



**Bamoto Distributors Limited v Mohamedali (Environment & Land Case  
E003 of 2022) [2024] KEELC 4718 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4718 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E003 OF 2022**

**LL NAIKUNI, J**

**JUNE 5, 2024**

**BETWEEN**

**BAMOTO DISTRIBUTORS LIMITED ..... PLAINTIFF**

**AND**

**NAJMUDIN NOORALI MOHAMEDALI ..... DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment by this Honourable Court pertains to a suit instituted through a Plaint dated 11<sup>th</sup> January, 2022 by Bamoto Distributors Limited, the Plaintiff herein against Najmudin Noorali Mohamedali, the Defendant herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance and filed his Defence dated 1<sup>st</sup> March, 2022 and filed in court on the 2<sup>nd</sup> March, 2022.

**II. Description of the Parties in the suit**

3. The Plaintiff was described as a limited liability company incorporated in Kenya under the *companies Act* CAP 486 laws of Kenya. Its address of service for purposes of this suit shall henceforth be care of Messrs. Opwapo & Company Advocates, Palli house, 3<sup>rd</sup> floor, Nyerere Avenue, opposite Biashara building, P. O. Box 80796 – 80100, Mombasa.
4. The Defendant in the Plaint was described as a male adult of sound mind residing and or working for gain in the County of Mombasa within the Republic of Kenya.

**III. Court directions before the hearing**

5. Nonetheless, on 18<sup>th</sup> May, 2023, the Honourable Court fixed the hearing dated on 13<sup>th</sup> July, 2023 with all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 on



the Pre - trial conference, the suit was fixed for full trial on the 13<sup>th</sup> July, 2023 with the Court proceeding for the same that afternoon at 2.00 pm and the Defendant called its witness on 22<sup>nd</sup> February, 2024. The Parties called their cases to a close on the same day.

6. This matter proceeded on for hearing by way of adducing “Viva Voce” evidence with the Plaintiff’s witness (PW – 1) testifying in Court on 13<sup>th</sup> July, 2023. After which the Plaintiff closed their case. The Defendant called its witness on 22<sup>nd</sup> February, 2024 (DW 1) after which their closed their case thereafter.

#### **IV. The Plaintiffs’ case**

7. From the filed pleadings, at all material times to this suit the plaintiff is the proprietor of go down No.1 on plot No. MOMBASA/BLOCK XV/47 having purchased the same in a public auction that was conducted on the 16<sup>th</sup> September 2021. After being supplied with all the documentations that were required for transfer of the said plot to its name the Plaintiff did make an application to the Registrar of Lands to have it registered as the proprietor of the suit property in which the Registrar of Lands issued a Certificate of Lease to that effect on the 19<sup>th</sup> November 2021.
8. On or about the 1<sup>st</sup> December 2021 the Plaintiff approached its advocates on record Messrs. Opwapo & Company Advocates with instructions to evict the defendant from the suit property upon which the foresaid advocates proceeded to write a demand letter to the defendant requiring him to give vacant possession of the suit property. The Defendant had been a trespasser and had continuously remained so with effect from 16<sup>th</sup> September 2021 to date. Despite of demand and notice of intention to sue having been issued to the Defendant, the Defendant had failed, refused and or neglected to give vacant possession of the suit property hence rendering the institution of this suit necessary.
9. According to the Plaintiff, the Defendant’s continued illegal and unlawful occupation of the suit property had caused and continued to cause substantial loss and damage to the Plaintiff as the Plaintiff had been unable to utilize, enjoy and occupy its property. There was no suit pending, and there had been no previous proceedings in any court between the parties herein over the same subject matter. The cause of action arose in Mombasa within the jurisdiction of this Honorable court.
10. The Plaintiff herein prayed that Judgement to be entered against the Defendant in terms of:-
  - a. A declaration that the Plaintiff is a legal registered owner of the whole of go down No.1 on plot NO.MOMBASA/BLOCK XV/47 having purchased the same in a public auction that took place on the 16<sup>th</sup> September 2021.
  - b. A declaration that the Defendant is a trespasser in go down No.1 on plot No. MOMBASA/BLOCK XV/47.
  - c. An order to the effect that the defendant vacate or be evicted from the suit property under supervision of the nearest police station.
  - d. Detinue and mesne profits
  - e. A permanent injunction to issue restraining the Defendant by himself, his authorized servants, agents, workmen and or any other person whatsoever and whomsoever from remaining on, disposing of, further trespassing and or in any other way interfering with and or doing any other act that is prejudicial to the Plaintiff’s quit enjoyment and occupation of go down NO.1 on plot NO. MOMBASA/BLOCK XV/47.
  - f. General damages for trespass and unlawful occupation on the suit property.



g. Costs and interest to this suit.

11. The Plaintiff called their witness PW - 1 on 13<sup>th</sup> July, 2023 at 2.00 pm where he averred that:-

**A. Examination in Chief of PW - 1 by M/s. Memia Advocate.**

12. PW - 1 testified on oath in English language. She identified herself as being M/s. Raksha Hasit Shah. The Court noted down all her identification particulars as stated out from the Kenyan national identity card. She lived in Mombasa Nyali. She was the Director for Bamoto Distributors Limited, the Plaintiff herein. She recorded witness statement dated 11<sup>th</sup> January, 2022. She filed the following documents:-

- a. A list of documents dated 11<sup>th</sup> January, 2023.
- b. The Supplementary list of documents dated 16<sup>th</sup> February, 2023 comprising of 9 documents;
- c. A further further list of documents dated 26<sup>th</sup> May, 2023 That is two documents.

Thus, the total number of documents filed by the Plaintiffs were 18 (Plaintiff Exhibit Numbers 1 to 18) which the witness adopted with the statement as her evidence in chief.

13. PW - 1 stated that she acquired the suit property through public auction. She a notice of sale of the suit property advertisement published from one of the local newspaper – “The Daily Nation” newspaper of 31<sup>st</sup> August, 2021. She attended the Public auction. They asked her to pay 30% which she did. Later on she was asked to pay 70% which she did. She acquired a Certificate of Lease in their name for the suit property. She knew about the sale through the newspaper advertisement in the local paper. She was issued with the certificate of sale. It was given to her by the auctioneer. She bought the suit property at a sum of Kenya Shillings Fourteen Million Seven Hundred Thousand (Kshs. 14,700,000/-). She was informed of the Land valuation report prepared by Messrs. P.K. Limited. It was valued for a sum of Kenya Shillings Twenty Seven Million (Kshs 27,000,000/-). Subsequently, there was another valuation report after the earlier one. It was valued at a sum of Kenya Shillings Fourteen Million Seven Hundred Thousand (Kshs. 14,700,000/). She made the 1<sup>st</sup> payment on 31<sup>st</sup> August, 2022. Although she took up possession of the property, but the Defendant was still on it. She had not acquired it illegally. She thought she would get the property but due to the Court cases, she had not gotten into it.

14. According to the witness, the property was currently worth at a sum of Kenya Shillings One Hundred Million (Kshs. 100,000,000/-). She had asked them to vacate through her advocates. She had incurred so much losses for 2 years. She urged Court to grant her the prayers sought from the Plaint. She wanted justice to be given to the property.

**B. Cross examination of PW - 1 by Mr. Mwanzia Advocate.**

15. The witness told the court that it’s the Bamoto Distributors Limited – the Plaintiff herein that bought the suit land property. She was the sole proprietor of the property. She confirmed not having the authority to be in court. The property was bought on 31<sup>st</sup> August, 2022. She made the payments through a cheque. After that they prepared the sale agreement and other transactional documents such as the transfer forms and consents.

