



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & MWILU, JJ.A)

CIVIL APPEAL NO. 133 OF 2006

BETWEEN

NANCY KAHOYA AMADIVA..... APPELLANT

AND

EXPERT CREDIT LIMITED..... 1ST RESPONDENT

JOHN MUTITU NGACHA2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Honourable Mr. Justice F. Azangalala as he then was) dated 5th November, 1999)

in

HCC NO. 1803 OF 1999

JUDGMENT OF THE COURT

1. Nancy Kahoya Amadiva, hereinafter the appellant, brought this appeal against the judgment and decree of the High Court of Kenya at Nairobi delivered on 5th November, 1999 by Justice F. Azangalala (as he then was) dismissing the appellant's suit against Expert Credit Limited, hereinafter referred to as the 1st respondent and John Mutitu Ngacha, hereinafter referred to as the 2nd Respondent.
2. The appellant, through an amended plaint, had sought injunctive reliefs against the respondents to restrain the respondents from dealing with property LR No.29/8343/107 (hereinafter the suit property) and generally interfering with the appellant's possession of the suit property. In the alternative the appellant sought a declaration that the charge over the suit property in favour of the 1st respondent was illegal, irregular, null and void and the subsequent sale of the suit property by the 1st respondent to the 2nd respondent be similarly declared illegal, irregular, null and void. The respondent pleaded that there had been fraud and collusion between the respondents to dispossess her of the suit premises. Further, she sought a declaration that the purported attachment of the appellant's goods and other effects by Auctioneers acting on behalf of the 2nd respondent's is illegal, null and void and that the said goods should revert to the appellant. Finally, the appellant

sought general and aggravated damages and costs.

3. By a statement of defence filed on behalf of the 1st respondent, the 1st respondent defended its actions in creating the charge, demanding for sums unpaid from the appellant and pleaded that its actions were at all times in accordance with the law.
4. The 2nd respondent on his part through his amended defence pleaded that he bought the suitland through a public auction and that he was an innocent purchaser for value without notice and his right over the suit premises was therefore indefeasible. The 2nd respondent also made a counterclaim against the appellant seeking eviction of the appellant and *mesne* profits at the rate of Shs.25,000/= per month.
5. The matter proceeded for hearing before Justice F. Azangalala. The appellant testified at length and also availed four further witnesses, **Simon Kiplagat Rono** an Assistant Manager, Bank Supervision at Central Bank of Kenya, **Christopher Edmond-Day Mbinda**, a valuer and estate agent, **Isaak Ongota Ojuok**, a person who had previously charged his property to the 1st respondent which property was subsequently purchased by the 2nd respondent and **Fredrick Odhiambo Odero**, a businessman.
6. The 1st respondent had **Francis Ngugo Mugo** testifying on its behalf. He was the 1st respondent's manager at the time of the lending transaction between the appellant and the 1st respondent. The 2nd respondent testified on his own behalf.
7. At the end of the trial, the learned judge found the charge to be valid and enforceable and proceeded to dismiss the appellant's suit in its entirety. The trial judge further allowed the appellant to voluntarily vacate the suit premises failing which an eviction order would issue for the appellant to be ejected from the suit premises.
8. Aggrieved by the judgment of the High Court, the appellant preferred this appeal against the entire judgment raising eleven grounds of appeal in her memorandum of appeal. The appeal proceeded for a period of over one and half years the same having been initially set down for hearing on 14th November 2013, mainly due to adjournments occasioned by the appellant who changed counsel five times as per documents filed in court, including a notice of intention to act in person, and with the last advocate having come on record on the morning of the hearing. Be that as it may, written submissions together with lists of authorities were filed by both parties, and respective counsel highlighted their submissions on 9th July 2015 upon our insistence that the matter had to be concluded, the court having granted a last adjournment the previous time the appeal was listed for hearing.
9. The appellant was represented by **Mr. Gilbert Mungu** instructed by Mungu, Kimetto & Company Advocates. **Mr. Joseph Mbugua** from the firm of Mbugua & Mbugua Company Advocates appeared for the 1st respondent while by **Mr. Robert Mutitu**, from Mutitu, Thiong'o & Company Advocates appeared for the 2nd respondent.
10. From her submissions as filed and highlighted, the appellant's eleven grounds were reduced to five. **Rule 86(1)** of the rules of this Court requires that grounds of appeal should be concise, without repetition, argument or narrative and that unduly wordy and expansive grounds of appeal serve no purpose other than to obfuscate the issues. In light of the above, we have narrowed down the appellant's grounds of appeal to the following:-
 - ***Whether the allegation of fraud and misrepresentation by the appellant against the respondents were proved to the required standards or at all***

- *Whether the charge document dated 27th April 1998 was valid creating a lawful contract.*
- *The effect of a non-valid statutory notice of sale and remedies for sale arising out of a non-valid statutory notice.*
- *Whether the 2nd respondent was an innocent purchaser for value without notice and obtained a good title.*

The 1st respondent restricted itself to the above grounds set out by the appellant while the respondent went further to submit on the grounds set out in the memorandum of appeal.

11. We have considered the record, respective submissions by learned counsel and the authorities cited by learned counsel for the appellant and are now at an opportune moment to render our decision. Our mandate on a first appeal is set out in **Rule 29(1)** of this Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called to our interrogation, we remain guided by the principles enunciated in *Selle v Associated Motor Boat Company Ltd [1968] EA 123*; and we will not interfere unless we are satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. A first appeal is a re-trial and we shall deliver ourselves on this appeal.

12. We are also mindful that the cause of action arose out of events that occurred on or about September 1997 when the appellant sought and obtained finance from the 1st respondent on the security of the suit property. From his testimony, the 2nd respondent bought the property by auction on 27th January 1998 and sought to take possession in March 1998 which activities led the appellant to filing suit before the High Court. Judgment was delivered in 2004. We find it necessary to point this out owing to the fact that there have been developments in the law since that time including the promulgation of the Constitution of Kenya, 2010 and the enactment of what is commonly known as the new Land Laws. We shall apply ourselves to the law as it obtained at the time with the appreciation that laws do not ordinarily have a retrospective application.

13. Turning to the first issue as to whether the allegation of fraud and misrepresentation by the appellant against the respondents were proved to the required standards or at all, the appellant contends that the respondent acted fraudulently and/or made misrepresentations. The appellant cites incidences like being made to sign acknowledging receipt of Shs.1,300,000/= instead of the shs.1,000,000/= that she actually received, the arbitrary and exorbitant interest of Shs.1,197,000/= over and above the principal after barely a month despite having been informed of the interest rate of 30%, then the charge document indicated an interest rate of 40%. Under **section 2** of the **Registration of Titles Act Cap.281** laws of Kenya (hereinafter referred to as the RTA), fraud shall, on the part of a person obtaining registration, include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.

14. We have previously held that in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR* Tunoi JA (as he then was) stated as follows:

“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.” (Emphasis ours)

As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

In this case, to succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.

15. In paragraph 21 of the amended pleadings, the appellant particularized six instances of fraud attributed to the 1st respondent ranging from the 1st respondent carrying himself as a bank in issuing a charge, extortionist and exorbitant interest rates and wrongfully purporting to realize security. These allegations amount to interpretation of statutory provisions to discern whether there has been breach or otherwise. The allegations fall within the RTA and Auctioneers Act to name but a few statutes. There was no dispute that the appellant sought financing from the 1st respondent and the loan was to be secured by the property. The law recognizes a charge as one such way of offering property as security. The witness from the Central Bank confirmed that the 1st respondent was licensed to carry out hire purchase business and not under the Banking Act. However, with the finding by the trial judge, which we agree with as correct, that it is not only banks that are permitted to take property as security by way of charge, that testimony became of not much value.

16. There is no doubt that it was unclear what interest rate was applicable or the calculation thereof. The appellant testified that the simple interest rate should have been applied while the 1st respondent argued that the applicable rate was compound. Finding basis on clause 1 of the charge, the 1st respondent argued that the minimum rate chargeable was 40% and the 1st respondent was at liberty to charge any such maximum permitted rate if the principal sum or any part thereof was not paid on the legal redemption date being the 31st day of September 1997. The said clause provides as follows:

“The Borrower hereby agrees with the Lender that if the Borrower will on the 31st day of September One thousand nine hundred and ninety seven next (hereinafter called “the Legal redemption date”) pay to the Lender the principal sum together with interest thereon from the 10th day of September (1997) at the minimum rate of (40%) per annum or at such other maximum rate for the time being permitted by the Government of Kenya to be charged by the Lenders and if the principal sum or any part thereof shall not be paid on the Legal redemption date to pay to the lender interest on so much of the principal Sum as shall for the time being be unpaid PROVIDED ALWAYS

- a. ***That the lender shall not be required to advise the Borrower prior to any change in the rate of interest . . .***
- b. ***That the rate of interest payable as aforesaid may from time to time be increased by the lender beyond the rate aforesaid...”***

Our plain reading of the clause is that there was no clear rate of interest applicable especially upon default beyond the Legal redemption date. The rate of 40% per annum was only applicable to the period up to and including the Legal redemption date. It can safely be inferred that on default the rate was going to increase, the discretion of which was reserved by the 1st respondent. The appellant has not demonstrated that she made any payment upon receiving the loan. As the appellant does not dispute the loan and that she defaulted, it is clear in our minds that the court has

a duty to uphold the rights of parties who have negotiated a commercial transaction and as a result one party acquires or achieves some benefits which she does not wish the other party to recover or enforce through the instrument that created the relationship. In that view we are guided by this Court's decision in *Aiman vs Muchoki (1984) K. L. R. 353* where it was held as follows;

“In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer”.

Moreover, where the 1st appellant was aggrieved and felt defrauded, she also had recourse under the law in reporting the matter to the police for their further investigation and action. No evidence was tendered to this end by the 1st appellant. We have reserved our further comments on the validity of the charge and its enforceability for discussion later on in this judgment. We are also mindful that the period during which the appellant borrowed lies within the period when there was high mobility in the interest rate regime. The best way, in our view, to address the applicable interest rate would be by evidence. The appellant despite request from the 1st respondent's advocates did not tender her version of what she considered a fair tabulation of the interest amount applicable. Without the benefit of being addressed on the matter, we are unable to make any definitive finding. However, we must add that the dispute as to the amount of debt does not in itself amount to an inference of fraud or malice to warrant the cancellation of the exercise of the power of sale by the 1st respondent and the subsequent purchase of the suit premises by the 2nd respondent.

17. In respect to the 2nd respondent, the appellant in paragraph 22 of her amended plaint attributed fraud to the 2nd respondent and particularized the fraud into six instances. These include the purchase of the suit property by the 2nd respondent whilst having reason to believe that the 1st respondent had no legal authority to dispose the suit property, collusion with the 1st respondent, attempts to evict the appellant and failing to notify the appellant of the 2nd respondent's acquisition of the suit property. The legality of the sale and transfer is the subject to our determination later in this judgment.

18. In evidence, the appellant produced two witnesses whose property had previously been acquired by the 2nd respondent following the sale by auction of their properties by the 1st respondent. However, despite showing that the property was eventually transferred to the 2nd respondent, none of the witnesses disputed their indebtedness to the 1st respondent leading to the sale of their properties. We are of the persuasion with this court's determination in *Central Kenya Ltd v Trust Bank Limited & 4 others [1996] eKLR* when

it held as follows:-

“There is no specific evidence to show that Floriculture and First National were aware of any dispute or defect in the title of the suit property. Mrs. Muiruri has said in her affidavit that one Mr. Nakar who was a director of the Floriculture was "linked" with Ajay Shah, the majority shareholder of Trust Bank and Trust Finance. That by itself cannot be evidence of Floriculture's complicity in the alleged fraud”.

