..... 5TH RESPONDENT

JAYNE GITHERE ..... 6TH RESPONDENT

NDATANI ENTERPRISES LIMITED ..... 7TH RESPONDENT

ANDREW MUGAMBI ..... 8TH RESPONDENT

JUSTUS MULWA NDUYA ..... 9TH RESPONDENT

GATANNA ENTERPRISES LIMITED ..... 10TH RESPONDENT

MARY WACEKE MUIGAI ..... 11TH RESPONDENT

REVTAT ORUYA NALO ..... 12TH RESPONDENT

LAURIAN MKALA ..... 13TH RESPONDENT

JOHN NGALA MUGO ..... 14TH RESPONDENT

REGINA WAIRIMU THAARA ..... 15TH RESPONDENT

JANE NJOKI GITAU ..... 16TH RESPONDENT

ANNE W WARUINGE ..... 17TH RESPONDENT

FENOSA HOLDINGS LIMITED ..... 18TH RESPONDENT

KENNEDY MWANGI ..... 19TH RESPONDENT

FREDRICK MALACHI OSIMBA ..... 20TH RESPONDENT

JOHN NGARUIYA ..... 21ST RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Mombasa (A. Omollo, J.) dated 16th September 2020 and delivered on 21st September 2020 in ELC Civil Suit No. 41 of 2009)

JUDGMENT

1. This appeal arises from the decision of the Environment and Land Court of Kenya at Mombasa (A. Omollo, J.) dated 16th September 2020 and delivered on 21st September 2020 in ELC Civil Suit No. 41 of 2009. However, the record of appeal before us does not contain either the original plaint or the amended plaint. What we have is a re-amended plaint dated 4th September 2015, in which the appellant sought the following orders:

    a. A declaration that the appellant has fully paid the said loan and interest due to the 1st respondent.

    b. A declaration that any sale transaction and/or conveyance and/or transfer and/or any subsequent dealings entered into in respect of L.R Subdivision No. 544 (Original No. 482/3) Section III M.N. and/or any of the subdivisions relating to the same in respect of the suit property which required Land Board Consents and which were not obtained shall be rendered null and void.

    c. A declaration that each of the subdivided plots 3449/III/MN, 3463/III/MN and 3464/III/MN in respect of the suit property were unlawfully transferred by the 1st respondent to itself and said transfers and subsequent titles issued by the 3rd respondent to the 1st respondent are null and void.

    d. A declaration that the titles issued by the 3rd respondent in respect of the subdivided plots 3463/III/MN and 3449/III/MN relating to the suit property and which are currently registered in the name of the 20th respondent are not genuine and are null and void.

    e. An order directing the 1st respondent to undertake a full forensic audit through an independent and reputable firm of accountants.

    f. Judgment be entered in any amount plus interest thereon at court rates found to have been overpaid or in respect of any surplus sums received by the 1st respondent in excess of the loan amount inclusive of interest.

    g. General damages and/or compensation be assessed and awarded in respect of any unlawful sale of the appellant's subdivided plots in the suit property against the 1st and 2nd respondents.

    h. An order directing the 1st respondent to give a full discharge of the appellant's title L.R Subdivision No. 544/Section III/M.N. Mombasa and release all certificates of titles and title documents thereof and/or all subdivision titles remaining unsold and/or in respect of which any dealings thereof have been rendered null and void to the appellant.

i. Orders for possession and eviction of the respondents from the suit property and all its subdivisions as aforesaid, which have been ordered to be discharged by the 1st respondent and in respect of any sale transactions with any of the respondents which have been declared null and void.

j. Costs of and incidental to the suit with interest thereon at court rates.

k. Any other or further relief that this Honourable Court shall deem fit to grant.

2. The appellant alleged that it was the registered and legal proprietor of Plot No. 544 (Original No. 432/2) Section III/M.N CR Number 33735 (herein after to be referred to as the suit property) measuring 133.4 acres; that the suit property was subdivided into 54 plots all registered in the name of the appellant vide a consent entered into between the appellant and the 1st respondent in HCCC No 652 of 1988; that as at 1984 the suit property had a farm house, over 400 heads of cattle, several tractors and farming equipment all valued at over Kshs.17 million excluding the value of the land; that it sought a land facility of Kshs.5 million from the 1st respondent and the same was granted; that a dispute arose between itself and the 1st respondent over the outstanding loan amount and interest and the 1st respondent proceeded to sell, by public auction, all the cows and farm equipment; and that although the 1st respondent was able to recover the outstanding loan amount, it failed to account for the surplus amount it received from the auction.

3. It was further pleaded that as a result of the failure to account for the surplus amount, the appellant instituted a suit in which various orders of injunctions were issued restraining the 1st to 3rd respondents from selling or whatsoever dealing with the suit property; that one such order was issued on 6th November 2009 restraining the 1st respondent from dealing with the suit property in any manner which order was duly served upon the 1st respondent.

4. According to the appellant, when the suit property was subdivided into 54 plots, an agreement was reached between itself and the 1st respondent that the subdivisions would be sold by both parties through their disclosed agents; that the 1st respondent breached the agreement and sold 19 subdivided plots by public auction in exercise of its statutory power of sale without the knowledge of the appellant; that the 19 plots were then transferred to the 2nd respondent by the 1st respondent on 31st May 2010 and the transfers were registered against the suit property as entries nos. 42, 45 to 57 inclusive and 56 to 60 inclusive; that the said transfer was in breach of the court order and consent entered into between the appellant and the 1st respondent and without obtaining consent from the Land Control Board and by misrepresentation on the part of the 1st and 2nd respondents; and that the said 19 subdivisions were registered as subdivision Nos. 3435, 3436, 3437, 3438, 3448, 3453, 3454, 3455, 3456, 3457, 3458, 3460, 3461, 3462, 3465, 3466, 3467, 3468 and 3469.

5. The appellant averred that on 9th February 2011 another injunctive order was issued by the court restraining the 1st and 2nd respondents from dealing with the suit property or the subdivisions arising therefrom, but on or about September to November 2010 most of the subdivisions were transferred by the 2nd respondent to the 4th to 19th respondents in further breach of the court orders; and that to give effect to the said transfers, the 3rd respondent, purporting to act pursuant to section 60 of the Registration of Titles Act Cap 281, Laws of Kenya (now repealed), unlawfully cancelled the court order given on 9th February 2011.

6. According to the appellant, the 1st respondent unlawfully acquired duplicate titles for plot No. 3464 while titles for plots no. 3449 and 3463 were fraudulently acquired by the 20th respondent from the 3rd respondent creating a situation where there were duplicate titles issued by the 3rd respondent to both

the 1st respondent and the 20th respondent; that the 3rd respondent unlawfully created two separate titles being CR 43848 and CR 43849 in respect of subdivision Nos. 3463 and 3449 by reference to a partial discharge registered as No. CR 7190/40; that the said discharge was obtained by the appellant from the 1st respondent in respect of CR 43549 and subdivision No. 3464 which the appellant had lawfully sold with the knowledge of the 1st respondent; that it did not at any time agree to sell any subdivision or transfer any subdivision to one Henry Obuya Were from whom the 20th respondent subsequently acquired subdivisions No. 3449 and 3463.

7. It was the appellant's case that no Land Control Board Consent was acquired for the sale transactions and/or transfers from the 1st respondent to the 2nd respondent and from the 2nd respondent to any of the 4th to 19th respondents; that the 1st respondent has fully recovered the loan amount and interest from the sale of the appellant's farm movable assets and from the unlawful auction of the 19 plots; and that a substantial amount of money was recovered in excess of the loan amount and interest and the 1st respondent, despite demand, refused to render a full and true account of the proceeds of the auctions.

8. The 1st respondent filed an amended defence on 27th May, 2017 in which it admitted that the appellant was the registered owner of the suit property; that the appellant used the suit property to secure various loans from its financial institution totalling to Kshs. 13,500,000; that over and above the duly executed notifications of Charge with respect to the loans, the appellant also executed chattels mortgages against the said loans as further security for the loan advances; that when the appellant failed to honour the loan repayment it issued instructions for the sale of the suit property by way of auction which sale was advertised in a leading daily Newspaper and the sale by public auction scheduled for the 26th June 2009 on which day the suit property was sold to the 2nd respondent who was the highest bidder for Kshs. 38, 445, 000; that the 1st respondent executed letters of transfer and relinquished any proprietary rights to the suit property to the 2nd respondent; and that at the time of sale of the suit property the amount the appellant owed was Kshs.210, 884, 300.92.

9. It was pleaded by the 1st respondent that the injunctive orders were issued on 6th November 2009 and since then it has done nothing against the appellant; and that it is not aware of any transactions that were done after the transfer of the suit property to the 2nd respondent.

10. In its counterclaim against the appellant, the 1st respondent pleaded that following the default by the appellant to honour the repayment of the loan amounts and the interest thereof, it initiated recovery process but the same was stopped by a suit filed in Mombasa HCCC No. 652 of 1988; that a consent was reached between itself and the appellant on 24th November 1989 in which both parties agreed that the suit property be subdivided and the portions emanating therefrom be sold at a minimum price of Kshs.150,000 per acre within 90 days from the date of the consent; that the purchasers would deposit 25% of the purchase price with Messrs. Kiambo & Co. Advocates as stakeholders and the balance would be paid in accordance with the individual sale agreement; and that the appellant breached the consent and it was forced to dispose off the whole property by way of public auction in exercise of its statutory power of sale to the 2nd respondent from which it realized Kshs.38,445,000 as against an outstanding amount of Kshs.210,884,300.92/= which was owing at the time of the sale. The 1st respondent therefore claimed a sum of Kshs. 280,702,809.83 which was outstanding as at 31st December 2016 with interest at the rate of 20% per annum until payment in full.

11. In response to the re-amended plaint, the 8th, 9th, 10th, 12th, 15th, 16th, 17th, 18th and 19th respondents filed a Statement of Defence dated 27th October 2015 in which they denied the allegations raised by the appellant and put the appellant to strict proof.

12. In its statement of defence filed on 28th March 2018, the 21st respondent pleaded that he had subdivisions No. 3449 and 3463 registered in his names on 14th day of May 2015 after purchasing them from the 20th respondent at Kshs.10 million and 30 million respectively; that in order to have the two parcels transferred to his name, the 20th respondent procured a consent from the local area Land Control Board which was granted on 7th May 2015; that at the time of purchase of the two parcels, there were no inhibitions on the titles of the properties and he only became aware of the injunctive orders issued by the court on 20th April 2016 when on 2nd March 2018 he conducted a search at the land's office; that his two parcels of land were not subject of the orders issued on 9th February 2011 as extended on 11th April, 2011; and that he was purchaser for value for the two parcels of land without any notice of any defect, default or irregularities in the titles hence the appellant is estopped from claiming any rightful interest in the two properties.

13. At the hearing, the appellant called its Managing Director, Hussein Nurmohamed, who testified as PW1. According to him, there were 54 subdivisions of the suit property out of which the 1st respondent had sold 32 leaving 22 prior to 2009; that they agreed with the 1st respondent for partial discharge of one plot No. 3464 which was sold by the appellant to the National Intelligence Service at a consideration of Kshs.28.5 million, a transaction for which they obtained consent; that they had obtained a discharge from the 1st respondent and that as a result, they did not owe the 1st respondent any monies; and that as per the auditor's report, it was the 1st respondent that owed them money. He disclosed that whereas the Memorandum of sale of the same was dated June 2009, the injunction was issued on 24th November 2009; that the parties before the court were the 1st respondent and the appellant and that the 2nd-20th respondents were joined later pursuant to the amendment; that while the 1st court order of 6th November 2009 referred to the original title, the 2nd order of 9th February 2011 was in respect of the subdivisions; that the order of February 2011 came after transfers were done in 2010; that he did not know whether the 4th-19th respondents had anything to do with the subdivisions; that as at 5th November 2009, the 4th, 8th - 12th and 15th -19th respondents had not been joined in the case; that when he got the injunction in 2009, he registered the order in the main title no. 544 (original no. 432)/ III/MN CR. No. 33735; that he obtained a consent dated 24th November 1989 for the subdivisions between himself and the 1st respondent; that the 2nd respondent sought to register the transfers in the mother title as entries no. 42-60; that he did not plead that he was defrauded by the 4th, 8th - 12th and 15th -19th respondents; and that he did not know the 2nd respondent before the auction and could not tell if the 2nd respondent was aware of the proceedings between himself and the 1st respondent.

14. According to PW1, his main complaint against the 3rd respondent was that there was an injunction registered at the Lands Office which was removed; that after he got the order, he personally served the Land Registrar and paid for it but admitted that he did not have the receipt in Court; the Land Registrar violated court orders although he neither reported the matter to the police nor instituted contempt proceedings against the Registrar; and that what he claimed was the remaining land portions.

15. Seven witnesses testified on the side of the defence. Evans Mwangi Maabe, DW1, trading as Murphy's Auctioneers, testified that he received instructions from the 1st respondent to sell plot no. 544/III/ MN registered in the name of the appellant; that he then served a notice on 22nd November 2008 upon the appellant's Managing Director who was introduced to him by the Branch Manager of the 1st respondent, Kilifi, one Mr. Haro; that he was told that unless they received contrary instructions, they were to sell the property; that on 27th January 2009, they advertised the property for sale slated for 19th February 2009 but the sale did not take place on that date as there were no serious bidders and they did not get a base approved by their principal; that they were advised to re-advertise which they did on 13th June 2009 setting the sale date as 26th June 2009 on which date the auction took place as scheduled

outside Mtwapa Post Office; that they had distributed handbills within the area where the property is situate as well as an advertisement in the newspaper; that they got a bidder, Milfan Ltd, who bid the reserve price of Kshs.500,000 per acre and that the total sale price was about Kshs.38,445,000; that the 2nd respondent knew of the sale through the advertisement; that upon the sale, the 2nd respondent deposited 25% of the sale price being Kshs.9,611,000 and they entered into a memorandum of sale; and that they only acted in accordance with their client's instructions and duly delivered.

16. In cross-examination, DW1 stated that at the 2nd auction they had six bidders but the others did not meet the base rate and that the 2nd respondent on whose behalf one Mr. Lawrence Mwangi bid and signed the Memorandum of sale were the only party who bid upto the reserve price. According to him, when the sale does not take place, they do not give another notice; they just re-advertise. He admitted that they advertised the sale of the entire farm as per his instructions of 6th August 2008 and that he was not aware that the land had been subdivided. He contended that after the sale, it was the prospective buyer's prerogative to obtain the Land Control Board's Consent. He confirmed that he did not require a Land Control Board consent to have an auction proceed.

17. DW2, Geoffrey Muthui Mwirebwa, the 1st respondent's debt recovery manager testified that the appellant borrowed a total of Kshs.13.5 million from the 1st respondent which was to run for a 15 year period and was secured by suit property by way of a notification of charge and a further security of charge over the client's loose assets; that although the loans repayment were due annually, the appellant did not comply with repayment terms and that there was no single payment of any instalment at the time they fell due prompting the 1st respondent to send a written demand for payment; that the terms of the facility were that in the event of default, the process of realization of the security by auction would be set in motion; that although the 1st respondent disposed of the security in 2009, the proceeds were still not sufficient to pay the debt since at the time of auction, the debt was Kshs.210,000,000 but the sale realized only about Kshs.38 million; that there were many correspondences between the appellant and the 1st respondent some of which were requests by the appellant for more time on account of illness suffered by himself and his wife and drought in the Coast region; that the appellant, by a letter dated 16th June 1988, requested that he be allowed to dispose the properties to settle the debts pursuant to which an auction took place and some cattle were sold although there was no indication of any amount deposited with the 1st respondent; that the basis of the 1st respondent's claim was the balance that remained unpaid after the said auction together with costs.

18. DW3, Henry Kimani, 1st respondent's accountant while reiterating the evidence given by PW2, gave finer details of the appellant's loans and default in payment as they fell due vide his statement produced as D.Ex 20; that a discharge of charge is only issued after a loan is paid in full and that a transfer cannot be done without discharging the charge; that in 2003, the President issued directives for waiver on specific loans; that after the auction, they did not take steps to recover the remainder of the outstanding debt; that the appellant's loan was reduced from Kshs.95million to Kshs.21 million.

