KCB Bank Kenya Limited v La'Paz Holding Limited (Civil Cause E004 of 2023) [2024] KEELC 6827 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6827 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CAUSE E004 OF 2023

JO MBOYA, J

OCTOBER 17, 2024

BETWEEN

KCB BANK KENYA LIMITED ..... PLAINTIFF

AND

LA'PAZ HOLDING LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff herein has approached the court vide Originating summons dated the 25th January 2023 expressed to be brought pursuant to the provisions of Sections 90, 96. 97, 98 and 104 of the *Land Act*, 2012; Order 37 Rule 4 of the Civil Procedure Rules, and Section 1A, 1B and 3A of the *Civil Procedure Act* and in respect of which same [Plaintiff] has sought for the following reliefs;

    i. Whether the Plaintiff in this suit can seek the Court's leave to sell the suit property know as L.R.No. Dagoretti/Mutuini/1220 at the best obtainable price not necessarily one above the forced sale value as the Plaintiff has already conducted two auctions which both failed due to low bids.

    ii. Whether the Plaintiff has exercised reasonable degree of care to ensure that the suit property obtains the best market price during its sale.

    iii. Whether this Honourable court is obliged to grant the Plaintiff leave to sell the property know as L.R.No. Dagoretti/Mutuini/1220 at the best obtainable price not necessarily one above the forced market value as the two auctions done on the said property have failed due to low bids.

    iv. Whether the sale of the suit Property at the best obtainable price not necessarily above the forced sale value is the only viable solution to reduce a greater part of the balance owed by the Defendant to the Plaintiff.

    v. Whether the Defendant shall bear the costs of this suit

2. The originating summons is supported by the affidavit of one Lilian Sogo sworn on the 25th January 2023 and to which the deponent has annexed [sic] a total of seven annexures including a copy of the charge dated the 16th October 2024.

3. Upon being served with the Originating Summon, the Respondent filed a replying affidavit sworn on the 1st September 2023 and in respect of which the Respondent has annexed/exhibited a total of three [3] documents.

4. The Originating Summons came up for directions on the 22nd October 2024 whereupon the advocates for the Parties covenanted to canvass same [O.S] on the basis of affidavit evidence. Furthermore, the Advocates covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timeline for the filing of the written submissions.

5. The Plaintiff thereafter proceeded to and filed written submissions dated the 16th September 2024 whereas the Defendant filed written submissions dated the 19th September 2024. Both sets of submissions are on record.

Parties' Submissions

a. Plaintiff's Submissions

6. The Plaintiff herein has filed written submissions dated the 16th September 2024 and wherein same has adopted the contents of the supporting affidavit together with the annexures thereto. In addition, the Plaintiff has also highlighted and canvassed two [2] salient issues for consideration by the court.

7. Firstly, learned counsel for the Plaintiff has submitted that the Defendant herein approached the Plaintiff for a baking facility and which facility was thereafter granted to and in favour of the Defendant. Additionally, learned counsel for the Plaintiff has submitted that upon the grant of the banking facility in favour of the Defendant, the Defendant perfected a charge in respect of L.R No. Dagoreti/Mutuini/1220 [hereinafter referred to as the charged property] in favour of the Plaintiff.

8. Be that as it may, it has been contended that upon procuring the facility, the Defendant herein failed to timeously repay the instalments and subsequently, the Defendant lapsed into total default, making the facility to remain in debit.

9. Arising from the foregoing, learned counsel for the Plaintiff has submitted that the Plaintiff was thereafter constrained to and issued the statutory notices in an endeavour to exercise her [Plaintiff's] right of foreclosure. Nevertheless, it was posited that even though the Plaintiff has made various efforts to sell the charged property vide public auction, the bids have been unresponsive. In this regard, learned counsel for the Plaintiff has submitted that the Plaintiff has therefore not been able to dispose of the charged property.

10. Owing to the fact that the Plaintiff has not been able to dispose of the charged property despite various efforts to do so, the Plaintiff has therefore approached the court seeking to be granted liberty to proceed and sell the charged property at an undervalue, namely, value below the forced sale value.

11. It has been contended that unless leave is granted to the Plaintiff to sell and dispose of the charged property at an undervalue, the debts due and payable shall continue to outstrip the value of the property and the Plaintiff shall stand prejudiced. Furthermore, it has been contended that unless liberty is granted to sell at an undervalue, the Plaintiff may not be able to dispose of the charged property taking into account that previous public auctions have been unresponsive.

12. In view of the foregoing, learned counsel for the Plaintiff has posited that the provisions of Section 97[3] of the *Land Act* envisages a situation where the court can be approached to grant liberty to a chargee, the Plaintiff not expected, to proceed and sell a charged property at an undervalue.

13. In support of the submissions that the court has the requisite jurisdiction to allow a chargee to sell the charged property at an undervalue, learned counsel for the Plaintiff has cited and referenced the holding in the case of NCBA Bank Kenya PLC v Angran Ltd [2021]eKLR, where it is contended that the court proceeded to and allowed a sale at an undervalue.

14. Secondly, learned counsel for the Plaintiff has submitted that the Plaintiff has made various efforts to sell and dispose of the charged property through public auction but the attempts have not been fruitful. In this regard, learned counsel for the Plaintiff has contended that the court is duty bound to protect the interests of the Plaintiff.

15. Furthermore, learned counsel for the Plaintiff has submitted that this is a court of law as well as a court of equity. In this regard, it has been submitted that by virtue of being a court of equity, the court ought to intervene in the instant situation to avert further prejudice and loses being suffered by the Plaintiff and to mitigate unjust enrichment by the Defendant herein.

16. At any rate, it has been contended that despite issuance and service of the statutory notice as well as the redemption notice, the Defendant herein has not endeavoured to liquidate the debt or to offer any viable scheme towards liquidation of the debt.

17. In short, learned counsel for the Plaintiff has therefore submitted that the circumstances obtaining in this matter behooves the court to grant the Plaintiff liberty to proceed and sell the charged property at an undervalue. Indeed, it has been posited that being a court of equity, the court should ensure that the Defendant herein does not benefit from his own wrong.

18. To this end, learned counsel for the Plaintiff has cited and referenced the holding in the case of Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014]eKLR, wherein the court underscored the importance of equity in the administration of justice.

19. Premised on the foregoing, learned counsel for the Plaintiff has therefore implored the court to find and hold that the claim beforehand is meritorious and thus same [originating summons] ought to be allowed.

b. Defendant's Submissions:

20. The Defendant filed written submissions dated the 19th September 2024 and wherein same has adopted and reiterated the contents of the replying affidavit sworn on the 1st September 2023. In addition, the Defendant has highlighted and canvassed three [3] salient issues for consideration by the court.

21. First and foremost, learned counsel for the Defendant has submitted that a chargee, the Plaintiff herein not excepted, is a trustee for and on behalf of the chargor and hence the chargee is obligated to ensure that in the course of exercising her right of foreclosure, the chargee must protect the rights and interests of the chargor.

22. In particular, it has been posited that by dint of Section 97[1] of the *Land Act*, 2012, the charge is obligated to obtain the best price reasonably obtainable at the time of the sale. In this regard, learned counsel for the Defendant has contended that the best price reasonably obtainable must be a price that does not fall below the forced sale value.

23. In support of the submissions, learned counsel for the Defendant has cited and referenced inter-alia the decision in the case of Patrick Kang'ethe Njuguna & 5 Others v Co-operative Bank Ltd [2017]eKLR and Criticos v National Bank of Kenya Ltd [as the Successor in business to Kenya national Capital Cooperation Ltd & Another] [2022] KECA 541 [KLR], respectively.

24. Secondly, learned counsel for the Defendant has submitted that the application by the Plaintiff to be allowed to sell the charged property at an under value, has been made in bad faith and thus same ought not to be granted.

25. In particular, it has been submitted that the Defendant has variously approached the Plaintiff with a view to renegotiating and obtaining a restructure of the banking facility, but the Plaintiff herein has remained adamant and thus contributing to the obtaining stalemate.

26. Additionally, it has been submitted that the Plaintiff herein proceeded to and unilaterally closed the loan account in the year 2019 and as a result of the closure of the loan account, the Plaintiff deprived the Defendant of the opportunity to continue liquidating the debt.

27. Other than the foregoing, it has also been submitted that the Plaintiff herein has also been guilty of mismanaging the Defendant's loan account by debiting default interests and other bank levies contrary to the terms of the charge instrument. To this respect, it has been posited that the improper manner in which the Plaintiff has managed the loan account has contributed to the current outstanding balance.

28. As a result of the foregoing, it has been contended that the Plaintiff herein has been responsible for the worsening status of the loan account and thus same cannot be heard to approach the court to be allowed to sell the suit property at an undervalue.

29. Finally, learned counsel for the Defendant has submitted that the annexures attached to the affidavit in support of the originating summons have not been properly serialized and thus same offend the provisions of Rule 9 of the Oaths and Statutory Declaration Act.

30. To the extent that the annextures to the supporting affidavit are not duly serialized, learned counsel for the Defendant has therefore posited that the impugned annexures are therefore incompetent and thus ought to be expunged from record. In addition, it has been contended that once the annexures are expunged, the court should also strike out the corresponding paragraph[s] of the affidavit.

31. Be that as it may, learned counsel for the Defendant, has contended that the court is divested of jurisdiction to grant liberty to the Plaintiff to sell and dispose of the charged property at an undervalue. Indeed, it has been contended that if parliament was inclined to allow the court to do so, same [parliament] would have expressly provided a window for granting a liberty to sell at an undervalue.

32. In short and based on the foregoing, learned counsel for the Defendant has implored the court to find and hold that the originating summons beforehand is devoid of merits and same ought to be dismissed with costs.

Issues For Determination:

33. Having reviewed the originating summons and the response thereto and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do emerge [crystalise] and are thus worthy of determination;

    i. Whether the annexures attached to the affidavit in support of the originating summons comply with Rule 9 of the Oaths and Statutory Declaration Rules or otherwise.

ii. Whether the honourable court is vested with the jurisdiction to grant liberty to a chargee to sell a charged property at an undervalue or otherwise.

Analysis And Determination

Issue Number 1. Whether the annexures attached to the affidavit in support of the originating summons comply with Rule 9 of the Oaths and Statutory Declaration Rules or otherwise.

34. The instant suit has been brought vide originating summons which is supported by an affidavit. Furthermore, the supporting affidavit has referenced and annexed several documents thereto.

35. To the extent that the deponent of the supporting affidavit has referenced and annexed various documents, it was incumbent upon the deponent to ensure that the annexures are duly serialized and attested by the commissioner of oaths, who administers the oath at the foot of the supporting affidavit.

36. For brevity, the manner in which annexures/exhibits attached to affidavits are supposed to be serialized is stipulated and provided for vide Rule 9 of the Oaths and Statutory Declaration Rules. The said Rules stipulate as hereunder;

> 9. All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.

37. My understanding of the provisions of Rule 9 [supra] drives me to the conclusion that the seal of the commissioner of oaths which is to be affixed to the annexure must be affixed thereto and not on any loose piece of paper or otherwise. Furthermore, the annexure must also be serialized for ease of identification.

38. Taking into account the import and tenor of Rule 9 [supra], there is no gainsaying that it was incumbent upon the deponent of the affidavit or her counsel to ensure that the seal by the commissioner of oaths is affixed to the annexure and where the seal was not so affixed, it behooved the deponent, and her counsel to have the annexures properly serialized.

39. However, in the instant case, there is no gainsaying that the serialization and the seal of the commissioner of oaths have been affixed on a loose and separate piece of paper preceding the annexure. Instructively, the annexures have neither been serialized nor sealed in accordance with the law.

40. In the premises, ,the question that does arise is whether the failure to serialize and securely seal the annexures vitiate and renders same invalid or otherwise.

41. To my mind, the manner in which the annexures/exhibits to be used in court are serialized and sealed is a critical issue and which goes into the validity or otherwise of the impugned annexure. In particular, where an annexure, is not properly and securely serialized and sealed, the impugned annexure becomes inadmissible and cannot be relied upon by a court of law.

42. Put differently, where the annexures and/or exhibits are not serialized and securely sealed thereto, such annexures cannot be relied upon before a court of law. Furthermore, such annexures cannot also be allowed to remain as part of the record of the court.

43. To this end, it then becomes evident and apparent that even though the supporting affidavit has referenced various annexures, those annexures are invalid and thus inadmissible. Consequently, the only alternative available to a court of law, which is confronted with improper annexures is to have same [annexures] struck out or expunged from the record of the court.

44. Arising from the foregoing and taking into account the peremptory provisions of Rule 9 [supra], I hereby proceed to and do expunge all the impugned annexures annexed to the supporting affidavit sworn on the 25th January 2023.

45. Additionally, having struck out and expunged the impugned annexures, the incidental question that does arise is whether the paragraphs of the supporting affidavit which cited and referenced the annexures are tenable and can remain on record.

46. In my humble view, the annexures having been struck out and expunged, the paragraphs of the supporting affidavit, that were underpinned by the said annexures are rendered unverifiable and invalid. In this regard, the corresponding paragraphs of the supporting affidavit similarly lend themselves to striking out.

47. To buttress the legal position pertaining to and concerning the import of Rule 9 of Oaths and Statutory Declaration Rules, it suffices to cite and reference the holding in the case of Solomon Omwega Omache & Bosongo Medical Centre Limited v Zachary O Ayieko, Vincent K Ayieko & Lydia Bosibori Momanyi t/a Mainstream Welfare Association (Environment & Land Case 124 of 2015) [2016] KEELC 827 (KLR) (6 May 2016) (Ruling), where the court stated and held thus;

> 1. Before I conclude this ruling I have something to say about the defendants replying affidavit. The replying affidavit sworn by Zachary O. Ayieko on 4th May 2015 is shown to annex up to 11 attachments or exhibits. These exhibits are not identified and/or marked and neither have they been sealed with seal of the commissioner for oaths. The exhibits one may say have been thrown at the court and it is left up to the court to flip through them to determine which one relates to what. I do not think that is what the case should be.
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> 1. Rule 9 of the Oaths and Statutory Declarations Rules requires that annextures to affidavits should be sealed and stamped. The rule reads;-
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> "All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification."
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> Hon. J. B Havelock J. (as he then was) in the case of Fredrick Mwangi Nyaga –vs- Garam Investments & Another [2013] eKLR had occasion to consider the application of the above Rule 9 of the Oaths and Statutory Declarations Rules. The judge in holding that an exhibit annexed to an affidavit which is not marked is for rejection cited with approval a ruling by Hayanga J. (as he then was) in the case of *Abraham Mwangi –vs- S. O Omboo & Others HCCC No. 1511 of 2002* where the judge had held thus:-
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> "Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibit marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That marks the affidavit incomplete and hence also rejected...".

48. Furthermore, the importance of Rule 9 [supra] and the legal implications attendant thereto were elaborated by the Court of Appeal in the case of *Zaheer Jhanda & James F. O. Kenani v Independent Electoral & Boundaries Commission, Julius Meja Okeyo, Richard Nyagaka Tongi & Chris Munga N.*

Bichage (Civil Appeal 33 of 2018) [2018] KECA 432 (KLR) (27 July 2018) (Judgment), where the court stated and observed as hereunder;

> " ..... It was thus a pure a point of law whether or not the exhibits were compliant with the mandatory provisions of rule 9 of the Oaths and Statutory Declarations Rules. The rule requires that exhibits be securely sealed under the seal of the commissioner for oaths and be marked with serial letters of identification. The appellant readily concedes non-compliance and does not deny that the issue was on a pure point of law. His contention is that the 3rd respondent ought to have filed a formal application to raise his object. We are not aware of any requirement that a preliminary objection can only be raised through a formal application. It can be raised, as far as we are aware, orally during the hearing if it is purely on matters of law and the opposite party has been given adequate notice. In Jeremiah Nyangwara Matoke v IEBC & 2 Others [2017] eKLR, Okwany, J. stated as follows on preliminary objections:
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> "I note that the issues raised in the preliminary objection relate to the validity of affidavits and whether this court has jurisdiction to entertain a defective affidavit...Courts have on numerous occasions held that points of law can be raised at any time in the proceedings and more so if they relate to the jurisdiction of the court. I therefore find that there was nothing wrong in timing and raising of the objection just when the hearing had commenced."
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> The appellant also contends that the trial court should have ignored this omission, invoked Article 159(2) (d) of *the Constitution* and opted to do substantive justice. He also contended that the exhibits were produced in evidence by a witness who was under oath, which cured the irregularity. Relying on the case of Litein Tea Factory Co. Limited (supra), he urged that the appropriate remedy was not to expunge the exhibits, but have the errors corrected.
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> For the respondents however, rule 12(3) and 12(14) of the Elections (Parliamentary and County Elections) Petition Rules, make it mandatory for each person that a petitioner intends to call as a witness at the hearing to swear an affidavit, to which the *Oaths and Statutory Declarations Act* and Order 19 of the Civil Procedure Rules, apply. Under those rules, they contend, exhibits must be sealed and serialized sequentially.
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> It has been consistently stated by our courts that Article 159 is not a panacea of all manner of maladies. For example in Raila 2017, the Supreme Court stated:
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> ".....Article 159 (2)(d) of *the Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court...." (emphasis provided).
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> And on the same issue, the High Court in Francis A. Mbalanya (supra) stated the following:
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> ".....although the plaintiff's advocate submitted that the failure to seal and mark the annextures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annextures must be sealed and numbered. That is the only way they can be allowed on record. It is therefore not true, as submitted by the Plaintiff's counsel, that the failure to seal and number the annextures is a procedural technicality that can be saved by the provisions of Article (159) (2) (d) of *the Constitution* and sections 1A and 1B of the *Civil Procedure Act*...."
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> We are in agreement with the above sentiments. Rule 9 of the *Oaths and Statutory Declarations Act*, is intended to prevent various kinds of mischief and to ensure that a

deponent owns and secures all the exhibits annexed to his affidavit. The rule further aims to prevent litigant from sneaking into the record documents that were not part of the affidavit, thus prejudicing their opponents. We therefore cannot fault the learned judge for expunging the annextures to the affidavit of PWII that were not marked as required by law."

49. From the foregoing discussion, my answer to issue number one [1] is threefold. Firstly, the provisions of Rule 9 of Oaths and Statutory Declaration Rules are couched in mandatory terms and hence it behooved the Plaintiff and her legal counsel to comply with and/or abide by same.

50. Secondly, there is no gainsaying that the annexures attached to [sic] the supporting affidavit have not been properly serialized and securely sealed thereto with the seal of the commissioner of oaths.

51. Thirdly, insofar as the annexures have not been properly serialized and securely sealed thereto as prescribed under the law, same [annexures] are inadmissible and are thus expunged [struck out] from the record of the court.

Issue Number 2. Whether the honourable court is vested with the jurisdiction to grant liberty to a chargee to sell a charged property at an undervalue or otherwise.

52. Having expunged the annexures attached to the supporting affidavit and having similarly struck out the corresponding paragraphs of the supporting affidavit, the originating summons beforehand would thus be rendered incompetent. Suffice it to posit that the originating summons cannot be sustained on the basis of the skeleton averments that would remain standing at the foot of the supporting affidavit.

53. Be that as it may, vide the originating summons beforehand, the Plaintiff is seeking for liberty to be allowed to sell and dispose of the charged property at the best obtainable price not necessarily one above the forced sale value. Pertinently, what I hear the Plaintiff to be seeking for is to be allowed to sell and dispose of the suit property at an undervalue regardless of the forced sale value.

54. The question that does arise is whether or not a chargee, the Plaintiff not excepted, can proceed to sell and dispose of a charged property, the suit property not excepted, at an undervalue or otherwise.

55. On the other hand, the incidental question that also arises is whether a court of law can proceed and grant leave [liberty] to a chargee, the Plaintiff not expected to proceed and sell a charged property at an undervalue.

56. To my mind, whether or not a charged property can be sold at a value below the forced sale value [undervalue], is a question that can readily be answered by referencing the provisions of Section 97 of the *Land Act*, 2012 [2016].

57. To this end and for ease of appreciation, it is therefore imperative to reproduce the provisions of Section 97 [supra]. Same are reproduced as hereunder;

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.

58. My reading of the provisions of Section 97 [1] of the *Land Act* drives me to the conclusion that every chargee, the Plaintiff herein not excepted who is exercising the statutory power of sale is under an obligation to obtain the best price reasonably obtainable at the time of the sale.

59. Furthermore, it is imperative to underscore that in an endeavour to determine the best price reasonably obtainable at the time of the sale, the law requires the chargee to procure and obtain a valuation report speaking to inter-alia the forced sale valuation. [See Section 97[2] of the *Land Act*, 2012].

60. The significance of procuring and obtaining a valuation and authenticating the forced sale valuation is to enable the chargee to appreciate the forced sale value, which is the lowest value [the floor] that the charged property can be sold at. Simply put, forced sale value constitutes the floor at which the charged property can be sold.

61. From the foregoing exposition and which is underpinned by Section 97[1] and [2] of the *Land Act*, there is no gainsaying that the chargee, the Plaintiff herein not excepted has no liberty to determine what is [sic] best price obtainable at the time of sale without due regard to the forced sale valuation.

62. Put differently, what I understand the provisions of Section 97 [1] and [2] of the *Land Act* [supra] to be highlighting is that at all time[s] the best price reasonably obtainable at the time of sale must be discerned and deciphered from the forced sale valuation and not otherwise.

63. To the extent that the chargee, the Plaintiff herein not excepted, are not allowed to sell the charged property an undervalue, an incidental/ auxilliary question then springs into play.

64. The position then is, if the chargee, the Plaintiff not excepted cannot by law sell a charged property at an undervalue, then can a court of law proceed to grant leave [liberty] to a chargee to sell at an undervalue.

65. In my humble view, the Plaintiff herein correctly appreciates that the provisions of Section 97 [1] and [2] of the *Land Act* prohibit same [Plaintiff] from selling at an undervalue, but to defeat the law, the Plaintiff is ingenious and has approached the court to help her to circumvent the provisions of the law.

66. To my mind, the duty and obligation of a court of law is to interpret the law objectively and taking into account the mischief that was intended to be cured and once the court clearly understands [discerns] the intention of parliament then the court is under duty to apply the law as it stands.

67. In my view, the import and tenor of Section 97 [1] and [2] of the *Land Act* was to reign in the conduct of charges [Banking Institutions], who previously would sell charged properties at throw away prises and thereafter revert to the chargor in an endeavour to recover the balance outstanding at the foot of the loan account.

68. Gone are the days when chargees, the Plaintiff herein not excepted, would be at liberty to sell at an undervalue. The provisions of Section 97 of the *Land Act*, makes it mandatory for the Plaintiff herein to undertake a statutory valuation and thereafter be guided by the statutory valuation in terms of what constitutes the best price available, taking into account the Interests of the Chargor.

69. Barring repetition, I beg to state that the forced sale valuation constitutes, the lowest sale price or better still, the floor at which the charged property can be sold.

70. In the premises, the Plaintiff herein cannot be heard to implore the court to break the law and to aid the Plaintiff in defeating the Defendant's equity of redemption by disposing of the charged property at an undervalue. If the court were to do so, then it would be tantamount to interpreting the law in a manner the defeats and negates a clear provision of the law.

71. Peremptorily, a court of law is obligated to heed and take cognizance of every statutory provision of the law which has neither been repealed nor declared unconstitutional. To do otherwise would be tantamount to legislating from the bench, which is legally unacceptable and would in any event, constitute a violation of the provisions of Article 1[3] and 95[3] of *the Constitution*, 2010.

72. The Supreme Court of Kenya [the Apex Court] in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), underscored, the obligation of courts to interpret the law and the statute in a manner that does not defeat a clear provision which has not been repealed.

73. For coherence, the supreme court stated thus;

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> "66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on

sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law.

However, in the special circumstances of a declaration of unconstitutionality, the process is reversed." [underlining supplied for emphasis].

74. Whereas the supreme court was not dealing with the provisions of Section 97 of the *Land Act* [supra] the ratio decidendi that is discernible from the ratio of the supreme court is to the effect that a court of law is to interpret the provisions of the law in a manner that does not defeat a provision that has not been repealed.

75. In my humble view, the reasoning of the supreme court on the decision [supra] applies to the matter beforehand. For good measure, the provisions of Section 97[1] and [2] prohibits the sale of a charged property at an undervalue.

76. Other than the foregoing, my attention has also been drawn to the decision in the case of Patrick Kang'ethe Njuguna, Edward Njuguna Kang'ethe & George James Kang'ethe v Co-operative Bank of Kenya Ltd, Robert Maina Nguru t/a Nguru Auctioneers, Leakey Auctioneers, Joserick Merchants Auctioneers & John Mariara Kigotho (Civil Case 50 & 54 of 2016) [2017] KEHC 7505 (KLR) (6 March 2017) (Ruling), where the court stated as hereunder;

> It is not in doubt that the *Land Act* 2012, provides stronger and wider safeguards to the chargor just to underscore the fact that a charge is not a transfer but a mere security for the payment of the debt so secured.
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> 15. It is also not in doubt that the statute now enacts the hetherto troublesome question as to whether a chargee was a trustee for the chargors' interest while exercising statutory power of sale. It is now plain that there is a statutory duty imposed upon the chargee to take care of the chargors' interests and any guarantor's or surety and to obtain the best reasonably attainable price at the time of sale. To realize that protection a duty is put on the chargee to ascertains the market value of the property. My reading of sub-section 97(2) & (3) *Land Act* give me the understanding that once the valuation is undertaken, a chargee would only be deemed to have failed or breached its duty of care where the sale is at a price of not more than 25% of the given market value.

77. Suffice it to point out, that the sentiments expressed by the judge in the decision [supra] reflect the true import and tenor of Section 97[1] and [2] of the *Land Act*, 2012 [2016].

78. Furthermore, I beg to underscore that where a chargee proceeds to and sells a charged property at an undervalue [price below the sale value], the chargor or anyone affected by such sale is at liberty to challenge the impugned sale. Quite clearly, this is the import of Section 97 [3] [b] of the *Land Act*, 2012 [2016].

79. In any event, it is worth recalling that the court of appeal in the case of Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "Kenyac") & another (Appeal 80 of 2017) [2022] KECA 870 (KLR) (28 April 2022) (Judgment), considered a situation where a chargee ventured forward and sold the charged property at a gross undervalue.

80. For coherence, the court stated and held thus;

> " 47. Our foregoing analysis leads to the inescapable conclusion that the appellant was treated by the respondents in a shabby and wholly unacceptable if not tyrannous manner in the entire transaction. In particular, the respondents conduct of charging the appellant manifestly excessive interest rates, declining his offers to redeem the debt and then proceeding to sell the property at less than the amount he offered, and at a gross under sale, was a plain breach of a bank's duty to act with care and in good faith. He may not have been a model guarantor but, like Shakespeare's King Lear, he definitely was a man more sinned against than sinning."

81. In my humble view, the message discernible from the decision of the court of appeal is to the effect that any sale of a charged property at an undervalue constitutes an illegality. Furthermore, where the chargor or such other person affected by the sale demonstrates to a court that the sale was undertaken at an undervalue, then the court will be obliged to decree recompense.

82. Quiet clearly, what is discernible from the discussion beforehand is to the effect that a chargee, the Plaintiff not excepted, is not at liberty to sell at an undervalue, namely, a value that is below the forced sale valuation.

83. In addition, it is also common ground, that if the chargor cannot sell at an undervalue, then there is no gainsaying that a court of law, cannot be called upon to create an avenue or better still, a window to facilitate the commission of what is otherwise unlawful and an illegality.

84. Arising from the foregoing, my answer to issue number two [2] is threefold. Firstly, the chargee is by law obligated to obtain the best price reasonably obtainable at the time of the sale albeit taking into account the forced sale valuation in terms of Section 97[2] of the *Land Act*, 2012.

85. Secondly, it is an illegality for a chargee to proceed and sell a charged property at an undervalue. For good measure, such an endeavour would constitute breach of trust on the part of the chargee and thus a violation of Section 97[1] of the *Land Act*.

86. Thirdly, a court of law, this court not excepted cannot be called upon to allow the Plaintiff herein to proceed and sell at an undervalue, which endeavour is prohibited under the law. Suffice it to posit that if this court were to do so, it would be tantamount to aiding the Plaintiff to defeat the law and by extension to commit an illegality.

Final Disposition:

87. Flowing from the discussion [details enumerated in the body of the Judgment], it must have become crystal clear that the Originating Summons by the Plaintiff herein is not only premature, but same is equally devoid of merits.

88. Consequently and in the premises, the final orders of the court are as hereunder;

    i. The annexures attached to the affidavit in support of the originating summons are contrary to Rule 9 of the Oaths and Statutory Declaration Rules and same be and are hereby expunged from the record of the court.

    ii. The originating summons dated 25th January 2023 is devoid of merits and same be and is hereby dismissed.

iii. Nevertheless, each party shall bear own costs of the suit taking into account the obvious fact that the Defendant herein is still indebted to the Plaintiff on the basis of the banking facility which was extended to same.

89. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17th DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of:

Benson - Court Assistant

Mr. Gitau for the Plaintiff

Mr. Njoroge for the Defendant