16. With reference to the valuation report dated 8<sup>th</sup> February, 2019, the forced value for the property is indicated as being a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-). However, she purchased the property at a sum of Kenya Shillings Fourteen Million (Kshs. 14,700,000/-). She knew Mr. Najmudin Noorali Mohamedali very well. She approached him on hearing that the property would be on sale and thus her wanting to purchase the said the property. He gave her an offer of a sum of Kenya Shillings Thirty Five Million (Kshs. 35,000,000/-). However, she found the offer rather high for



her. Nonetheless, she gave him a counter offer of a sum of Kenya Shillings twenty Three Million (Kshs. 23,000,000/-) but which he declined. She was not surprised when the bank sold it at a sum of Kenya Shillings Fourteen Million Seven Hundred Thousand (Kshs. 14,700,000/-). One always went for the cheaper offer. The property was located along the Mamba Village area. She was aware of the Civil Suit HCCC No. 93 of 2021 before the High Court over the same subject matter. She had suffered losses in terms of failure to receive rental income from a property she had already acquired in her name. She had nothing to prove the losses incurred though she urged the Court to consider the location where the property was situated being a prime one to be able to deduce the value and her submission.

#### **C. Re - examination of PW - 1 by M/s. Memia Advocate.**

17. PW - 1 confirmed that she made the payment on 31<sup>st</sup> August, 2022 and 16<sup>th</sup> September, 2022 through the I & M Bank. She was given an offer by the Defendant for a sum of Kenya Shillings Thirty Five Million (Kshs 35,000,000/-) which was way before the public auction had happened. She was aware that Bamoto Distributors Limited was involved in the High Court. She estimated that the rental income was around the tune of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) per month.
18. Through their counsel M/s Memia Advocate, the Plaintiff marked their case closed on 13<sup>th</sup> July, 2023.

#### **V. The Defendant's case**

19. The Defendant entered appearance and filed his Defence dated 1<sup>st</sup> March, 2022 and filed in court on the 2<sup>nd</sup> March, 2022. He opposed the suit and sought for the following orders:-
  - a) The Defendant prayed that the Plaintiff's suit be struck out and / or dismissed with costs.
20. On 22<sup>nd</sup> February, 2024, the Defendant called its witnesses DW - 1 who testified as follows:

#### **A. Examination in Chief of DW - 1 by Mr. Mwanzia Advocate.**

21. DW - 1 testified on oath in the English language. He identified himself as being Mr. Najmudin Noorali Mohamedali. The Court noted down all his identification particulars as stated out from the Kenyan national identity card. He told the Court that he lived near the Railway Station at the County of Mombasa. He was engaged in Brakes Lining business. He recorded a witness statement dated 28<sup>th</sup> April, 2023 which he adopted as his evidence in chief. Further, he admitted the list of documents as Defendant's Exhibit Number 1 to 6. He was in court to state that the godown in dispute was his. He bought it in the year 1990 from one Mr. M.A. Tajbhai. DW – 1 stated that he then gave it to his brother in law as a guarantor. By then his brother – law was operating a petrol station trading in the names and style of Messrs. Hatimi Services Stations. In the course of time, he had taken a loan from some financial institution to continue running his petroleum – products related business. Eventually, he was unable to service the loan and asked the witness to pay it. DW – 1 outrightly refused as he was not the one who utilized the finances but his brother – in law. It was thereafter, he started receiving notices written to him directly from the financial institution threatening that they would take appropriate legal action if the loan was unsettled. In order to protect his property and secure legal rights which he was entitled to, he filed a civil case in HCCC (Mombasa) No. E093 of 2021.
22. The witness told the court that he was challenging the auction for three reasons. First, despite filing the said case, at first there were no orders. But later on, he got stay orders. At page 14 of his bundles, on 15<sup>th</sup> September, 2021 were said orders to stop the auction from being conducted by the bank. They served the orders upon the auctioneers through a process server. Accordingly the auction was stopped. But later on, it was alleged that the Auction was carried out on 16<sup>th</sup> September, 2021 and the payment was made on 31<sup>st</sup> May, 2022. See the on Defendants documents at Page 13. This was invalid.



23. Secondly, DW - 1 told the court that he was also challenging the auction as it was under - valued. Thirdly, as far as he was concerned, there was no auction that was done. He had the valuation report. He had never taken the loan but it was taken by Hatimi Services Stations. It was his brother – in – law to pay but he refused. This was an issue between him and Hatimi Services Stations. He wanted his Go down back.

#### **B. Cross examination of DW - 1 by M/s Memia Advocates.**

24. DW - 1 told the court that he gave his brother in law a guarantee to the bank. He never got the money. He never joined Hatimi Security Station and I & M as a party in this suit nor in the Civil Case HCCC E093 OF 2021. He was not aware that the case had been dismissed. He did not know of the case No. 11 of 2020. He did not know that the Court ordered for the payment of the loan to the bank. With reference to the Certificate of lease in the Plaintiff's bundle of documents, it was issued on 19<sup>th</sup> November, 2021. He did not know anything. He strongly refuted that the auction ever took place. It was fraud as there was a Court order for stay of execution.

25. According to the witness, he challenged both Certificate of Lease as the auction never took place at all. With reference to paragraph 2 of the Court order dated 16<sup>th</sup> September, 2021 (HCCC. E093 of 2021) there was no public auction which took place. There were no witnesses at the said auction. It must have been done at the Plaza. With reference to the Notice on the auction at paragraph, DW – 1 held that it was an inside job. He did not know of the Certificate of sale dated 16<sup>th</sup> September, 2021. There was no order to declare the auction was illegal. He did not have anything in Court to show that the Court was served. He never sold the property to the Plaintiff. He was never paid any money. When reference to the cheque made for the purchase of the property, he stated that it indicated to be for a sum of Kenya Shillings Three Million Seven Hundred Thousand (Kshs. 3,700,000/-) which was paid dated 31<sup>st</sup> August, 2022.

26. DW - 1 told the Court that from the title deed the charge was on 3<sup>rd</sup> June, 2010 and discharged on 29<sup>th</sup> March, 2016. With reference to the letter dated 3<sup>rd</sup> June, 2010 the witness stated that currently it was him who had been in occupation of the suit property. Thus, it was his property although he was not paying any rates on it. On the order issued on 16<sup>th</sup> September, 2021, he had no proof it was served on Bamoto Distributers Limited.

#### **C. Re - examination of DW - 1 by Mr. Mwanzia Advocate.**

27. The witness confirmed that he had sued the I & M Bank in other cases. He had seen the order of 16<sup>th</sup> September, 2021. Although, he saw the notice for public auction but there was no auction. The cheque was paid in Nairobi and the auction was in Mombasa.

28. On 22<sup>nd</sup> February, 2024 the Learned Counsel for the Defendant, Mr. Mwanzia marked the close of their case.

#### **VI. Submissions**

29. On 22<sup>nd</sup> February, 2024 after the Plaintiff and Defendant marked the close of this case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that all the parties fully complied accordingly. On 22<sup>nd</sup> April, 2024, the Honourable court reserved a date to deliver its Judgement on 5<sup>th</sup> June, 2024.