19. On behalf of the 2nd respondent, DW4, Lawrence Mwangi, his property agent testified that he came across fliers stuck on the road and an advertisement in the Standard newspaper of 11th June 2009 pursuant to which the auction of 26th June 2009 was conducted outside Mtwapa Post Office; that he conducted searches after seeing the advert and confirmed that the sale was being conducted on behalf of the 1st respondent; that he participated in the auction conducted by Murphy Auctioneers as one of about 6 bidders and they paid Kshs.500,000 per acre; that they had a memorandum prepared after the sale whereby he paid 25% of the sale price of Kshs.38,445,000; that before buying the property, he had no knowledge of any suit between the appellant and 1st respondent nor was he served with any court orders; that subsequently, the parcels were sold to various persons within six months during which no

court order was served on him; and that the entire process was procedurally sound and above board; that the suit plot was advertised as one plot which they paid for and afterwards, they realized that it had been subdivided when they were given the deed plans for the subdivisions; that this development made their work easier as they intended to subdivide for re-sale purposes; and that most of the legal issues were handled in February 2011 when they had sold all parcels of land; and that as at 1st July 2011, all the pieces of land had been sold after the charge on the property was discharged.

20. DW5, Justus Mulwa Nduya, a practicing Advocate based in Mombasa and named as the 9th respondent testified that he purchased one of plots that resulted from the subdivision of the suit property; that while purchasing the property, some of his friends named as respondents in this case approached him to act for them; that an agent of the 2nd respondent informed them that they had bought a plot which they were interested in selling; that they requested to see the original titles and beacons which confirmed that the land was vacant; that thereafter, they agreed on the purchase price of the plots and he personally went to the Lands Office where the Registrar confirmed that the copies of the respective titles emanated from his office and were issued by him from 25th June 2010; that for each of the subdivisions the Registrar had opened parcel files and his CR No. was 48028 which was the reference number; and that from the searches they conducted, the 2nd respondent was shown as the registered owner whose title was issued on 25th June 2010; and there were no encumbrances registered against the title.

21. In DW5's evidence, he prepared sale agreements for each individual, paid the purchase price and prepared transfers which were registered by the Registrar; that his transfer was registered on 8th October 2010; that he became aware of this case in 2011 long after he had taken possession; that afterwards, the registrar wrote to some of his clients asking for the return of the original titles for cancelation but they did not comply as they had purchased the land procedurally; that his clients instituted judicial review proceedings in case no.863 of 2011 against the Registrar for purporting to cancel titles which powers he did not have and were successful when the Registrar's letter was quashed on 5th April 2016; that he subdivided his portion into 6 and the registrar issued titles for the said plots some of which were transferred to third parties; that they were not aware of any dispute between the appellant and 1st respondent before purchasing the property and as such they should not be affected by it.

22. According to DW5, the property they were buying was not agricultural land as it was situated within Mtwapa Township and he was not aware if the 1st or 2nd respondents applied for Land Control Board consent; that they did not apply for the same because it was not necessary; that at the time he visited the site, there were residential buildings by NSIS and Coca Cola bottlers; that there was an injunction registered after the transfers of plots into their names which had not been cancelled; that there was an entry no. 4 which cancelled the court order no.3 under section 60 of the RTA; and that he had no claim against the 1st respondent as he was in possession of his plot and had a title.

23. DW6, Samuel Kariuki Mwangi, the Land Registrar, Mombasa confirmed that the subdivisions arising from plot no. 544 were registered as 33735 on 25th June 2010; that although there was a contention that at the time of registration there was an injunction order issued on 9th December 2009, on perusal of their records, he found that at the time the subdivisions were registered, there was a reconstruction of the file at the Lands office; that the reason for reconstruction was that the original register at the lands office was reported missing although there was no correspondence reporting loss; that it was possible that the order was registered in the original register which was still missing; that a copy of the register showed that the order was registered; and that he came across a copy of the title which surprisingly had a court order as entry no. 42.

24. DW6 testified further that he saw correspondence by his predecessor whereby the Registrar of titles had commenced the process of recalling the titles from the owners for cancelation purposes; that the

said action sought to nullify and quash all transfers and titles issued in breach of the order issued on 11th December 2009; that that action became a subject of HCCC No. 45 of 2011; that currently, the record shows that transfers were registered and title numbers issued to the respective plots; that he was aware of the allegation accusing the Registrar of creating two registers for 43849 and 43848; that from the title register, the two titles were registered as new grants from the government in respect of plot no. 14798 and 14799 and not subdivisions arising from the suit property; that it was not illegal to reconstruct a file hence the allegations of fraud levelled against the Land Registrar lacked merit.

25. According to DW6, he was not aware of the consent entered into by the parties on 30th August 1988; that there has never been a change of user as per their records which show that the property is freehold; that according to their records, all 45 subdivisions have been sold; that although they received the injunction on 9th December 2009, the register in their custody did not have an entry where it was registered; that subdivisions from the mother title get independent parcel files and consequently, the search dated 15th December 2009 shows the subdivisions and also refers to a court order; that the court order was not reflected in the subdivisions hence a search would not reveal the same; that he was unable to state with certainty that the suit land was subject to Land Control Board consent although the advertisement at clause 4 referred to the reserve price and Land Control Board consent if any; that entry no. 3 revealed that the court order was presented on 17th May 2011 while entry no. 2 thereof showed that there had already been a transfer; and that the cancelation process of the titles was not completed because of the order issued in the Judicial Review proceedings.

26. According to DW6, by the time of the 2009 order, the plots had been subdivided and transferred by the appellant where they sold 22 plots each; that in the absence of a registered injunction order in the record, the Registrar could not tell if there was an existing order; that at the time of the auction, plot Nos. 3449, 3463 and 3464 had not been sold to third parties and their titles were in the 1st respondent's possession; that since they were registered in the appellant's name, it was not open for the appellant to raise issues on them; that the 2nd respondent could not be faulted for any mistake; that similarly, the other respondents came to the property as a result of a transfer by the 2nd respondent to them; that the 2nd respondent had acquired 19 of 22 plots whose titles were lawfully issued by the Lands Office; and that consequently, purchasers from the 2nd respondent acted on the 2nd tier of files, not from the mother title hence any search conducted by the 5th – 20th respondents would reveal the 2nd respondent as the registered owner.

27. The 21st respondent, John Njeru Ngaruiya gave evidence as DW7.

He stated that he applied to be joined in these proceedings vide the application dated 28th March 2018 pursuant to which he filed his defence and statement on even date; that subdivisions no. 3449 and 3463 are registered in his names and that he had developed them; that he was not aware that the two plots comprised of the original suit property; that he applied for consent to transfer as the property was agricultural land; that he bought his plots from one Fredrick Osimba Marachi named as the 20th respondent in the suit; that before purchasing his plots he conducted due diligence and results of a search revealed that Mr. Marachi was indeed the registered owner thereof; that he only learned of this case when he did a search and found a court order registered against his plot; that Mr. Marachi gave him the documents he used while purchasing the plots from the 1st respondent namely title deeds, a letter from the 1st respondent and the Land Control Board consent; that he had put up a factory on one plot worth Kshs.84 million and the other was fenced with a perimeter wall; and that there were many factories in the neighbourhood including Coca Cola.

28. In her judgement, the learned Judge framed the following issues for determination;

a. Whether or not the 1st respondent lost its right to exercise statutory power of sale over the suit property.

b. If (a) is negative, whether or not the appellant was properly issued and served with statutory notices before the sale.

c.

(i) Whether or not the property was properly described in the advertisement for public auction and;

(ii) If an auction took place on 26/6/2009.

d. Whether or not Land Control Board consent was required for the ensuing transactions between the respondents.

e. Whether or not the 2nd – 21st respondents are innocent purchasers for value without notice.

f. Whether or not the appellant is entitled to the reliefs sought in the claim.

g. Is the 1st respondent's counter-claim time barred.

h. Who bears the costs of the suit.

29. In her judgement, the learned Judge found that by the consent entered into between the appellant and the 1st respondent on 24th November 1989 in Mombasa H.C.C.C No. 652 of 1988 (O.S), the suit property was to be subdivided into 54 plots and be sold at Kshs.150,000 per acre; that the funds received from the sale were to eventually be used to settle the debt owed to the 1st respondent; that the consent did not indicate that the charge registered on the property was to be discharged before the subdivision process could commence; that the fact that there is evidence of partial discharge executed on 31st January 2008 in respect to sub-division No. 3464 C.R. No. 7190 between the 1st respondent and the appellant confirmed that the charge remained registered on the title (and or the resultant sub plots); that there was no evidence presented to demonstrate that the 1st respondent forfeited its rights under the original charge document as provided in section 70 of the repealed Registered *Land Act*, (the repealed Act); that the statutory notices were duly served as per the provisions of section 74(1) & (2) of the same Act; that given that the titles for the sub-divided numbers had not been issued as at the date of the auction, the auctioneer (1st respondent's agent) option was to describe the property in accordance with the records held at the lands office which is L.R No. 544/III/M.N.; that since it was admitted by the appellant in cross-examination that the 1st respondent had a charge over the resultant titles, the outcome (sale for redemption of the loan) would still be the same whether advertised as separate plots or one plot; that the appellant's contention that the loan owing to the 1st respondent was settled by the proceeds from the public auction of dairy cows and farm equipment done in 1988 was contradicted by the documents produced and relied on in this case, inter alia, the consent of 24th November 1989 which provided way forward on how to repay the loan and correspondences exchanged between the appellant and the 1st respondent such as the letter dated 30th May 2002 by the appellant to the managing director of the 1st respondent requesting for waiver of interest and making reference to the public auction that took place in 1988; that the order of injunction given on 6th November 2009 against the 1st respondent was issued after the selling, auctioning or foreclosing had taken place; that based on the ELC case of Kimoi Ruto & Ano v Samuel Kipkosgei Keitany & Ano (2014) eKLR and in light of the provisions of section 3(4) and 4(2) of the *Agricultural Finance Corporation Act* and case cited, the 1st respondent is a government body and thus entitled to enjoy the exemption provided under section 6(3)(b) of the *Land Control Act* and that this was corroborated by the evidence that as at the time of charging the

property, no consent of Land Control Board the Board was obtained; that in addition, the sale to the 2nd respondent was pursuant to a public auction and pursuant to the proviso to section 3 of the *Law of Contract Act* and the decision of this Court in the case of Willy Kimutai Kitilit v Michael Kibet (2018) eKLR as cited in the decision in Public Trustee v Wanduru Ndegwa (1984) eKLR, the provisions of *Land Control Act* did not apply; that in the circumstances, there was no requirement for the Land Control Board's consent to be obtained; that in any case, the law protects the interest of the other respondents since the intentions of the 1st and 2nd respondents was clear that the transaction was for the purchase of land following the failure by the appellant to stop the sale before it took place; that the order of 6th November 2009 was issued when the appellant and the 1st respondent were the only parties to the suit; that on the authority of the cases of Mbuthia v Jimba Credit Finance Corporation and another [1986-1989] 1 EA 340 (CAK), Ze Yu vs Yang Nova Industrial Product Ltd [2003] 1 EA 362 (CCK), Bomet Beer Distributors Ltd & Another v Kenya Commercial Bank Ltd & 4 Others [2005] eKLR and Captain Patrick Kanyagia v Damaris Wangechi & Others, Civ. Appeal No. 150 of 1993, the rights of the appellant in regard to redeeming the suit property was extinguished at the fall of the hammer on 26th June 2009 and therefore, nothing barred the 1st respondent from executing the transfers in respect on the suit property inspite of being it being party to the orders of temporary injunction; that in any case the said orders were issued after the sale; that to prove there was disobedience of the order, the appellant had an obligation to prove that the 2nd respondent who presented the transfers and who was joined to these proceedings after February 2011, was aware of it and that the order had been registered on the title as at the time when the transfers were presented to the 3rd respondent for registration; that on the face of the order, there was nothing directing the 3rd respondent not to cause it to be registered; that given the evidence that at the time of registration of the transfer in favour of the 2nd respondent the register containing the order was missing, in view of section 39 of the repealed Act, there was an obligation on the appellant to show that the 2nd respondent was a party to the illegality, if any, committed by the Lands office; that from the evidence adduced, there was no evidence that the 2nd respondent was aware of the order or that he contributed to the loss of the Original register (the fact of loss not controverted by the appellant) hence there was no basis to vitiate the sub-division titles acquired by the 2nd respondents; that having found that the 2nd respondent's title was regularly acquired, it followed that it had good titles to pass on to the 4th – 19th respondents; that the appellant could only question the transaction as between the 1st and 2nd respondent and not between the 2nd to 3rd parties (4th – 19th respondents) since he had no direct claim against them as they were admittedly joined by an order of the Court; and that as the appellant's claim had not been proved to the required standards, the same was dismissed.

30. Regarding the 1st respondent's amended defence and counter-claim for the sum of Kshs.280,702,809 from the appellant as the balance of the outstanding loan as at 31st December 2016, the learned Judge found that the balance of the loan due to the 1st respondent became a debt after the sale accruing from 27th June 2009 which was the day after it exercised its statutory power of sale; that the six-year period thus lapsed on 26th June 2015 and as the counter- claim was brought without leave of the court it was time barred and was struck out.

31. On costs, the learned Judge directed that each party meets their respective costs of the suit going by the history of the case.

32. It was that decision that aggrieved the appellant who moved this Court on the grounds that:

    1. The learned Judge erred in fact and in law when framing the issues for determination arising from the pleadings and the evidence by omitting to include relevant and material issues for determination.

2. The learned Judge erred in law and in fact in failing to determine material issues arising from the pleadings and evidence before her which is whether the 1st respondent is lawfully entitled to transfer to itself any of the suit property over which it had a charge and if so whether the proper procedure was followed as set in section 33(4) (1) (a), (b) and (c) of the Agriculture Finance Corporation Act (Act) for the recovery on default by occupation or sale of the suit property in respect of subdivision Plot Nos. 3463/III/MN and 3449/III/MN.

3. The learned Judge in any event failed to consider or at all whether the 1st respondent was in breach of subsection 4 (1) (a), (b) and (c) of section 33 of the Act and thereby failed to make any finding to the effect that the 1st respondent had thereby illegally transferred the said sub-divided Plot Nos. 3463/III/MN and 3449/III/MN to itself.

4. The learned Judge having made a finding that the 1st respondent did not lose its right to exercise its statutory right of sale erred in applying the provisions of the Registered *Land Act*, Cap 300 (repealed) instead of the *Agricultural Finance Corporation Act* that applied to the suit property.

5. The learned judge erred in fact and in law in making an erroneous finding that the 1st respondent had a right to exercise its statutory right of sale in respect of the suit property over which it had registered a charge without first giving any proper consideration to the fact that several subdivisions in respect of the suit property had already been sold to various third parties (not parties to this appeal) prior to the institution of the suit in the High Court whereby the charged property known as LR 544(original No. 423/3) section III, MN and Certificate of Title CR. No. 33735 comprising of 54.11 hectares (133.4 acres) had ceased to exist.

6. The learned judge erred in law and fact in making a finding that the charged property LR 544 (original No. 423/3) section III, MN and Certificate of Title CR. No. 33735 was properly advertised and described in the advertisement for public auction and that the misdescription of the said title and the difference in acreage given in the said advertisement is a minor issue which could not have altered the terms of sale of the property.

7. The learned judge erred in law and in fact in making findings that the 1st respondent is a Government body and is thus entitled to enjoy the exemption provided under section (3) (b) of the *Land Control Act*.

8. The learned judge erred in fact and in law when she held that the sale by public auction to the 2nd respondent was pursuant to a public auction pursuant to the provisions of section 70 of cap 300 and there was no requirement for the Land Control Board Consent to be obtained.

9. The learned judge erred in fact and in law in failing to consider and or to make a finding to the effect that all subsequent sale transactions or dealings entered into between the 2nd respondent and all the other respondents herein save for the 20th and 21st respondents required the consent of the Land Control Board and failure to apply for such consents rendered the said sale transactions and or dealings with the suit property null and void.

10. The learned judge erred in fact and in law in failing to give any proper consideration to the fact that the 1st respondent sold both the subdivided titles in respect of Plot Nos. 343/III/MN and 3449/III/MN directly to the 20th respondent whereby the 1st respondent applied for and obtained the consent of the Land Control Board after the sale and transfer to the 20th respondent had already been carried out.

11. The learned judge erred in fact and in law in failing to give any consideration or to make any reference to the appellant's submissions to the effect that the aforesaid consents obtained by the

1st respondent and the 20th respondent were irregularly obtained from the Land Control Board thus invalidating the said consents resulting in the said dealings or transactions between the 1st respondent and the 20th respondent and between the 20th respondent and the 21st respondent null and void.

12. The learned judge erred in fact and or in law in failing to exercise her discretion judicially after striking out the 1st respondent's counterclaim by making an order that each party meet their respective costs of the suit without giving any or any proper reasons.

33. The appellant prays that the impugned judgment be set aside and substituted with the judgment for the appellant as prayed for in the re-amended plaint dated 4th September 2015 and filed on 9th September 2015 in respect of the prayers and orders sought in (b), (c), (h), (i) and (j) therein; that in the alternative prayer (g) be granted in the said re-amended plaint for an award of general damages and or compensation to be assessed and judgment be entered for the appellant against the 1st and or 2nd respondents in the assessed amount with costs; and that the costs of the counterclaim be awarded to the appellant against the 1st respondent.

34. In determining this first appeal from the decision of the trial court, we are alive to our mandate as espoused in the case of Ng'ati Farmers' Co-operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 that:

> " An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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."

35. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court in Peters v Sunday Post Limited [1958] EA 424, the predecessor of this Court, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

36. With respect to findings of fact by the trial court, this Court's position as stated by Hancox, JA (as he then was), in Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183 is that:

> " The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

37. Before we deal with the substance of the appeal, we must point out that by a Notice dated 16th May 2024, the appeal against the 7th and 20th respondents was withdrawn. The withdrawal of the said appeal effectively means that no order can be made against those respondents in respect of the parcels of land in which they had interest. In our view, without challenging the manner in which the 20th appellant obtained his title, it would also follow that the 21st respondent's title numbers 3449 and 3463 section III/Mainland North, which he acquired from the 20th respondent cannot be challenged. In other words, the appeal against the 21st respondent must, consequent upon the withdrawal of the appeal against the 20th respondent, collapse.

38. In any case, the 21st respondent became the registered owner of both subdivisions number 3449 and 3463 on the 15th May 2015 and was only made a party to the proceedings on 28th March 2018, on its own application, in order to protect his interest in his said plot numbers 3449 and 3463 section III/ Mainland North. Since he was not a party against whom orders were expressly sought by the appellant, no order could be made against him and in respect of his said properties. The appeal as against the 21st respondent must therefore fail in limine.

39. Submitting on grounds, 1, 2 and 3 it is contended on behalf of the appellant that the learned Judge failed to include the material and relevant issues arising from the appellant's pleadings and submissions, namely whether the 1st respondent is lawfully entitled to transfer to itself any of the suit property over which it had a charge and if so, whether the procedure set out in Section 33(4),(1)(a),(b) and (c) of the Act was followed in respect of subdivision of Plot No. 3463/III/MN and 3449/III/MN; that before the 1st respondent was lawfully entitled to transfer the suit property being the subdivided plots 3463/ III/MN and 3449/III/MN to itself, the procedure as set out under section 33(2), (3), 4(a), (b) and (c) of the *Agricultural Finance Corporation Act* (the Act) must be strictly complied with; that none of the said mandatory and lawful procedures were ever carried out by the 1st respondent in respect of the specific plots namely subdivision Plot Nos 3463/III/MN and 3449/III/MN before the same were transferred to itself in breach of section 33 of the Act; that the public auction which took place on 26th June 2009 in respect of the whole of the suit property was only intended to be sold to a third party without involvement of the 1st respondent and that the same was ultimately sold to the 2nd respondent as the highest bidder at a consideration of Kshs. 38, 445,000 who was allocated 19 subdivisions which were the only ones remaining unsold; that no authorized agent had been appointed in writing by the 1st respondent to attend and bid for the purchase of the subdivided plot No. 3463/III/MN and 3449/ III/MN at the auction; that notwithstanding that, the 1st respondent, transferred both the said plots to itself without consideration and thereafter transferred the said Plots to the 20th respondent, who then sold the two plots to the 21st respondent; and that the 1st respondent exercised its statutory power of sale under the Act unlawfully.

40. In response to these grounds, the 1st respondent submitted that the appellant failed to point out the relevant and material issues for determination not included by the trial court in violation of rule 66(2) of the Court of Appeal Rules; that the 1st respondent exercised its statutory powers under section 33(20, (3), (4) (a), (b) and (c) of the Act procedurally and accurately; that it is allowed by law to buy the property at the auction under section 33(2) of the Act; that it was not in dispute that the appellant was indebted to the 1st respondent hence the 1st respondent's statutory power of sale had crystallized and the realization of the property was set in motion procedurally and legally; that the 21 days' notice threshold required under section 33(4) of the Act was fully complied with and the appellant has not demonstrated how the procedure therein was flouted or compromised; that the appellant did not dispute service of the notice and cannot raise the issue on appeal; that the appellant breached the terms of the consent between it and the 1st respondent that required the appellant to dispose of the pledged

security within 6 months as from 19th March 1991 and remit the proceeds thereto to the 1st respondent in settlement of the outstanding loan; and that upon the fall of the hammer, the appellant lost its right of redemption and its remedy lay in damages.

41. On its part, the 2nd respondent submitted that grounds 2 and 3 of the appeal relate to the parcels of land known as Subdivision No. 3449 Section III Mainland North and Subdivision No. 3463 Section III Mainland North whose issues are between the appellant and the 1st respondent and not the 2nd respondent.

42. The 4th, 5th, 6th, 11th, 13th and 14th respondents submitted that the judgment delivered by the trial court was lawful, took into account all material facts, decided all the issues in controversy and was lawful and fair; that the appeal contravened rule 66(2) of the Court of Appeal Rules since the appellant did not state the alleged relevant and material issues for determination which were not considered by the learned Judge; that the issue whether the 1st respondent is lawfully entitled to transfer to itself any of the property over which it had charged is misconceived because it was raised and answered by the learned Judge; that the court found that there was no evidence that the 1st respondent had forfeited its rights under section 70 of the repealed Act; that the issue whether the recovery of the parcels of land known as 3463/III/MN and 3449/II/MN was unprocedural was also heard and determined; that since it is not in dispute that the appellant was indebted to the 1st respondent and had failed to make payments to offset the loan, pursuant to the repealed Registration of Titles Act and the Act, the 1st respondent had the right to sell off the property by way of an auction and realize its security; that the sale of 3463/II/MN and 3449/II/MN does not affect their legal rights or their titles in subdivisions 3436, 3435, 3467, 3459, 3466 and 3455 respectively which arise from a different transaction; and that ground 3 is misconceived in law because the learned Judge found that the 1st respondent had not forfeited its rights under the original charge; that the learned Judge was correct in applying the provisions of the repealed Act to the facts and in finding that the 1st respondent had not forfeited its rights under the original charge and had served the appellant with the requisite statutory notices.

43. The 8th, 9th, 10th 12th, 15th, 16th, 17th, 18th and 19th respondents took the view that grounds 2, 3 and 10 of the appeal that deal with properties namely 3463/111/MN and 3449/11/MN do not touch and are not related to the transaction involving them; and that the transactions complained of in these properties primarily involved the appellant and the 1st respondent herein.

44. We have considered the submissions in respect of grounds 1, 2 and 3. The appellant's complaint is that whether the 1st respondent is lawfully entitled to transfer to itself any of the suit property over which it had a charge and if so, whether the procedure set out in Section 33(4),(1)(a),(b) and (c) of the Act was followed in respect of subdivision of Plot No. 3463/III/MN and 3449/III/MN. Section 33 of the Act whose title is "Procedure for recovery on default by occupation or sale of property" provides that:

    1. In any of the circumstances or events mentioned in section 31 of this Act, the Corporation may, by notice served on the person to whom the loan has been made or his personal representative (in this section referred to as the debtor) personally or by post, demand repayment of the loan and, after due notice of such demand has been served in similar manner on all subsequent mortgagees of the land on the security of which the loan was made, the Corporation may, without recourse to any court, enter upon the land and either take possession of or sell by public auction through a licensed auctioneer the whole or (where subdivision is not prohibited under section 34 of the Government Lands Act (Cap. 280)) any part of the land upon such terms and conditions as the Board may in all the circumstances consider proper.

2. At a public auction held in pursuance of subsection (1) of this section, the Corporation, by its agent duly authorized in writing, may bid for and purchase the whole or any part of the land offered for sale.

3. The Corporation, as agent of the debtor, may transfer the land to itself or any other purchaser and give a good and unencumbered title to it, and may execute all such documents and do all such other acts as may be necessary to complete the transfer.

4. A sale under subsection (1) shall not be held until—

   a. a notice of the sale has been published in the Gazette, or in a newspaper circulating in the area in which the land is situated, stating the date, time and place of the sale, and the terms and conditions of the sale; and

   b. twenty-one days have elapsed since the date of publication of the notice; and

   c. all reasonable steps have been taken by the Corporation to notify in writing the persons having a registered interest (or any unregistered interest of which the Corporation knows) in the land of the intended sale.

5. In subsection (1), the expression "licensed auctioneer" has the meaning assigned to it in section 2 of the *Auctioneers Act*, 1996.

45. It is clear from the foregoing provision that the 1st respondent was empowered, as agent of the appellant, to transfer the land to itself or any other purchaser and give a good and unencumbered title to it, and to execute all such documents and do all such other acts as may be necessary to complete the transfer. In this case it is submitted that section 33(4), (1)(a), (b) and (c) of the Act was followed in respect of subdivision of Plot No. 3463/III/MN and 3449/III/MN. The cited provisions require that the sale cannot be held until a notice of the sale has been published in the Gazette, or in a newspaper circulating in the area in which the land is situated, stating the date, time and place of the sale, and the terms and conditions of the sale; twenty-one days have elapsed since the date of publication of the notice; and all reasonable steps have been taken by the Corporation to notify in writing the persons having a registered interest (or any unregistered interest of which the Corporation knows) in the land of the intended sale. In this case it is not contended that there was any person with an interest in the suit property apart from the appellant. In her judgement the learned Judge expressed herself as hereunder:

> "On the second question whether the plaintiff was properly issued and served with the statutory notices, the plaintiff has annexed at pages 90 – 93 letters addressed to itself giving it the 3-months' statutory notice. The 1st defendant presented evidence on the dates the foreclosure notices were served. In the 58 paragraph witness statement dated 14/6/2016 by Hussein Nurmohamed, he does not mention anything about non-service of the statutory notices. Therefore, court draws an inference that the statutory notices were duly served as per the provisions of section 74(1) & (2) of the Registered *Land Act* Cap 300 (repealed)."

46. In his testimony, PW1 substantially relied on his witness statement. Nowhere in that statement was it averred that there was non-service of the statutory notices. What was stated without elaboration was that:

> "I am also advised by the Plaintiff's Advocates which I verily believe that the sale of the 19 subdivided plots by the 1st Defendant to the 2nd Defendant was contrary to the statutory provisions of the *Agricultural Finance Corporation Act*, Cap 323, Laws of Kenya and non-

compliance of the *Land Control Act*, Cap 302, Laws of Kenya in failing to obtain the necessary consent from Land Control Board."

47. In fact, in the supplementary submissions it was acknowledged at paragraph *17* that:

> " The appellant has not submitted nor argued that the suit property was not advertised in newspapers. We submit that the public auction as advertised relates to the entire property comprising of 44 subdivided parcels of land out of which 22 parcels of land had already been sold to third parties in the years 2000 and 2001 to 2006. The said auction advertised the wrong property for sale and not the suit property comprising of 22 subdivisions. The advertised property was mis-described by misrepresentation and the same was unlawful and void."

48. It is therefore clear that the appellant is not challenging the non- advertisement of the auction, but the description of the property in the said advertisement.

49. It is not in doubt that the suit property was originally one title (LR Subdivision No. 544 (Original No. 482/3) Section III M.N.). It was that title that was advertised as opposed to the subdivisions emanating from it. According to the appellant, the advertisement ought to have been in respect of the subdivisions and not the mother title. In dealing with this issue, the learned Judge expressed herself as follows:

> For purposes of my determination, although there is no dispute that the original title was subdivided, it never ceased to exist as the sub-divisions were being registered on it. Given that the titles for the sub-divided numbers had not been issued as at the date of the auction, the auctioneer (1st defendant's agent) option was to describe the property in accordance with the records held at the lands office which is L.R No. 544/III/M.N. The difference in acreage given in the advertisement in January 2009 and the one for June 2009 in my opinion is a minor issue which could not alter the terms of sale of the property. The plaintiff had admitted in cross- examination that Agricultural Finance Corporation (1st defendant) had a charge over the resultant titles. Thus whether advertised as separate plots or one plot, the outcome would still be the same – sale for redemption of the loan."

50. In the evidence of PW1, the suit property was subdivided by his consent in 1987 as a result of the delay in repayment and that the 1st respondent created charges over the resultant titles. Despite that in 2009, when he obtained an order injunction he registered the order on the main title No. 544 (Orig. No. 432/III/MN – CR No. 33735. From that evidence, it is clear that although there were subdivisions done on the suit property, both the appellant and the 1st respondent still treated the title as if it was in its original state. The learned Judge's conclusion that "whether advertised as separate plots or one plot, the outcome would still be the same – sale for redemption of the loan" was borne by the evidence adduced by the parties and that finding cannot be faulted. We find that in the circumstances of this case in which the parties referred to the suit property, even after its subdivisions, by original title, the advertisement of the subdivisions as if the original title was the one being sold did not cause any prejudice to the appellant and the sale cannot be faulted on the ground of mis-description.

51. Regarding the transactions in respect of in respect of subdivision of Plot No. 3463/III/MN and 3449/III/MN, we have already found that an appeal against the proprietor thereof, the 21st respondent, cannot succeed, the appeal having been withdrawn against the 21st respondent's predecessor in title, the 20th respondent. Similarly, no orders were sought against the 21st respondent before the trial court, in order to give rise to an appeal against him. Therefore, the appeal, can only succeed, in respect of the said parcels, if at, against the 1st respondent, and only in damages.

52. On ground 4 and 5 of the appeal regarding the statutory power of sale, the appellant submitted that the main title under the charged property LR No. 544/III/MN having been subdivided into 44 parcels of land, pursuant the consent order recorded in court on 24th November1988, were allocated separate and individual sub-titles hence the title ceased to exist and the 1st respondent thereby lost its right to exercise its statutory right and power of sale. According to the appellant, the learned Judge erred in applying the provisions of the repealed Act when determining the issue of the 1st respondent's statutory power of sale instead of section 33 of the Act.

53. The 1st respondent, in response to these grounds submitted that there were 6 clauses in the consent order that never indicated any intentions of the 1st respondent to relinquish its right of exercising statutory power of sale; that as along as a contract is tied to a legal charge, there is a continuing security until the debt is paid and until the security is discharged; that the issue of the charge was not addressed and therefore it remains as pending issue; that the circumstances surrounding the consent clearly indicated that the consent was premised on the payment of the drawdown sum in order to stop the auction and it did not preclude payment of the contractual sum or exercise of the 1st respondent statutory power of sale upon default; that the consent order never discharged the rights of the 1st respondent in the suit property and charge registered thereon hence it was valid to advertise it as charged; that the appellant breached the express terms of the consent order and upon the lapse of 6 months and the subdivisions of the 44 plots having not been completed, the 1st respondent was at liberty to revert back to exercising its statutory power of sale since that the process of subdivision and issuance of new titles was still ongoing; that the subject charge was in respect of the entire suit property and not part of it; that the partial rights acquired in the suit property were limited to the realization of the security advanced and that created relationship that had to be sustained on the mother title until full payment of the money advanced to the appellant or upon full sub division and disposition of the plots; that the repealed Act was the substantive law dealing with registration of charges, transfers, discharges among others and was properly invoked by the learned Judge.

54. On behalf of the 2nd respondent, it was submitted that even after subdivision and sale of some plots, the sub-divided plots with Deed Plans still remained part and parcel of the mother title until the issuance of separate certificates of title; and that the plots only obtained Certificates of Title after the public auction.

55. The 4th, 5th, 6th, 11th, 13th and 14th respondents' submission was that the learned Judge did not err in applying the provisions of the repealed Act instead of the Act as there is no provision under the latter barring the application of the former to land within the scope of the Act and vice versa; that the repealed Act under section 77(6) as read with section 79 specifically provides for dealings with agricultural land; that section 33 of the Act deals with procedure for recovery on default by occupation or sale of the property hence the provision would be of no assistance to the court; and that the 1st respondent had not lost its statutory power of sale in respect of the suit property since the titles to the subdivided numbers had not been issued as at the date of the sale by auction hence the suit property still existed and that the appellant had admitted during the hearing of the case that the 1st respondent charge persisted over the resultant titles of the subdivisions.

56. The 8th, 9th, 10th 12th, 15th, 16th, 17th, 18th and 19th respondents in their submissions on grounds 4 and 5 contended that although the title to the suit property had been subdivided, only a few of the said deed plans had been registered into titles by the time of auction; that the mother title only ceases to exist after all the Deed Plans have been registered and their titles effectively produced; and that it is only after the auction occurred on 26th June, 2009 that the remaining deed plans were registered by the Registrar of Lands in Mombasa.

57. Two issues arise from these submissions. The first one is whether the consent order discharged the rights of the 1st respondent in the suit property while the second issue is whether it was proper for the learned Judge to have relied on the provisions of the repealed Registered *Land Act*. In order to determine the first issue, it is necessary to refer to the terms of the consent dated 24th November 1988 which were that:

    1. The suit premises shall be subdivided into parcels as shown in the survey Plan of M/s Kanyi Land Surveyors dated December 1987.

    2. The subdivisions shall be sold variously by M/s Town Properties Datoo Associates and Polly Properties & Services who shall be agents for both plaintiff and defendants.

    3. The sale price shall be at the minimum of Shs 150,000 per acre provided that if the suit premises are not sold within30 days from today, the Counsels' of the respective parties shall review the price per acre after taking into account the prevailing market prices of land in the area of the suit premises. After such review the Counsels may lower the minimum price per acre.

    4. The purchasers shall deposit 25% of the purchase price with M/s Kiambo & Company Advocates as stakeholders and the balance shall be paid in accordance with the Agreement of Sale which shall be entered into with each individual purchaser.

    5. All the sales shall be subject to the consent of the defendant.

    6. The plaintiff shall execute a specific Power of Attorney in favour of its advocate on record for the purposes of disposal of the suit premises and the lease assets. That until the subdivisions are all sold the said Power of Attorney shall not be revoked by the plaintiff, its assigns or successors.

58. From the said consent there was no express stipulation that the existing charge over the suit property was discharged. In his evidence, PW1 stated that:

    > " AFC had a charge over the resultant titles."

59. This was a clear appreciation that notwithstanding the subdivisions, the 1st respondent's charge over the suit property applied with equal force to the subdivisions. It is not in doubt that at the time of the auction, the subdivisions had no titles and that the titles came out only after the auction. From the evidence of PW1, it is clear that despite the subdivisions, the charge over the suit property remained in existence and attached to the subdivisions as well. We agree that in this case the mother title could only have ceased to exist after all the Deed Plans had been registered and their titles effectively produced.

60. Regarding the application of the Registered *Land Act* to the sale, it is clear that there is no provision in the *Agricultural Finance Corporation Act* that excluded the application of the former to transactions undertaken under the latter. The preamble to the repealed Act stated that it was:

    > An Act of Parliament to make further and better provision for the registration of title to land, and for the regulation of dealings in land so registered, and for purposes connected therewith.

61. Unless there was expressly provided to the contrary under the *Agricultural Finance Corporation Act*, the Registered *Land Act* was the statute guiding dealings in lands registered under that Act including charges and realisation of securities where they were registered thereunder or under the *Agricultural Finance Corporation Act*.

62. We find no merit in these grounds of appeal.

63. Regarding ground 6 of the appeal, the appellant submitted that the public auction held at Mtwapa on 26th June 2009 was not advertised in any newspaper but only the auctions for 27th January 2009 and 11th June 2009 were advertised in the Standard Newspaper which never took place as advertised; that the failure to publish a re-advertisement notice in any newspaper 21 days prior to the auction is in direct breach of section 21(i) of the *Auctioneers Act* and rule 16 of the Auctioneers Rules relating to advertisement; that the learned Judge failed to frame an issue of whether the property sold at the auction had been properly advertised; that the charged property described as LR No. 544(Org. No. 482/3) Section III, MN is erroneous as it comprised of 44 subdivided parcels of land each having separate title numbers and 23 of the said subdivisions belonged to third parties and only 21 of the same were still registered in the appellant's name; that the description of the charged property was no longer 54.11 Hectares as it had reduced to approximately 22. 2 Hectares (being the aggregate acreage of 19 plots) whereas the measurement is erroneously given as 33. 206 Hectares hence the learned Judge erred in finding that it had not ceased to exist and that the difference in acreage given in the advertisement in January 2009 and one in June 2009 was a minor issue which could not alter the terms of the sale of property.

64. In response, it was submitted by the 1st respondent that it adhered to the provisions of section 21(1) of the *Auctioneers Act* and Rule 16 of the Auctioneers Rules; that the transactions on the suit property had not been completed and therefore it would not have been possible to close its register and open fresh ones; that a partial discharge depicts the existence of the mother title upon which all other discharge have to be registered and new titles issued to enable closure of the register; that the appellant's assertion that there was an error in the advertisement in terms of the acreage lacked any legal basis since it did not challenge and/or raise any issue regarding the value of the land, the valuation report and the description of the property therein or the reserve the price; and that the auctioneer, DW1's evidence on how he effected service upon the appellant's Managing Director, advertised the property in a newspaper of wide circulation and conducted the auction, was never challenged.

65. The 2nd respondent in this regard submitted that the information in the advertisement carried out by DW1 offered sufficient description of the property including the Land Reference No. 544 Section III Mainland North and of critical importance, the location of the property hence the public auction was lawfully held and was unchallenged by the appellant. The 4th, 5th, 6th, 11th, 13th and 14th respondents submitted that the public auction held on 26th June 2009 was properly advertised and since the appellant did not cross-examine the auctioneer DW1 who placed the advertisement on 13th June 2009, his evidence remained uncontroverted; that the learned Judge made a correct finding that the titles to the sub-divided numbers had not been issued as at the date of the sale by auction and as such the description of LR 544/III/MN still existed at the Land registry; and that the appellant admitted during the hearing of the case that the 1st Defendant had a charge over the resultant titles of the subdivision. On their part, the 8th, 9th, 10th 12th, 15th, 16th, 17th, 18th and 19th respondents submitted that the public auction conducted on 26th June 2009 was advertised in the Kenya Daily newspapers and the auctioneer's notices were duly served; and that the auction was lawful and went unchallenged.

66. As we have held hereinabove, as at the time of the auction not all the titles to the subdivisions had been issued. DW1 in his evidence detailed the steps he undertook in carrying out the auction sale. He stated that the advertisement disclosed the place, date and time of the auction and that he complied with the Auctioneers Rules. His evidence was never challenged as regards the service of the notices and the advertisement and as we have stated above, PW1 did not challenge the service of the notices either in his statement or in his evidence before the court. We find no basis to disagree with his evidence and this ground of appeal also fails.

67. As regards ground 7, the appellant submitted that the learned Judge did not take into consideration that when the 1st respondent transferred the two plots to itself and thereafter sold them to the 20th respondent, the 1st respondent applied for the Land Control consent, albeit after the conveyance had already been completed; and that the 1st respondent was at all times aware that it required to obtain the consent under the *Land Control Act*, in respect of all transactions and the only exemption was in respect of a mortgage in its favour.

68. The 1st respondent, in its submissions contended that the learned Judge correctly found that the 1st respondent was a government body entitled to enjoy the exemption provided under section 6(3)(b) of the *Land Control Act*; that the exercise of its statutory power of sale and the resultant transfer of land to the 2nd respondent was by operation of the law hence it would have been erroneous to nullify the resultant transaction on the basis of lack of consent under the *Land Control Act*; that it acquired plot No. LR No. 3447/III/M and LR No. 3463/III/MN in its name as contemplated under section 33(3) of the *Agricultural Finance Corporation Act*; that upon the final acquisition of the titles, the transaction shifted to a normal land disposition falling under the provisions of the *Land Control Act* hence the sole reason why consent was to be obtained for the transfer of plot No. LR No. 3447/III/MN and LR No. 3463/III/MN; and that there is no material on record to suggest that the consent obtained for the transfer of the two parcels was irregular.

69. The 2nd respondent's submissions were similar in substance to those of the 1st respondent who added that the 1st respondent sold the suit property to it in exercise of its statutory power of sale; that under the law, the appellant's equity of redemption was extinguished at the fall of the hammer at the public auction held on 26th June 2009 hence the 2nd respondent was clothed with the ownership of the suit property; that the suit property is located in Mtwapa Township which boasts of residential and commercial buildings including light industries like Coca Cola Bottlers Limited hence was not an agricultural property so as to bring it under the purview of the Land Control Board for the purposes of the consent; that the appellant did not prove on a balance of probabilities that the land is agricultural so as to require that the consent of the Land Control Consent Board be obtained; that on the basis of the evidence of DW1, it was not proved that the land purchased from the 2nd Defendant was agricultural land as it was located in Mtwapa Township and had residential buildings; that DW5 was unable to say with finality that the suit land was subject to Land Control Board consent; and that there was no need for the consent if the land fell within a municipality and it was sold via a public auction or through a court order.

70. The 4th, 5th, 6th, 11th, 13th and 14th respondents adopted similar position and added that the 2nd respondent bought the suit property from the 1st respondent via an auction hence the subsequent transactions between the 2nd respondent and the 4th to 19th respondents cannot and could not be affected by the consent or lack of it because it was subsequent to a sale by auction; that a chargor's equity of redemption is extinguished by mortgagee's exercise of power of sale and that if the appellant is aggrieved by the acts of the 1st respondent and auctioneer, then its remedy lies in damages; and that the trial court properly considered the issue of consent of the Land Control Board with regard to all the sales and transfers of the suit property to all of the respondents.

71. According to the 8th, 9th, 10th 12th, 15th, 16th, 17th, 18th and 19th respondents, it is now trite law that the *Land Control Act* should be construed with the alterations, adaptations and exceptions necessary to bring it into conformity with *the Constitution*, 2010; that Article 10(2)(b) of *the Constitution* has elevated the principles of equity as a distinct principle of justice and one that is a constitutional principle requiring the courts in exercising judicial authority to protect and promote the same; that this court has now held that the equitable doctrine of constructive trust and proprietary estoppel are

applicable to and supersede the *Land Control Act* where a transaction relating to an interest in land is void and unenforceable for lack of consent of Land Control Board.

72. In determining the above submissions, it is important to have a distinction between the transaction between the 1st respondent and the 2nd respondent and that between the 2nd respondent and the 4th to 19th respondents. The former was a transaction that arose from the 1st respondent's exercise of its statutory power of sale while the latter was a normal sale from a purchaser at an auction to third parties. Section 6 of the *Land Control Act* sets out the transaction that are void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act. However, section 6(3) (b) of the said Act provides that:

    This section does not apply to-

    (b). A transaction to which the Government or the settlement Fund Trustees or (in respect of Trust Land) a county council is a party.

73. In her judgement, the learned Judge held that:

> In light of the provisions of section 3(4) and 4(2) of the *Agricultural Finance Corporation Act* Cap 323 and case cited, I am persuaded to find that the 1st defendant is a government body and thus entitled to enjoy the exemption provided under section 6(3)(b) of the *Land Control Act*. This was corroborated by the evidence that as at the time of charging the property, no consent of Land Control Board was obtained."

74. From the evidence on record, it is true that at the time of charging the property, the consent of the Land Control Board was never obtained. The appellant must have been aware right from the point of charging the suit property that the consent of the Board was not required. Even if the consent of the Board was required in the subsequent disposal, the subdivisions apart from No. LR No. 3447/III/M and LR No. 3463/III/MN, were as a result of a public auction.

75. A sale by public auction where a chargor fails to repay the loan advanced to him is not a contractual sale. It is a transaction whereby the chargee exercises its statutory power of sale. In other words, it is a sale by the operation of law. The proviso to section 3 of the *Law of Contract Act* captures this when it states thus:

> provided that this section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creating of a resulting, implied or constructive trust."

76. Such a sale is complete at the fall of the hammer and as appreciated in the case of Mbuthia v Jimba Credit Finance Corporation and another [1986-1989] 1 EA 340 (CAK) where this Court held that:

> " This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act."

77. In the case of Captain Patrick *Kanyagia v Damaris Wangechi & Others, Civ. Appeal No. 150 of 1993*, this Court held that:

> It is clear therefore that Muchemi's equity of redemption came to an end when the Kanyagias signed the contract of sale and not later. However, it is not in dispute that even registration of the title of the suit property in favour of the Kanyagias has also been effected. Mr Ibrahim for the Kanyagias relied on the case of Mbuthia vs Jimba Credit Finance Corporation & another Civil Appeal No 111 of 1986 (unreported) to say that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale. Although Apaloo, JA (as he then was) differed with Platt, JA and Masime Ag JA (as they then were) in the end result, all three judges were ad idem on the issue as to the extinguishment of the equity of redemption upon the execution of a valid contract of sale in the exercise of statutory power of sale. That was and is the law when the land is held under Registered *Land Act* (cap 300), despite that Act (RLA) expressly applying English doctrines of equity per section 163 of RLA. As TPA expressly so provides, the answer to Mr Githu's question is clear. In my view, Muchemi's equity of redemption was extinguished when the contract for sale was signed on the date of auction sale."

78. The consent from the Land Control Board is normally obtained after the agreement for sale but before the transfer takes place. Ordinarily the parties to a contract of sale know each other before the sale is concluded. In an auction sale, the purchaser is only known at the fall of the hammer and at that point in time equity of redemption is extinguished by the execution of the contract for sale on the date of auction sale. The procedure under sale by public auction, in our view does not contemplate the issuance of the consent from the Land Control Board as a pre-condition for a valid transfer of land. Not being a contractual sale, we agree that the provisions of the *Land Control Act* that require that the consent of the Land Control Board be obtained were inapplicable to the transactions in question since as held by Madan, JA (as he then was) in Public Trustee v Wanduru Ndegwa [1984]eKLR:

> " The provisions of *Land Control Act* have no application to where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land."

79. Regarding the allegation that no consent was obtained respondents, we do not see how the appellant can challenge those subsequent transactions. Once the challenge to transfer by the 1st respondent to the 2nd respondent fails, the appellant cannot successfully challenge the transfers by the 2nd respondents to the other respondents. In any case there was no clear evidence that all those parcels were agricultural plots. There was evidence that some of the plots in question were in fact commercial and were within the Mtwapa Township area.

80. This ground also fails.

81. Grounds 8,9,10 and 11 in so far as the submissions are concerned, were on the same ground save that they were directed to the sale by the 2nd respondent to the 4th to 19th respondents. However, as held by this Court in Mwambeje Ranching Co. Ltd v Kenta National Capital Corporation [2019] eKLR:

> " Once a statutory power of sale is legally activated, any anomaly in the sale which prejudices the rights of the chargor is remediable with damages under section 99(4) of the *Land Act*."

82. Therefore, any person suffering damage by an irregular exercise of statutory power of sale has his remedy in damages only against the person exercising the power once the transfer by a charge is duly

exercised. See Marco Munuve Kieti v Official Received & Interim Liquidator Rural Urban Credit Finance & Another [2010] eKLR.

83. On ground 12 of the appeal, the appellant submitted that the learned Judge erred in not awarding the costs to the appellant upon striking out the 1st respondent's counterclaim without giving good reasons or justifiable explanations hence she failed to exercise her discretion judicially. According to the appellant, a vague reference to the history of the case fails to fulfil the judicial standard required in the exercise of judicial discretion. The appellant also opposed the notice of grounds affirming the decision.

84. According to the 1st respondent, the court had an absolute and unfettered discretion to award or not to award costs to the appellant hence its decision not to award costs to the appellant was in accordance with reason and justice. The 4th, 5th, 6th, 11th, 13th and 14th respondents took the view that the learned Judge was correct to order each party to bear its own costs and in any event, the counterclaim by the 1st respondent was only against the appellant and not the 4th, 5th, 6th, 11th, 13th, and 14th respondents hence they could not be ordered to pay costs to the appellant with respect thereto.

85. In her judgement, the learned Judge ordered each party to bear their respective costs of the suit, citing the history of the case. It is trite that costs follow the event but as this Court held in the case of *Supermarine Handling Services Ltd v Kenya Revenue Authority Civil Appeal No. 85 of 2006*:

> " Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."

86. Since neither the appellant nor the 1st respondent who filed the counterclaim could be said to have wholly succeeded in either the claim or the counterclaim, none of them could lay claim to the costs and we find no reason to fault the learned Judge as regards her exercise of discretion on costs.

87. Although the 21st respondent filed a Notice of Grounds Affirming decision of the superior court dated 12th May 2023, in light of what we stated above as regards the withdrawal of the appeal against the 20th respondent from whom the 21st respondent obtained his titles, the foundation of the appeal against the 21st respondent crumbled. The assertions by the 21st respondent of being an innocent purchaser without notice were therefore unassailable once the appeal against the 20th respondent was discontinued. In any case, the 21st respondent having joined the proceedings only for the purposes of protecting his own interest, no evidence was adduced against it. We wish to say no more on the Notice of Grounds Affirming decision.

88. Having considered the grounds of appeal that were urged before us, we find them unmerited and we dismiss the appeal but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

A.K. MURGOR

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR