



**Unaitas Savings & Credit Co-operative Society Limited v Kimeria & another
(Environment & Land Case 52 of 2024) [2024] KEELC 13332 (KLR)
(Environment and Land) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 52 OF 2024
MC OUNDO, J
NOVEMBER 21, 2024
(FORMERLY NAKURU ELC NO. 2 OF 2020)**

BETWEEN

**UNAITAS SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED PLAINTIFF**

AND

ELIUD WAITITU KIMERIA 1ST DEFENDANT

JANE MUTHONI KARANJA 2ND DEFENDANT

JUDGMENT

1. Vide a Complaint dated 9th January, 2020 and amended on 21st July, 2021, the Plaintiff herein sought for the following orders:
 - i. An order for delivery of vacant possession of all that property known as Title No. Naivasha/Maraigushu Block 18/647 forthwith or within such reasonable time as the court may set in the order.
 - ii. An order of eviction of the Defendants at their own cost from all that property known as Title No. Naivasha/Maraigushu Block 18/647 in the event of their failure and/or refusal to comply with the order granted under prayer (i) above.
 - iii. An order directed at the Officer Commanding Station (OCS) Naivasha Police Station to provide security and ensure peace and order for purposes of implementation of the order made in prayer (ii) above.



- iv. A Permanent injunction to restrain the Defendants whether by themselves, their servants, agents or otherwise howsoever from remaining on, entering into or continuing in occupation of all that property known as Title No. Naivasha/Maraigushu Block 18/647.
 - v. Damages for trespass and/or mesne profits at the rate of Kshs. 500,000/= per month or such as court may assess with effect from 22nd October, 2019 until actual delivery of possession of Title No. Naivasha/Maraigushu Block 18/647.
 - vi. Any other relief that the court may deem just to grant.
 - vii. Costs of the suit.
2. The 1st and 2nd Defendants filed their Statement of Defence dated 5th March, 2020 and amended on 8th July, 2021 in which they denied the contents of the Plaint putting the Plaintiff to strict Proof while stating that the Plaintiff's purported sale by public auction had been illegal and unlawful which should be declared a nullity hence the same could not make the Plaintiff the legal and bonafide owner of the suit land. That they were still the legal owners of the suit land and were entitled to exclusive occupation of the same thus they should continue running their businesses therein without the Plaintiff's consent.
 3. That they were not trespassers as they were legally occupying the suit land hence the Plaintiff's claim of mesne profits of Kshs. 500,000/= per month with effect from 22nd October, 2019 until delivery of possession could not stand as the same would amount to extortion. They thus prayed that the Plaintiff's suit against them be dismissed with costs.
 4. The matter proceeded for hearing ex-parte on the 24th March, 2022 in the absence of the Defendants, the court having been satisfied that proper service had been effected upon their Advocate on record. Subsequently Simon Gachuru Mwangi, the Plaintiffs' Chief Manager Business Development had testified as PW1 after which the Plaintiff's case had been closed and the Plaintiff directed to file submissions and serve a mention notice upon the Defendants.
 5. However, before the said mention date, vide a Notice of Motion Application dated 12th April, 2022, the Defendants herein had sought that the court set aside its orders of 24th March, 2022 that had allowed the hearing of the matter to proceed in the absence of the Defendants and substitute the same with orders re-opening the Plaintiff's case for purposes of cross examination. That further, the Defendants case be re-opened for purposes of tendering evidence and cross-examination. The said Application had been allowed vide a court's Ruling dated 22nd September, 2022.
 6. Nevertheless, when the matter came up for cross examination of PW1 one Simon Gachuru Mwangi, the counsel for the Plaintiff sated that he could not procure the attendance of the said PW 1 who had earlier testified without undue delay the witness having long left employment of the Plaintiff and further that he had secured a substitute witness whose statement had been filed and served. The Defendants having not contested to the same, the evidence of the said PW 1 was set aside and directions issued that the matter proceeds afresh with the evidence of the substituted witness.
 7. Subsequently, Mary Wangu Mwangi, the Plaintiff's Branch Manager at Tithumu branch testified as PW1 to the effect that whereas she had worked with the Plaintiff for about 20 years, she had started working in Tithumu Branch from September 2023 before which she had been working at Naivasha branch since April 2015.
 8. She adopted her witness statement dated 21st February, 2023 as her evidence in chief before explaining that the Plaintiff was a financial institution dealing with savings and lending for which the Defendants were their clients. That the Plaintiff had advanced the Defendants a loan of Ksh. 80,000,000/= wherein



- the said funding had been granted in two phases, the first phase was for Kshs. 65,000,000/= while the second phase was for Kshs. 15,000,000/=. That the loan had been unpaid.
9. When she was referred to Page 1 to 7 of the Plaintiff's bundle of documents, she confirmed that a letter of offer for the advancement of a loan in the sum of Kshs. 65,000,000/= was dated 27th October, 2015. That the said letter from the Plaintiff had been addressed to Elimer Art Depot Limited for the purpose of construction of cottages wherein Elimer Art Depot was to give a title deed for Naivasha/Maraigushu Block 18/647.
 10. Upon being referred to page 6 of the Plaintiff's bundle, she confirmed that the said letter of offer had been accepted and signed by Mr. Eliud Waititu Kimeria (the 1st Defendant herein) on 27th October, 2015. She produced the said Letter of offer dated 27th October, 2015 as Pf exh 1.
 11. She identified a document on Pages 8 to 11 of the Plaintiff's bundle as minutes of the Directors of Elimar Art Depot Limited who were Eliud Waititu Kimeria and Edith Wanjiku Waititu. That the said minutes had confirmed the acceptance of Kshs. 65,000,000/= and the security for the same as a Title Deed to No. Naivasha/Maraigushu Block 18/647 which was the same parcel of land that had been mentioned in the letter of offer. She produced the said duly signed minutes as Pf exh 2.
 12. When she was referred to page 13 of the Plaintiff's bundle, she confirmed that the same was a Charge document dated 10th November 2015, between Eliud Waititu Kimeria and Jane Muthoni Karanja as the Chargor, Elimar Art Depot Limited as the borrower and United Sacco Society as the Chargee in respect to land parcel No. Naivasha/Maraigushu Block 18/647. That the said charge instrument which had secured an amount of Kshs. 80,000,000/= had been registered on 10th November, 2015.
 13. She identified the document on page 47 of the Plaintiff's bundle as a letter of consent from the Land Control Board issued to Eliud Waititu Kimeria and Jane Muthoni Karanja (the Defendants herein) and that it was dated 15th October, 2015 and was in relation to land parcel No. Naivasha/Maraigushu/Block 18/647 wherein they had been authorized to charge the said land to Unaitas Sacco Society (the Plaintiff herein) for a loan of 80,000,000/=. She explained that the letter of offer had related to the Charge as it was a security for the loan. She produced the Charge and consent as Pf exh 3 (a-b).
 14. She also identified at Page 48 of the Plaintiff's bundle, a letter of offer dated 12th July, 2016 from Unaitas Sacco to Elimar Art Depot Limited for a project loan of Kshs. 15,000,000/= for cottage construction wherein the security had been a title deed for land parcel No. Naivasha/Maraigushu Block 18/647. That at page 52 of the said bundle, the said letter of offer had been accepted and duly signed by all parties. She produced the said letter of offer as Pf exh 4 before explaining that pages 53 to 54 of the bundle contained minutes of the Board of Directors of Elimar Art Depot who were Eliud and Edith Waititu, with regard to the acceptance of the advance of Ksh. 15,000,000/=. She produced the said minutes as Pf exh 5.
 15. She confirmed that the security had been a title to land parcel No. Naivasha/ Maraigushu Block 18/647. On being referred to pages 55 to 87 of the Plaintiff's bundle, she confirmed that the same was a further charge of Kshs. 15,000,000/= for Naivasha/Maraigushu Block 18/647 dated 8th September, 2016 wherein the Chargor had been Eliud Waititu and Jane Muthoni Karanja (the Defendants herein), the borrower had been Elimar Art Depot and the Chargee had been United Sacco Society (the Plaintiff herein) and that the said further charge had been registered on 8th September, 2016.
 16. On being referred to Page 88 of the Plaintiff's bundle, she confirmed that the same was a letter of consent to charge title No. Naivasha/Maraigushu Block 18/647. She produced the Further Charge and consent as Pf exh 6 (a-b) and went on to confirm that there had been a certificate of official dated 21st September, 2016 in relation to land parcel No. Maraigushu/Block 18/647 at page 89 of the bundle



- wherein the first entry on the encumbrance section was a charge to Unaitas Sacco Society (Plaintiff) dated 10th November, 2015 to secure a sum of Kshs. 80,000,000/=. That the second entry was a further charge to Unaitas Sacco Society dated 8th September, 2016 to secure a sum of Kshs. 15,000,000/=. She produced the said official search as Pf exh 7. She then testified that the documents that she had produced on behalf of the Plaintiff was evidence that they had indeed advanced the Defendants a sum of Kshs. 80,000,000/= wherein the security had been land parcel number Naivasha/Maraigushu Block 18/647. That the person who had given security was to guarantee the loan with the said security.
17. When she was referred to Pages 90 to 92 of the Plaintiff's bundle, she confirmed that the same was a Statutory Notice dated 1st November 2017 addressed to the 1st and 2nd Defendants in relation to land parcel number Naivasha/Maraigushu Block 18/647 which notice had demanded the unpaid monies from the said 1st and 2nd Defendants. That the same had been dispatched through registered post as per the receipt at page 92 of the Plaintiff's bundle. She produced the said Notice and receipt as Pf exh 8 (a-b) wherein she proceeded to testify that despite the demand for payment, there had neither been payments made nor a response to the said Notice.
 18. That the document at Pages 93 and 94 of the Plaintiff's bundle was a Notice to sell dated 9th February, 2018 that had been issued to the 1st and 2nd Defendants pursuant to the provisions of Section 96 (2) of the Land Act 2012 in relation to land parcel No. Naivasha/Maraigushu Block 18/647. That the said Notice had been delivered by a registered post as evidenced by a receipt of the registered post at page 51 of the Plaintiff's bundle. She produced the said Notice and receipt as Pf exh 9 (a-b) before proceeding to clarify that the Notice to sell had required the addressee to pay the outstanding balance of Ksh. 65,183,660.33/= for the first phase of the loan and a total of 13,998,559.51/= for the second phase of the loan. That further, in the event that the said monies would not have been paid, the Plaintiff was to sell the security to recover the money.
 19. That there had been neither a response by the addressee nor was the loan paid wherein as shown at pages 97 to 102 of the Plaintiff's bundle, a notice for auction by Garam Invest Auctioneers had been issued. That the first document dated 18th February, 2019 had been addressed to the 1st and 2nd Defendants in connection to the parcel of land No. Naivasha/ Maraigushu Block 18/647 wherein they had been given 45 days' Notice to pay the sum of Ksh. 88,360,763.12/=.
 20. On being referred to Page 98 of the Plaintiff's bundle, she confirmed that the same was a Notice to sell dated 21st February, 2019 that had been issued by Garam Investment Auctioneers to the 1st and 2nd Defendants in relation to land parcel No. Naivasha/Maraigushu Block 18/647. She was further referred to page 101 of the Plaintiff's bundle wherein she confirmed that the same was a certificate under Section 15 (c) of the Auctioneers Rules dated 7th January, 2019 that had been issued by Garam Investments Auctioneers. She produced the said Notices and certificate as Pf exh10 (a - c).
 21. When she was referred to pages 103 and 104 of the Plaintiff's bundle, she confirmed that the same was a Notice on the Daily Nation dated 4th February, 2019. That there had also been an advertisement dated 18th February, 2019 in the Daily Nation for the sale of land parcel No. Naivasha/Maraigushu Block 18/647 and that the suit property was number 2 in the said advertisement. She produced the two (2) advertisements as Pf exh11 (a - b) and then testified that the auction had been scheduled for 21st January, 2019.
 22. Upon being referred to page 105 of the Plaintiff's bundle, she confirmed that the same was a letter from Garam Investment Auctioneers dated 25th February, 2019 to Muma Waweru and Co. Advocates for a failed auction. That the said document had showed that whereas the auction exercise had been carried out, the property had not been sold. She produced the said letter as Pf exh12. She proceeded to



- testify that thereafter, there had been a re-advertisement in the Daily Nation on the 19th August, 2019 wherein the auction was to take place on 5th September, 2019.
23. When she was referred to page 107 of the Plaintiff's bundle, she confirmed that the same was a Notice dated 15th August, 2019 to the 1st and 2nd Defendants herein informing them that the property was to be auctioned on 5th September, 2019. On being referred to page 109 of the bundle, she confirmed that the same was a certificate of auctioneer pursuant to the provisions of Section 15 (c) of the Auctioneer Rules. She produced the Notice and Certificate as Pf exh13 (a - b).
 24. Her response on being referred to pages 111 and 112 of the Plaintiff's bundle was that the document was an advertisement in the Daily Nation for the 19th August, 2019 notifying the public that the property was to be auctioned on 5th September 2019. She produced both the advertisements as Pf exh14 (a & b). When she was referred to page 113 of the Plaintiff's bundle, she confirmed that the same was a letter dated 6th September, 2019 from Garam Investments to the Plaintiff notifying it that the auction had been successful and that the highest bidder had been Unaitas Sacco for the amount of Kshs. 71,300,000/=.
 25. When she was referred to page 114 of the Plaintiff's bundle, she confirmed that the same was a list of the attendance at the public auction which had been held on 5th September, 2019. She produced the auctioneer's report and the attendance list as Pf exh15 (a – b). Her response on being referred to pages 115 to 119 of the Plaintiff's bundle was that the same was a Memorandum of Sale in relation to the auction that had taken place on 5th September, 2019 with regard to land parcel No. Naivasha/Maraigushu Block 18/647 and it depicted the price of the auction as Ksh. 71,300,000/= wherein the purchaser had been Kennedy Karenga for Unaitas Sacco Society.
 26. Upon being referred to page 120 of the Plaintiff's bundle, she confirmed that the same was a cheque dated 5th September, 2019 amounting to Ksh. 17,825,000/= payable to Unaitas Sacco Society Limited. Her response on being referred to page 121 of the said bundle was that it was a certificate of sale issued by Garam Investment showing that the auction had been successful. It also showed the amount that had been paid by Unaitas Sacco Society. She produced the Memorandum of Sale, Cheque dated 5th September, 2019 and the Certificate of Sale as Pf exh16 (a-c).
 27. When she was referred to pages 122 to 130 of the Plaintiff's bundle, she confirmed that the same was a transfer document to purchase by charge in a public auction relating to land parcel No. Naivasha/Maraigushu/Block 18/647 at a consideration of Kshs. 71,300,000/=. That the said transfer had been pursuant to a Charge dated 10th November, 2015 and a Further Charge dated 8th September, 2016 which transfer had been registered on 22nd October 2019
 28. On being referred to page 126 of the Plaintiff's bundle, she confirmed that the same was a copy of title deed in relation to land parcel No. Naivasha/Maraigushu Block 18/647 dated 22nd October 2019 registered to Unaitas Sacco Society Limited. When she was referred to page 130 of the bundle, she confirmed that the same was a certificate of official search dated 29th September, 2020 in relation to land parcel No. Naivasha/Maraigushu Block 18/647 showing that the owner of the said property was Unaitas Sacco Society. She produced the said transfer document, a copy of title deed and a certificate of official search as Pf exh17 (a-c)
 29. Her evidence was that the Plaintiff was in court so as to direct the Defendants to vacate from the suit property because after the loan had remained unpaid the Plaintiff had bought and taken over the property. When she was referred to page 131 of the Plaintiff's bundle, she confirmed that the same was a Notice to vacate the suit property dated 3rd December, 2019 that had been issued by the Plaintiff to the Defendants. She produced the said Notice as Pf exh 18 and then explained that the suit property in



- the instant matter was a hotel with accommodation and restaurant which was being operated by the 1st Defendant. That however, since the property had been transferred to the Plaintiff, the 1st Defendant had not paid the Plaintiff anything.
30. On Cross-examination she confirmed that from the documents that she had produced, the suit property was registered to the Plaintiff although it had previously been registered to the Defendants. She also confirmed that the suit property had been advertised severally that it was to be sold by way of public auction.
 31. That before the sale by public auction, the suit property had been charged to the Plaintiff to secure a loan that had been advanced to the Defendants. She confirmed that the Plaintiff was part of the bidders in the said public auction and that there had been no declaration of a conflict of interest.
 32. When she was referred to Pf exh15 (b), she confirmed that the same was the list of the participants at the public auction and that the Plaintiff was the only party that had been allocated a bidding number. That there was no indication of the amount that the other parties had bided.
 33. She confirmed that before the public auction had been carried out, communication was made to the Defendants vide Notices that had been sent through registered post. That Garam Auctioneers had been instructed to sell the suit property by the Plaintiff as their agents. That whereas a valuation had been done before the auction, she had not produced the same. That further, there was no evidence that the full amount had been paid since only part of the said amount had been paid.
 34. When she was referred to Pf exh16 she confirmed that the amount that had been referred to in the cheque was Kshs. 17,825,000/= which was the amount that had been paid on the auction date, that is, 5th September, 2019. That whereas she did not have evidence of the payment of the full amount, she could provide the same.
 35. She confirmed that the transfer that she had produced had been done by the Plaintiff to the Plaintiff. Her response when she was referred to a letter dated 6th September, 2019, that is, Pf exh15 (a) was to the effect that the alleged forced value had been Kshs. 17,300,000/= and that the amount that had been paid by the Plaintiff had been Kshs. 71,300,000/=. That the difference between the amount bided and the alleged forced value was Ksh. 50,000/=. She however testified that she was not sure if the Plaintiff had been informed of the figure to bid by Garam Auctioneers since the auction had been open to everybody.
 36. She confirmed that the 1st Defendant was currently running a hotel business on the suit property wherein the Plaintiff had served them with a Notice to vacate. That however, they did not have any evidence to prove that the 1st Defendant was carrying on business on the said property. She confirmed that she had no evidence that the Notice to Vacate had been received or signed by any of the Defendants.
 37. In re-examination, she was referred to Pf exh14 (a - b) wherein she stated that there had been description of the business carried out on the suit property being a oneself contained rooms and that the same was a restaurant and 3 blocks of cottages. When she was referred to Pf exh15 (a), she explained that the same had been part payment mode on the day of the auction which had been 25% of deposit. That there had been no request by the Defendants to overturn the sale and the amount sold neither had there been a matter in court relating to the amount that the property had been sold at.
 38. When she was referred to Pf exh13 (b), she confirmed that paragraph 5 of the same had indicated that they had contacted the registered owner of the suit property on phone wherein she had asked her personal assistant to accept the Notice. On being referred to Pf exh10 (a) she read paragraph 5 of the same and testified that from the said extracts, the notices had been received by the Defendants.



39. On being referred to Pf exh10 (a), she confirmed that the document had indicated the value of the suit property as at 6th December, 2018 at Ksh. 95,000,000/= and that the said document had been issued to the Defendants. She confirmed that the reserve price had been indicated as Kshs. 71,250,000/=.
- The Plaintiff thus closed its case.
40. On 24th July, 2024 when the matter had come up for Defence hearing, the counsel for the Defendants prayed for leave to amend their Defence and Counterclaim as far as the reliefs sought in the counterclaim were concerned which Application was vehemently opposed by the Counsel for the Plaintiff. The court having considered the submissions by both counsel for the parties, as well as the conduct of the Defence and the fact that there had been no counter claim to the Defendants' defence that had been amended on the 8th July, 2021 it denied the Defendants' Application for reason that it was without basis and ordered that the Defence hearing proceeds.
41. Since there were no witness, the Defence Counsel closed the Defence case.
42. Despite parties having been directed to file and exchange their written submission only the Plaintiff complied to wit it summarized the factual background of the matter as well as its evidence as adduced in court before framing one issue for determination to wit;
- i. Whether the Plaintiff was entitled to the reliefs sought in the Amended Plaintiff.
43. Its reliance was hinged in the decided case of Netah Njoki Kamau & another v Eliud Mburu Mwaniki [2021] eKLR to submit that the Defendants having failed to lead any evidence in court, their position as had been pleaded in the Amended Defence did not fall for consideration as the same remained allegations unsupported by any proof. That subsequently, the Plaintiff's case as had been presented during trial remained unchallenged.
44. That in any event, the evidentiary material that had been placed on record by the Plaintiff during trial had proved the Plaintiff's claim to the required standards. That indeed the title document and an official search confirming that the Plaintiff was the registered proprietor of the suit property formed part of the evidence on record in support of the Plaintiff's case hence its right as a proprietor of land should be effected. Reliance was placed on the provisions of Sections 24 and 25 of the Land Registration Act and the decided case of Kenya Medical Research Institute v Jenifer Muthoki Mbuvi [2022] eKLR.
45. That further, by virtue of the said registration as the sole proprietor of the suit property, the Plaintiff was conferred with an indefeasible title thereon hence it enjoyed legal protection pursuant to the provisions of Sections 24, 25 and 26 of the Land Registration Act. Further reliance was placed in the decided case of Nkena Ole Keshu v Mateki Ole Tiima [2021] eKLR.
46. Its submission was that the circumstances under which the Plaintiff had acquired ownership of the suit property had been clear since the same had been a purchase of the suit property at a public action that had been held on 5th September, 2019 in exercise of the Chargee's statutory power of sale pursuant to the provisions of Section 100(3) of the Land Act. That the Defendants as the Chargors then did not commence any proceedings in court to challenge the sale. That unlike what the Defendant's Counsel had suggested on cross-examination, it had not been a requirement in law that the Plaintiff was obligated to declare any conflict of interest in the said auction as none had arisen whatsoever.
47. The Plaintiff placed reliance on the provisions of Rule 15 (b) as read together with Rule 11 (b) (x) of the Auctioneers Rules, 1997 to submit that a notification of sale for purposes of a public auction of an immovable property was supposed to indicate both the market value and the reserve price of the



property on the basis of a professional valuation that had been obtained not more than 12 months prior to the date of the auction. That the notification that had been served upon the Defendants for purposes of the public auction of the suit property and had set out the said value thus the Plaintiff had been entitled to participate in the auction pursuant to the provisions of Section 100(3) of the [Land Act](#) in so far as its bid for the property was well above the reserve price was concerned.

48. That subsequently, having purchased the suit property for valuable consideration as had been demonstrated from the evidence on record, the Plaintiff's right as the absolute owner thereof had crystallized upon its registration as the proprietor. Reliance was placed on the provisions of Section 99 of the [Land Act](#) as well as on a combination of decisions in the case of Michael Matu v Martin Luther King Andati [2017] eKLR and Milimani HC Comm. 319 of 2019, Lata Suresh Madhyan vs Wema Transporters Limited & 2 Others (unreported) to urge the court to find that the Plaintiff was entitled to the non-pecuniary reliefs sought in the Amended Plaint.
49. With regards to the claim for pecuniary damages for trespass to the suit property, it submitted that the Defendant having admitted in their Amended Defence that they were in occupation of the suit property, in addition to the evidence adduced in support of the Plaintiff's case during trial, the Defendants' trespass on the suit property was a continuing trespass. It thus placed its reliance in the decided case of [Kenya Power & Lighting Company Ltd vs Ringera & 2 Others \(Civil Appeal E247 & E248 of 2020\)](#) (Consolidated) [2022] KECA 104 (KLR) (4 February 2022) (Judgement) to submit and urge the court to find that the Plaintiff would be entitled to an award in compensation by way of general damages for trespass.
50. That accordingly and noting that the Defendants' occupation of hence trespass on the suit property had been continuing since the Plaintiff became the registered proprietor thereof, an award in general damages of Kshs. 3,000,000/= would be fair and reasonable.

Determination

51. I have considered the unopposed evidence herein adduced, the authorities cited and the provisions of the law. The gist of matter arising herein and which matters are not in contention are that the Plaintiff, being a financial institution dealing with savings and lending, advanced the Defendants who were their clients and Directors of Elimer Art Depot Limited, a loan of Ksh. 80,000,000/= in two phases, the first phase was for Kshs. 65,000,000/= while the second phase was for Kshs. 15,000,000/= wherein they had offered Naivasha/Maraigushu Block 18/647 registered in the names of both the Defendants herein as security for an advancement of a loan facility by the Plaintiff.
52. That a charge had subsequently been registered on 10th November, 2015, between Eliud Waititu Kimeria and Jane Muthoni Karanja as the Chargor, Elimar Art Depot Limited as the borrower and United SACCO Society as the Chargee in respect to land parcel No. Naivasha/Maraigushu Block 18/647.
53. That they had then defaulted in the repayment of the loan and the suit property was advertised for sale and was auctioned on the on 5th September 2019 pursuant to the Bank's remedies as provided for in Section 90(3) of the [Land Act](#) to the Plaintiff who had been the highest bidder.
54. On the 22nd October 2019, the land was registered to the Plaintiff who had subsequently issued a Notice dated 3rd December, 2019 to the Defendants to vacate from the suit property wherein the 1st Defendant operated a hotel with accommodation and restaurant. That the notice to vacate was ignored despite the Defendants not remitting any payments to the Plaintiff as the proprietor of the suit premises.
55. I find the matters arising herein are as follows;



- i. Whether the Plaintiff had served the Defendants with a Statutory Notice pursuant to Section 90(2) of the Land Act ;
 - ii. Whether the Plaintiff's right of Statutory Power of Sale had accrued.
 - iii. Whether the Defendants should give vacant possession of all that property known as Title No. Naivasha/Maraigushu Block 18/647 and in default an order of eviction issued.
 - iv. Whether permanent injunction should issue restraining the Defendants whether by themselves, their servants, agents or otherwise howsoever from remaining on, entering into or continuing in occupation of all that property known as Title No. Naivasha/Maraigushu Block 18/647.
 - v. Whether the Defendant should pay damages for trespass and/or mesne profits.
56. On the first issue for determination, I find that the evidence on record was to the effect that after the Defendants failed to service the loan as per the parties agreement, they had been issued, through their postal address, P.O box 1262--20117 Naivasha a 90 days' Statutory Notice dated 1st November 2017 for a sum of sh. 77,052,496.75/= together with all the interest to accrue therefrom the 31st October 2017 until the date of payment in full, addressed to both Defendants and which Statutory Notice and certificates of posting had been produced as Pf exh 8(a)&(b) respectively.
57. Section 90 of the Land Act, to which is of importance in the instance case, provides for remedies of a Charge to the effect that;

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- (1) If a Chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any Charge or in the performance or observation of any covenant, express or implied, in any Charge, and continues to be in default for one month, the Chargee may serve on the Chargor a Notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

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- (2) The Notice required by Subsection (1) shall adequately inform the recipient of the following matters –

The Notice required by subsection (1) shall adequately inform the recipient of the following matters—

- a. the nature and extent of the default by the Chargor;
- b. if the default consists of the non-payment of any money due under the Charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;
- c. if the default consists of the failure to perform or observe any covenant, express or implied, in the Charge, the thing the Chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;
- d. the consequence if the default is not rectified within the time specified in the Notice, the Chargee will proceed to exercise any of the remedies referred to in



this section in accordance with the procedures provided for in this sub-part; and

- e. the right of the Chargor in respect of certain remedies to apply to the court for relief against those remedies

58. It is worth noting that a Statutory Notice issued under Section 90 of the Land Act, prompts a process, which leads to the Chargee ultimately exercising its remedies outlined under Section 90(3) of the Act. The Notice is issued where the Chargor is in default of any obligation under the Charge or has failed to pay interest or any other periodic payment and such default continues for one month.
59. As read together with Section 90(3), Section 90(2) of the Land Act obligates the Chargee to firstly, state the nature and extent of default. Secondly, where the default consists of non-payment, to state the amount required to be paid within three months for the purposes of making good the default or where the default is non-observance of a covenant in the Charge, then the Notice is to state what the Chargor is to do or desist from doing so as to rectify the default. Thirdly, the Notice ought to state the fact that if the default is not rectified within the time stated in the Notice, then the Chargor would thereafter sue for money due and owing under the Charge, appoint a receiver of the income of the security property, lease the security property, enter into and keep possession of the security property or sell the security property. The fourth and final requirement under the Notice is that the Notice needs to state that the Chargor has the right to apply to court and seek any relief or challenge the exercise by the Chargee of any of the statutory remedies. The Notice crystallizes after the expiry of ninety days from the date it is received by the Chargor.
60. The Statutory Notice stipulated under the Land Act are mandatory legal requirements. The right to exercise the statutory remedies accrues only after full compliance with the legal framework on Statutory Notices. The Statutory Notice in the present case in my humble view was in accordance with Section 90(2) of the Land Act and therefore the acts of the Plaintiff in seeking to exercise its Chargee's Statutory Power of Sale was lawful.
61. Section 96 of the Land Act is also explicit to the effect that after the borrower has failed to remedy the default in accordance with the Notice issued under the law, the Chargor, who is the guarantor is entitled to a Notice of not less than 40 days under Section 96(2) of the Land Act, before the Chargee can sell the Charged property. The Notice under Section 96(2) of the Land Act is mandatory, and is quite different from the Redemption Notice issued under Rule 15 of the Auctioneers Act.
62. Section 96(2) of the Land Act which provides as follows:-
- “ Before exercising the Power to sell the Charged land, the Chargee shall serve on the Chargor a Notice to sell in the prescribed form and shall not proceed to complete any contract for Sale of the Charged land until at least forty days have elapsed from the date of the service of the Notice to sell”.
63. In this case, a 40 days' Notice to Sell dated the 9th February 2018 had been served upon the Defendants demanding a payment of a total sum of Ksh. 65,183,660.33/- for the first phase of the loan and a total of 13,998,559.51/= for the second phase of the loan respectively. The Statutory Notices and certificates of posting had been produced as Pf exh 9 (a) and (b) respectively.
64. It had been upon the failure by the Defendants to respond to the said Notices that had thus prompted the Plaintiff to instruct Garam Investment Auctioneers to issue a 45-days' Redemption Notice together with the notification of Sale and schedule in respect to land parcel No. Naivasha/ Maraigushu Block



- 18/647 wherein they had been given 45 days' Notice to pay the sum of Ksh.88,360,763.12/=.The said Notices and certificate were produced as Pf exh10 (a-c).
65. The postal address wherein the Defendants were served through registered mail was not disputed. These Notices I find, had given the Defendants sufficient time for the full payment to be made failing which the Plaintiff would realize the Charge on the suit lands. The Statutory Power of Sale had fully matured and thus was exercisable.
66. As far as the contents of the 45 days Redemption Notice issued by the Plaintiff's auctioneer is concerned, the same is provided for under Rule 15 (d) of the Auctioneers Act as follows;
- “Upon receipt of a Court warrant of letter of instruction he Auctioneers shall in the case of immovable property.
- d) Give in writing to the owner of the property a Notice of not less than forty – five days within which the owner may redeem the property by payment of the amount set forth in the Court warrant or letter of instruction.”
67. Subsequently, a Notice was published in the Daily Nation of 4th February, 2019 and the 18th February, 2019 for the sale of land parcel No. Naivasha/Maraigushu Block 18/647 by public auction scheduled for 21st January, 2019. Pf exh11 (a - b). The property was not sold at this auction wherein there had been a re-advertisement -Pf exh14 (a & b), in the Daily Nation on the 19th August, 2019 for the auction was to take place on 5th September, 2019 wherein a Notice dated 15th August, 2019 to that effect had been issued to the 1st and 2nd Defendants. The Notice and Certificate of auctioneer pursuant to the provisions of Section 15 (c) of the Auctioneer Rules were produced as Pf exh13 (a - b).
68. A letter dated 6th September, 2019 from Garam Investments to the Plaintiff confirmed that the auction had been successful and that the highest bidder had been Unaitas Sacco (Plaintiff) for the amount of Kshs. 71,300,000/=. I thus find that the Plaintiff herein had complied with the provisions of the law as herein above cited and therefore the Statutory Power of Sale was legally exercised.
69. Having found that the Statutory Power of Sale was legally exercised whereupon the Plaintiff was registered as the proprietor to No. Naivasha/Maraigushu Block 18/647, the provisions of Section 24(a) 25, and 26 of the Land Registration Act No. 3 of 2012 which outlines the interests and rights of a registered proprietor of land kicks in.
70. Section 24(a) of the Land Registration Act provides as follows;
- ‘the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....’
71. Section 25(1) of the Land Registration Act also stipulates that ;
- ‘The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...’



72. The law is very clear on the position of a holder of a title deed in respect of land. Indeed Section 26(1) of the [Land Registration Act](#) provides as follows:

“the Certificate of Title issued by the Registrar upon registration, to a 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

73. It will be seen from the above, that title to land is protected, but the protection can be removed and title impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, un-procedurally, or through a corrupt scheme.

74. There was no evidence adduced to the effect that the Plaintiff acquired the suit land through fraud or misrepresentation or that its certificates of title had been acquired illegally, un-procedurally or through a corrupt scheme and this being the case, by virtue of the Defendants’ continued occupation and possession of the said suit parcel of land constitutes trespass, which has been defined by the 10th Edition of Black’s Law Dictionary as;

“An unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”

75. Section 3 (1) of the [Trespass Act](#), also defines trespass as follows;

“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.”

76. The Court in *John Kiragu Kimani vs Rural Electrification Authority* [2018] eKLR also in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;

‘Any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.

77. I find that the Plaintiff is indeed entitled to protection by the law from the Defendants who interfered with it’s rights and privileges over the suit land. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd vs. John Mithamo Njika & 7 others* (2014) eKLR where 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...’



78. In Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR the court held as follows:

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See Hostler – vs – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

79. The summation of my finding is that the Plaintiff has proved its case against the Defendants to the effect that they had trespassed on the suit property without any legal claim or title for which it is trite law that an act of trespass is actionable per se by an award of general damages once it is established.

80. That said and done I hold that the Plaintiff has proved its case on a balance of probabilities and is entitled to the prayers sought in the Plaint. Consequently, I hereby enter judgment for the Plaintiff against the 1st and 2nd Defendants in the following terms:

- ii. The 1st Defendant is herein ordered to give the Plaintiff vacant possession of all that property known as Title No. Naivasha/Maraigushu Block 18/647 within 45 days of delivery of this judgment
- iii. Failure to comply with (i) above, an eviction order shall issue wherein the Officer Commanding Station (OCS) Naivasha Police Station shall provide security and ensure peace and order for purposes of implementation of the order.
- iv. A Permanent injunction is herein issued restraining the Defendants whether by themselves, their servants, agents or otherwise howsoever from remaining on, entering into or continuing in occupation of all that property known as Title No. Naivasha/Maraigushu Block 18/647 upon the expiry of the 45 days herein above stated.
- v. The Plaintiff is herein awarded general damages for trespass in the amount of Ksh. 2,000,000/ = (Two million shillings only) to be paid by the Defendants within 30 days of the delivery of the judgment.
- vi. The Plaintiff had the burden of proof to place material before the court demonstrating how the amount that was claimed for special damages, (mesne profits) if any, had been arrived at. (See Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR) but failed to do so and so the prayer for special damages is denied.
- vii. Costs of the suit.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 21ST DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