## A. The Written Submissions by the Plaintiff

30. The Plaintiff through the Law firm of Messrs. Opwapo & Company filed their written submissions dated 26<sup>th</sup> March, 2024. M/s. Memia Advocate submitted that these were Plaintiff's final written submission in support of her case as against the Defendant. The Learned Counsel provided a brief background on the matter. She stated that the Plaintiff moved this court by Plaint dated 11<sup>th</sup> January, 2022 and filed on the 14<sup>th</sup> January, 2022 and sought for the above set out orders.
31. The suit was defended whereby the Defendant entered appearance and filed his Defence dated 1<sup>st</sup> March, 2022 and filed in court on the 2<sup>nd</sup> March, 2022 when he opposed the suit and sought for the following orders:-
  - a) The defendant prays that the plaintiff's suit be struck out and / or dismissed with costs.
32. The suit was set down for hearing on the 13<sup>th</sup> October, 2023 where the Plaintiff testified and closed her case and matter was set down for defence case hearing on the 22<sup>nd</sup> February, 2024. On the 22<sup>nd</sup> February, 2024 the defendant's case was heard and closed and the honorable court gave further directions on the filing of the submissions.
33. On the issues for determination, the Learned Counsel relied on the following four (4) issues. These were, firstly on whether or not the Plaintiff is a Legal registered owner of the whole of GODOWN NO.1 on PLOT NO. MOMBASA/BLOCK XV/47. The Learned Counsel submitted that PW - 1 testified during the hearing that it was the beneficial owner of all that suit property known as Godown No.1 on Plot No. MOMBASA/BLOCK XV/47 and relied on Exhibit no. 2 being the Certificate of Lease which was issued on the 19<sup>th</sup> November, 2021. Section 26 of the [Land Registration Act](#).
34. She submitted that the Defendant had never filed any Claim in any Court of Law for cancellation of the said Certificate of lease in circumstances of this case the said Certificate is valid. Therefore the Plaintiff is the lawful and/or registered owner of the suit property herein.
35. Secondly, on whether or nor the transfer of the suit property to the Plaintiff herein was unlawful. The Learned Counsel averred that the answer to this question was in the affirmative. That on the 13<sup>th</sup> July, 2023 of the Plaintiff company testified before this Court that on or about the 30<sup>th</sup> August, 2021 she read an advertisement published on one of the local dailies being "The Daily Nation" newspaper on the sale of the suit property by public auction. She became interested and after making inquiries on the suit property she made payment of the requisite 25% deposit by way of cheque No 000501 dated 31<sup>st</sup> August, 2021. The said cheque was filed as item number 1(one) in the Plaintiffs further list of documents dated 26<sup>th</sup> May, 2023. The 25% paid by the Plaintiff on the 31<sup>st</sup> August, 2021 translated to a sum of Kenya Shillings Three Million Seven Hundred and Fifty Thousand (Kshs. 3,750,000/-). Further, the said Plaintiffs witness testified that she made the last payment of the suit property on the 19<sup>th</sup> September, 2021.
36. The Learned Counsel asserted that the Defendant on his part never disputed the fact that the suit property was transferred to the Plaintiff but stated in Paragraph 8 of his defence dated 1<sup>st</sup> March, 2022 and filed on the 2<sup>nd</sup> March, 2022 that:
  - " 18. The Defendant states that the sale of the suit property in favor of the Plaintiff was illegal, null and void for the following reasons:



- a. I & M Bank Limited had not served the Defendant with a ninety (90) days - notice under Section 99 of the Land Act before the said intended sale.
- b. I & M Bank Limited had not served the Defendant with a forty (40) days - notice Under Section 96 (2) of the Land Act before the aforesaid intended sale.
- c. I & M Bank Limited had not served the Defendant with a forty-five (45) days -notice as provided for Under Rule 15(d) of the Auctioneers Rules.
- d. The sale offends Section 97(2) and (3) of the Land Act as read with Rule 11 (b) (x) of the Auctioneers Rule, which provides that the bank should undertake the current valuation of the suit properties before undertaking the said sale as no current valuation of the suit properties has been undertaken herein. For the avoidance of doubt such a report should not be older than 12 months up to the date of the intended date of sale of the property.
- e. Even though the value of the suit property is over Kshs 36,000,000/- the Plaintiff purchased the property at Kshs 24,000,000/-
- f. Crucially the I & M Bank Limited had not complied with the orders made by the Court in Mombasa High Court Civil Suit No.11 of 2020; Najmudin Noorali Mohamedali – Versus - I & M Bank Limited and another.

37. The Learned Counsel submitted that the Defendant's alleged particulars of illegality could not negate the sale of the suit property to the Plaintiff as the Plaintiff is protected Under the Provisions of Section 99(2) of the Land Registration Act. The said Provisions of the Law states that:-

“ 99

- (2) A person to whom this Section applies-
  - a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charge land.
  - b) is not obliged to see the application of the purchase price.
  - c) is not obliged to inquire where there has been a default by the charger or whether any notice required to be given in connection with the exercise of power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.....”



38. According to the Learned Counsel, the only remedy that the Defendant had here was to claim damages arising as a result of the sale from the Auctioneers as provided in Section 99(4) of the [Land Registration Act](#) which states that:-

“99(4) A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power”

39. It was the Learned Counsel’s submission that there was no order filed before this Court declaring the sale of the suit property by public auction on 16<sup>th</sup> September, 2021 unlawful or illegal. The Defendant never bothered to obtain orders to restrain the Land Registrar of Mombasa from registering the Plaintiff as a lawful owner of the suit property nor did the Defendant file a Counter - Claim in this suit to seek for the cancellation of the Certificate of Title issued to the Plaintiff on the 19<sup>th</sup> September, 2021. In the circumstances of this case the suit property lawfully changed hands from the Defendant to the Plaintiff herein and the Plaintiff being an innocent purchaser for value ought to be allowed to enjoy quite vacant possession of the suit property herein.

40. The Learned Counsel opined that the above submissions resonated with the case of “David Situma Wekesa & Another – Versus - I & M Bank Limited & Two Others” where the Court cited cases of “Erick O. Odindo – Versus - National Bank of Kenya & 2 Others (2008) eKLR”, the Court held that:-

“The requirement of Rule 15 of the Auctioneers rules are obviously mere statutory procedures precedent to the lawful exercise of power of sale by charge, non-compliance of which is a mere irregularity which will not ordinarily invalidate an auction sale.”

41. To buttress on this point further, the Learned Counsel cited the case of:- “Jacob Ochieng Muganda – Versus – Housing Finance Company of Kenya Limited (2003) eKLR”,

“The Property in issue is a block of flats in West Nairobi. The Property was knocked down at Public auction. If there was any irregularity in the conduct of the auction the applicant would be entitled for damages against the auctioneer pursuant to section 26 of the Auctioneer Act which provides that subject to the provisions of any other law, a person who suffers any special or general damages by the unlawful or improper exercise of any power of a licensed auctioneer shall be entitled to recover any damages directly suffered by him from the auctioneer by action”.

This never happened in the instant case.

42. Thirdly, on whether or not the Defendant ought to be evicted from the suit property. It was the contention of the Learned Counsel that the Defendant by his written statement dated 28<sup>th</sup> April, 2023 stated that:-

“At all material times in this suit, I was and remain a guarantor to HATIMI SERVICES STATION In credit over draft facility offered to them by I & M BANK LIMITED sometime on 12<sup>th</sup> January, 2020 for the sum of Kshs.8,500,000/- (eight million five hundred thousand only).”

The said guarantee was effected through a charge on my property known as Title number MOMBASA/BLOCK XV/47 (Godown No.1) herein after called, “suit property”.

43. According to the Learned Counsel, this amounted to admission. Further, that the Defendant never filed any document before this Court to the effect that the said loan facility was satisfied to completion.



However, from the prevailing circumstances it was worth noting that the said loan was not satisfied to completion reason why the sale of the suit property by Public Auction was conducted where the Plaintiff emerged the highest bidder and therefore became an innocent purchaser for value.

44. It was the Learned Counsel's submission that the Defendant guaranteed HATIMI SERVICES STATION in the loan facility mentioned above while knowing very well of the consequences and repercussions that could issue in the event that the said loan was not satisfied to completion yet he failed to ensure that the said facility was paid back to the chargee (I&M bank) who in default of repayment on the same on their part of the Defendant proceeded to sale the suit property to the Plaintiff herein.
45. She referred Court to the case of:- "Joyce Wairimu Karanja – Versus - James Mburu Ngure & 3 others (2018) eKLR" Justice Joel Ngugi while citing the case of "Simon Njoroge Mburu – Versus - Consolidated Bank of Kenya Limited (2014) eKLR" stated in paragraph 31 of his judgement that:

“..... what is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the charger is extinguished. The only remedy for the charger who is dissatisfied with the conduct of the sale is to file a suit for general or special damages.....”
46. The issue of this suit being premature and sub judice to High Court civil suit No. E093 of 2021 cited in paragraphs 10 and 11 of the Defendant's statement of defence dated 1<sup>st</sup> March, 2024 never held any waters here. This was because, for one this was the only Court that is clothed with the jurisdiction of entertaining matters related to land. Secondly, Mombasa High Court of Civil suit NO. E093 of 2021 had since been dismissed as against the Plaintiff herein vide the High Court's ruling delivered on 13<sup>th</sup> July, 2023.
47. The Defendant testified before this Honourable Court on the 22<sup>nd</sup> February, 2024 that he was in actual possession of the suit property. In view of the above submission the Defendant ought to be evicted and/or vacated from the suit property to enable the Plaintiff enjoy quite vacant possession of the same.
48. Fourthly, on whether, the Plaintiff was entitled to the reliefs sought herein this suit. The Learned Counsel opined that the Plaintiff among sought the following orders: -
  - a. A declaration that the Plaintiff is a legal registered owner of the whole of Go down No.1 on plot No. MOMBASA/BLOCK XV/47 having purchased the same in a public auction that took place on the 16<sup>th</sup> September, 2021.
49. According to the Learned Counsel, PW - 1 testified in court that the suit property was advertised on the 30<sup>th</sup> August, 2021 for public auction on the 16<sup>th</sup> September, 2021. The newspaper advertisement was marked as exhibit No. 5. It was issued with a certificate of sale dated 16<sup>th</sup> September, 2021 having bought the same from Purple Royal Auctioneer for a sum of Kenya Shillings Fourteen Million Seven Hundred Thousand (Kshs. 14,700,000/-) herein marked as Exhibit no 4 of the plaintiffs list of documents dated 11<sup>th</sup> January, 2022.
50. It was the case of PW - 1 that she received the transfer documents and made an application to the Registrar of Lands Mombasa office. This was to have the suit property registered in the Plaintiff's company's name. Indeed, the registration was executed on 19<sup>th</sup> November, 2021. A Certificate of Lease was issued and which was referred as Plaintiff exhibit no 2. In light of the above and with the testimony by PW – 1, the suit property known as whole of Go down No.1 on plot No. MOMBASA/BLOCK XV/47 belonged to the Plaintiff.



51. To justify this legal assertions, the Learned Counsel relied on the provisions of Sections 24, 25 and 26 of 'The Land Registration Act' No. 3 of 2012. Further, she cited the provision of Section 107 (1) of the Evidence Act, Cap. 80 on the burden of proof to wit that he who alleges had to prove. She submitted that the Plaintiff had proved beyond reasonable doubt that it is the legal registered owner of the whole of the suit land.

52. On prayer (b) in the Plaint;

b. A declaration that the defendant is a trespasser in go down No.1. on plot No. MOMBASA/BLOCK XV/47

The Learned Counsel submitted that the PW - 1 stated that although the Plaintiff had a valid Certificate of Lease issued on the 19<sup>th</sup> November, 2021 the suit property is in actual possession of the Defendant herein. During cross examination, DW - 1 stated that he had been staying in the suit property for 2 years. According to BLACK'S LAW DICTIONARY 8<sup>TH</sup> EDITION, Trespass is defined, in the strictest sense, as:-

“An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property.”

53. A continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”

54. It was PW - 1's case that the Defendant was a continued trespasser having illegally been in occupation in the suit property for 2 years. This was even after the demand letter dated 1<sup>st</sup> December, 2021 herein exhibit no 3 of the Plaintiff's list of documents dated 11<sup>th</sup> January, 2022 was served upon the Defendant herein to give vacant possession of the suit property. During cross examination the Defendant informed the honorable court that by virtue of his old certificate of lease marked as Defendant's exhibit No. 2 he was entitled to ownership of the suit property and that he was in current possession of it.

55. To support her on this point, the Counsel referred Court to the case of:- “Park Towers Limited – Versus - John Mithamo Njika & 7 others (2014) eKLR”, J.M Mutungi J., stated:

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case....”

56. They further relied on the following case where the honorable court was determining the award of damages for trespass J.M. ONYANGO in his judgement in “Joseph Kipchirchir Koech – Versus - Philip Cheruiyot Sang [2018]eKLR” stated as follows at paragraph 55.

“I have already determined that the Defendant's actions amounted to trespass to private land. It therefore follows and I do find that the Plaintiff has suffered loss and damage, to wit: quiet enjoyment of his property through the unwarranted interference of his property by the defendant. No evidence is required before damages for trespass to land can be awarded. However, considering the peculiar circumstances of this case where the plaintiff initially



invited his brother (the Defendant) to use and cultivate the suit land, I will award only minimal damages”.

57. Therefore, the Learned Counsel averred that the Plaintiff prayed that the Defendant be deemed to be a continued trespasser and the honorable court to award damages for trespassing.

58. On the third prayer on an order to the effect that the Defendant vacate or to be evicted from the suit property under the supervision of the nearest police station. The Learned Counsel submitted that the Plaintiff prayed for the Defendant to give vacant possession of the suit property known as the whole of the suit property which the Defendant had been in occupation for two years having known he was not the owner of the suit property thus defeating the provision of Section 26 of the *Land Act* that gives the Plaintiff the rightful enjoyment of the suit property having obtained a certificate of lease issued on the 19<sup>th</sup> November, 2021 and herein marked as exhibit 2 of the Plaintiff's list of document dated 11<sup>th</sup> January, 2022.

59. They relied on the case of “Joseph Kipchirchir Koech – Versus -Philip Cheruiyot Sang [2018] eKLR” where the justice M. Onyango ordered as follows:-

“The defendant shall vacate the suit land within 90 days from the date hereof failing which the plaintiff may apply for an eviction order”

60. On detinue and mesne profits, the Learned Counsel relied on the case of “East Africa in Rioki Estate CO. (1970) Limited – Versus - Kinuthia Njoroge (1977) KLR” where the court referred to the definition of “mesne profits” in the provision of Section 2 of the *Civil Procedure Act*, Cap. 21. The section provides:-

“Mesne profits, in relation to property, mean those profits which the person in wrongful Possession of such property actually receive or might with ordinary diligence have received there from, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

61. The Plaintiff witness one RAKSHA HASIT SHAH testified before this Court that the Plaintiff would have earned a monthly income of Kenya Shillings One Hundred and Fifty Thousand (Kshs.150,000/-) per month had it been left to occupy and utilize the suit property. The said testimony was not controverted in way by the Defendant when he gave his evidence in chief before this Court on the 22<sup>nd</sup> February, 2024. In the premises, they prayed that the Court awards the said prayer on the basis of the above anticipated monthly income from the time of purchase of the suit property until full and final payment of the same.

62. On the prayer on the permanent injunction to issue restraining the Defendant by himself, his authorized servants, agents, workmen and or any other person whatsoever and whomsoever from interfering with and or doing any other act that was prejudicial to the Plaintiff's quiet enjoyment and occupation of the suit property; the Learned Counsel submitted that the Plaintiff being aggrieved by the acts of the Defendant's interference on the suit property prayed for a permanent injunction.

63. On the general damages for trespass and unlawful occupation on the suit property. The Learned Counsel submitted that the Plaintiff prayed for damages for trespass and relied on the above “Joseph Kipchirchir Koech case (Supra)”, where the Honourable court awarded the Plaintiff therein an award of general damages for trespass and further stated as follows:

“No evidence is required before damages for trespass to land can be awarded....”



From the above cited case they therefore left it to the court for the determination of general damages award.

64. On the costs and interest to this suit, the Learned Counsel urged Court to award cost and interest of this suit to the Plaintiff for the unlawful interference of the suit property.

## **B. The Written Submissions by the Defendant**

65. The Learned Counsels for the Defendant through the Law firm of Messrs. Mutisya Mwanzia & Ondeng filed his written submissions dated 3<sup>rd</sup> May, 2024. Mr. Mwanzia Advocate submitted that the Defendant acted as a guarantor to Hatimi Service Station for a loan of a sum of Kenya Shillings Eight Million Five Hundred Thousand (Kshs.8,500,000/-) issued by the I & M Bank Limited. The guarantee was effected through a charge over the suit property. Sometimes in the year 2020, the Defendant was served with a notification of Sale of the Suit property. However, the Defendant successfully challenged the intended Sale of the Suit property by filing a Civil Suit “Mombasa High Court Civil Suit No. E011 of 2020; Najmudin Noorali Mohamedali – Versus - I&M Bank Limited & Another”. In a Ruling delivered on 3<sup>rd</sup> February, 2021, the Court made the following orders:

- “ a. The Defendants be and are hereby directed to serve the Plaintiff specifically with notices per-requisite to exercise of statutory power of Sale as required in Law. I direct as such to enable the Plaintiff put his house in order be at Liberty to settle the outstanding amount before the period for notices expires.
- b. An injunction is hereby granted against the Defendants pending compliance with order (a)above.”

66. Despite having not complied with the orders made by the Court with regard to the service of all the notices per-requisite to exercise of statutory power of Sale, the bank proceeded to issue another notification for Sale of the property on 16<sup>th</sup> September, 2021. The Defendant then moved the court through “Mombasa High Court Civil Suit No. 93 of 2021 Najmudin Noorali Mohamedali – Versus -I & M Bank Limited” from proceeding with the intended public auction. Despite being served with the order, the Bank appears to have transferred the property to the Plaintiff herein the court order notwithstanding. Even though the public auction was conducted on 16<sup>th</sup> September, 2021, the Plaintiff paid the deposit of the purchase on 31<sup>st</sup> August, 2021 way before the auction. Further the Plaintiff confirmed that forced Sale value was a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-). The said report was dated 8<sup>th</sup> February, 2019.

67. The Learned Counsel relied on the following issues for determination:-

- a. Whether the transfer of the suit property from the Defendant to the Plaintiff was lawful?
- b. Whether the Plaintiff is entitled to the relief sought?

68. On whether the transfer of the suit property from the Defendant to the Plaintiff was lawful, the Learned Counsel submitted:

- a. None issuance of the requisite statutory notices and compliance with the orders issued in Mombasa High Court Civil Suit No.E011 of 2020, Najmudin Noorali Mohamedali in I & M Bank Limited & another.



- b. The auctioneer planned a “staged” public auction which is not in line with the Auctioneer Act and the Rules by colluding with the Plaintiff and receiving a deposit for the sale before the date set for the auction.
  - c. Sale of the property at on under-value.
  - d. The Bank and the Auctioneer did not conduct the sale in strict accordance with the Rules of Public Auction and are deemed to have conducted a private sale and Section 98(4) of the [Land Act](#) makes it mandatory that the said sale be at market value. In addition, that sale does not extinguish equity of redemption.
69. The Learned Counsel submitted that the Defendant relied on the ruling made by the court in “Mombasa High Court Civil Suit No. E011 of 2020; Najmudin, Noorali Mohamedali – Versus - I & M Bank Limited & another” whereby the Court granted a mandatory injunction restraining the Bank from selling the suit property until all the requisite notices are complied with. Even though the Plaintiff filed notices allegedly served upon the Defendant by the Bank, the Plaintiff failed to call a witness from the Bank to testify and/or produce the said letters. Therefore, the Plaintiff never rebutted the fact that notices were not served before the Sale of the Suit property. On 13<sup>th</sup> July, 2023, the Plaintiff sought for leave to call witnesses to produce the letters and the valuation but when leave was granted, the witnesses were not produced in Court. This clearly confirmed none compliance on the part of the Bank. The said none compliance rendered the Sale null and void.
70. The Learned Counsel further submitted that it was not in dispute that the public auction was conducted on 16<sup>th</sup> September, 2021. However, the Plaintiff confirmed that she paid the deposit on 31<sup>st</sup> August, 2021, way before the public auction. Though, the Plaintiff alleged that she made the payment after seeing an advert on the news - paper, she never produced any evidence to that effect. In any event, a deposit was only lawfully payable during the auction at the fall of the harmer.
71. In the Ruling delivered by the High Court in the case of “Harrogate Limited & another – Versus - Mwananchi Credit Limited & another, HCC Civil Case No. E834of 2021, [2021]eKLR”, the court emphasized the need for integrity in auction process. The Court granted the borrowers an injunction order staying the transfer of the suit property which had been sold at an auction by the lender, due to glaring irregularities in the conduct of the auction. Ordinarily, where a borrower was in default and all relevant statutory notices have been issued by the lender, the court was usually slow in curtailing the lender's right to realize its security through exercise of its statutory power of sale, since the borrower's claim, if found to be successful at trial, can sufficiently be compensated by an award of damages, However, it in the above case, the court found that the injunctive orders were necessary to protect the borrowers from suffering irreparable harm or eviction from their home, based on a possibly illegal and irregular sale of their property. The said decision highlights the importance of following procedure when exercising the statutory power of sale, failure to which a lender's recourse to fully realize its security was curtailed.
72. The law has therefore developed to the extent that if a public auction was not conducted in accordance with the law, the sale arising therefore was then quashed and/or could not be allowed to stand simply because the owner of the property could be compensated by an award of damages. In the Learned Counsel's view, the reasoning in the above decision applies herein on all fours, the alleged public auction was a sham since the Auctioneer had prior agreements with the Plaintiff and had already sold the property to the Plaintiff. They wondered how the Plaintiff determined the deposit payable before the date of the auction and actually paid the same the miraculously the only alleged bidder of the property.



73. Further, the provision of Article 46 of *the Constitution* of Kenya, 2010 provides that:-

46.

- (1) Consumers have the right-
  - (a) to goods and services of reasonable quality/
  - (b) to the information necessary for them to gain full benefit from goods and services;
  - (c) to the protection of their health, safety, and economic interests; and
  - (d) to compensation for loss or injury arising from defects in goods or services.
- (2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.
- (3) This Article applies to goods and services offered by public entities or private persons.

74. The Auctioneer had therefore a duty to obtain the best price for the suit property. The High Court of Kenya had a chance of addressing a similar issue in the case of:- “NCBA Bank PLC – Versus - Cyrus Ndung’u Njeri t/a Digital Tours and Logistics [2021] eKLR” where it stated as follows,

“It is therefore clear that consumers of service including banking services are entitled to the protection of their economic interests. Those rights, in my view includes the right to the best possible market price when the secured creditor resorts to selling the security to recover its loan. Therefore, where the value of the security being sold can be ascertained, it is the duty of the secured creditor to ascertain the said value as much as possible dispose the property at a price as near as possible to the value of the property in question..”

75. The Learned Counsel submitted that the above decisions were material because the Plaintiff confirmed that the forced Sale values of the property was a sum of Kenya Shillings Twenty-Seven Million (Kshs. 27,000,000/-) as per the valuation report prepared by DK Real Estate Limited. However, the Plaintiff purchased the property at a sum of Fourteen Million Seven Hundred (Kshs. 14,700,000/-) which was way below the Sale value. Crucially, the Plaintiff had approached the Defendant with a view to purchasing the property and the two did not agree at the price since the Defendant’s offer was a sum of Kenya Shillings Eighty Million (Kshs. 80,000,000/-). It appeared that the Plaintiff simply arranged a sale with the auctioneer.

76. In light of the above, it was the Learned Counsel’s submission that the suit property from the Defendant to the Plaintiff was illegal null and void. They relied on the decision made in the case of:- “Stephen Boro Gitaha – Versus -Nicholas Ruthiru Gatoto & 2 others [2017] eKLR” where the Court held:-

“The Learned Judge arrived at were therefore correct in law. Section 74 (1) of the RLA was designed to offer protection to Chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title. The learned Judge was right to find and



hold that innocence of Gitahi's purchase was not curative of the fundamental defect in the title due to the absence of the requisite notice."

77. Therefore, they urged the Court to find and hold that the sale and transfer of the suit property from the Defendant to the Plaintiff was unlawful.
78. On whether the Plaintiff was entitled to the reliefs sought in the Suit. The Learned Counsel submitted that having demonstrated that the transfer of the suit property from the Defendant to the Plaintiff was illegal, it followed then that the Plaintiff was not entitled to the relief sought.
79. Assuming that this Court was in doubt on the above, the Learned Counsel submitted that the Defendant filed "Mombasa High Court Civil Suit No.E093 of 2021;Najmudin Noorali Mohamedali – Versus - I & M Bank Limited & 2 others" and made a Ruling delivered on 9<sup>th</sup> February, 2023, Hon. Justice Njoki Mwangi held that it was the High Court that had the Jurisdiction to determine whether the Bank had complied with statutory natives before the alleged Sale. This explained why the Defendant never opted to file any Counter - Claim in the current suit as the issues were raised in the Statement of Defence and the Plaint in the said suit before the High Court. Further, at paragraph 31 of the ruling the court stated as follows,
- "It is evident from the Amended Plaint dated 22<sup>nd</sup> March, 2022, that the Plaintiff is challenging the statutory power of Sale exercised over the suit property by the 1<sup>st</sup> Defendant in favour of the 3<sup>rd</sup> Defendant, and sub servant transfer of the suit property to the sued Defendant. The Plaintiff contends that it was not served as was ordered by the court on 3<sup>rd</sup> February, 2021, in Mombasa HCCC No. E011 of 2020; Najmudin Noorali Mohamedali v. I & M Bank Limited & purple Royal Auctioneers, therefore, the orders of injunction restraining the 1st and 2<sup>nd</sup> Defendants from selling the suit property were still in force at the times it as sold to the 3<sup>rd</sup> Defendant."
80. Surprisingly, when Hon. Justice Kizito replaced her at Mombasa High Court on account of transfer the learned Judges delivered and ruling on 13<sup>th</sup> July, 2021, holding that the high Court had no jurisdiction to hear Justice Njoki Mwangi. The Ruling of Hon Justice Kizito is now the subject matter in "Mombasa Court of Appeal Civil Appeal No E056 of 2024,Najmudin Noorali Mohamedali – Versus - I & M Bank & 2 others". This Court should therefore hold the delivery of the Judgement awaiting the decision by the Court of Appeal in "Mombasa Court of Appeal Civil Appeal No E056 of 2024, Najmudin Noorali Mohamedali – Versus - I & M Bank & 2 others". Without prejudice to the submissions above, they believed that the Plaintiff had a duty to prove the root of her title was lawful before her claim could be allowed. Having failed to so, this court can proceed and dismiss her claim irrespective of the pendency of "Mombasa Court of Appeal Civil Appeal No E056 of 2024, Najmudin Noorali Mohamedali – Versus - I & M Bank & 2 others" nothing that this suit was heard on merits.
81. In conclusion, the Learned Counsel submitted that they believed that they had said enough to demonstrate the Plaintiff's suit lacked merit. Thus, they urged that the suit be dismissed with costs.

## VII. Analysis and Determination

82. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the myriad of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
83. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -



- a. Whether the Plaintiff was an innocent purchaser for value and whether it has a valid title to the suit property?
- b. Whether the Defendant has trespassed on the suit property
- c. Whether the Plaintiff is entitled to the orders sought in the Plaintiff
- d. Who bears the costs of the suit?

**ISSUE NO. a). Whether the Plaintiff was an innocent purchaser for value and whether it has a valid title to the suit property**

84. Under this sub – title, the Honourable Court deciphered that the main substratum in this matter is whether the Plaintiff is an innocent purchaser for value without notice of any fraud or impropriety. To begin with on his legal front, the Black’s Law Dictionary 8<sup>th</sup> Edition defined a bona fide purchaser to be:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims,”

85. Legally speaking, the Honourable Court is guided by the legal rationale founded in the cases of “Lawrence Mukiri – Versus - Attorney General and 4 Others [2013] eKLR” as well as “Katende – Versus - Haridar and Company Limited” the court defined a bona fide purchaser as follows:

“.....a bona fide for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) The vendors had apparent valid title;
- (e) He purchased without notice of any fraud;
- (f) He was not party to any fraud.”

86. This brings the Honourable Court to the question on the extent of due diligence to be exercised by a purchaser at a public auction. The Court of Appeal has held that there is no duty placed on such a purchaser where he participates in an auction that has been duly advertised.

87. The court in considering a similar question. It held in the case of “Abdi Adan Hussein & 2 others – Versus - Attorney General & 2 others [2017] eKLR” as follows: -

“The Plaintiff argues that he was an innocent purchaser for value and was not party to any fraud. This brings me to the question; what is the extent of due diligence to be exercised by a purchaser? In Captain Patrick Kanyagia and Another – Versus - Damaris Wangeci and others, NBI civil appeal no 150 of 1993 (unreported) the Court of Appeal 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 the court of



appeal in David Katana Ngomba – Versus - Shafi Grewal Kaka [2014] eKLR. In Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported), the Court of Appeal 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.”

