



Coast Professional Freighters Limited v Welsa Bange Oganda, Industrial & Commercial Development Corporation & Nadhia Limited (Civil Appeal 18 of 2016) [2017] KECA 686 (KLR) (17 February 2017) (Judgment)

Coast Professional Freighters Limited v Welsa Bange Oganda & 2 others [2017] eKLR

Neutral citation: [2017] KECA 686 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 18 OF 2016
W OUKO, K M'INOTI & MSA MAKHANDIA, JJA
FEBRUARY 17, 2017**

BETWEEN

COAST PROFESSIONAL FREIGHTERS LIMITED APPELLANT

AND

WELSA BANGE OGANDA 1ST RESPONDENT

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION 2ND
RESPONDENT**

NADHIA LIMITED 3RD RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Mombasa (Kasango, J.) dated 21st August, 2015 in H.C.C. NO. 50 of 1998)

JUDGMENT

1. In the year 1975, Industrial & Commercial Development Corporation “the 2nd respondent”, a statutory corporation, advanced to Welsa Bange Oganda “the 1st respondent” a loan facility to the tune of Kshs.300,000/-. As security for the loan the 1st respondent charged his property known as MOMBASA/BLOCK /X/291 “the suit premises” to the 2nd respondent. The purpose of the loan was to develop the suit premises into a hotel and rental flats. Before payment in full of the advanced monies, the 1st respondent again approached the 2nd respondent for another loan facility amounting to Kshs.294,000/-. A further loan agreement dated 19th March 1981 was entered into by the two parties and a further charge created on the suit premises. In 1985, the two loan facilities were amalgamated into one “for ease of management” according to the 2nd respondent and the 1st respondent was thereafter required to pay a monthly sum of Kshs.9,104.50 for a revised period of ten (10) months to settle his



- liability to the 2nd respondent. It is alleged that the 1st respondent however defaulted in the repayment of the loan and accumulated arrears. As a result, sometimes in 1996 or thereabouts, the 2nd respondent issued him with a notice signaling its intention to exercise its chargee's statutory power of sale in respect of the suit premises.
2. Following the notice, the 1st respondent made a proposal to the 2nd respondent to the effect that since he had secured a prospective buyer who was willing to purchase the suit premises for Kshs.22, 000,000/-, he should be allowed to sell the suit premises by private treaty and then liquidate the loan and the interest that had accrued. It would seem his request was accepted as a public auction scheduled for July 1997 was called off. However the intended sale by private treaty never materialised. Without any further notice to the 1st respondent, the suit premises were on 17th September 1997, sold allegedly through a public auction, by Nadhia Limited "the 3rd respondent" as the auctioneers, to Coast Professional Freighters Limited "the appellant" for a consideration of Kshs. 4.5 million. That amount was applied in settling or reducing the monies the 1st respondent owed the 2nd respondent. Following those events, the 1st respondent instituted a suit in the High Court by way of a Plaint dated 10th February 1998. That Plaint was amended further twice culminating in the Amended Plaint dated 7th July 2005 seeking various orders but in the main that the sale of the suit premises to the appellant be declared null and void and be set aside on the ground that it was illegal and fraudulent; that the transfer of the suit premises by the 2nd respondent to the appellant be revoked; that the 1st respondent be declared the true and legal owner of the suit premises; an order for eviction of the appellant from the suit premises and award of damages.
 3. The 1st respondent made various allegations against the 2nd respondent. However, the most prominent allegation and which now forms the pivot of this appeal is that the appellant never participated in the public auction held on 17th September 1997. That the 2nd and 3rd respondents connived to hold that the appellant was the highest bidder rather than Daber Enterprises Ltd who in fact emerged the highest bidder in that auction. Further, that the 2nd respondent auctioned the suit premises, valued at Kshs. 22 million according to the 1st respondent, at a throw away price of Kshs. 4.5 million out of which only Kshs. 4.2 million was receipted. That even that amount was paid fraudulently through instalments rather than by 25% of the purchase price being paid at the fall of the hammer and the balance within 30 days as demanded by the Auctioneer Rules. The 1st respondent alleged that the appellant was allowed by the 2nd respondent to pay the deposit through instalments and then use the suit premises as collateral to obtain a loan to pay the balance of the purchase price. As such, the 1st respondent disputed and denied that there was any auction or sale on the purported date and averred instead that the appellant had in fact obtained a certificate of sale fraudulently. The 1st respondent maintained that the notice of sale issued by the 2nd respondent was deemed as withdrawn following the aborted auction and the 2nd respondent was bound by law to issue a fresh notice to him at least 3 months before selling the suit premises by way of public auction. By purporting to sell the suit premises without issuing a fresh notice, the 2nd respondent was in breach of the chargee's duty of care owed to him. That as it were, the suit premises were auctioned without his knowledge and when in fact he had fully repaid both loans. Accordingly, the 2nd respondent lacked capacity to exercise the chargee's statutory power of sale.
 4. The 2nd respondent through its Further Amended Statement of Defence dated 30th August 2005 denied the averments by the 1st respondent and maintained that by the time of the auction, the 1st respondent was indebted to it in excess of Kshs. 5 million as at August 1997. That the auction scheduled for July 1997 aborted following receipt of a cheque issued by one of the 1st respondent's tenants but which was subsequently dishonored upon presentation to the bank. It alleged that the prospective buyer for Kshs. 22 million mentioned by the 1st respondent was a ploy by the 1st respondent to prevent realization of



the security and maintained that the auction of 17th September 1997 was proper and regular. It denied accepting the 1st respondent's request to abort the auction or to withdraw the statutory notice of sale it had issued to him. The 2nd respondent further denied that the suit premises were sold at a throw away price as alleged. It contended that the 1st respondent benefitted from many cancelled auctions and extended times for repayment using many ploys but still fell into arrears. It maintained that the 1st respondent knew all along that the suit premises were due to be auctioned. It counter-claimed for Kshs.8,766,002.40/- being the amount it claimed was still owed to it as at 31st July 2005 even after the proceeds of the auction had been applied towards the loan arrears.

5. The appellant on its part denied that the suit premises were valued at Kshs. 22 million as alleged by the 1st respondent. It stated that on 29th October 1997, the suit premises were valued at Kshs. 6 million by Tysons Limited Real Estate Agents and Valuers on instructions of Kenya Loan and Savings Ltd. It contended that the 1st respondent must have been aware of the auction as it had been advertised in local dailies. It averred that it purchased the suit premises at a public auction conducted by the 3rd respondent on instructions of the 2nd respondent for Kshs. 4.5 million and was issued with a certificate of sale. That thereafter, it charged the suit premises for Kshs. 3 million to Kenya Loans and Savings Ltd. It maintained that the suit premises were lawfully sold, transferred and registered in its name and a charge registered in favour of Kenya Loan and Savings Ltd. As such, it contended that the sale of the suit premises could not be set aside neither could the title issued be revoked. It denied any knowledge of fraud, breach of duty and/or contract or being privy to any such fraud or breach of duty. It maintained that the sale was proper and regular and denied any connivance and fraud. The third respondent did not file a defence to the claim.
6. The suit has had a long history after being filed in 1998. It was heard by a total of 4 judges of the High Court to wit; Maraga, J. (as he then was), Ibrahim, J. (as he then was), Serگون, J. and Kasango, J. who eventually delivered the judgment on 21st August 2015 now impugned before this Court. The delay in finalizing the case was mainly because of transfers of Judges hearing the case. In the end however, Kasango, J. found in favour of the 1st respondent and declared the public auction held on 17th September, 1997 null and void. She ordered the suit premises register to be rectified to reflect the 1st respondent as the lawful owner and the appellant to vacate therefrom within 30 days or otherwise be forcefully evicted. The Judge also entered judgement against the appellant and the 2nd respondent jointly and severally, in favour of the 1st respondent for Kshs. 8 million as compensation for loss of use of the suit premises. The Judge in essence found that there was breach of contract by the 2nd respondent in illegally varying interest rates, failing to notify the 1st respondent of such variations and through piecemeal disbursements of the loan amounts. Further, the learned Judge found that there was fraud by the 2nd respondent in respect of the public auction when it declared the appellant the highest bidder rather than Daber Enterprises Ltd and that the appellant could not therefore claim to be an innocent purchaser for value without notice. Further, that the 2nd respondent failed to meet the evidential burden of proof that it served the statutory notice upon the 1st respondent before the auction.
7. Aggrieved by the findings, the appellant is now before this Court by way of this appeal. In its memorandum of appeal dated 18th March 2016, the appellant has raised 13 grounds of appeal. In summary the appellant maintains the Environment and Land Court rather than the High Court (Commercial Division) had jurisdiction to hear and determine the suit; it disputes the finding that it did not participate in the public auction held on 17th September 1997; it challenges the judge's finding that it was not the highest bidder in the auction and that Patrick Mutune Kiasyo was not its director; it faults the trial court for failing to make a finding that the 1st respondent's remedy lay in



damages payable by the 2nd respondent by virtue of Section 77 of the Registered Land Act (repealed) and for failing to award the 1st respondent damages against the 2nd respondent as prayed for in his Pleint. The appellant further faults the learned Judge's reliance on the decisions in HCCC No. 113 of 1999- Daber Enterprises v Industrial & Commercial Development Corporation and this Court's ruling in Civil Application No. 223 of 1999 - Industrial & Commercial Development Corporation v Daber Enterprises Ltd to reach its conclusions, on the basis that it was not a party to those suits. As such, it contends it was condemned unheard which was against the rules of natural justice, the audi alteram partem rule and a contravention of Article 50 of the Constitution. The appellant also faults the Judge for reaching the conclusion that there was fraud or collusion between it and the 2nd respondent to defraud the 1st respondent of the suit premises despite fraud not having been proved to the required standard in law. Further, the appellant faults the Judge on the basis that she failed to consider its defence that it was an innocent purchaser for value without notice. Finally, the appellant faults the learned Judge for making the orders she did and disregarding its evidence.

8. The appeal was canvassed by way of written submissions. The appellant and the 1st respondent filed their written submissions on 9th June 2016 and 14th July 2016 respectively. The 2nd and 3rd respondents filed no submissions on their part.
9. The appellant submitted that it was undisputed that the 1st respondent received a statutory notice of sale in 22nd July 1996 and the law did not require service of more than one statutory notice for a property registered under Registered Land Act (RLA). To buttress that point it relied on the cases of *Mbuthia v Jimba Credit Finance Corporation & Another* (1988) eKLR and *John Wambugu Njoroge v Kenya Commercial Bank Civil Application No. 178 of 1992 (UR)*. The appellant submitted further, that the record did reflect that an advertisement was carried in a local daily on 9th September 1997 informing the public of the auction of the suit premises scheduled for 17th September 1997. That though the 1st respondent claimed that the suit premises were sold without his knowledge and that he only came to learn of the sale in February 1998, his own testimony before the trial court contradicted that position. This is because of a letter dated 15th September 1997 by his advocates addressed to the 2nd respondent seeking to stop the scheduled auction on the ground that he had entered into a sale agreement with one Rev. Gideon O. Karindo for the purchase of the suit premises at Kshs. 22 million. The appellant maintained that a proper auction took place on the 17th September 1997 and the 1st respondent had full knowledge of it.
10. It also submitted that no other party testified before the High Court to have attended the auction except Patrick Mutune Kiasyo, a director and nominee of the appellant, who was declared the highest bidder, paid Kshs. 1.2 million as deposit, issued with a certificate of sale and later paid the balance on 31st January 1998. The appellant was issued with a Certificate of Lease on 17th December 1997. That following the sale, the chargor's right of redemption was extinguished and his remedy against the chargee lay in damages as per Section 77 of Registered Land Act. As such, the trial court ought to have awarded Kshs. 22 million to the 1st respondent as damages together with costs and interest at court rates from the date of filing suit as against the 2nd respondent. To buttress its point that the chargor's right of redemption was extinguished at the fall of the hammer, the appellant relied on the following authorities; *Nancy Kahoya Amadiva v Expert Credit Limited & Another* [2015] eKLR, *David Katana Ngombe v Shafi Greqwal Kaka* [2014] eKLR, *James Ombere Ockotch v East Africa Building Society & 2 Others* [1997] eKLR and *Julius Musili Kyunga v Kenya Commercial Bank Ltd & 2 Others* [2015] eKLR.
11. The appellant maintained that it was an innocent purchaser for value without notice. Further, that the trial court erroneously relied on two cases in which the appellant was not a party, to pass judgment



against it which was against the rules of natural justice and in any event inadmissible as evidence. For this proposition it relied on the cases of *Central Kenya Ltd v Trust Bank Ltd & 14 Others* and *JMK v MWN & MFS* [2015] eKLR. The appellant also reiterated its averments that there was insufficient evidence tendered to prove the allegations of fraud against it. In regard to HCCC No. 113 of 1999 *Daber Enterprises v ICDC*, it was submitted that although Kasango J. heard and determined that suit, she failed to disclose that fact to the parties when she took over the case leading to this appeal. As such, the appellant questioned the Judges objectivity in deciding the suit before her. Lastly, the appellant urged that since the suit was instituted after the suit premises had been transferred to it, the Judge on being seized of the matter should have transferred the case to the Environmental & Land Court which had been established on 30th August 2011. According to the appellant, the question to be determined then was recovery of land rather than a contractual relationship between a lender and a borrower. It therefore contended that the High Court's Commercial Division had no jurisdiction over the matter.

12. In opposing the appeal, the 1st respondent submitted that it had led evidence before the trial court showing that by the time the 2nd respondent sought to exercise its statutory power of sale and to transfer the suit premises to the appellant, the 1st respondent had not only repaid in full the loan but had actually overpaid the loan and interest accrued. That being the case, no statutory power of sale arose, with the consequence that the subsequent sale and transfer of the suit premises was null and void ab initio. The 1st respondent denied that the appellant was the highest bidder at the auction conducted on 17th September 1997 and asserted that the appellant sought to illegally and fraudulently acquire the suit premises with the connivance of the 2nd respondent. That the fraud vitiated the purported sale and transfer rendering them void and null. It was submitted further that the highest bidder was one Bernard Mwangi Mbai who placed a bid of Kshs. 3.2 million on behalf of Daber Enterprises Ltd. It was also submitted that the two prior cases had shown that the sale to Daber Enterprises Ltd was cancelled on 14th October 1997 and the appellant bought the suit premises after that without following the Auctioneers Rules that require payment of 25% of the purchase price immediately at the fall of the hammer and the balance after 30 days. Further that the suit premises had a reserve price of Kshs. 4.8 million which was disregarded, when the 3rd respondent sold the same to the appellant at 4.5 million. The 1st respondent further submitted that the 2nd and 3rd respondents were not challenging the High Court decree as in fact the 2nd respondent had already paid the decretal sum. It submitted that the High Court had jurisdiction over the suit by virtue of the sixth Schedule, Part 5, section 22 of the Constitution and section 30 of the Environment and Land Court Act, 2011.
13. The 1st respondent pointed out that the 3rd respondent chose not to testify to explain why it issued two certificates of sale in regard to the auction carried out on 17th September 1997; one to Daber Enterprises Ltd on 23rd September 1997 and another one to Patrick Mutune Kiasyo on 9th October 1997. With regard to the reliance on the two judgments, the 1st respondent explained that they were tendered in evidence to demonstrate that another party, other than the appellant emerged the highest bidder and the Judge was right to rely on them as they were relevant. The 1st respondent submitted that the appellant could not have been an innocent purchaser for value without notice as it was a participant in the irregularities alluded to above and especially since it instigated and was part of the fraud. It relied on the cases of *Aikman & Others v Muchoki & Others* [1982] eKLR, *Nyagilo Ochieng & Another v Fanuel B. Ochieng & 2 Others* [1996] eKLR and *Kakamega District Cooperative Ltd v Cooperative Bank of Kenya Ltd & Another* [2013] eKLR to support that proposition. It denied that the only remedy available to it was damages as alleged.
14. The appellant further submitted that the 2nd respondent wrongly charged penalties, varied interest rates, charged interest on sums which were never released to it and failed to give credit on some repayments, leading to a wrong conclusion by the 2nd respondent that money was still owed as at



September 1997. That the genuine mistake of a party, such as the 1st respondent who continued to pay the loan amount and interest accrued mistakenly does not preclude a party from seeking remedy upon discovering the mistake. The case of *Savings and Loans Kenya Ltd v Onyancha Bw'omote* [2016] eKLR was cited in support of that proposition. In conclusion, the 1st respondent submitted that the amount of Kshs. 8,000,000/- granted in its favour for loss of use of the suit premises for 18 years following illegal eviction was modest.

15. During oral highlights of the written submissions, learned counsel Mr. Mogaka appearing with Mr. Muniyithya for the appellant reiterated that Kasango J did not hear the evidence of the appellant as that evidence had been taken by the Judge from whom she took over the case. Counsel was of the view that the Judge's determination of the suit centred on the evidence of the 1st respondent on fraud. That among the particulars of fraud pleaded was that the 2nd and 3rd respondents had failed to put a reserve price. Counsel submitted that the appellant's title could only be impeached if fraud, and knowledge or involvement in it by the appellant, was established. That fraud could not be inferred but it had to be proved. He relied on the authority of *Nancy Kahoya Amadiva v Expert Credit Ltd & Another* [2015] eKLR to buttress that point. Further, counsel submitted that only DW3 testified as to what transpired during the auction as the 1st respondent had confirmed that he never attended the auction and so had no knowledge of what happened. The 3rd respondent never testified, leaving the Judge at a loss also as to what transpired at the alleged auction.
16. Mr. Fred Ngatia, learned counsel teaming up with Mr. Amuga, learned counsel for the 1st respondent, from the outset pointed out that the two prior decisions relied on by the Judge in her determination had been tendered in evidence before Serگون, J. with the full knowledge and consent of all the parties. That the decisions could not be ignored as they were central to the resolution of the dispute and that even if they were not tendered in evidence they were decisions of a court which the trial court was at liberty to look at. Further, although during the trial parties were represented by the same advocates as in this appeal, no party objected to Kasango J. taking over the case.
17. According to counsel, the entire suit could be collapsed into two broad areas of dispute; whether the appellant attended the public auction on 17th September 1997 and was declared the highest bidder and whether as of that date the 1st respondent was indebted to the 2nd respondent to warrant the exercise of statutory power of sale. On the first broad issue, counsel submitted that in the Further Amended Plaintiff there were clear accusations that the appellant did not participate in the auction, that there was connivance between the 2nd and 3rd respondents in selling the suit premises and that the 3rd respondent sold the suit premises in a clandestine manner and not through a public auction. That though the 2nd respondent's advocates had intimated that they were also acting for the 3rd respondent, no defence was filed in respect of the 3rd respondent and so the accusations against the 3rd respondent remained unchallenged. Counsel submitted that the evidence showed that the highest bidder was Daber Enterprises Ltd and that it could not be said that the appellant attended the auction considering the findings of the two prior cases. In counsel's view, the evidence on record showed that the appellant participated in the pleaded fraud and was infact the prime mover.
18. On the second issue, counsel submitted that there was incontrovertible evidence that the 1st respondent had fully repaid the loan and there was no basis for the auction. According to counsel, as the appellant had entered into possession of the suit premises illegally, the court could not countenance such actions.
19. Mr. Nderitu, learned counsel for the 3rd respondent associated himself fully with the submissions made on behalf of the appellant. Counsel reiterated that the Environmental and Land Court, rather than the High Court, Commercial Division had jurisdiction over the dispute; that the Judge should not have relied on the two cases decided earlier on with regard to the dispute as the 2nd and 3rd respondents were



not parties to it; that the 2nd and 3rd respondents were prejudiced by the fact that the same High Court Judge had participated in those suits; that fraud was not established as required in law; and that the evidential burden that the auction never took place had not been discharged.

20. On the basis of the material before us we are satisfied that the following five broad issues fall for determination in this appeal:
- (i) Whether or not the High Court (Commercial Division) had jurisdiction to hear and determine the dispute;
 - (ii) Whether the exercise of statutory power of sale by the 2nd and 3rd respondents was proper and or lawful;
 - (iii) Whether the appellant participated in the public auction held on 17th September 1997;
 - (iv) If the answer to (iii) is in the affirmative, whether the appellant emerged or was declared the successful bidder in the auction; and,
 - (v) Whether the award of Kshs. 8 million to the 1st respondent, jointly and severally, against the appellant and the 2nd respondent was sustainable.
21. As this is a first appeal, this Court is enjoined to revisit the evidence that was before the High Court afresh, analyze it, re-evaluate it and arrive at its own independent conclusions. (See *Selle & Company Ltd & Others* [1968] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424).
22. The jurisdiction of the High Court (Kasango, J.) to hear and determine the dispute has been challenged by the appellant. The 2nd and 3rd respondents are in support of the proposition that the Commercial Division of the High Court, had no jurisdiction to determine the suit. The appellant in support of that position submitted that the claim was for recovery of the suit premises. That by the time the 1st respondent filed the suit; the suit premises had already been auctioned, transferred and registered to a third party. As such, it was not a matter of a contractual relationship between a financier and a borrower but one about recovery of land. The appellant stated that Kasango, J. started hearing the suit on 17th October 2011 and that the Environmental and Land Court “ELC” commenced operations on 30th October, 2011. According to the appellant therefore, upon the ELC commencing operations the Judge was obligated to transfer the suit to the ELC for hearing and determination as the trial court no longer had jurisdiction to preside over the suit. Counsel for the 2nd and 3rd respondents pointed out that sections 13, 30(1) of the ELC Act, section 150 of the Land Act and Statute Law Miscellaneous (Amendments) Act No. 25 of 2015 conferred the ELC with exclusive jurisdiction to determine the matter.
23. However, the 1st respondent takes a contrary view on account of the provision of the Sixth Schedule, Part 5 Section 22 of the Constitution and Section 30 of the Environment and Land Court Act. He has also sought refuge in the fact that the issue was never raised before the trial court.
24. In our view however, this issue is a non-starter. The hearing of the suit as stated earlier commenced before the promulgation of the Constitution 2010. The Sixth Schedule Part 5 Section 22 to that Constitution provides as follows;

“All judicial proceedings pending before any court shall continue to be heard and determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.”



25. On the basis of the foregoing, the learned judge had the option of either transferring the suit to the ELC or determining the suit herself and it cannot be argued or gainsaid that the judge had no jurisdiction over the suit. Further, the Chief Justice did give practice directions as mandated by the aforementioned schedule. The said directions were published on 9th November 2012 vide Gazette Notice No. 16268. Of relevance they provided that “part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the Court.” The constitutionality or validity of the directions were challenged but upheld by the High Court in *Edward Mwaniki Gaturu & Another v The Hon. Attorney General & 3 Others* [2013] eKLR. In that case, Lenaola, J. (as he then was) held that in issuing the directions the Chief Justice did not violate the Constitution. That the Chief Justice was performing his duties under section 24 (2) of the ELC Act and in furtherance of his duties under section 5 (2) of the Judicial Service Act. That decision to the best of our knowledge has not been challenged by way of appeal and therefore still stands.
26. Furthermore, and as rightfully submitted by counsel for the 1st respondent, this was not purely a land matter per se as there was also a challenge to the exercise of statutory power of sale. Counsel cited the case of *Housing Finance Company of Kenya Ltd v John Mwashigadi Mwakisha* [2016] eKLR for the proposition that the suit could have been tried and determined by either the Commercial Division of the High Court where it had been filed or in the ELC, a court of equal status. In that case, an issue arose as to whether the dispute was a commercial dispute that did not relate to the environment, use and occupation of and title to land. Omollo J. held, and we are in agreement, that in her view, the dispute as regards charges and mortgages where title to land is used as security, fell under commercial transactions and not disputes exclusive for determination by the ELC. Lastly, the parties who were all represented by able counsel all of whom appeared in this appeal for their respective parties did not object to Kasango J. presiding over the case as a judge in the Commercial and Admiralty Division of the High Court. This challenge now must be dismissed and taken as an afterthought.
27. It is prudent at this juncture to examine whether the statutory power of sale was properly exercised or was lawfully invoked by the 2nd respondent against the 1st respondent.
28. Had the 1st respondent defaulted in the payment of his loan? In her determination, the Judge found that the 2nd respondent was not in a position to make positive statement as to whether the 1st respondent was indeed indebted to it. A perusal of the record reveals why it is difficult to fault the Judge in arriving at that conclusion. First although the 1st loan borrowed was Kshs.300,000/-, in reality only Kshs.263,966.25/- was disbursed. PW2, a professional accountant and auditor testified that although the second charge was for Kshs.294,000/-, only 245,810/- was disbursed to the 1st respondent. Despite this, the 2nd respondent proceeded to charge interest on the entire agreed loan amounts rather than on the actual disbursed amounts. There is also evidence that the 2nd respondent illegally varied the interest applicable from 10% per annum on the first loan to rates of up to 15%, 16% and 18% annually. The charge instruments did not give the 2nd respondent such right of interest variation and it never informed the 1st respondent of such variations. It may suffice to say that the loan amounts were also disbursed to the 1st respondent in batches rather than in lump sum to the detriment of the 1st respondent who needed the whole loan amounts for continuous development of the suit premises. PW2 testified that the first loan of the alleged Kshs. 300,000/- was disbursed over a period of 2 years between 31st October, 1975 to 2nd October 1977. However, interest for that loan accrued from the start as if the amount had been disbursed in lump sum. The Judge came to the conclusion that the 1st respondent’s desire to complete the development of the suit premises and yield income was dashed by the callous handling of the transaction by the 2nd respondent. We cannot fault the Judge for that conclusion given the evidence on record.



29. There is also evidence that some repayments made by the 1st respondent were not credited to his loan account but were in fact treated as disbursements or related loan costs. To compound matters further, the 2nd respondent went ahead to amalgamate the two loans into one loan and applied a standard interest rate in spite of the fact that the two loans attracted different interest rates. PW2 gave evidence that by 31st August 1997, the 1st respondent had not only fully repaid the loan but had in fact overpaid the loan amounts by Kshs.1,117,882.80/-. From the foregoing it is clear that the 2nd respondent rode roughshod over the 1st respondent and the power of statutory sale cannot be said to have been properly or lawfully exercised in the circumstances.
30. That aside, did the appellant in fact participate in the public auction allegedly held on 17th September 1997? In determining this issue, the Judge relied on the outcomes of two other prior decisions of the High Court and Court of Appeal touching on the suit premises that were relevant. The decisions are HCCC No. 113 of 1999-Daber Enterprises v Industrial & Commercial Development Corporation and this Court's ruling in Civil Application No. 223 of 1999 - Industrial & Commercial Development Corporation v Daber Enterprises Ltd. The appellant and 3rd respondent have vehemently opposed or challenged the High Court's reliance on those two cases to reach its conclusions. In the main, they contend that they were not parties to the said cases and hence the High Court in relying on them condemned them unheard which was against the principles of natural justice. Further, that the two decisions were not produced as evidence in the course of the trial and the Judge therefore only had knowledge of the two decisions because she had tried and determined HCCC No. 133 of 1999. The appellant also alleged that reliance on the two decisions violated section 34 of the Evidence Act. The 1st respondent thinks otherwise on the basis that these were decisions of the courts touching on the same subject matter and the Judge was perfectly entitled to consider them. Secondly, the same had been tendered in evidence with the consent of all the parties involved in the dispute.
31. Upon perusal of the two decisions, it is understandable why the appellant is so vehemently opposed to reliance on them. The facts and or conclusions of those decisions are that it was Daber Enterprises Ltd "Daber" which emerged the highest or successful bidder at the public auction held on 17th September 1997 with regard to the suit premises, a fact which the appellant has gone to great lengths to deny for obvious reasons. In HCCC No. 113 of 1999, Daber Enterprises Ltd as the plaintiff sued the 2nd respondent. Its case was that it emerged the highest bidder of the public auction conducted on 17th September 1997 with its bid of Kshs.3,200,000/-. That it paid 25% of that purchase price being Kshs.800,000/- on 23rd September 1997 vide a cheque forwarded to the 3rd respondent, and was subsequently issued with a certificate of sale. Daber however claimed breach of contract as thereafter, the 2nd respondent failed or refused to release the completion documents to it to enable it pay the balance of the purchase price or complete the transaction. The 2nd respondent in its defence did not deny in particular that the Daber emerged the successful bidder, but argued that it had failed to comply with auctioneers rules that require payment of 25% of the purchase price at the fall of the hammer and the balance within 30 days thereafter. The 2nd respondent alleged that Daber offered or requested to pay the balance within 60 days and thus in effect varied the terms of sale amounting to a counter-offer which the 2nd respondent declined to accept. The 2nd respondent thereafter repudiated the contract of sale, refunded the deposit to Daber and sold the suit premises to a third party, the appellant in this appeal, even after Daber later intimated to the 2nd respondent that it could be able to pay the balance within 30 days from the date of the auction. The Judge in that suit, who is the same Judge who delivered the impugned decision in this appeal, found that a binding contract had arisen between Daber and the 2nd respondent and that Daber was the successful bidder in the auction.



32. To properly, determine who emerged the successful bidder at the auction, the two decisions cannot be ignored or disregarded by this Court as sought by the appellant for various reasons. First, contrary to what counsel for the appellant submitted-that Kasango J. relied on those decisions which had not been tendered in evidence at the trial-there is evidence on record that those decisions were tendered in evidence. As such, those decisions became part of the evidence to be considered by the court in its final determination. Counsel for the 1st respondent also submitted and rightly so in our view, that despite all the parties' knowledge that Kasango J. had rendered the judgment in HCCC No. 133 of 1999, they all opted to proceed before her, nevertheless. The appellant argues that reliance by the High Court of those two decisions violated its right to a fair trial, in particular, the audi alteram partem rule as it was not a party to the said cases. However and as seen above, the two decisions were produced as evidence before the High Court with the appellants consent and with full knowledge of their import. The appellant had an opportunity to challenge the production or admission of the decisions as part of the evidence then and clearly waived that right. As it is, the decisions formed part of the evidence to be considered by the High Court and indeed formed part of the Record of Appeal before this Court. The appellant cannot now be heard to challenge the court's reliance on the said judgment and ruling.
33. Secondly, reliance on the said judgment did not offend section 34 of the Evidence Act as argued. Section 34 (1) (d) of Evidence Act allows evidence given in a judicial proceeding to be admissible in a subsequent proceeding where the questions in issue are substantially the same such as in the present case. In both the present case and in the two previous cases, the dispute centered on the suit premises and stated broadly, both revolved around whether a contract was entered into between the appellant and the 2nd respondent so as to make the appellant the lawful owner of the suit premises. The suits also involved all the respondents to some level with the exception of the appellant.
34. Thirdly, the judgment was a decision of a competent court of law applying itself to evidence and law. The decision has not, to the best of our knowledge been appealed from, set aside or varied. It cannot be wished away by the appellant nor can it be ignored or disregarded by this Court in the determination of this appeal since it is of great significance especially given the fact that the 2nd respondent's defence was not to the effect that the 1st respondent was not the successful bidder.
35. It should also be borne in mind that this Court's mandate under rule 29 of the Court of Appeal Rules, is to re-analyze and re-evaluate the evidence tendered before the trial court and draw inferences of fact before reaching its own conclusions. It's not in contention that the suit premises were advertised for public auction by an advert carried in a local daily on 9th September 1997 informing the public that an auction in regard to the suit premises was slated for 17th September 1997. Following the advert, an auction did in fact take place on 17th September 1997 as conceded by all parties. A divergence of facts occur thereafter with the appellant, supported by the 2nd and 3rd respondents, alleging that it was declared the successful bidder and issued with the requisite certificate of sale. Those facts are disputed by the 1st respondent who claims that a third party, Daber emerged the highest bidder with a bid of Kshs. 3.2 million. In support of its case, the appellant exhibited a certificate of sale dated 9th October 1997, issued to it by the 3rd respondent following its successful bid. The record also shows a certificate of sale was issued to Daber on the 23rd September 1997 following a successful bid. Both certificates cite the 17th September 1997 as the date of the auction.
36. The issue with regard to these two conflicting certificates could have easily been resolved or put to rest authoritatively by the issuer, the 3rd respondent. Counsel for the 1st respondent submitted that despite there being a clear allegation against the 3rd respondent that it sold the suit premises to the appellant in a clandestine manner, rather than in the public auction, with the connivance of the 2nd respondent, the third respondent never filed a defence to the averments. That is despite the fact that it was represented



by same counsel now appearing on its behalf before this Court. As such, the allegations against the 3rd respondent remained uncontroverted.

To put the matter to rest we must revert to the record.

37. It is irrelevant whether or not the 1st respondent attended that public auction; what is relevant in this determination is who in fact emerged or was declared the successful bidder. The record reflects that on 17th September 1997, one Bernard Mwangi Mbai, an advocate of the High Court, attended a public auction on behalf of Daber, where he is a director, and emerged the successful bidder with a bid of Kshs. 3.2 million. On 21st September 1997, Daber forwarded a cheque of Kshs.800,000/- being 25% of the purchase and deposit. Thereafter, the 3rd respondent issued to Daber a certificate of sale dated 23rd September 1997. Daber's advocates then wrote a letter to the 2nd respondent requesting for completion documents and giving a professional undertaking to pay the balance of the purchase price within 60 days. By a letter dated 24th September 1997, the 2nd respondent acknowledged receipt of the letter but refused to release the requested documents. The reason it advanced for that refusal was that by offering to pay the balance of the purchase price within 60 days rather than within 30 days as demanded by the 3rd respondent, Daber had in effect varied the terms of the contract which amounted to a counter-offer which the 2nd respondent was not obliged to accept. On receipt of that letter, Daber offered to be allowed to pay the balance within the 30 days after receipt of the completion documents. Despite that offer, the 2nd respondent vide its letter dated 1st October 1997, returned the amount paid by Daber as deposit and cancelled the sale. The 3rd respondent actually returned the deposit of Kshs. 800,000/- to Daber on 14th October 1997. Subsequently, without any other advertisement or auction, the suit premises were purportedly sold and transferred to the appellant, leading to the litigation in HCCC No. 133 of 1999 whose facts and findings have been discussed elsewhere in this judgment.
38. So what about the appellant's certificate of sale? First of all, it's dated 9th October 1997 and so it appears it was issued after the 2nd respondent had allegedly cancelled the sale to Daber. It appears that after the said cancellation, the 2nd respondent sought to sell the suit premises to the appellant. To do so, it instructed the 3rd respondent to issue another certificate of sale to one, Patrick Mutune Kiasyo, on behalf of the appellant. A closer scrutiny of the said certificate shows it was issued on "9th SEPTE OCT 1997" and states the highest bid as Kshs. 4.5 million. The cancellation is counter-signed, showing an acknowledgement of the alteration. This may be inferred as an attempt to regularize the state of affairs in sync with the 2nd and 3rd respondents' intention of now disposing the suit premises to the appellant. The increased purchase price might be deemed a motive for that intention. Evidence of the foregoing is contained in an undated letter from the 3rd respondent to the 2nd respondent. The letter indicates to have been received by the 2nd respondent on 14th October, 1997. The said letter states in part as follows;
- “.....we act by your instruction to accept the bid from Patrick Mutune Kyaso Of P.o Box 41506 Mombasa.
- In your telephone conversation.....we were instructed to accept the bid of Kshs. 4.500,000/ = (Four Million Five Hundred Thousand) from Patrick Mutune Kyaso for the property Mombasa/block X/291.
- The bidder (Mr. Patrick Mutune Kyaso) brought a bankers cheque of the 25% sale price.....We shall issue our cheque to ICDC once the bankers cheque clears.”
39. It is following that letter that a certificate of sale was issued to the appellant and the date altered or tampered with to regularize the fraud. Fraud because the appellant was not represented during the auction conducted on 17th September 1997 and did not participate at all in that auction. From



these alterations, the date of the certificate of sale to the appellant and the manner in which the 2nd respondent cancelled the sale to Daber, the conclusion is inevitable that the purported sale of the suit premises to the appellant was an elaborate fraud. The standard of proof where fraud is alleged has been held to be a standard above a balance of probabilities. In *R. G. Patel v. Lalji Makanji* (1975) EA 314, the former Court of Appeal for Eastern Africa stated thus;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

40. We are satisfied on the basis of the evidence on record that the 1st respondent discharged this burden and the sale of the suit premises to the appellant was fraudulent. Further, the appellant went on charge the suit premises to Savings and Loan Kenya Ltd to secure Kshs. 3,000,000/- as the balance of the sale price after having paid 25% deposit purportedly at the fall of the hammer. The charge was registered in favour of the appellant on 23rd December 1997. It was submitted that the balance of the purchase price was paid to the 2nd respondent on 31st January 1998, after at least 115 days had elapsed from 9th October 1997 when the 3rd respondent issued a certificate of sale to one Patrick Mutune Kyaso on behalf of the appellant as the successful bidder in the auction conducted on 17th September 1997. The reason the 2nd respondent had given for cancelling the sale to Daber was that the latter had varied the terms of the auction that required payment of the balance of the purchase price within 60 days after the fall of the hammer. Despite the foregoing, a Certificate of Lease was still issued in favour of the appellant on 17th December 1997.
41. This version of facts appear to be correct as opposed to those advanced by the appellant. The appellant’s version leaves more gaps and questions than answers. For example, if the appellant was the highest bidder, why did the 3rd respondent issue a certificate of sale to Daber initially and further, why did the 2nd respondent initially accept the 25% deposit paid by Daber? The appellant’s defence in HCCC 133 of 1999 is especially telling since nothing would have been easier for it than to plead that Daber was not the successful bidder if that was the case. There is no way the appellant could claim to be an innocent purchaser for value without notice under the circumstances of this case.
42. As already stated, the events leading to the appellant being registered as the lawful owner of the suit premises were tainted with fraud and or illegality and cannot be held to have conferred on the appellant a lawful title to the suit premises. The High Court was therefore right under section 143 of the Registered Land Act (repealed) to order rectification of the attendant land register by virtue of section 162 (1) of the Land Act 2012. The latter section provides that any right, interest, title power or obligation acquired or accrued before the commencement of the Land Act, 2012 would be governed by the applicable law to it immediately prior to the commencement of that Act. Section 143 of the Registered Land Act on its part gave the High Court power to order rectification of a land register where it is satisfied that the same was obtained through fraud, such as in this case. In the circumstances of this case, the court cannot be faulted for doing so. This conclusion and the analysis of the evidence disposes of issues (ii), (iii) and (iv) as framed by us.
43. Lastly, is the award by the Judge of Kshs. 8 million to the 1st respondent jointly and severally against the appellant and the 2nd respondent sustainable? In his pleadings the 1st respondent had inter alia prayed for compensation for missed rental income taking into account rental increment and financial growth of the hotel that now stands on the suit premises. In her determination, the learned Judge held that the 1st respondent was entitled to compensation of profits lost for the 18 years he was dispossessed of the suit premises. The learned Judge proceeded to order an award of Kshs. 8 million against the



appellant and the 2nd respondent in favour of the 1st respondent which the appellant now faults in its memorandum of appeal. It was pointed out by the 1st respondent in his submissions that the 2nd and 3rd respondent were not challenging the High Court decree as in fact the 2nd respondents had already paid the decretal sum. The 1st respondent in support of that award stated that the amount was for loss of use of the suit premises for 18 years since being illegally evicted in the year 1998 and that the amount was modest.

44. It is instructive that though the award of Kshs.8, 000,000/- as compensation is raised as a ground of appeal by the appellant, no submissions both oral and written were made in that regard by the appellant. Similarly, no such submissions were made by the 2nd and 3rd respondents. It is only the 1st respondent who submitted in support of the award. This perhaps may be explained by the fact that the amount had already been paid to the 1st respondent. In the absence of submissions by the appellant, the 2nd and 3rd respondents in support of that ground of appeal, we have no basis or material upon which we can fault the learned Judge for making the award. In any event, the award of damages is at the discretion of the trial court and as an appellate court, we can only interfere with the exercise of that discretion upon being satisfied that certain principles have being met. These principles are either that the court took into account an irrelevant factor, or that it left out a relevant factor, or misapprehended the facts, or that due to any of the above reasons or any other reason, awarded damages that were so inordinately high or so inordinately low as to represent a wholly erroneous estimate of the damages. See *Kemfro Africa Ltd T/a Meru Express Service & Another Vs A.r. Lubia & Another* (1982 – 88) I KAR. 727. We are satisfied that those principles have not been met in this appeal to warrant us to interfere with the award. Accordingly, this ground must of necessity fail.

45. The appeal on whole therefore fails and is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF FEBRUARY, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

