



Kihu v Housing Finance Company Kenya Limited & another (Environment & Land Case 176 of 2012) [2024] KEELC 13455 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13455 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 176 OF 2012
OA ANGOTE, J
NOVEMBER 20, 2024**

BETWEEN

MUTUA KIHU PLAINTIFF

AND

HOUSING FINANCE COMPANY KENYA LIMITED 1ST DEFENDANT

KENNEDY ONGUNYI 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff, through a Further Amended Plaint dated 4th September 2012, has sought the following reliefs against the Defendants in this suit:
 - a. A declaration that the sale by Public Auction of the parcel of land L.R. No. Nairobi Block 82/273 held on 27th March 2012 and the actions precedent and antecedent to that, are irregular and therefore null and void, and further that the same contravened the Plaintiff's constitutional right to inherent dignity and to be treated in a dignified and non-degrading manner and should be rescinded and the same be set aside.
 - b. That an order for injunction do issue against the first and second defendants, their servants, and/or agents restraining them from transferring, charging and in any way evicting, harassing and/or interfering with the Plaintiff's quiet user of L.R. No. Nairobi/Block 82/273 Donholm Estate Phase 1.
 - c. Alternatively, and without prejudice to (a) and (b) above, an order for general damages and restitution of amounts overpaid and or alternatively the rightful value of the suit property.
 - d. Costs and interest of the suit.



- e. Any other relief which the Honourable Court may deem fit to grant.
2. The Plaintiff's claim is that he has at all material times been and still is the registered proprietor of the suit property, which is Nairobi/Block 82/273 Donholm Estate Phase 1; that he borrowed a loan from the 1st Defendant, has been making regular payments to clear the debt; that he has paid over Kshs. 4,544,895 to clear the loan and interest; and that he paid Kshs. 500,000 on 14th December 2011, Kshs. 400,000/- on 20th December 2011 and Kshs. 80,000/- on 22nd March 2012.
 3. The Plaintiff averred that in spite of these payments, the 1st Defendant insisted that he was in arrears in his loan repayments and that on August 2011, he made and signed a sale agreement with his daughter Angela Wanjiru Mutua on the 1st Defendant's advice, where he would sell the suit property to her and in return, she would clear the arrears of the loan.
 4. It was averred that on 16th August 2011, the 1st Defendant offered to finance the said Angela Wanjiru Mutua, who accepted the offer. However, the 1st Defendant later failed to honour its promise, prompting him to resort to selling his properties.
 5. According to the Plaintiff, on 9th March 2012, he received a notice from Garam Investments, who had been instructed by the 1st Defendant to sell the suit property by public auction, and that on the 1st Defendant's advice, he entered into an agreement with Crystal Valuers Ltd on 26th March 2012, to value the suit property and to authorize Crystal Valuers to collect rent proceeds from tenants on the suit property.
 6. It was averred by the Plaintiff that on the basis of these arrangements, he requested the 1st Defendant to stop the auction. However, on 27th March 2012, the 1st Defendant in purported exercise of its power of sale over the parcel of land had the same sold by public auction to the 2nd Defendant at Kshs. 10 million.
 7. The Plaintiff's case is that the 1st Defendant connived with the 2nd Defendant to sell the suit property at a throw away price, and that the 1st Defendant did not act in good faith since it had already contracted Crystal Valuers to be their agents to collect rents from the premises and pay it directly to it.
 8. The Plaintiff asserted that the irregularities in the auction included the 1st Defendant putting a low reserve price of Kshs. 10 million while it was aware that the suit property is valued at over Kshs. 23 million; that the 1st Defendant through its officials even informed him that the sale would not be conducted since they had entered into a mutually acceptable mode of payment and that the 1st Defendant generally failed to have proper regard for the interests of the Plaintiff in the suit property.
 9. According to the Plaintiff, he had no debt with the 1st Defendant at the time of the sale and the 1st Defendant was the one indebted to him; that the disputed debt was Kshs. 3,419,491.70, comprising a principal of Kshs. 82,315.45/- and interest and other charges of Kshs. 3,337,176.25/- as at 1st May 2007 and that as at 22nd March 2012, 5 days before the sale, he had paid Kshs. 3,930,000/-, which was more than the alleged debt.
 10. However, on the strength of an independent report, the Plaintiff asserts that between January 1999 and March 2012, he paid Kshs. 4,945,560/- in contrast to the debt due on 1st January 1999 of 859,234.31/-; and that all the payments taken together with the further charge dated 11th May 1989, showed that the principal debt had amounted to Kshs. 417,460/- comprising a charge dated 26th May 1980 for Kshs. 169,960/- and a further charge dated 11th May 1989 for Kshs. 247,500.
 11. It is the Plaintiff's case that with the application of the in duplum rule, he was not in any arrears in respect of which the 1st Defendant could exercise its statutory power of sale.



12. The Plaintiff avers that the 1st Defendant inflated his alleged indebtedness and thereby enriched itself or intended to enrich itself unjustly in addition to charging interest oppressively and unreasonably by computing interest to include interest on arrears or penalty interest or interest on the interest yet the same was not provided for in the contract between them, in the form of the charge dated 26th May 1980 and the Further Charge dated 11th May 1989.
13. He asserted that the 1st Defendant is dispossessing him of his home, wherein he has stayed with his wife from 1980 and where he continues to stay with her and their children, was a violation of his right to freedom from being treated in an inhumane and degrading manner provided under Articles 25(a), 28 and 29(f) of *the Constitution*.
14. He asserted that he is entitled to an order of accounts to determine the amount that he overpaid the 1st Defendant and his entitlement to restitution. In the alternative, the Plaintiff asserts that he is entitled to the full value of the suit property.
15. The 1st Defendant, through its Statement of Defence dated 20th November 2012, denied the Plaintiff's claim, particularly that the he made various payments. It asserts that the Plaintiff continues to be in arrears and denied that it advised the Plaintiff to sell the suit property to his daughter. Rather, the Plaintiff made that decision out of his own volition.
16. The 1st Defendant asserted that despite it suspending a scheduled auction of the suit property to allow Angela Wanjiru Mutua to transfer the suit property to herself and to take over the mortgage on the Plaintiff's behalf, the Plaintiff and 1st Defendant failed to effect the transfer as they were unable to pay the rates of Kshs. 700,000 outstanding at that time.
17. The 1st Defendant denied advising the Plaintiff to enter into any arrangement with Crystal Valuers as alleged. Its assert that the Plaintiff was dishonest because the agreement was only executed one day before the auction, which had already been advertised; that the terms of the agreements are clear that all proceeds were to be remitted to the Plaintiff himself; that there is no mention of the 1st Defendant in the agreement and that it is not a party thereto.
18. The 1st Defendant asserts that the sale by auction was conducted in good faith and the sale price of Kshs. 10 million was in tandem with the valuation report issued by Crystal Valuers dated 3rd June 2011, which was appointed by the Plaintiff and that the in duplum rule does not apply in this matter.
19. It was averred that the High Court already made a finding accepting the mortgage statement of the 1st Defendant as a true account of the Plaintiff's mortgage account and that the High Court already made a finding that the report of the Interest Rates Advisory Centre could not be relied upon, as it was not part of the contract between the Plaintiff and the 1st Defendant.
20. In his Reply to the 1st Defendant's Defence, the Plaintiff denied that the property was sold in a public auction and averred that the sale was by private treaty where the Defendants connived with each other to purchase the property at an undervalue and that the sale was irregular because the forced sale value of the property at the time of the alleged sale was Kshs. 19 million.
21. It was averred that the 1st Defendant did not produce any bidders' register; that the 2nd Defendant admitted that only himself and his wife bid for the property; that the terms of the auction to pay 25% of the bid price at the fall of the hammer was never honoured as the payment was made on 3rd and 4th April 2012, and that the value date was back dated by the 1st Defendant to 27th March 2012.
22. The Plaintiff averred that the finding of the court at the interlocutory stage of the case cannot interfere with the hearing of the main suit at trial on evidence, and that those findings are not binding.



23. The 2nd Defendant opposed the suit through its Defence and Counterclaim dated 16th September 2019. He asserted that him and his wife, Lyner Miheso, are the joint registered owners and proprietors of the suit property; that they purchased the suit property in a public auction conducted on 27th March 2012 by Garam Investment Auctioneers on behalf of the 1st Defendant at an auction price of Kshs. 10 million and that they were issued a certificate of sale on the same day and the suit property was subsequently transferred into their names and the certificate of lease was eventually given to them on 6th December 2012, which title has never been impeached.
24. According to the 2nd Defendant, the Plaintiff has remained in possession of the suit property and has been collecting rent from the commercial extensions thereto, despite his applications for injunction, maintenance of status quo and contempt of court being dismissed and despite title and ownership changing to him and his wife.
25. The 2nd Defendant denied any connivance with the 1st Defendant or knowledge of any valuation by Crystal Valuers. He asserted that the Plaintiff's equity of redemption was extinguished on the date of the auction at the fall of the hammer and issuance by the auctioneer of the certificate of sale to him and his wife.
26. Consequently, it was averred, any claim by the Plaintiff of any irregularity or illegality can only be brought against the 1st Defendant for damages and not any entitlement over the suit property, and that he has been wrongly joined in this suit.
27. By way of counterclaim, the 2nd Defendant asserts that he lawfully purchased the suit property by public auction and paid the full purchase price of Kshs. 10 million. The suit property was thereafter transferred to him and his wife's name.
28. The 2nd Defendant claims mesne profits being rental income from the suit property accruing from 30 days from the date of public auction on 27th March 2012, being 1st May 2012, until the date the Plaintiff vacates and hands over the suit property to and his wife.
29. It is the 2nd Defendant's case that the mesne profits have been assessed by a valuer in the sum of Kshs. 204,000/- per month from the main house and the rental extensions. The 2nd Defendant also seeks an order for the Plaintiff to vacate the suit property and hand over the same to him in good order.

Hearing and Evidence

30. The Plaintiff, PW1, adopted his statement as his evidence in chief. He testified that he is 72 years old and resides on the suit property since April 1980; that the 1st Defendant advanced him a loan in 1980 and a further advance in 1989, and he has been paying the loan, and that the purpose of the advances was to buy the land from the developer.
31. He asserted that most of the repayments for the land were by way of deductions from his salary and direct from the bank; that in March 2012, the house was sold by public auction, though they were still in negotiations; that he approached his daughter Angela Wanjiru to take over the mortgage and that they allowed the transfer to her but later changed their mind for reasons he never understood.
32. PW1 stated that he was introduced to Crystal Valuation agency by the 1st Defendant to take over payments from the shops on the land; that he was not indebted based on the in duplum rule; that penalty charges were made on interest, which was not what they had contracted and that the 1st Defendant would charge interest then penalty on the interest, and compound the penalty together with the interest and again charge interest.



33. He asserted that he could not understand what they were doing so he hired an expert. He asserted that in his first charge issued in 26th May 1980 he was advanced Kshs 169,960, while in the further charged of 1989, he was advanced Kshs. 247,500. The total borrowed amount was Kshs. 417,460/-.
34. He asserted that as at 11th May 2007 when the in duplum rule came in force, he was told his arrears were Kshs. 82,315.45 while the arrears in interest was Kshs. 3,337,176.25; that as at 22nd March 2012, he had paid Kshs. 3,93,0000 and that as at 27th March 2012, the 1st Defendant had no right to sale the land as he had in fact overpaid.
35. He further asserted that the value of the property was grossly understated at Kshs. 10 million yet the actual value was Kshs. 23 million. He produced a bundle of documents marked as PEXB1, which he relied on.
36. In cross examination, he stated that he received letters from the 1st Defendant which informed him on the changes of the applicable interest; that he had no sale agreement with his daughter; that the valuation did not take into account the rental income; that the transfer of the land to the 2nd Defendant was unlawful and that he is still in possession of the suit property.
37. PW2, Wilfred Onono, a Certified Public Accountant working for Interest Advisory Centre as the Managing Consultant, asserted that the Plaintiff hired him to check the interest charged by HFCK on to his loan account between January 1990 and March 2012; that the prepared a report on the same dated 24th March 2023 and that there were no records preceding January 1990.
38. It was his evidence that he made a finding that there is a re-calculated difference of Kshs. 3, 781,162 and that the Plaintiff was in credit of the said amount and was not indebted. He produced the report as evidence to support his statement.
39. In cross-examination, he stated that the statement produced by the 1st Defendant is the same one as his. He stated that on 30th June 2010, Kshs. 162, 581 was in credit, meaning it had been paid in excess; that from then, there was no interest chargeable and that he used the strict terms of the facility as a basis of recalculation and also included the interest rates from various letters supplied to him by the Plaintiff.
40. It was his evidence that he did not receive the letters dated 7th May 2010 at page 43 and 44 of the 1st Defendant's bundle dated 11th October 2022 and that they did not take into account the additional interest as this was not provided to them.
41. DW1, the 2nd Defendant, relied on his witness statement dated 12th February 2015 and the bundle of documents filed on 16th September 2019, produced in court as 2DEXB1. He asserted that he saw an advertisement of the auction of the suit property and participated in the said auction on 27th March 2012.
42. It was his testimony that he paid Kshs. 100,000 for a bidding number and his bid of Kshs 10 million was successful as it was the highest bid; that he paid the balance of 25% of the value of the house within 90 days of the auction, on 8th May 2012; that the transfer was not immediate as he was informed there was an injunction and that he signed the transfer documents in October 2012 and the transfer was processed in December 2012.
43. It was the evidence of DW1 that he paid the full purchase price on 10th May 2012 and the rates. In his bundle of documents, he presented a title in his and his wife's name and the rates clearance certificate. He asserts that he has never been able to get possession of the suit property and sought for an order of mesne profits.



44. DW2, Alice Weru, a collection officer in the debt collection department of HFCK, the 1st Defendant, relied on her statement of 6th December 2019. She also produced two bundles of documents dated 11th October 2022 and 14th October 2022 as DEXB3A and B. She testified that the first facility in 1980 was for Kshs. 690,000 and the second facility in 1989 was for Kshs. 247,000.
45. She testified that the Plaintiff was furnished with his statements, but he never queried the details of the statement; that they indulged him even after he fell into arrears and even gave him several options of selling the property, but he declined and went back to renegotiate; and that the Plaintiff even agreed that Crystal Rivers should collect rent and remit the money to the bank.
46. DW2 stated that they stopped the auction but later on Garam Auctioneers were instructed to sell it and they gave the Plaintiff 45 days notice; that the auction was advertised in the newspaper and the land was sold for KShs. 10 million to the successful bidder, the 2nd Defendant, and that the bidder paid Kshs. 650,000 on the date of auction and the balance was paid after 30 days of the auction.
47. She testified that the land was residential but the Plaintiff had done extensions which were not authorized; that the said extensions were not considered in the valuation; that valuation shows that the extensions had been marked for demolition and that she was not aware of the shops.
48. In cross-examination, she averred that at the time of the sale, the Plaintiff owed Kshs. 2,332,478/- as at 23rd March 2012 as per the statement; that after they sold the suit property, the difference was put in the call account which is in the name of HFCK; that they continue to hold onto the money as the Plaintiff was to meet certain conditions and that he was informed about the funds but he chose to come to court.
49. She testified that the rate of 12% interest was charged if the Plaintiff paid on the due date and that arrears were charged a higher rate of 26%. She testified that it was the Plaintiff who went to Crystal Valuers and directed them to collect rent and remit it; that the 1st Defendant was not a party to the agreement and did not authorize it and that the said agreement was signed on the day of the auction.

Submissions

50. Counsel for the Plaintiff submitted that the Plaintiff fully paid the initial charge amount at the time he signed the Further Charge and the purported refinancing of the loan was irregular. According to Counsel, the charge and further charge did not provide for penalties or interest on the same, thus the levying of the same amounted to unfair enrichment.
51. The Plaintiff's Counsel submitted that the 1st Defendant's statutory power of sale had not crystallized and the sale was illegal; that assuming that the Plaintiff was indebted to the 1st Defendant, the 1st Defendant thwarted the Plaintiff's efforts to redeem his property by selling the suit property while the Plaintiff waited in their office and that the Plaintiff only learnt of the sale on 27th March 2012.
52. It was the Plaintiff's Counsel's submission that the only relationship between the Plaintiff and the 1st Defendant through the charge and further charge was an equitable mortgage owing to the fundamental omission where the Transfer of Lease held by the Plaintiff was never entered in the register of the property, and that the Charge and Further charge could therefore not be registered and therefore Section 3 of the *Equitable Mortgages Act* applied, under which the chargee could only realize the security by a court order issued in its favor.
53. Counsel relied on the decision in *Odd Jobs v Mubia* [1970] EA 476, where it was held that a court may decide on an unpleaded issue if it appeared that the issue had been left to the court, provided that the parties were heard on the said issue.



54. It was counsel's submission that while the land registrar could rectify the omission of the registration of the Plaintiff's Transfer of Lease under the Registered Lands Act (Repealed), as at 27th March 2012, this had not been done; that the certified copy of the land register of the suit property omits to list the Government of Kenya as the 1st proprietor, Continental Developers as the 2nd proprietor and the Plaintiff as the 3rd proprietor.
55. According to counsel, the register lists the Charge registered on 28th May 1980 as the 1st entry; the Further Charge registered on 11th May 1989 as the 2nd entry, a Discharge of Charge and Further Charge registered on 6th December 2012 as the 3rd entry; a court order as the 4th entry; a court order dated 31st August 2012 authorizing the lifting of a previous court order as the 5th entry and the transfer to the 2nd Defendant and his wife by the charge as the 7th entry.
56. According to the Plaintiff's Counsel, the Plaintiff overpaid the borrowed amount to the 1st Defendant who is liable to it for a refund under the in duplum rule enshrined in the *Banking Act*. Further, that the 1st Defendant sold to the 2nd Defendant the suit property vide a memorandum of sale dated 27th March 2021, which was inconsistent with the terms of the auction; that the 2nd Defendant failed to pay the balance within 30 days of the sale, which determined the sale by public auction, and that anything thereafter amounted to a sale by a private treaty which was not anticipated.
57. Counsel for the 1st Defendant submitted that this court does not have the jurisdiction to hear and determine this matter and sought that this matter be struck out with costs without consideration of the merits. They argue that this court only has jurisdiction to deal with disputes connected to use of land and contracts incidental to the use of land, which does not include mortgages, charges, collection of dues and rent, which fall within the jurisdiction of the High Court.
58. Counsel relied on the Court of Appeal's determinations in *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR and *Bank of Africa Kenya Limited & Another vs TSS Investment Limited & 2 Others* [2024] KECA 410 (KLR). They also relied on the Supreme Court case of *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR and the Supreme Court of Nigeria's decision in *All Progressive Grand Alliance (APGA) v Senator Chritiana N.D. Anyanwu & 2 others*, LER [2014] SC 20/2013.
59. Counsel further submitted that three judges of this court have previously found and held that the Plaintiff defaulted on his loan repayment obligations. He urged that consequently, the issue as to whether the Plaintiff defaulted on his loan repayment obligations is *res judicata*.
60. Counsel submitted that the 1st Defendant has presented evidence that the Plaintiff defaulted on his loan repayment obligations, including through the Plaintiff's mortgage statements which show his arrears and defaults ever since the credit facilities were advanced to him; numerous letters addressed to the Plaintiff requiring him to rectify his arrears and defaults, and numerous correspondence by the Plaintiff where he acknowledged his indebtedness and requested the 1st Defendant to indulge him.
61. The 1st Defendant's Counsel submitted that the 1st Defendant's statutory power of sale over the suit property rightly crystallised immediately upon the Plaintiff's default. He urged that the 1st Defendant complied with the applicable legal requirements by issuing the Plaintiff with the prerequisite statutory notices and carrying out a professional valuation of the suit property, dated 3rd June 2011.
62. The said valuation, it was submitted, was in compliance with Rule 11(1)(b)(x) of the Auctioneer's Rules which provides that the reserve price of a property should be indicated via professional valuation carried out no more than 12 months prior to the proposed sale.



63. It was submitted that the 1st Defendant has progressively been conducting valuations over the suit property and that the Plaintiff's argument that the suit property's value is over 23 million is unexplained and cannot be relied upon.

Analysis and Determination

64. In this suit, the issues that arise for determination are as follows:
- a. Whether this court has jurisdiction
 - b. Whether the right to sell the suit property had accrued to the 1st Defendant?
 - c. Whether the 1st Defendant lawfully exercised its statutory power of sale
 - d. Whether the 2nd Defendant's Counterclaim is merited.
65. It is settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings.
66. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
- “...It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
67. It is further well settled that submissions are not pleadings. The parties can therefore not purport to raise legal issues and seek prayers that are not articulated in their pleadings.
68. The parties in this suit have purported to introduce several issues through their submissions which were neither asserted in their pleadings, nor were they addressed in the course of hearing this suit. The Plaintiff's counsel has submitted that the charge between himself and the 1st Defendant is an equitable charge and not a legal charge because the Plaintiff neglected to enter the Transfer of Lease in his favour into the register of the property.
69. Although they concede that this issue is unpleaded, they assert that the issue was addressed by both parties. This is however not the case because neither party addressed itself as to the legality of the charge. Rather, the parties herein have proceeded on the basis that this was a proper legal charge. The court therefore declines to delve into the issue of whether the Charge and Further Charge before it was an equitable or legal charge.
70. The 1st Defendant has challenged the jurisdiction of this court to determine this suit. This court appreciates that jurisdiction is everything, without which this court cannot move. The Respondent



has quoted the Court of Appeal's decision in *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* [2017] eKLR, where the Court of Appeal held that a dispute concerning a charge was not within the jurisdiction of the Environment and Land Court.

71. The Court of Appeal further held that a charge does not fall within the definition of use of land within the meaning of Article 162 of *the Constitution*. The court also noted that the dispute concerned a question of accounts rather than the validity of the accounts, thus outside the ambit of the ELC.
72. This position was later affirmed by the Court of Appeal in *Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates vs Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates* [2019] eKLR in the following words:
 - (11) It is evident from Article 162(2) of *the Constitution* that the intention of the framers of *the Constitution* was the creation of special courts to determine disputes relating to the environment and the use and occupation of, and title to, land. This is confirmed by the preamble to the ELC Act wherein it is stated that the purpose of the ELC Act is:

‘To give effect to Article 162(2)(b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.’
 - (12) We reiterate the position taken in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna* (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land.”
73. In this matter, the predominant issue is whether the statutory power of sale had accrued to the 1st Defendant and whether such power of sale was lawfully exercised. The Plaintiff has however sought that this court find that contrary to the 1st Defendant's claims, it fully paid the debt and to find that it is the 1st Defendant who actually owes the Plaintiff.
74. Guided by the above determinations, this court declines the invitation of the Plaintiff to undertake an accounting exercise in determining the extent to which he was indebted. That is the preserve of the High Court as was held by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others* [2017] eKLR. This question would be beyond the jurisdiction of this court. This court shall restrict itself to the question of whether the 1st Defendant lawfully exercised a right to sale the suit property.
75. The facts in this matter are that through a charge dated 26th May 1980, the Plaintiff obtained a mortgage of Kshs. 169,960 from the 1st Defendant, with the suit property as security. The sum borrowed is evidenced through the charge instrument attached to the 1st Defendant's bundle dated 14th October 2022. This is further buttressed by the entry in the register of the suit property, which indicates that the first mortgage obtained was for Kshs. 169,960.
76. The claim by DW2, Alice Weru, that the charge was for Kshs. 690,000 is consequently disproved. It is further not disputed that thereafter in 1989, the Plaintiff obtained a further mortgage on 11th May 1989 for Kshs. 247,500/-.
77. Under Section 74 of the Registered *Land Act* (repealed), a chargee may exercise the right to sell a charged property where a chargor is in default of the payment of the principal sum or of any interest,



which default continues for a month, and upon a notice to pay the money owing, the charger does not comply within three months of service. It provides:

74.

- (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.
- 2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may -
 - (a) appoint a receiver of the income of the charged property; or
 - (b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise

the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.”

78. The 1st Defendant has presented the statement of the Plaintiff’s loan account from 1980, which indicates that the Plaintiff was a serial defaulter in the payment of his loan. A similar statement has also been adduced by the Plaintiff in his bundle of documents.
79. A consideration of the correspondences between the 1st Defendant and the Plaintiff further establish the state of the Plaintiff’s indebtedness. Through a letter dated 3rd September 1981, the 1st Defendant notified the Plaintiff that he was in arrears of Kshs. 5,298.35/-; on 6th March 1985, the Plaintiff was notified he was in arrears of Kshs. 13, 821.35; on 29th July 1985, the Plaintiff was in arrears of Kshs. 24,953.10; on 24th October 1988, the Plaintiff was notified that he was in arrears of KShs. 6,242.65; on 6th August 1990, the Plaintiff was in arrears of Kshs. 25,359.70 and on 26th April 1991, the Plaintiff was in arrears of Kshs. 58,461.70.
80. Further, on 27th May 1992, the Plaintiff was notified of being in arrears of 146,001.70 and the 1st Defendant required payment of Kshs. 571,137. 50 inclusive of the principal; on 8th August 1995, the Plaintiff’s arrears stood at Kshs. 187,776.85 and the balance was at Kshs. 840, 039.70/- and on 31st July 2000 the Plaintiff’s arrears were Kshs. 633,139.80 and the total loan balance was Kshs. 1,352,774/. At the date of the auction on 27th March 2012, the Plaintiff’s loan balance was at Kshs. 2,332,478/-
81. This court takes due notice that from the documents submitted by the parties herein, that the Plaintiff was acutely aware of his indebtedness to the 1st Defendant and that several arrangements were made between the parties towards settlement of the loan balance.
82. The Plaintiff acknowledged his indebtedness through his letter dated 14th May 1990 where he asserted that he was not aware that his employer was not sending the correct mount to service the account. In a letter dated 29th September 1992, the Plaintiff requested HFCK’s indulgence and sought them to cancel their instructions to Marchet Auctioneers. He undertook to make arrangements to pay the loan balance.



83. It is also apparent that the auction held in 2012 was not the first attempt by the 1st Defendant to sell the suit property. Based on the correspondences between the parties, the 1st Defendant had scheduled to auction the suit property on 11th April 2006, 30th January 2007 and 25th November 2008. In all these cases, the Plaintiff successfully requested the 1st Defendant to suspend the auctions, and promised to clear its loan balance.
84. The evidence shows that on 12th January 2009, the Plaintiff lent his signature to an agreement for capitalization of the loan arrears, in which he agreed and acknowledged the total outstanding debt of Kshs. 3,661,627.55 inclusive of arrears of Kshs. 377,728. 65. This agreement was in settlement of HCCC No. 512 of 2006 *Mutua Kihu v HFCK Limited*.
85. On the preponderance of this evidence, this court is satisfied that the right to sell the charged property had properly accrued to the 1st Defendant.
86. Section 74 of the *Land Registration Act* provides that if a chargor is in default of his obligations to pay his loan balance for one month, a chargee may serve on him a notice in writing to pay the money owing or to perform and observe the agreement. If the chargor fails to comply within three months, a further notice shall be sent to the chargor, and the chargee may sell the suit property.
87. Even if the court was to find that the power of sale was irregularly exercised, the chargee's remedy only lies in damages. This was held in *Krobought Grant vs Kenya Commercial Finances Co. Ltd & 2 Others* -Civil Appeal No. 227 of 1995, where the court stated that a purchase at a public auction was protected by Section 69 B of the ITPA and could only lose the protection if it was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice of.
88. This was similarly upheld in *Kamulu Academy Limited & Another vs British American Insurance (K) Ltd & 2 Others* [2018] eKLR as follows:

“The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not...in the case of *Mbuthia vs Jimba Credit Finance Corporation and another* [1986-1989] 1EA 340(CAK) considered when the impact of an auction sale on the equity of redemption. The charged property was sold by public auction to the second Respondent. The Court of Appeal held:- A sale destroys the equity of redemption in the mortgaged property...The Court will not grant to a mortgagor tendering the moneys due under the mortgage an injunction restraining the mortgage from completing by conveyance a contract to sell the mortgagee from completing by conveyance a contract to sell the mortgaged property in exercise of his power of sale unless it is proved that the mortgagee entered into the contract in bad faith...This means that the mortgagor's right of redemption is lost as soon as the mortgage either sells the mortgaged property by public auction or enters into a binding contract in respect of it. On the acceptance of a bid at an auction, there is an immediate sale binding on the chargor. The chargee is then entitled to immediate possession of the charged property under subsection (2) of the Act. In the case of *Ze Yu Vs Yang Nova Industrial Produce Ltd* [2003] 1 EA 362 (CCK), Justice Nyamu (as he then was) held as follows: - “The existence of a valid sale agreement extinguished the equity of redemption and the Applicant had no remedies touching on the property both as against the former mortgagee and against the person exercising the power. *Mbuthia Vs Jimba Credit Corporation* [1986] LLR 3292 (CAK), *Grant Vs Kenya Commercial Finance Company Limited* Civil Appeal Number 227 of 1995 and *Central Bank of Kenya Limited Vs Trust Bank and Others* [1996] LLR 472}} (CAK) applied.”



89. Additionally, in *Joyce Wairimu Karanja vs James Mburu Ngure & 3 Others* [2018] eKLR the court held that: -

“Both statutory and decisional law have clearly stated that the remedy for a mortgagee who has suffered damages as a result of improper auction, is not to reverse the auction against an innocent purchaser – but in damages.”

90. The 1st Defendant has attached a copy of an advertisement of the auction of the suit property, which was published in the Nation Newspaper on 12th March 2012. Further, as noted above, the 1st Defendant issued several statutory notices to the Plaintiff, including one dated 3rd June 2011.

91. Having been served with the mandatory statutory notice, and the property having been advertised in the newspaper for sale by public auction, this court finds that the sale of the suit property was lawful.

92. The upshot of the foregoing is that the Plaintiff's suit is unmerited and the same is for dismissal in toto.

93. In his counterclaim, the 2nd Defendant has sought orders for mesne profits. The mesne profits have been particularized as constituting Kshs 204,000 per month. This claim is supported by the Valuation Report dated 12th September, 2019.

94. In the report, it is indicated by the valuer that the monthly rent for the property as at September, 2019 was Kshs 204,000, while the annual rent was Kshs. 2,448,000. The valuer has tabulated how he arrived at this figure. The Plaintiff did admit that he has always been in possession of the suit property and has been receiving rent.

95. In the absence of a contrary report to show that the payable rent as at 2019 was not Kshs 204,000 per month, it is the finding of the court that the 2nd Defendant has proved his claim.

96. In conclusion, the court makes the following final orders:

- a. The Plaintiff's suit is dismissed with costs.
- b. The 2nd Defendant's counter claim is allowed as follows:
 - i. The Plaintiff to pay the 2nd Defendant Kshs. 204,000 per month from 6th December, 2012, being the date when the 2nd Defendant was registered as the proprietor of the suit property, until the date he vacates the house and hands over the suit property.
 - ii. The Plaintiff to pay interest on the said mesne profit at court rates from 6th December, 2012 until the date he vacates and hands over the suit property
 - iii. The Plaintiff to pay the 2nd Defendant the costs of the suit and the counter claim.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

O. A. Angote

JUDGE

In the presence of

Mr. Ombwayo for Plaintiff

Mr. Otieno for 1st Defendant

Mr. Kopere for 2nd Defendant



Court Assistant: Tracy