88. Now turning to the instant case. The Plaintiff herein has demonstrated that had notice of the exercise of the statutory power of sale by I & M Bank which statement was confirmed by the Defendant’s witness DW – 1. DW – 1 told the court that he gave his brother in law a guarantee to the bank. He never got the money. It was his brother – in – law who got the money but outrightly defaulted and failed to service the loans facility. The bank came after the Defendant as per the terms and conditions stipulated from the Charge documents. In exercise of their statutory power of sale, the suit property was sold through public auction. The Plaintiff being aggrieved by that instituted a suit in High Court against the brother – in law. He emphatically held that there was never public auction that took place and if at all it did it was illegal and void. Its instructive to note that in both suits, the Plaintiff never joined Hatimi Security Station and I & M as a party. With regard to the HCCC E093 of 2021, DW -1 indicated not being aware that the case had been dismissed. He did not know of the case No. 11 of 2020. He did not know that the Court ordered for the payment of the loan to the bank. With reference to the Certificate of lease in the Plaintiff’s bundle of documents. It was issued on 19<sup>th</sup> November, 2021. He did not know anything about it. After all according to him he still retained the old certificate of Lease to the suit property. It was fraud as there was a court order for stay. He further went ahead to stated that there was no order to declare the auction was illegal. He did not have anything in Court to show that the Court was served. He never sold the property to the Plaintiff. He was never paid any money. When reference to the cheque was made, he stated that this indicated that a sum of Kenya Shillings Three Million Seven Hundred Thousand (Kshs. 3,700,000/-) was paid dated 31<sup>st</sup> August, 2022. As per the testimony of the Plaintiff, the action to purchase was based on the advertisement for sale advertised in the newspaper. The Plaintiff through its director PW - 1 participated in the in the auction and their bid was accepted.

89. On analysis under this Sub heading, the starting point has to be under the provision of Section 97 of the Land Act, Act No 6 of 2012. It is squarely in issue in this case and the Honourable Court feels compelled to lay it out in full. It provides as follows :-

Duty of chargee exercising power of sale.

97.

- (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
- (3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—
  - (a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and



- (b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).
- (4) It shall not be a defence to proceedings against a chargee for breach of the duty imposed by subsection (1) that the chargee was acting as agent of or under a power of attorney from the chargor or any former chargor.
- (5) A chargee shall not be entitled to any compensation or indemnity from the chargor, any former chargor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).
- (6) The sale by a prescribed chargee of any community land occupied by a person shall conform to the law relating to community land save that such a sale shall not require any approval from a Community Land Committee.
- (7) Any attempt by a chargee to exclude all or any of the provisions of this section in any charge instrument or any agreement collateral to a charge or in any other way shall be void.

90. The provision of Section 97 above, embodies the duty of care owed to the chargor by the chargee. The duty therein is no more than “to obtain the best price reasonably obtainable at the time of sale.” Apart from this, there is no other duty imposed. The provision of Section 97 (2) requires the chargee to undertake a valuation of the property. The purpose of the valuation is to enable the chargee discharge the duty of care required by Section 97 of the Act. The hypothesis of course is that the valuation report will guide the chargee as to the forced sale value and the price under which such sale may prima facie be taken to be have breached the duty to obtain the best price reasonably obtainable at the time of sale.

91. The *Land Act*, No. 6 of 2012 at the provision of Section 99, offers protection to purchasers of properties sold in the exercise of the chargee's statutory power of sale. It provides as follows :-

Protection of purchaser

99.

- (1) This section applies to—
  - (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or
  - (b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.
- (2) A person to whom this section applies—
  - (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;
  - (b) is not obliged to see to the application of the purchase price;



(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.

92. It will be seen that under the provision of Section 99 (2) (c) above, a purchaser is not obliged to inquire, inter alia, into whether the sale is necessary, proper or regular. Under the provision of Section 99 (3), the purchaser is protected unless there is fraud, misrepresentation or dishonest conduct on the part of the chargee of which the purchaser had actual or constructive notice. The provision of Section 99(4) provides that the remedy of a person affected by an unauthorized, improper or irregular exercise of the power of sale, shall have his remedy in damages against the charge. The protection offered to the purchaser is quite expansive. The protection is offered even where there has been no default, where no notice has been issued, where the sale is not necessary, proper or regular.

93. The Defendant in his statement and his testimony averred that the auction was irregular. The Court notes that as per the statute, a purchaser will be protected in the face of an irregularity in the sale. And the Defendant having claimed that the auction was done fraudulently has not implicated or suggested that the Plaintiff herein was a party to that fraud or misrepresentation in any way. It follows that the Plaintiff, as a purchaser, is protected, irrespective of the irregularities mentioned but not proved by the Defendant.

94. From the list of documents produced by the Plaintiff, it is evident that the Plaintiff became an owner of the suit property through a public auction conducted by I & M Bank who was a charger of the suit property from the Defendant. There being nothing to show that the public auction was contested or an order of court impeaching the said auction, means that the Plaintiff is the bona fide purchaser of the suit property for value as held by Nambuye JA in the case of:- “Marteve Guest House Limited – Versus - Njenga & 3 others [2022] KECA 539 (KLR)” where it was stated:-

“

“44. Black’s Law Dictionary, 8th Edition defines a bona fide purchaser as “one who buys something for value without notice of another claim to the property and without actual or constructive notice of any defects in or infirmities, claim or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims”

Elements/ingredients for qualification of a party as a bona fide purchaser, and which I fully adopt are those distilled in the case of Lawrence P Mukiri Vs. Attorney General & 4 Others [2013 ] eKLR, namely, proof that the claimant:

- a) He holds a certificate of Title;
- b) He purchased the Property in good faith;



- c) He had no knowledge of the fraud;
- d) The vendors had apparent valid title;
- e) He purchased without notice of any fraud;
- f) He was not party to any fraud.”

95. As a Court, I am extremely reluctant to diminish the exercise of the statutory power of sale stemming from statute in the absence of impropriety being attributed to the mortgagee. The Court is satisfied that the present case is not one that fall within an instance where it is called upon to interfere with the settled principle of law regarding statutory power of sale. If the Court was 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 the case of:- “Muhani and Another – Versus - National Bank of Kenya Limited [1990]eKLR”). In conclusion, after being supplied with all the documentations that are required for transfer of the said plot to its name the plaintiff did make an application to the registrar of lands to have it registered as the proprietor of the suit property in which the registrar of lands issued a certificate of lease to that effect on the 19<sup>th</sup> November 2021, the Court discerns that that, indeed the Plaintiff is the bona fide owner of this suit property. If the Defendant was aggrieved with the sale vide public auction then there is a legal process to follow to air out his grievances. Apparently, this was still to happen by the time of penning down this Judgement.

**ISSUE b). Whether the Defendant has trespassed on the suit property**

96. Under this sub title the Honourable Court will examine whether the Defendant has trespassed into the Plaintiff’s property. The Plaintiff case was that the Defendant herein, has been a trespasser and has continuously remained so with effect from 16<sup>th</sup> September 2021 to date. Despite of demand and notice of intention to sue having been issued to the defendant, the defendant has failed, refused and or neglected to give vacant possession of the suit property hence rendering the institution of this suit necessary.

97. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

98. Thus, and I fully concur with the Learned Counsel for the Plaintiff that trespass is an intrusion by a person into the land of another who is in possession and ownership. As already been determined in this Judgment, the Plaintiff is duly registered as the absolute owner of the suit property as espoused by Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012 which provides that:-

“ 24 the registration of a person as the proprietor of land shall vest in that person  
 (a) the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...

26 The certificate of title issued by the Registrar upon registration, or to a  
 (1) purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner...”



99. The Defendant during cross examination admitted that he was the one currently in occupation of the suit property as according to himself, it was still his property although he never paid rates. I have examined the Plaintiff's exhibits and the Court notes that indeed the Defendant was aware of the public auction and that his property has been sold to the Plaintiff.
100. The court is unable to agree with the Defendant's contention that they did not trespass onto the Plaintiff's land as the same has been confirmed in his testimony when he told the court that the property was his. The material on record further shows that the Defendant decided to stay in stay in the suit property knowing very well it no longer belonged to him. In this premises, the Court finds and holds that the Defendant's continued stay into the suit property was not with the consent of the Plaintiff as there was no form of communication to seek to stay in the said property. Hence the allegation of trespass has been proved on a balance of probabilities.

**ISSUE No. c). Whether the Plaintiff is entitled to the orders sought in the Plaintiff**

101. Under this Sub heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaintiff, herein. On whether the Plaintiffs are entitled to be granted the Permanent and mandatory injunction sought in the plaintiff, there is no doubt that the Defendant continued stay upon the suit property and his actions interfered with the Plaintiff use and occupation of the suit property. The Plaintiff seek a permanent injunction, restraining the defendant by himself, his authorized servants, agents, workmen and or any other person whatsoever and whomsoever from remaining on, disposing of, further trespassing and or in any other way interfering with and or doing any other act that is prejudicial to the plaintiff's quit enjoyment and occupation of the suit property.
102. Unlike the order for temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the orders of Permanent Injunction under the provision of Sections 1A, 3 & 3 A of the Civil Procedure Act, Cap. 21 if it feels the right of a Party has been fringed, violated and/ or threatened as the Court cannot just seat, wait and watch under these given circumstances.
103. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The Honorable Court must be very cautious and vary that the matter before court is not only an application for mandatory injunction, but is one which, if granted would amount to the grant of a major part of the relief claimed in the action. Such applications should be approached with great circumspect and caution and the relief granted only in a clear case. Certainly, that would not be equity, fair and just at all to the other party.
104. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the "Locus Classicus" case of "Giella – Versus - Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was "Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case" in which Megarry .J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent



waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.

105. With all due respect and arising from the surrounding facts and inferences, the Honourable Court has already opined and determined in the previous issue that the Defendant has indeed trespassed the suit property and therefore the prayers are granted as prayed. The Defendant has no legal mandate to remain or use the suit property in any manner. As such this prayer is meritorious.

106. On the prayers for damages in respect to the trespass, in this case the Plaintiff has proved to the Court that the Defendant indeed trespassed. The Plaintiff has also provided a valuation reported where the Court in 2019 was valued at a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-) but it failed to produce a recent valuation nor adduced any evidence as to the state or the value of her property currently. On this aspect, I wish to cite the case of:- “Nakuru Industries Limited – Versus - S S Mehta & Sons [2016] eKLR” where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Kshs. 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

107. Additionally, in the case of “Willesden *Investments Limited – Versus - Kenya Hotel properties limited NBI H.C.C. NO. 367 of 2000*”, the court stated that:-

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10 000 000 is a reasonable award for general damages”.

108. The Court has taken into account the fact that the Defendant has occupied the suit property since the public auction happened in the year 2021 to date and the same being situated in an high point/market and affluent urban area. The Court is of the view that an award of Kenya Shillings Seven Million (Kshs. 7,000,000/-) as general damages for trespass is sufficient.

109. On detinue and mesne profits. PW - 1 in her testimony stated that she estimated that the rent around the area was a sum of Kenya Shillings One Hundred thousand (Kshs. 100,000/-) per month having been kept out of it for 2 years at the time of her testimony. The provision of Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;”

110. Under the provision of Order 21 Rule 13 of the Civil Procedure Rules, 2010 provides as follows:-

13.

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—

(a) for the possession of the property;



- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
  - (i) the delivery of possession to the decree-holder;
  - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

111. The Court of Appeal in the case of “Attorney General – Versus - Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”

112. Further, the court in the case of “Rajan Shah T/A Rajan S. Shah & Partners – Versus - Bipin P. Shah [2016] eKLR” had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In Bramwell – Versus - Bramwell, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, Williams & Bradley – Versus - Tobiasen it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in Halsburys Laws of England, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end.

Halsburys, op. cit, 4<sup>th</sup>, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The Black’s Law Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession between (2) two dates.” The Concise Oxford English



Dictionary defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.”

The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18th October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the Plaint discloses a rent dispute. An amended defense was filed on 9th August 2010 whereby the Appellant cited a notice dated 3<sup>rd</sup> March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

“..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raising .....are the same issues already in court. Your clients notice of termination of lease ....is therefore inconsequential.”

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.



Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

113. The Learned Nyamweya J in the case of “Karanja Mbugua & another – Versus - Marybin Holding Co. Ltd [2014] eKLR” stated as follows with regard to mesne profits:-

“This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of [Civil Procedure Act](#). The said provisions state as follows with regard to a decree for possession and mesne profits:

- “(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree
- a. For the possession of the property.
  - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
  - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-
    - i. The delivery of possession to the decree-holder
    - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
    - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/- per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the



event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

114. Unfortunately, and it is my humble opinion that the Plaintiff has not tabled evidence before this court to enable the court make a determination on the same.
115. On prayers (a), (b) and (c) being that the Court opines that the Plaintiff is the bona fide legal proprietor of the suit property then the same are granted with accordance to the provision of Sections 24, 25 and 26 of the [Land Registration Act](#), No. 3 of 2012.

#### **ISSUE No. d). Who bears the costs of the suit**

116. It is now well established that the issue of Costs is at the discretion of the Court. Costs means the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
117. In the case of:- “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;

“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

118. In the present case, the Plaintiff has been able to establish its case as pleaded from the filed pleadings. Therefore, I proceed to award them the costs of this suit to be borne by the Defendant herein.

#### **VIII. Conclusion and Disposition**

119. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established its case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:
- a. That Judgment be and is hereby entered in favour of the Plaintiff as pleaded in Plaintiff dated 11<sup>th</sup> January, 2022.
  - b. That a declaration be and is hereby issued that the Plaintiff is a legal registered owner of the whole of go down No.1 on plot NO.MOMBASA/BLOCK XV/47 having purchased the same in a public auction that took place on the 16<sup>th</sup> September 2021.



- c. That a declaration be and is hereby issued that the Defendant is a trespasser in go down No.1 on plot No. MOMBASA/BLOCK XV/47.
- d. That an order do and is hereby issued pursuant to the Provision of Section 152 E of the Land Act, No. 6 of 2012 to the effect that the Defendant vacate or be evicted from the suit property under supervision of the nearest police station.
- e. That there be no orders as to Detinue and mesne profits.
- f. That a permanent injunction be and is hereby issued, restraining the defendant by himself, his authorized servants, agents, workmen and or any other person whatsoever and whomsoever from remaining on, disposing off, further trespassing and or in any other way interfering with and or doing any other act that is prejudicial to the plaintiff's quiet enjoyment and occupation of go down NO. 1 on plot NO. MOMBASA/BLOCK XV/47.
- g. That the Plaintiff be and is hereby awarded General damages of Kenya Shillings Seven million only (Kshs. 7,000,000/-) to compensate the trespass occasioned by the Defendant on the suit property.
- h. That the costs of this suit to be awarded to the Plaintiff to be borne by the Defendant herein.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....5<sup>TH</sup> .. .....DAY OF .....JUNE.....2024.**

.....

**HON. MR. JUSTICE L.L. NAIKUNI  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Memia Advocate holding brief for M/s. Opwopo Advocate for the Plaintiff.
- c. Mr. Mwanzia Advocate for the Defendant.