(our emphasis)

The 2nd respondent admitted to being a businessman who buys and sells property. We did not see any evidence of relationship between the respondents apart from in the course of their respective business activities. It would be harsh for us to condemn and impute fraud on the mere fact that the 2nd respondent had prior transactions with the 1st respondent. Based on the standard and burden of proof on fraud that we have mentioned earlier in this judgment, we find that the appellant did not successfully discharge her burden as to cause a determination by this Court to impute fraud and/or

misrepresentation on the part of the 2nd respondent.

19. On the validity of the charge document dated 27th April, 1998, the appellant argued that the document did not meet the requirements of a valid charge creating a lawful and enforceable contract. From the description of the suit premises in the amended plaint, our perusal of the record and in particular the copies of title and the charge document in respect of the suit premises, it is apparent that the proper regime governing the suit property is the RTA

Section 2 of the RTA defines a “*charge*” to mean any charge created on land for the purpose of securing the payment of money and also the instrument by which the charge is created. *In Govindji Popatlal Shah vs Nathoo Visandjee [1960] E. A. 361 Windham J.A. said at p. 365:*

“...registration contained in Parts XIII and XIV of the Ordinance and to the exception of fraud or misrepresentation as set out in section 23 itself, the registration under the Ordinance of a mortgage or charge on land, if duly proved shall be accepted by the courts as conclusive of the validity of the document effecting it, including that which is a pre-requisite of its validity namely its due execution.”(emphasis supplied) Moreover, in *Govindji Popatlal vs Nathoo Visandjee (1962) E. A. 372 Privy Council* upheld the said decision of the Eastern African Court of Appeal. Lord Guest (at p.375 letter h) said:

“The certificate of title was in terms of section 23 conclusive evidence of the title of the mortgagee to the property. The charge when registered under section 32 has by section 46 the effect of a legal mortgage which transfers the property to the mortgagee leaving only an equity of redemption to the mortgagor.”

There is no doubt that the charge in issue was registered as No.IR 37140/4 on 3rd September 1997. As was held in the cases we have referred to above, registration of charge is conclusive on its validity including its execution. This is covered in the provisions of **sections 58 and 100** of the RTA and **section 69** of the **Indian Transfer of Property Act** on charges. The appellant’s submissions under the **Registered Lands Act**, are irrelevant as that Act is not applicable in the present circumstances. The appellant’s contention that the charge document was not explained to her despite her voluntary signature of the same before an Advocate is not only contradictory but is not persuasive at all. The underlying consideration is that the appellant intended to secure her borrowings from the 1st respondent by offering the suit premises. The appellant, a person who is well educated and exposed and could not have been duped into offering the suit premises as security as she now wants us to believe.

20. The appellant further argued that the 1st respondent had carried itself out as a bank and thus violated the provisions of **section 3** of the **Banking Act**. To that end the appellant procured a witness from the Central Bank who testified and confirmed that the 1st respondent was only licensed to carry out hire purchase transactions and was not a licensed bank. In so far as the charge is concerned, section 2 of the RTA defines a “*chargee*” to mean the person in whose favour a charge is created, and includes the person for the time being entitled to the benefit of the charge. This definition in our mind is not restricted to only banks within the meaning of the Banking Act and it covers other entities such as the 1st respondent. To this extent therefore, we agree with the trial judge that the 1st respondent was entitled to secure its borrowings by way of a charge over the suit property irrespective of whether or not it was a registered and/or licensed bank.

21. The trial judge found, and rightly so, that the statutory notice of sale was invalid. The trial judge did not however fault the sale arising from the said invalid notice for which the appellant is aggrieved. This question of validity of notice is well covered under case law in Kenya stemming from the English principles. There are two considerations in determining the validity of sale carried out further to an invalid statutory notice - before the sale and after the sale. Under RTA the mortgagee has power to sell either by private treaty or public auction and does not have to go to court to prove his debt provided **section 69A** of the Indian Transfer of Property Act is conformed

with. There are also instances where a notice need not issue, where interest for more than two months is due and remains unpaid. This was held by this court in *Trust Bank Ltd v Kiran Ramji Kotendia Civil Appeal No.61 of 2000* [2000] eKLR and followed in *James Ombere Okoth v East African Building Society & others Civil Appeal No.202 of 1996 (unreported)*. There is no evidence on record of payment having ever been made by the appellant to the 1st respondent towards repayment of the money borrowed for more than two months. For this reason alone, no notice was issuable to the appellant as explained above and it does not behove us to consider the issue any further.

22. Property passes to the purchaser and thus the mortgagor loses his equity of redemption upon execution of a valid contract of sale. It is not allowed to continue until conveyance or registration notwithstanding that some time elapses before conveyancing formalities are completed vesting the legal title to the purchaser. (See **Fisher and Lightwood Law of Mortgages** and *James Ombere Okoth case (supra)*). The cases follow the rule enunciated by

Mbuthia v Jimba Credit Corporation and another by Apaloo JA though dissenting). Since then, the law is settled that the equity of redemption is lost on the completion of a valid agreement for a valid sale (see *Ze Yun Yang v Nova Industrial Products Limited [2003] 1 EA 362*). This is notwithstanding that the mortgagee and purchaser may adjust the conditions of the contract as they agree. It is not lost on us that the 2nd respondent by the acceptance of his bid during the public auction and subsequent completion of a valid agreement for sale of the suit premises effectively locked out the appellant's right of redemption over the suit premises. The Registration of Lands Act, which is inapplicable in the present case, on the other hand expressly provides for this duty in **section 77(1)** thereof.

23. There is a general duty for a mortgagee to act in good faith in exercising the power of sale. This duty stems more from equity than statute. This argument is backed by the proposition that the fact that a sale has been effected at a properly conducted auction is a strong prima facie evidence that no unfair advantage has been taken either by the vendor or purchaser. Indeed, it has been argued that there is no better or more reliable method of determining the true and fair market value of property than by sale at public auction. To this end, Lord Macnaghten in *Frewen v Hayes [1912]106 LT 516* stated that

“the prices which the public are asked to pay (i.e at an auction) are the highest prices which those who bid can be tempted to offer by the skill and tact of the auctioneer and under the excitement of open competition.” From the foregoing, and having found that the 1st respondent was not obliged to sell by public auction, we are convinced that the 1st respondent acted in good faith towards realizing the security following the default by the appellant. The appellant was silent all along during the proceedings on any efforts she made towards repaying the loan or seeking indulgence on her borrowing despite aggressively coming out in seeking to impede the 1st respondent's exercise of its statutory duty. These actions by the appellant did not augur well in her attempts to seek our positive consideration in the circumstances.

24. We have also perused the notification of sale and noted that the same is issued pursuant to **rule 15** of the Auctioneer's Rules and is preceded by an Auctioneer's notice of 45 days. From the record before us, there is no evidence of such 45 day notice preceding the notification. Moreover, the notification contains a „typographic? error as to the description of the property indicating it to be LR No.209/8343/108 instead of LR.No.209/8343/107. It is worthy of note that the Indian Transfer of Property Act does not oblige sale to be subject to Auctioneer rules unlike the Registered Land Act. Moreover, **rule 11** of the Auctioneer's Rules applies to sale of immovable property in execution of decree. Its breach results in a grant of injunction at interlocutory stage as was held by Njagi J in a

Harrishcha Bhovanbhai Jobanputra & Another V Paramount Universal Bank Ltd & 3 Others [2011] eklr as follows:-

“Failure to indicate the reserve price is therefore, an express breach of Rule 11 (1) (b) (x) which is couched in mandatory terms and which must, therefore, be obeyed in observance. Failure to comply can only denote that no valuation of the property was undertaken contrary to the express requirement of that Rule. .. The total sum of these irregularities is that it would be procedurally illegal to allow the Applicants’ property to be sold unless and until the laid down procedure has been adhered to. I therefore, find that it would be improper to allow the Applicants to sell the said property without complying with the law, and that the Applicants have established a prima facie case with a probability of success. As the suit property has not been subjected to any valuation, it is difficult to tell what loss the Applicants will suffer, in monetary terms, if the said property is sold.”

On the same issue, Alnashir Visram J (as he then was) in *Nationwide Finance Co. Ltd Vs Meck Industries Ltd & Michael Gerald Kimani*[2001] eKLR held as follows:

“It is not disputed that the Notification of Sale did not contain a reserve price. At the time of its issue no valuation had been done. The power of the court to set aside a sale on the ground of irregularity is dealt with under Order XXI rule 79 of the Rules. That rule provides as follows:

“79. Where any immovable property has been sold in execution of a decree, the decree – holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it: Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”

I do not think that the court’s power to set aside a sale which is published or conducted irregularly or fraudulently is affected by the fact that the property had been sold to a bona fide purchaser for value without notice of the irregularity. The Learned Author of volume II of MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF 1908 (13th Edition, 1967, N.M. Tripathi Private Ltd, Bombay) says as follows at p. 1182:-

“If the conditions of this rule are satisfied, the sale will be set aside though the purchaser may be a bona fide purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale.”

The failure to comply with the relevant mandatory requirement of the Auctioneers Rules was a material irregularity and the judge was agreeable to setting it aside. The upshot of our above analysis is that unlike under the Registration of Lands Act, the 1st respondent as a chargee under RTA is not obliged to sell by public auction and the sale is not subject to the Auctioneer rules. Moreover, the said rule only applies when the intended sale is in execution of a decree and not the exercise of a power of sale as was in the present case.

25. The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser? In *Captain Patrick Kanyagia and Another v Damaris Wangeci and others*, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in *David Katana Ngomba v Shafi Grewal Kaka* [2014] eKLR. In *Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported)*, this court held that a purchaser at a public auction was protected by **section 69(B)** of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice. In the present case, the appellant has not demonstrated that the 2nd respondent had any notice of irregular exercise of the statutory power of sale by the 1st respondent or indeed whether there was any such irregular exercise of the statutory power of sale. As per the

testimony of the 2nd respondent before the trial court, the 2nd respondent's action to purchase was based on the advertisement for sale advertised in the newspaper. The 2nd respondent duly participated in the auction and his bid was accepted. We are reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. We are satisfied that the present appeal does not fall within an instance when we are called upon to interfere with the settled principle of law regarding protection of the exercise of statutory power of sale. If we were to interfere with this power, the acceptance of charge as security would in itself diminish with the attendant consequences of limiting access to finance as banks would not readily accept charges as security. (Pall J, in **Muhani and Another v National Bank of Kenya Limited [1990]KLR 73**)

26. We find it necessary to consider the remedies available for sale arising out of a non valid statutory notice. We restate that a mortgagor who has been prejudiced by a defective auction can only be remedied in damages. This is both under RLA and ITPA. Ringera J in **David Ngugi Mbuthia v Kenya Commercial Bank and Another (HCCC No.304 of 2001) Unreported** set the principle thus: a person damnified by a transfer of property by mortgagee to an auction purchase pursuant to any irregular or improper exercise of statutory power of sale is entitled to recover any damages directly suffered by him from the auctioneer. The same judge restated the position in **Hilton Walter Osinya and Saving and Loan (K) Ltd and another (HCCC No.274 of 2001) Unreported**. We agree with the above observation of Ringera J (as he then was).

27. The Auctioneer's Rules allow any person aggrieved by an auctioneer's exercise of his powers to make a complaint before the Auctioneer's Licensing Board including seeking damages. The appellant is aggrieved by the auctioneer who flouted provisions of the Auctioneer's rules in so far as the exercise of the power of sale was concerned as pointed out in her submissions. We were however baffled by the appellant's failure to prefer a claim against the auctioneers despite this direct grievance against them. Had the auctioneers been party to the suit perhaps we would have considered the matter differently and arrived at a different conclusion. However, in the circumstances, we are unable to apply ourselves to that probable situation as the prayers sought in the appellant's amended claim were against the respondents and not auctioneers. We therefore find merit in the trial judge's findings with regards to the issue of damages.

28. In conclusion, we do not find merit in the appeal which we dismiss. We would order that each party bear its own costs.

Dated and delivered at Nairobi this 2nd day of October, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR