



**Bii & another v Kenya Commercial Bank & 2 others (Civil Appeal 276 & 318 of 2018  
(Consolidated)) [2022] KECA 785 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 785 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 276 & 318 OF 2018 (CONSOLIDATED)  
MSA MAKHANDIA, P NYAMWEYA & JW LESSIT, JJA  
JULY 22, 2022**

**BETWEEN**

**ELIJAH KIPNG'ENO ARAP BII ..... APPELLANT**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MWEHIA GITAU ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
CIVIL APPEAL 318 OF 2018**

**BETWEEN**

**KENYA COMMERCIAL BANK ..... APPELLANT**

**AND**

**SAMUEL MWEHIA GITAU ..... 1<sup>ST</sup> RESPONDENT**

**ELIJAH KIPNG'ENO ARAP BII ..... 2<sup>ND</sup> RESPONDENT**

*(Appeals from the Judgment of the High Court of Kenya at Nairobi  
(Odunga J.) dated 12th May 2017 in HCCC no 882 of 2003)*

**JUDGMENT**

1. The two consolidated appeals herein, namely Civil Appeal No. 276 of 2018 and Nairobi Civil Appeal No. 318 of 2018, arise from the judgment and decree dated 12<sup>th</sup> May 2017 delivered by the High Court in Nairobi High Court Civil Case number 882 of 2003. The parties in the consolidated appeals are Elijah Kipng'eno Bii, (the Appellant in Civil Appeal No. 276 of 2018 and the 2<sup>nd</sup> Respondent in



Nairobi Civil Appeal No. 318 of 2018), Kenya Commercial Bank, (the Appellant in Civil Appeal No. 318 of 2018, and 1<sup>st</sup> Respondent in Nairobi Civil Appeal No. 318 of 2018), and Mr. Samuel Mwehia Gitau, (the 2<sup>nd</sup> and 1<sup>st</sup> Respondent respectively in Civil Appeal No. 276 of 2018 and Nairobi Civil Appeal No. 318 of 2018). For ease of reference, we shall in this judgment refer to Elijah Kipng'eno Bii as the 1<sup>st</sup> Appellant, Kenya Commercial Bank as the 2<sup>nd</sup> Appellant Bank, and Samuel Mwehia Gitau as the Respondent.

2. A brief background to the consolidated appeals, which have had a long sojourn in the courts, is as follows. The Respondent, who was the plaintiff in the suit filed in the High Court, sued the 1<sup>st</sup> Appellant claiming to have bought the property known as Land Reference No. 209/9854 Nairobi (hereinafter the suit premises) by private treaty from the 2<sup>nd</sup> Appellant upon exercise of the statutory power of sale. That upon paying the sum of Kshs 3,800,000/- for the suit premises in accordance with the terms of a sale agreement dated 20<sup>th</sup> February 2003 with the 2<sup>nd</sup> Appellant, a transfer dated 4<sup>th</sup> June 2003 was effected which transferred the rights and interests in the suit premises to the Respondent. The Respondent consequently entered upon the suit premises to take possession, but was denied entry by the 1<sup>st</sup> Appellant.
3. The Respondent therefore claimed that the 1<sup>st</sup> Appellant was in illegal and unlawful possession of the suit premises as a trespasser without his consent and authority. He sought orders against the 1<sup>st</sup> Appellant for vacant possession of the suit premises, damages for trespass until possession is delivered up; the sum of Kshs 2,890,000/- being loss and damages he suffered and which he particularised; and costs.
4. The Respondent testified during the trial in the High Court as PW1, and also called Hebert Mwangi Kamau (PW2), a registered valuer, as an additional witness in support of his case. The Respondent produced and referred to correspondence on his bid for the suit premises and its acceptance; the agreement for the sale of the suit premises; and the cheques and receipts evidencing his payment for the suit premises, which payment the Respondent testified was made through his firm of advocates, and as per the sale agreement. PW2 on his part testified that he was commissioned by the Respondent to undertake a valuation of the suit premises as at 28<sup>th</sup> February 2012, and found the open market value of the premises to be Kshs 32,500,000/= and the rental value from July 2003 to end of February 2012 to be Kshs 3,955,000/=. PW2 produced his valuation report as an exhibit.
5. The 1<sup>st</sup> Appellant on his part denied the Respondent's allegations in the defence he filed in the trial Court, and raised a counterclaim in which he joined and sued the 2<sup>nd</sup> Appellant as a defendant. The 1<sup>st</sup> Appellant contended that that no statutory notice was served on him, and that the 2<sup>nd</sup> Appellant unlawfully exercised its statutory power of sale in violation of their contract of credit. In any event, that there was no public auction conducted since the sale of the suit premises is purported to have been by way of a privately negotiated treaty which was fraudulently conducted and the Kshs 3.405 million offered was inordinately low as compared to a bank valuation report of Kshs 7.6 million in 1997 .
6. The 1<sup>st</sup> Appellant asserted that the subsequent transfer and registration of the suit property to the Respondent was fraudulent and illegal, and he was therefore not a trespasser and under no legal obligation to vacate the suit premises since the Respondent was not the rightful owner. The 1<sup>st</sup> Appellant consequently sought orders of a declaration that the said sale of the suit premises was null and void ab initio; special damages; general damages and costs against the 2<sup>nd</sup> Appellant and Respondent jointly and severally.
7. During the trial, the 1<sup>st</sup> Appellant testified as DW1, and called two additional witnesses, Prof. George Ngugi Njuguna (DW2) and Dr. Joseph Nathan Kipruto arap N'gok (DW3). The 1<sup>st</sup> Appellant



- testified that he was previously employed as the 2<sup>nd</sup> Appellant's General Manager, and challenged the termination of his employment by the said 2<sup>nd</sup> Appellant on the grounds that its Board of Directors was at the time not properly constituted, and that the decision by it to sell the suit premises was also made in violation of his credit agreement as he was up to-date in the repayment of his loan.
8. In addition, that he was not served with the 2-month statutory notice; that there were various versions of the sale of the suit premises which showed that the purchase price was Kshs 4.4 million and 3.45 million respectively, and not 3.8 million as alleged; that in 1997 the Bank had valued the suit premises at Kshs 7.6 million and another valuation five years later on 13<sup>th</sup> November 2002 at the time of the sale showed it to be valued at a lower value of Kshs 4.3 million, while the valuation by the Respondent in 2012 showed an appreciation in value to Kshs 32.5 million, which he agreed with. The gist of his evidence was that the sale of the suit premises was fraudulent and at an undervalue.
  9. DW2 testified that he was a registered and practising valuer, and a lecturer at the University of Nairobi, he confirmed having undertaken the valuation of the suit properties in 1997, and having valued the open market value of the same at Kshs 7.6 million, and produced the valuation report dated 23<sup>rd</sup> October 1997. According to DW2, the suit premises would have appreciated to a value of about Kshs 15 million in 2002, and confirmed that the valuation of Kshs 32 million in 2012 would be reasonable. Upon cross examination, DW2 conceded that his name was not included in the Gazette Notice of the registered valuers in 2007. DW3 on the other hand testified that he was an economist and lecturer at Jomo Kenyatta University of Agriculture and Technology and the gist of his evidence was that even though there was an economic downturn in 2000, the property prices remained high due to shortage of housing, and did not fall.
  10. The 2<sup>nd</sup> Appellant in its defence denied that it sold the suit premises fraudulently or that a public auction was held on 17<sup>th</sup> January 2003 or at all. The 2<sup>nd</sup> Appellant's case was that it regularly sold and transferred the said premises to the Respondent by private treaty in lawful exercise of its chargee's statutory power of sale, after the 1<sup>st</sup> Appellant charged the premises to it. It called two witnesses to testify on its behalf, namely, Dr. Clement Sironka Ole Keriasek (DW4), a practising valuer from the firm of Kenasek & Co Ltd; and Francis Komen (DW5), its recovery manager. DW4's evidence was that he received instructions from the 2<sup>nd</sup> Appellant to value the suit premises and assess its open market value in November 2002, and that after considering the effect of the Goldenberg scandal on property prices and that there was apathy as a result of pending elections, he assessed its value at Kshs 4.3 million. DW4 produced his evaluation report dated 13<sup>th</sup> November 2002 as evidence.
  11. DW5's testimony on the other hand was that the 1<sup>st</sup> Appellant had credit facilities with the 2<sup>nd</sup> Appellant which was secured by three charges on the suit premises, which was one of several properties provided by the 1<sup>st</sup> Appellant as security; that the 1<sup>st</sup> Appellant defaulted in payment of the facilities in January 1998 and the 2<sup>nd</sup> Appellant demanded payment and issued the requisite statutory notices on the address supplied by the 1<sup>st</sup> Appellant by registered post and by hand delivery; that there was a first public auction held on 21<sup>st</sup> August 2001 when the suit premises were not sold because the bidder did not raise the 25% deposit; and that the second public auction scheduled for 3<sup>rd</sup> December 2002 did not proceed because the 1<sup>st</sup> Appellant obtained an injunction from Court.
  12. DW5 testified further that the 2<sup>nd</sup> Appellant was thereafter advised to sell the suit premises by private treaty, which it did to the Respondent for the price of Kshs. 3.8 million after notifying the 1<sup>st</sup> Appellant's lawyers of the cancellation of the public auction, and while abiding by the valuation of the property which had market value of Kshs.4.3 million, forced value of Kshs.3.4 million and reserve price of Kshs. 3 million.



13. The High Court (Odunga J.), having heard the parties, made several findings in its judgment. Firstly, after setting out the legal definition of fraud and the requirements for its proof, the trial Court found that the sale of the suit premises was based on private treaty and was not on an auction sale, and that the 2<sup>nd</sup> Appellant was entitled to resort to the said sale under section 69(1) of the Transfer of Property Act 1882 of India after the public auction was stopped by a Court order. Secondly, that under the said sale agreement, the 2<sup>nd</sup> Appellant could extend the time for completion, and the failure to pay the purchase price within the time for completion particularly where there is such a provision cannot amount to fraud, and only amounted to an impropriety or irregularity in the exercise of the sale which did not necessarily nullify the sale.
14. Thirdly, that from the evidence the suit property was valued in 1997 at Kshs 7.6 million, and at Kshs. 32,500,000/= in 2012, and that the open market value should have been at least Kshs 7.6 million. There was thus an undervalue of the suit property and a misrepresentation by the 2<sup>nd</sup> Appellant on that score. Fourthly, that the 2<sup>nd</sup> Appellant exhibited evidence that the statutory notices were issued, and the 1<sup>st</sup> Appellant admitted that the address appearing on the face of the postage was his correct address, therefore the 2<sup>nd</sup> Appellant could not be faulted in the circumstances. Fifthly, the issue of variation of the credit contract was the subject of another case between the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, being HCCC No.324 of 2000, and declined to make any finding thereon as it would prejudice the outcome of the said suit. Sixthly and lastly, that it followed that the only recourse available to the 1<sup>st</sup> Appellant in the circumstances was a suit for damages and not possession of the suit property, and to that extent he was a trespasser.
15. The High Court therefore directed the 1<sup>st</sup> Appellant to give vacant possession of the suit premises to the Respondent, and to pay him damages of Kshs 155,000/=, and that the 2<sup>nd</sup> Appellant pays the 1<sup>st</sup> Appellant damages of Kshs 3,800,000/= since the property was sold at an undervalue. Lastly, no order was made as to costs.
16. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants being dissatisfied with the said judgment, lodged separate Memoranda of Appeal dated 6<sup>th</sup> of August 2018 and 30<sup>th</sup> August 2018 respectively in this Court. The 1<sup>st</sup> Appellant raised seventeen grounds of appeal challenging the findings of the High Court on the issuance of the statutory notice, the fraudulent sale of the suit property, the effects of the undervaluing of the suit premises, as well as on the payment of damages to the Respondent. The 2<sup>nd</sup> Appellant on its part raised nine grounds of appeal which all challenged the findings of the High Court on the undervaluing of the suit premises. The Respondent in turn filed a Notice of Grounds for Affirming the Decision of the High Court dated 11<sup>th</sup> August 2018.
17. As the consolidated appeals are first appeals from the judgment of the High Court of 12<sup>th</sup> May 2017, we reiterate this Court's role as expressed in *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, where it was stated that such an appeal is by way of retrial, and the applicable principles are that this Court must reconsider the evidence, evaluate it and draw its own conclusions of facts and law, 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 this regard we will only depart from the findings by the High Court if they are not based on the evidence on record;  
  
where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & another v Shah* [1968] E.A.
18. The consolidated appeals were urged by Mr. Sumba, learned counsel for the 1<sup>st</sup> Appellant; Ms. Gitahi who was holding brief for Mr. Charles Njagi, the learned counsel for the 2<sup>nd</sup> Appellant; and Mr. Ngugi,



learned counsel for the Respondent. Counsel for the 1<sup>st</sup> Appellant relied on two sets of submissions both dated 11<sup>th</sup> April 2019, while the counsel for the 2<sup>nd</sup> Appellant likewise filed two sets of submissions both dated 25<sup>th</sup> July 2019. The counsel for the Respondent relied on submissions dated 16<sup>th</sup> May 2019. The grounds urged by the respective counsel in this respect can be collapsed into three issues, namely, whether the sale of the suit premises to the Respondent was illegal, secondly whether the suit premises were sold at an undervalue, and lastly what remedies if any, are available to the 1<sup>st</sup> Appellant and Respondent.

19. The first issue of the legality of the sale of the suit premises was urged by the 1<sup>st</sup> Appellant's counsel along four limbs. First, that no statutory notice or notification of sale was served upon the 1<sup>st</sup> Appellant, and that this averment was never controverted by the 2<sup>nd</sup> Appellant through oral or documentary evidence. The 1<sup>st</sup> Appellant's counsel analysed the registered envelope and letter dated 20<sup>th</sup> November 2001 that was produced by the 2<sup>nd</sup> Appellant as evidence of issue of the statutory notice, and submitted that there were many dates stamped thereon, and there was no explanation as to which of the said dates the letter was sent. In addition, that there were "return to sender" handwritten thereon, which suggested that the registered letter was never delivered to the 1<sup>st</sup> Appellant. Therefore, that in the circumstances the burden of proof shifted to the 2<sup>nd</sup> Appellant to clarify the irreconcilable omissions on the face of the alleged registered letter. Reliance was placed on the decision by this Court in Nyangilo Ochieng vs Fanuel B. Ochieng & 2 Others, Kisumu Civil Appeal No 148 of 1995 on compliance with the requirements that were set out in section 74 (1) of Registered Land Act (since repealed) on the exercise of the statutory power of sale, and the burden of the chargee to prove that a notice was sent, once a chargor alleges non receipt.
20. Second, that the 45-day mandatory notification of sale was not served on the 1<sup>st</sup> Appellant, and no evidence of a delivery book or certificate of posting of the notification of sale dated 31<sup>st</sup> October 2002 was produced, with the 1<sup>st</sup> Appellant's counsel contending that the auctioneer's affidavit of service produced in evidence showed that a stranger in the name of the 1<sup>st</sup> Appellant's wife was instead served. Third, that the 2<sup>nd</sup> Appellant's power of sale arose after the 90-day statutory period, which began to run upon delivery of the said notice, yet the auction was supposedly slated for 7<sup>th</sup> January 2003, payments forwarded on 11<sup>th</sup> February 2003, and the sale agreement entered into on 20<sup>th</sup> February 2003, which were all before the lapse of the said 90 days, even if it were to be assumed that the statutory notice was issued and served on 20<sup>th</sup> November 2002.
21. The third limb was that the purchase price of the suit premises was fraudulently predetermined and the purported public auction of 17<sup>th</sup> January 2003 which was cancelled in favour of the sale by private treaty, and various versions of the sale of the suit premises were aimed at manipulating the purchase price downwards and the sale in favour of the Respondent. The 1<sup>st</sup> Appellant in this respect submitted that the evidence of fraudulent dealings was that firstly, a payment of Kshs 1,128,971.15 was made by the Respondent on 17<sup>th</sup> January 2003 as part of the purchase price before the auction and sale by private treaty had taken place, that a cheque for another sum of Kshs 1,128,971.15 was again sent by the Respondent on 6<sup>th</sup> February 2003 to his advocates as payment of part of the 25% deposit of the purchase price; secondly, that there were 3 different purchase prices, one of Kshs 3,800,000 as per the sale agreement dated 20<sup>th</sup> February 2003, one of Kshs 3,405,000.00 as per the transfer documents by the 2<sup>nd</sup> Appellant to the Respondent, and one of Kshs. 4,515,884.00 which the 1<sup>st</sup> Appellant worked out from the payment of a 25% deposit of Kshs. 1,128,971.15.
22. Lastly, that there were two versions of the sale, one on 17<sup>th</sup> January 2003 by public auction to the Respondent as highest bidder, and thereafter by a privately negotiated treaty, which was alleged to be a fraud between the 2<sup>nd</sup> Appellant and Respondent to effect a transfer in the Respondent's favour for a



- price lower than the previous bid, and as there was no evidence of any court order in existence stopping the public auction. In addition, that the terms of the sale agreement dated 20<sup>th</sup> February 2003 was that the balance of the purchase price ought to have been completed within 90 days by 20<sup>th</sup> May 2003, but the Respondent was still remitting part of the purchase price by a letter dated 14<sup>th</sup> July 2003. The Appellant in this regard faulted the learned Judge's definition of fraud and in particular the distinction made between fraud and actual fraud, as well as the Judge's findings on fraud which it was submitted did not consider the 1<sup>st</sup> Appellant's particulars of fraud.
23. The 2<sup>nd</sup> Appellant's counsel on his part submitted that it produced a certificate of posting as proof of service of the statutory notice, and the 1<sup>st</sup> Appellant did not deny that the address used for posting was not his address. Therefore, that the burden shifted to the 1<sup>st</sup> Appellant to prove non- receipt of the notice as held in *Nyangilo Ochieng and Obel Obuom vs Fanuel B. Ochieng & 2 others* (supra), which burden was not discharged. In addition, that service of the auctioneer's notification of sale is not required in a sale by way of private treaty. The decisions of this Court in *Nancy Kahoya Amadiva v Expert Credit limited & another* [2015] eKLR and *Captain Patrick Kanyagia & another v Damaris Wangechi & 2 others* (1993) eKLR were cited for the submission that in the event the notices were not served, the proper remedy is damages against the person exercising the statutory power of sale.
24. The counsel further denied that the 2<sup>nd</sup> Appellant exercised its power of sale before the lapse of the statutory 90 days, and submitted that contrary to the 1<sup>st</sup> Appellant's submissions, he was served with the statutory notice on 20<sup>th</sup> November 2001 and not 20<sup>th</sup> November 2002 as alleged, which was well over a year before the sale of the suit premises on 20<sup>th</sup> February 2003. Therefore, that the 2<sup>nd</sup> Appellant was within time, and the Appellant had adequate time to respond to the statutory notice and exercise his equitable right of redemption. The counsel reiterated that there was only one version of the sale of the suit premises, which was by private treaty after the public auction was cancelled. Further, that that the public auction was stopped after the 2<sup>nd</sup> Appellant received a letter from its advocate advising for its cancellation for reason that the notification of the sale was not properly served on the 1<sup>st</sup> Appellant, which cancellation was communicated to the 1<sup>st</sup> Appellant's advocate. Furthermore, that the advertisement of a sale by public auction did not deprive the 2<sup>nd</sup> Appellant of its powers under section 69 of the Transfer of Property Act to sell the charged property by private treaty as was held in *Nancy Kaboya Amadiva v Expert Credit Limited & another* (supra) and the case of *Francis Mogaka Maranya v National Bank Kenya Limited* [1997] eKLR.
25. In addition, that the trial Judge did not create any new distinction of "actual fraud" as the same is defined in the Black's Law Dictionary and acknowledged in section 75 of the Registration of Titles Act, and after taking into consideration the particulars of fraud pleaded, did not find the same proved by the 1<sup>st</sup> Appellant to the required standard, which is above a mere balance of probabilities, as held in the case of *Central Bank of Kenya Ltd v Trust Bank Limited & 4 others*, [1996] eKLR; *Urmilla w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR and *Bruce Joseph Bockle v Coquero Limited* [2014] eKLR. Further that the issue as to whether the purchase price of the suit premises was predetermined and was fraudulently manipulated was not raised in the trial Court nor specifically pleaded, and no evidence was consequently adduced on it. The decision in *Mbuthia v Jimba Credit Finance Corporation & another* [1998] eKLR was cited for the submission that the purchase price could be made outside the completion date pursuant to clause 8 of the sale agreement, and was not proof of fraud. Lastly, it was submitted that even if fraud was proved, the Respondent's title if without notice of the fraud was impeachable. The decision by this Court and the Supreme Court of Kenya in *Charles Karathe Kiare & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 3 others* [2013] eKLR and *Charles Karathe Kiare & 2 others v Administrator of the Estate of John Wallace Mathare (Deceased) & 3 others* [2015] eKLR were cited in this regard.



26. The Respondent’s counsel echoed the submissions made by the counsel for the 2<sup>nd</sup> Appellant on service of the statutory notice, the allegations and findings on fraud by the trial Judge, and the option to sell the suit premises by private treaty. The Respondent’s counsel in addition submitted that the 1<sup>st</sup> Appellant did testify as to the lapse in checking his mail for the statutory notice, and did not subject the sale agreement to any test of fraud, and not being a party to the agreement whose compliance was confirmed by the parties thereto, the sale of the suit premises was accordingly valid.
27. In this respect, it is notable from the evidence produced by the Appellants that the suit premises were registered under the Registration of Titles Act (since repealed), and the provisions of the Indian Transfer of Property Act of 1882 (also since repealed and hereinafter “the ITPA”) was the applicable substantive law with regard to transactions involving the suit premises, since the *Land Act* (No 6 of 2012) that currently applies came into effect on 2nd May, 2012 after the impugned sale. The provisions of section 69 of the ITPA provided that the mortgagee’s power to sell the mortgaged property without the intervention of the Court arose when the mortgage-money became due, when either the day fixed for repayment thereof, or part thereof by the mortgage instrument had passed, or some event occurred which according to the terms of the mortgage instrument rendered the mortgage- money, or part thereof, immediately due and payable. Before the mortgagee could exercise the power of sale, section 69A of the ITPA required the following actions to be undertaken,
- a. notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or
  - b. some interest under the mortgage is in arrears and unpaid for two months after becoming due; or
  - c. there has been a breach of some provision contained in the mortgage instrument or in the Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.
28. The first requirement to be met under the section for a statutory notice of sale to be valid was that the mortgagor was to be given at least 90 days before the sale to make good the payments, and if this was not done a mortgagor’s right of redemption would be violated where the property was sold before the 90 days following the notice. This position and the rationale thereof was explained by this Court in *Trust Bank Limited v Eros Chemists Limited* [2000] eKLR as follows:
- ....it appears to us that the only reason why it was held that the three months’ period stipulated in Section 69(A)(1) of the Transfer of Property Act need not be specifically referred to in the notice to sell is because this is not so stated in the statute. The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months period is to consider what the object of a notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor’s equity of redemption would be extinguished. This would be
- a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months’ period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months’ period. To omit to say so or to state a period of less than three months for sale (as in the Russell case) is to deny the mortgagor a right conferred upon him by statute. That



clearly must render the notice invalid. In our judgment, with respect, there is a mandatory requirement that a statutory right to sell will not arise unless and until three months' notice is given. We consider that the provision as to the length of the notice is a positive and obligatory one; failing obedience to it a notice is not valid."

29. It is necessary to clarify at the outset the dates of the statutory notice and of the sale, as different dates were urged by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants in this respect. It is notable that the 1<sup>st</sup> Appellant produced a letter dated 20<sup>th</sup> November 2001 which contained the statutory notice at pages 57 and 58 of its Record of Appeal lodged in this Court on 10<sup>th</sup> August 2018 and at pages 1-2 of its Supplementary Record of Appeal lodged on 5<sup>th</sup> April 2019. The same notice was produced as evidence by the 2<sup>nd</sup> Appellant and can be found at pages 73 and 74 of its record of appeal. There was no evidence of any statutory notice of sale dated 20<sup>th</sup> November 2002 as alleged by the 1<sup>st</sup> Appellant in his arguments, that was produced by any of the parties. Likewise, the sale agreement with respect to the suit premises entered into between the 2<sup>nd</sup> Appellant and Respondent that was produced by all the parties was dated 20<sup>th</sup> February 2003.
30. The notice dated 20<sup>th</sup> November 2002 required the 1<sup>st</sup> Appellant to remit the amount demanded therein before the expiry of three months, and gave notice that the 2<sup>nd</sup> Appellant would be entitled to sell the suit premises upon default on expiry of the said period. The 1<sup>st</sup> Appellant did not bring any evidence of compliance with the statutory notice after its issue on 20<sup>th</sup> November 2001, and it is thus our finding that the statutory notice was not only valid, and but that the sale took place over 90 days after the date of the statutory notice. It is also notable that Mr. Sumba informed the Court that he was abandoning this ground of appeal during the hearing.
31. The second requirement is that of service of the statutory notice, and we note in this regard that section 69A of the ITPA did not specify the manner of service of the statutory notice. However, clause 7(k) of the Charge dated 18<sup>th</sup> April 1986 entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and produced by the 2<sup>nd</sup> Appellant at page 380 of the 2<sup>nd</sup> Appellant's Record of Appeal lodged in this Court on 31<sup>st</sup> August 2018 provided as follows in this regard:

"That any notice required or authorized by law or by this charge to be served by the lender on the charger shall be sufficiently served if it be sent by post in a stamped envelope addressed to the chargor at the last known postal addresses in Kenya or if it be delivered to the place of abode or business of the chargor or posted on the charged property AND THAT proof of posting shall be proof of service."

32. This Court in *Nyagilo Ochieng & another v Fanuel Ochieng & 2 others*, (*supra*) while dealing with similar provisions of service that were found in section 74(1) of the repealed Registered [Land Act](#), held that:

"Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-



receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya...”

33. In the present appeal, the service of the statutory notices was contested by the 1<sup>st</sup> Appellant who claimed that the envelopes produced by the 2<sup>nd</sup> Appellant in evidence as proof of service showed that the statutory notices were returned back to the sender and were therefore not received. With respect, the 2<sup>nd</sup> Appellant having produced evidence of postage of the statutory notice by registered post, it was incumbent upon the 1<sup>st</sup> Appellant to demonstrate that the address used was not the proper address as availed, which he failed to do, and on the contrary admitted that the said address was his and that he had not checked the mail therein for sometime, and also given that the address used by the 2<sup>nd</sup> Appellant was the address in the charge documents the 1<sup>st</sup> Appellant executed with it. We therefore find that the 2<sup>nd</sup> Appellant discharged its burden of proof of service of the statutory notice on the 1<sup>st</sup> Appellant.
34. The 1<sup>st</sup> Appellant also challenged the statutory sale on the ground that there was no 45-day mandatory notification of sale. The 1<sup>st</sup> Appellant in this respect referred to the notification of sale dated 1<sup>st</sup> October 2002 and certificate dated 14<sup>th</sup> November 2002 issued under section 15(c) of the Auctioneers Rules, that he claimed were not served on him. In this regard it is notable that the requirement for an auctioneer to give forty-five days’ notice of the sale was provided for under the Auctioneers Rules, when a sale was by way of public auction. The contention by the 2<sup>nd</sup> Appellant that the sale was by way of private treaty and not by public auction was not controverted by the 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant in this respect produced evidence of the sale agreement dated 20<sup>th</sup> February 2003 evidencing sale by private treaty. The 1<sup>st</sup> Appellant in this respect relied on the different amounts of the purchase price in the said sale agreement and in the transfer by chargee dated 4<sup>th</sup> June 2003 as evidence of different versions of sale. It is notable in this respect that the reference to Kshs 3,405,000.00 in the transfer by chargee was with respect to the amount charged, and the legal nature and purpose of the two instruments was different.
35. Section 69C of the ITPA provided on the application of the proceeds of a statutory sale as follows:
- “69C. The money which is received by a mortgagee, arising from a sale by him under the mortgagee’s statutory power of sale, after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into Court of a sum to meet any prior encumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof”
36. Therefore, it is not always the case that the purchase price in a sale agreement should be the amount reflected in a transfer by chargee, as there are other costs of the sale that a chargee is required to meet, before discharging the amount charged. It is also notable that any balance ought to be paid to the chargor. Reliance was also placed on a purported sale at the price of Kshs 4,515,884.00, as evidenced by letters dated 7<sup>th</sup> January 2003 and 6<sup>th</sup> February 2003 respectively exchanged between the Respondent and his lawyers. It is notable that the two letters only evidenced receipt of deposit paid by the Respondent of Kshs 1,128,971.15, with respect to the suit premises. Lastly, the 1<sup>st</sup> Appellant did not dispute that a public auction that was scheduled for 17<sup>th</sup> January 2003 that was cancelled, and indeed provided evidence of notification of the said public auction dated 31<sup>st</sup> October 2002 by Garam Auctioneers.



37. In addition, unlike the position in the repealed Registered *Land Act* that the statutory sale was to be undertaken by public auction, there was no such requirement under section 69A of the ITPA, which specifically stated that the chargee had the power “to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; This position was also acknowledged by this Court in *Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others* [2020] e KLR as follows:

“In this case, the sale was by private treaty. There was evidence on record to the effect that the suit property had been advertised twice to proceed by way of public auction but the bidders never met the reserve price, the highest offer having been 5.7 million. In our view, there was nothing sinister therefore with the Bank proceeding by way of private treaty. The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the *Amadiva* case (*supra*), if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed. In any event, even if the Court was minded to cancel the 3rd respondent’s Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st respondent who had not cleared the loan with the Bank.”

38. On the last limb urged of the sale being fraudulent, it is trite that where fraud is alleged, it must be specifically pleaded, and it is not enough to deduce it from the facts. In *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR Tunoi JA (as he then was) pronounced himself as follows in this regard:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

39. The standard of proof of an allegation of fraud is above balance of probabilities, and the onus is on the party alleging fraud to provide evidence and prove its case to the required standard as held by this Court in *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* (*supra*). To this extent, the trial Judge did not err in finding the requirements for proving fraud as follows:

174. Therefore to defeat the registered interest of the Plaintiff in the suit land, the Defendant must show that the registration of the title to the suit land in the name of the Plaintiff was as a result of a fraud or misrepresentation to which the Plaintiff was a party. My view is supported by the holding in *Jandu v Kirpal & another* [1975] EA 225), at pg. 231 in which the elements of fraud are outlined as a proven knowledge, the existence of an unregistered interest and knowingly and wrongfully defeats. I also agree with the learned view of the author of *Black’s Law Dictionary* 1990 who defines fraud as:

“An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right; a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so



that he shall act upon it to his legal injury; anything calculated to deceive, whether by a single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture; fraud comprises all acts, omissions, and concealments involving a branch of legal or equitable duty and resulting in damage to another.”

175. It is however clear that where actual fraud is proved the Court has the power to nullify a sale. This must be so because section 75 of the RTA that preserves the court’s jurisdiction for cases of ‘actual fraud’ by providing that: Nothing contained in this Act shall take away or affect the jurisdiction of the court on the ground of actual fraud”
40. We have already found that the 1<sup>st</sup> Appellant did not bring sufficient evidence of different versions of sales of the suit premises or of the sale prices. The 1st Appellant appeared to place heavy reliance on the correspondence between the Respondent and his advocates on payment of the deposit of the purchase price before and after the public auction as evidence of manipulation of the purchase price. It is not clear to us how correspondence between an advocate and its client during negotiations of a sale can amount to manipulation, particularly in the absence of any participation by the 2<sup>nd</sup> Appellant, which was the mortgagee and seller of the suit premises. The Respondent’s letter dated 23rd January 2003 addressed to the auctioneers enhancing his bid for the suit premises to Kshs 3.800,000.00 is also cited as evidence of fraudulent manipulation of the purchase price, and we are again at pains to appreciate how an offer of a higher bid can be fraudulent. We therefore find that the 1<sup>st</sup> Appellant did not prove any fraudulent conduct on the part of the Respondent. We shall deal with the question of whether there was an undervaluing of the suit property by the 2<sup>nd</sup> Appellant, and if so whether it was fraudulent, in our determination of the next issue.
41. On the second issue as to whether there was an undervaluing of the suit premises, counsel for the 2<sup>nd</sup> Appellant urged its position that the suit premises was at the time of the sale sold at the best possible price and was not undervalued along three limbs. Firstly, that the trial Judge failed to consider the submissions filed by the 2<sup>nd</sup> Appellant on the valuation of the suit premises, which was in violation of its right to a fair hearing pursuant to Article 25 (c) and 50 of *the Constitution* of Kenya, and cited the cases of Lenny Maxwell Kivuti v Independent Electoral and Boundaries Commission (IEBC) & 3 others [2019] eKLR and Timothy Alvin Kahoho vs The Secretary General of the East African Community, Civil Appeal No. 2 of 2013 for the propositions that since submissions are intended to solidify or controvert claims they should be considered by the trial Court, and ignoring a party’s arguments is fatal to the exercise of discretion and a fair hearing and trial.
42. Secondly, that it is trite law that land need not be sold at the market value as long as it is above the reserved price and forced sale price as was provided by section 77 of the Registered *Land Act* which was the operating statute at the time, and that the trial Judge erred in assessing the damages by using the Court’s derived market value of Kshs 7.600,000.00. Further, that the trial Court in arriving at the said market value, erred in not considering the principle that it is prudent to sell land based on a current valuation, and instead took into account the valuation report done in 1997 by Prof. George Njuguna Ngugi, while invalidating the valuation report by Dr. ole Keriasek, that was commissioned by the 2<sup>nd</sup> Appellant just before the sale of the suit premises in 2003. In addition, that the trial Court disregarded jurisprudence to the effect that where the true market value cannot be ascertained from the valuation report, it can be ascertained from bids at a public auction as held in Mbutia v Jimba Credit Finance Corporation & Another, Civil Appeal No 111 of 1986 .
43. Thirdly, the reliance on the expert opinion of Prof. George Njuguna Ngugi by the trial Court was faulted on various grounds, being that there was no evidence of instructions given to the expert by the



2<sup>nd</sup> Appellant; the opinion was based on an evaluation report the Court had found inadmissible; the report was prepared in 1997 yet the credit facilities were advanced to the 1<sup>st</sup> Appellant in 1986, 1990 and 1991, and the sale took place in 2003; and it did not indicate the comparable factors or reserve and forced sale value. Reliance was placed on the decision in *David Musyimi Ndeti t/a Oasis Mineral Water Company & another vs Safepak Ltd* [2005] eKLR for the proposition that if the opinion of an expert is in conflict with other evidence and is not soundly based, the court is not only entitled but under duty to reject it.

44. In response, the 1<sup>st</sup> Appellant's counsel submitted that it was not in dispute that the valuation of the suit property by Prof. George Njuguna Ngugi in 1997 of Kshs 7,600,000.00 was confirmed by the 2<sup>nd</sup> Appellant in letters dated 21<sup>st</sup> January 1998 and its memo dated 18<sup>th</sup> March 1998, yet at the sale six years later in 2003 the property was valued at half that value at Kshs 3,800,000.00 instead of appreciating. In addition, that the 2<sup>nd</sup> Appellant did not produce any other valuation of the suit property at the time of advancing the 1<sup>st</sup> Appellant the subject loan. The counsel submitted that the gross undervalue of the suit premises was indicative of fraud. According to the counsel, the valuation report by Keriasek & Co. Ltd used the wrong number of rooms of the suit property, never annexed any qualification certificates and relied on third parties, and the considerations testified to by Dr. ole Keriasek as depreciating the value of the property were not captured in the said report. On the other hand, that Prof. George Njuguna Ngugi's professional qualifications were annexed, and that the registrar who gazettes valuers confirmed in a letter dated 23<sup>rd</sup> October 2014 that Prof. Ngugi's practising certificate was issued to him on 14<sup>th</sup> May 1997.
45. We find it prudent to start with an examination of the operating law at the time as regards the mortgagee's duty in relation to the value of the charged land during the exercise of a power of sale. We note that the 2<sup>nd</sup> Appellant referred to section 77 of the repealed Registered *Land Act* on the duty on the part of a chargee to act in good faith and have regard to the interests of the charger when exercising his power of sale, and that the sale was to be subject to such reserve price set. However, the repealed Registered *Land Act* did not apply to the suit premises, and the applicable law was the ITPA which did not have similar provisions. The mortgagee's duty to act in good faith was however required by the equitable principle that a mortgagee is required to exercise reasonable care to obtain the best possible price when realizing a mortgaged property which the circumstances of the case permit, as held in the English case of *Standard Chartered Bank v Walker* [1982]3 All ER 938.
46. This duty of the mortgagee in equity is explained by Kevin Gray and Susan Francis Gray in *Elements of Land Law*, 5<sup>th</sup> Edition at page 785 as follows:

“There has been much difference of opinion as to the proper balance to be maintained between the respective interests of the mortgagor and mortgagee. Assessed purely in terms of immediate financial self-interest, the mortgagee's only concern in sale is to obtain with speed and efficiency a sufficient price to cover the amount of the outstanding loan, interest and costs. However, a sale which satisfied only this minimum purpose would almost inevitably inflict grave prejudice on the mortgagor, since any sale at an undervalue erodes the effective value of his equity of redemption. A sale price which is adequate to meet only the costs of the sale and outstanding mortgage money leaves no surplus at all for the mortgagor. The ambiguity of the mortgagee's position was for a long time reflected in the divergent and sometimes inconsistent criteria applied by the courts in determining the propriety of a mortgagee's exercise of his power of sale. It now seems clear, however, that the conduct of the selling mortgagee is to be judged with reference to two criteria, one subjective in nature and the other objective. The mortgagee must always act in good faith; he must also discharge



a duty of reasonable care towards his mortgagor. The mortgagor has a valid ground for complaint if either of this criteria has not been met.”

47. The question as to whether the 2<sup>nd</sup> Appellant acted in good faith and exercised reasonable care in this regard hinges on its action of reliance on the valuation report undertaken by Dr. ole Keriasek in 2004 that valued the suit premises at Kshs 3,400,000.00 and reasons therefor. When presented with the said valuation reports by Prof George Njuguna of 1997 and by Dr. ole Keriasek of 2004, the High Court relied on the valuation report by Prof. George Njuguna undertaken in 1997 that valued the suit premises at Kenya shillings 7.600,000.00 and found as follows in this regard:

“From the record it is clear that though Professor George Njuguna Ngugi had not been issued with the practising certificate for the relevant year, his name had been restored to the register and he was therefore entitled to use the title “Registered valuer”. He could therefore competently give an opinion based on his experience though he could not practice as a valuer and despite the inadmissibility of his valuation report. As to who actually instructed him, it is not in doubt that he was instructed by the Defendant who averred that he was doing so on behalf of the Bank. That he was the General Manager of the Bank is not in doubt. It has not been contended that he was not authorised to give such instructions. Whereas eyebrows may be raised on the propriety of the borrower instructing a valuer to undertake a valuation of his property, the Bank has not produced any other valuation report commissioned on its behalf on the basis of which it advanced the subject facilities to the Defendant. In the absence of any other valuation report, this Court has no option but to rely on the testimony of Professor George Njuguna Ngugi based on the Bank’s commission.

48. On the valuation by Dr. ole Kesiarek, the High Court observed as follows:

192. However in the year 2002 Dr Clement Sironka Ole Keriasek found that the value of the property had depreciated to Kshs.4.3 million. Although this depreciation was contributed to the fact that the year was an election year and also due to the Goldenberg scandal, none of these explanations, which in my view were crucial, considering the fact that the depreciation was unusual, were never mentioned in the report of Dr Keriasek....

193. Dr Keriasek did not get access to the suit property. He relied on evidence of third parties and based thereon made some erroneous assumptions of fact such as that the suit property is a three (3) bedroomed house when the truth of the matter was that the house is four (4) bedroomed as confirmed by Prof. George Njuguna Ngugi of Grassroots Valuers and Mr. Herbert Mwangi Kamau of R.R. Oswald. With due respect to Dr Keriasek, I find his valuation report though admissible, unreliable.”

49. We agree with the High Court’s findings for three reasons. Firstly, the 2<sup>nd</sup> Appellant sought to discredit the valuation of the suit premises undertaken in 1997 on account of the fact that Prof. George Ngugi Njuguna did not have an annual practicing certificate for that year. It is notable in this regard that the 1<sup>st</sup> Appellant tendered evidence that the 2<sup>nd</sup> Appellant Bank did acknowledge that the advances made to him were secured by a legal charge over the suit premises which were valued at 7.600,000.00, particularly in the letter dated 21<sup>st</sup> January 1998 written by an officer of the 2<sup>nd</sup> Appellant to the 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant, having relied on the said valuation report to the detriment of the 1<sup>st</sup> Appellant, is thereby estopped from contesting the qualifications of Prof. George Ngugi Njuguna at the time.

50. Secondly, an expert is defined in Blacks Law Dictionary Tenth Edition at page 699 as “someone who, through education or experience has developed skill or knowledge in a particular subject, so that he



or she may form an opinion that will assist the fact finder”. Expert evidence is defined at page 675 as “evidence about a scientific, technical professional or other specialised issue given by a person qualified to testify because of familiarity with the subject or special training in the field.” Prof. George Ngugi Njuguna in his evidence detailed his educational qualifications, namely a Bachelor’s degree in Land Economics, and Masters degree and doctorate degree in Urban and Regional Planning, membership of professional associations and experience in conducting valuations. The lack of a current practicing certificate if any, in our view did not make his valuation report of 1997 inadmissible or unreliable as he demonstrated his expertise. The High Court therefore did not err in relying on the said valuation report.

51. Thirdly and lastly, we also find that valid reasons were given by the High Court as regards the unreliability of the valuation report by Dr. ole Kesiarek. This Court in *Criticos v National Bank of Kenya Limited* (as the successor in Business to Kenya National Capital Corporation Limited “KENYAC”) & another (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (Civ) held as follows with respect to conflicting expert opinions:

“As properly held in *Stephen Kinini Wang’ondu* (supra), expert evidence can only be challenged by another expert. We also associate ourselves with the criteria for assessing an expert’s evidence as outlined in the same decision, rehashed herein below for emphasis.

“A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another* [*Same v Bird and others* [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.”

52. It is notable that the technical principles applied by Prof Njuguna in his report were not contested by the 2<sup>nd</sup> Appellant. On the other hand, various shortcomings were noted by the High Court in the valuation report by Dr. ole Kesiarek namely, that there were no reasons advanced in the report by this witness for the depreciation in value, and there were also mistakes as regards the description of the suit premises. We note that indeed there was a detailed description of the suit premises and its condition in the evaluation report by Prof Ngugi Njuguna, including of the measurements of the various rooms in the buildings and of the amenities therein , which details were lacking in the report by Dr. ole Kesiarek, and which was material in an assessment of the true market value of the suit premises. In the circumstances we do not find fault in the High Court’s observations, and also find that the 2<sup>nd</sup> Appellant did not exercise reasonable care in obtaining the best possible price for the suit premises resulting in an undervalue.

Other than the under valuation, we note that the 1<sup>st</sup> Appellant did not produce evidence of any collusion between the 2<sup>nd</sup> Appellant and Respondent to lead to a finding of lack of good faith and fraudulent dealing on their part.

53. With regard to the last issue of the remedies, if any, that are merited, both the 1<sup>st</sup> Appellant and Respondent sought possession of the suit premises, special damages and general damages. The 1<sup>st</sup> Appellant submitted that having found that the suit premises were sold at an undervalue, the High Court ought to have nullified the sale for being tainted with fraud as the 2<sup>nd</sup> Appellant did not act in good faith. Reliance was placed on the decision of this Court in *Mbuthia vs Jimba Credit Finance Corporation*, (supra) that the mortgagee is bound to act in good faith and have regard to the best



interest of the mortgager, and a court is entitled to set aside and nullify the sale of an auctioned property if the price is so low as to be in itself evidence of fraud. Further, that the trial judge found that the 1<sup>st</sup> Appellant did not delay in prosecuting the suit due to the pendency of his appeal in the Court of Appeal, and since the suit premises were not complete and had no tenant, the award of mesne profits for the loss of rental income to the Respondent was misplaced.

54. The 2<sup>nd</sup> Appellant's position was that the 1<sup>st</sup> Appellant was a trespasser having refused to give vacant possession of the suit premises to the Respondent who was registered owner, and that the trial Judge rightly awarded damages for trespass in the form of mesne profits, which was proved by expert evidence. Reliance was placed on the decision to this effect in *Kenya Hotel Properties Limited vs Willesden Investment Limited* [2009] eKLR. In addition, that the trial Court erred in awarding the 1<sup>st</sup> Appellant Kshs 3,000,000.00 after finding that the suit premises were undervalued, even though it was not specifically pleaded or counterclaimed by the 1<sup>st</sup> Appellant, and reliance was placed in this regard on the case of *Eastlands Theaters Limited & 2 others v Kenya National Capital Corporation Limited* [2018] eKLR. Further, that in the event this Court finds that the suit premises were not sold at an undervalue, the decision that the 2<sup>nd</sup> Appellant should pay the 1<sup>st</sup> Appellant damages of Kshs 3,800,000.00 should be reversed, and the Respondent should instead be paid damages of Kshs 3,955,000/ as opposed to Kshs 155,000/=.

55. The Respondent's counsel on his part supported the holding by the Court that even though the suit premises were undervalued, this was not a ground to nullify the sale of the said premises, and cited the decision in *Nancy Kahoya Amadiva vs Expert Credit Limited & Another* (supra) for the proposition that a purchaser can only lose the protection afforded by section 69B of the ITPA if it is proved he had notice of the irregularity, and that the 1<sup>st</sup> Appellant failed to adduce any evidence that the 2<sup>nd</sup> Respondent had any notice of any undervaluation of the suit premises or irregularity in its sale.

The Respondent's position was that the proper remedy in such circumstances is an award of damages as held in the case of *David Ngugi Mbuthia v Kenya Commercial Bank & another*, HCCC No 304 of 2001, which damages were awarded by the trial Court.

56. This Court addressing the issue of remedies in the case of *Nancy Kahoya Amadiva vs Expert Credit Limited and Another* (supra) held that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. Likewise, in *Captain Patrick Kanyagia & another vs Damaris Wangechi & 2 others* [1995] eKLR, A.B. Shah, JA held that a purchaser for value without notice in a public auction possessed a good title, and that the mortgagor could then only revert to damages for the irregular sale in accordance with Section 69B (2) of the ITPA. The section provides as follows:

- (1) A mortgagee exercising the mortgagee's statutory power of sale shall have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights, and encumbrances to which the mortgage has priority, but subject to all estates, interests, rights, and encumbrances which have priority to the mortgage
2. Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-
  - a. that no case had arisen to authorize the sale; or
  - b. that due notice was not given; or



- c. that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer,

concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

57. We have found that despite the irregularity in undervaluing of the suit premises, there was no evidence of fraud on the part of the Respondent and 2<sup>nd</sup> Appellant that could merit this Court to intervene and set aside the sale of the suit premises. On the assessment of damages that the Respondent and Appellant merited in the circumstances, we agree with the position adopted by this Court in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR as follows:

“Assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country, such as inflation, and also prior relevant decisions. An appellate court should only interfere with such an award where the trial Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or where the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage...”

58. Given the findings in this judgment, we find no reason to interfere with the exercise of the trial Judge’s discretion when he found as follows, after noting that the Respondent had brought expert evidence of the rental value of the suit premises of Kshs 3,955,000.00:

“209.....I find that the Plaintiff ought to have been entitled to Kshs 3,955,000/= . I have however found that the suit property was sold at a grossly undervalued price. Accordingly to award the Defendant that sum of money would amount to an unjust enrichment and that would be inequitable. In my view the Defendant is only entitled to the said sum less the difference between the Sum of Kshs 3.8 million which he ought to have paid had the suit property been properly valued. It follows that the Plaintiff is entitled to vacant possession of the suit property plus Kshs 155,000.00. from the Defendant.

210. That brings me to the issue whether the claim in the Counterclaim can stand. I have already found that the Defendant’s property was sold at an undervalue. The suit property ought to have been sold for at least

7. 6 million. It was instead sold at Kshs 3.8 million. Accordingly, the Defendant is entitled to Kshs 3,800,000.00. being the difference from the Bank.

210. As regards the costs of the suit, none of the parties to the suit was completely blameless. Whereas the Plaintiff was not guilty of fraud, the price he paid for the suit property was clearly way below what ought to have been paid. With respect to the Defendant, he was clearly in default at least in respect of the period following the termination of his employment. As regards the Bank, it relied on a valuation report that was clearly unsatisfactory”

59. The result therefore, is that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants’ appeals are found not to be merited. We also note that the Respondent’s Notice of Grounds for Affirming the Decision of the High Court did not contain the grounds which the Respondent was relying on, as required by Rule 94 of the Court of



Appeal Rules of 2010, which were then applicable. We accordingly affirm the decision of the High Court for the reasons given in this judgment, and dismiss the 1<sup>st</sup> and 2<sup>nd</sup> Appellants' appeals with costs to the Respondent.

60. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**PAULINE NYAMWEYA**

.....

**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

