



REPUBLIC OF KENYA



KENYA LAW
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**Waireri v Kenya Commercial Bank Limited (Commercial Case 327 of 2005)
[2025] KEHC 4380 (KLR) (Commercial and Tax) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 327 OF 2005
MN MWANGI, J
MARCH 28, 2025**

BETWEEN

FRANCIS THUO WAIRERI PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

JUDGMENT

1. The plaintiff vide a plaint dated 16th June 2005 instituted this suit against the defendant seeking judgment against it as hereunder -
 - i. A perpetual injunction to restrain the defendant, whether by itself, its Auctioneers or other agents from selling, advertising for sale, inviting offers for sale or in any other way alienating or disposing of the plaintiff's parcels of land known as Land Reference Numbers 7022/151 & 161 Kiambu whether by public auction or private treaty;
 - ii. An order that accounts be taken and made;
 - iii. A declaration that the defendant's Statutory power of sale has not arisen and/or is not exercisable;
 - iv. An order that the defendant do execute at its own expense re-conveyance of mortgage in respect of land reference numbers 7022/151 and 161 Kiambu and release, and discharge the same to the plaintiff;
 - v. General damages;
 - vi. Costs of the suit;
 - vii. Interest on (v) & (vi) above; and



- viii. Any other or further relief deemed fit.
2. The plaintiff's case is that he was the registered owner of Land Reference Numbers 7022/151 & 161 Kiambu. He averred that by a mortgage dated 29th April 1998, he mortgaged the said properties to the defendant to secure a loan of Kshs.500,000/=, which was advanced to Afro Automobiles & Hardware Agencies Limited, but despite the borrower having repaid Kshs.2,000,000/=, the defendant refused to execute a re-conveyance of mortgage and to discharge the suit properties. The plaintiff stated that by a letter dated 1st December 1999, the defendant through its Advocates purported to issue him with a Statutory Notice demanding Kshs.2,813,868.95.
 3. The plaintiff however contended that the said Notice was invalid as it did not comply with Section 69(1) of the Indian Transfer of Property Act, 1882, it did not specifically make reference to the suit properties but referred to several different properties and the requirements as to service of the alleged Notice were not complied with. The plaintiff averred that in reliance of the said Notice, the defendant instructed Baseline Auctioneers to sell the suit properties at an auction that was scheduled for 17th June 2005, thus exposing the plaintiff to suffer loss and damage. He asserted that the said sale was illegal as statutory requirements under the Act and the Auctioneers Act, 1996, were not met.
 4. In opposition to the suit, the defendant filed a statement of defence dated 24th May 2013, where it denied all the averments in the plaintiff's plaint. The defendant contended that the plaintiff mortgaged the suit properties to cover the principal loan, interest, costs, and other charges. It averred that contrary to the plaintiff's claim that the loan was fully repaid, the plaintiff and the borrower had previously acknowledged outstanding amounts and sought leniency on accrued interest. The defendant disputed the plaintiff's claim that the Statutory Notice issued was invalid and insisted that the said Notice was properly issued and served.
 5. It further asserted that due to consistent loan defaults exceeding two months, it was entitled to exercise its statutory power of sale over the suit properties pursuant to the provisions of Section 69A(b) of the Indian Transfer of Property Act, 1882 (now repealed). It was stated by the defendant that the plaintiff and the borrower have since paid a negotiated amount in full settlement of the amounts due to it and all securities have been returned to him, thus the plaintiff's claim has been overtaken by events.
 6. This matter proceeded to hearing where the plaintiff called one witness in support of his case, and the defendant also called one witness to ventilate its case.

Plaintiff's Case.

7. Mr. Francis Thuo Waireri testified as PW1. He stated that he was a long-time customer of Kenya Commercial Bank under his company, Afro Automobiles & Hardware Agencies. That he obtained a loan of Kshs.500,000/= from KCB on 18th March 1998, secured by four parcels of land being L.R. Nos. 7022/151, 7022/161, 7022/162, & 7022/166, Kiambu. He further testified that he later secured an overdraft of Kshs.2,000,000/= which was also secured by the aforementioned parcels of land and which he serviced through his business. Mr. Thuo testified that the dispute herein arose when the defendant sought to auction his land through Baseline Auctioneers. He asserted that he was never served with a valid Statutory Notice or a notification of sale, contrary to legal requirements, as he only became aware of the impending sale of L.R. Nos. 7022/161 when he saw an advertisement in the Daily Nation Newspaper.
8. Mr. Thuo testified that the defendant claimed to have sent him a Statutory Notice via registered post, but he did not receive it. He however acknowledged receiving Statutory Notices from a different Auctioneer, being Muga Auctioneers and General Merchants, in relation to other properties. Mr.



Thuo contended that three of the four properties being L.R. Nos. 7022/161, 7022/162 & 7022/166 were returned to him after he completed payment, but L.R. No. 7022/151 was unlawfully sold by the defendant. He however maintained that he had fully repaid his debts before the defendant and the Auctioneers proceeded with the said sale. In support of his case, Mr. Thuo produced the documents in his list and bundle of documents as plaintiff exhibits No. 1-13.

9. Upon cross-examination, Mr. Thuo admitted having received a Statutory Notice from Muga Auctioneers for an auction set for 13th September 2000 and acknowledged receipt of a notification of sale dated 30th June 2000. He however denied receipt of a Statutory Notice dated 1st December 1999 from Macharia Njeru & Co. Advocates. Mr. Thuo stated that he only became aware of the auction of LR No. 7022/151 through a Newspaper advertisement and that he personally witnessed its sale to William Kamiri Ngeru for Kshs.1,000,000/= at an auction conducted on 17th June 2005. PW1 acknowledged receipt of correspondence from the defendant after the sale of LR No. 7022/151, including a letter dated 24th February 2005 from him to the defendant, in which he did not explicitly complain about the unlawful sale of the said property. He also confirmed that the defendant had written off Kshs.1,848,018.01 of his debt and that he collected certain documents from the defendant on 22nd February 2010.
10. In re-examination, Mr. Thuo confirmed that he verbally complained to the defendant about the illegal sale of his property. He clarified that he did not write to the defendant informing it that he agreed with the sale, but he was aware that his property had been sold. He stated that he attended the auction to witness how the sale would be conducted and to receive any proceeds from it. He stated that in as much as he thanked the defendant for reducing part of his debt, it did not mean that he approved the sale of LR No. 7022/151.

Defendant's Case.

11. Mr. Emmanuel Kyalo Wambua testified as DW1. He adopted his witness statement dated 27th September 2022 as his evidence in chief and produced the documents in the defendant's list and bundle of documents dated 23rd September 2022 as defence exhibits No. 1-41. He testified that Afro Automobile & Hardware Agencies Limited, which the plaintiff was a co-director, obtained a Kshs.500,000/= loan from the defendant on 18th March 1998 secured by properties L.R. Nos. 7022/151, 7022/161, 7022/162, & 7022/166, but the company failed to meet its repayment obligations prompting the defendant to issue a Statutory Notice on 15th December 1999, demanding Kshs.2,813,868.95 plus interest. He stated that both the borrower and guarantor failed to comply with the said Notice leading the defendant to instruct Baseline Auctioneers to sell the aforesaid properties through public auction.
12. Mr. Kyalo stated that a public auction was held on 17th June 2005, following advertisements in the Daily Nation and Notices in Kiambu Town. He further stated that L.R. No. 7022/151 was sold to Mr. William Kamiri Ngeru for Kshs.1,000,000/=. He further stated that the Court Order issued on 12th July 2005, was neither served on the defendant nor the Auctioneers before the aforesaid sale. Mr. Kyalo contended that in 2009, the plaintiff approached the defendant and an agreement was reached to settle the remaining debt for Kshs.1,731,069.51. He testified that after full payment in February 2010, the defendant discharged L.R. No. 7022/161, returning the Title to the plaintiff. DW1 testified that the order of permanent injunction sought is irrelevant as L.R. No. 7022/151 was lawfully sold and L.R. No. 7022/161 was released to the plaintiff upon full payment. He further testified that the accounting request is unnecessary since the plaintiff agreed on the final amount, which was settled.



13. During cross-examination, Mr. Kyalo confirmed that L.R. Nos. 7022/151 & 7022/161 were among the four properties securing the subject loan. He acknowledged that the Statutory Notice served did not specify the mortgage value or indicate the outstanding amount after considering the mortgage value of the properties. He contended that the said Statutory Notice was sent to the plaintiff via post in compliance with Section 69A(1) of the Indian Transfer of Property Act. He however failed to produce a certificate of postage as proof. He stated that Bestline Auctioneers sold L.R. No. 7022/151 after conducting a valuation on it, but admitted that Bestline Auctioneers did not issue the plaintiff with a redemption notice before the sale.
14. Mr. Kyalo asserted that the redemption notice by Muga Auctioneers was sufficient despite not being issued directly before the sale. He stated that the transfer documents show that L.R. No. 7022/151 was transferred to William Kamiri Ngeru for Kshs.800,000/= but could not explain why the amount was not Kshs.1,000,000/=. He asserted that the Statutory Notice dated 1st December 1991 was signed and served but admitted there was no evidence of its postage. He could not confirm whether it was anchored on the correct provisions of the law.
15. In re-examination, Mr. Kyalo stated that the Statutory Notice produced as defence exhibit No. 17 was signed and stamped. He emphasized that since the plaintiff annexed the Statutory Notice to his affidavit as annexure no. FTW3, it proved that he was indeed served with it. He contended that the outstanding loan covered all the properties charged to the defendant by the plaintiff. He referred to page 76 of the defendant's documents, highlighting a memorandum showing that the purchaser of L.R. No. 7022/151 paid a deposit of Kshs.250,000/=. He referred to page 77 of the defendant's documents which confirmed that Baseline Auctioneers received Kshs.750,000/= from William Kamiri Ngeru as part of the payment for L.R. No. 7022/151.
16. At the close of the defendant's case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 11th May 2024 by the law firm of Wamwayi & Co. Advocates, while the defendant's submissions were filed by the law firm of Macharia – Mwangi & Njeru Advocates on 11th June 2024.
17. Mr. Wamwayi, learned Counsel for the plaintiff cited Section 107 of the *Evidence Act* and submitted that the defendant did not prove service of the Statutory Notice making the said Notice invalid. He referred to the provisions of Section 69A(1)(a) of the Indian Transfer of Property Act and further submitted that the defendant failed to comply with the provisions thereunder, thus rendering the Statutory sale defective. He relied on the case of Kennedy Kamau Ngaruiya t/a Daily Chick Supplies v Industrial & Commercial Development Corporation & Another [2000] KEHC 253 (KLR), and contended that the Auctioneer failed to issue a 45-day redemption notice and a notification of sale as required under Rule 15(c) & (d) of the Auctioneers Rules, making the auction invalid. He argued that the discrepancy in the actual selling price of L.R. No. 7022/151 raises doubts about the legality of the auction.
18. Mr. Kimani, learned Counsel for the defendant relied on the case of Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd [2019] eKLR, and submitted that the plaintiff failed to amend his pleadings to reflect that LR No. 7022/161 was discharged after settling Kshs.1,420,000/=. Citing the case of Joseph Kipkorir Biwott v Kenya Railways Corporation [2021] eKLR, Counsel asserted that the reliefs being sought have been overtaken by events. He also noted that the plaintiff's claim of an illegal sale for Kshs.800,000/= was not in the original plaint. He relied on the case of Heineken East Africa Import Company Limited & another v Maxam Limited [2024] KECA 625 (KLR), and contended that an order for accounts cannot be issued as a final order. Mr. Kimani argued that no evidence was provided to support the claim that Afro Automobiles and Hardware Agencies Limited paid Kshs.2,000,000/=.



19. He stated that the defendant offered to settle the loan at Kshs.1,420,000/=, which the plaintiff accepted, agreeing to a monthly repayment plan. That on 2nd February 2010, the plaintiff confirmed a final payment of Kshs.345,070/=, fully settling his debt. He cited the case of *XXR Technologies Limited v Maseno University* [2020] eKLR and contended that the plaintiff is estopped from demanding an accounting of funds.
20. Mr. Kimani relied on the case of *Michael Angaya Arunga & another v Commercial Bank of Africa Limited* [2019] eKLR, and maintained that the Statutory Notice dated 1st December 1999 was properly issued, and the plaintiff's denial of receipt was an afterthought, as he did not dispute it in his initial pleadings. He argued that the defendant issued the plaintiff with a redemption notice and notification of sale through Muga Auctioneers on 30th June 2000, thus there was no requirement to re-issue the said Notices.
21. Mr. Kimani stated that the defendant conducted a valuation of LR No. 7022/151 before selling it at a public auction. He cited the case of *Palmy Company Limited v Consolidated Bank of Kenya Limited* [2014] eKLR, and stated that although the plaintiff claimed the property was valued at Kshs.1,500,000, he failed to provide any contrary valuation. He referred to Section 69B (2) of the Indian Transfer of Property Act, 1882, and emphasized that despite multiple communication between the parties herein after the suit was filed, the plaintiff never claimed the sale was illegal. Counsel maintained that the plaintiff neither pleaded nor proved fraud or illegality in the sale of LR No. 7022/151 to the required legal standard.

Analysis And Determination.

22. I have considered and analyzed the evidence adduced alongside the pleadings filed, as well as the written submissions filed by Counsel for the parties. The issue that arises for determination is whether the plaintiff is entitled to the reliefs sought in the plaint.
23. The plaintiff obtained a loan of Kshs.500,000/= and an overdraft of Kshs.2,000,000/= from the defendant, secured by among others, a mortgage over all those parcels of land known as L.R. Nos. 7022/151 & 7022/161. The plaintiff's case is that despite having paid Kshs.2,000,000/=, the defendant refused to execute a re-conveyance of mortgage and to discharge the suit properties. Instead, it purported to issue the plaintiff with a Statutory Notice vide a letter dated 1st December 1999, demanding Kshs.2,813,868.95. The plaintiff asserted that the said Notice was invalid as it did not comply with the provisions of Section 69(1) of the Indian Transfer of Property Act, 1882. The defendant on the other hand contended that the plaintiff did not prove that it paid the defendant Kshs.2,000,000/=.
24. It is not disputed that L.R. No. 7022/161 has since been discharged and the Title returned to the plaintiff, but L.R. No. 7022/151 was sold by public auction on 17th June 2005. The defendant has demonstrated that after the institution of this suit and the sale of L.R. No. 7022/151, the parties herein got into negotiations. Subsequently, in a letter dated 29th January 2009 produced as defence exhibit No. 34, the defendant requested the plaintiff to settle the debt for Kshs.1,420,000/=. The plaintiff countered this offer in a letter dated 24th February 2009 produced as defence exhibit No. 35 by proposing to make a payment of Kshs.1,000,000/=.
25. In a letter dated 19th March 2009 produced as defence exhibit No. 36, the defendant rejected the counter-offer and re-affirmed its offer of Kshs.1,420,000/=, subject to 15% interest from November 2007, bringing the total balance to Kshs.1,731,069.51 as at 28th February 2009. The defendant acknowledged receipt of Kshs.1,000,000/= as at 19th March 2009 and instructed the plaintiff to repay



the balance of Kshs.731,069.51 in 12 monthly instalments of Kshs.65,985.00, starting on 30th April 2009. The defendant then asked the plaintiff to signify its acceptance of the offer by signing and returning a copy of the letter dated 19th March 2009, which the plaintiff did. On 2nd February 2010, the plaintiff confirmed full payment of the outstanding debt, expressed gratitude for the defendant's cooperation, and requested for a discharge of the securities held.

26. In view of the fact that the said evidence was not rebutted by the plaintiff in cross-examination of the defendant's witness, I am persuaded that the plaintiff was indebted to the defendant to warrant the defendant to exercise its powers provided for under Section 69 of the Indian Transfer of Property Act, 1882.
27. I however note that in as much as the defendant maintains that the letter dated 1st December 1999 constituted a valid Statutory Notice, the High Court, differently constituted, in a ruling delivered on 12th July 2005 held that the said Notice was defective, hence it could not form the basis upon which the defendant could proceed to exercise its statutory power of sale.
28. The plaintiff disputes having received a 45-day redemption notice and notification of sale from Baseline Auctioneers. The only evidence provided by the defendant in support of this averment is a letter dated 31st March 2005 from Baseline Auctioneers stating that they served the plaintiff with the required Notices. The defendant argued that re-issuing the documents was unnecessary since Muga Auctioneers had already served them, service of which is not disputed by the plaintiff. The above notwithstanding, since the Statutory Notice dated 1st December 1999 was declared by the Court to be defective, the defendant had no legal basis to instruct Auctioneers to advertise and sell L.R. No. 7022/151. As a result, whether Baseline Auctioneers or any other Auctioneer issued the 45-day redemption notice and notification of sale is irrelevant to the final outcome of this suit.
29. I am alive to the provisions of Section 69B(2) of the Indian Transfer of Property Act, 1882, which provides that -

Where a transfer is made in exercise of the mortgagee's Statutory power of sale, the title of the purchaser shall not be impeachable on the ground

- a. that no case had arisen to authorize the sale; or
- b. that due Notice was not given; or
- c. that the power was otherwise improperly or irregularly exercised,

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due Notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

30. The Court of Appeal in *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] KECA 768 (KLR) in addressing the import of the aforementioned provisions held that –

As rightly observed by the learned Judge, the 2nd and 3rd respondents had not issued a Statutory Notice for the requisite period of 90 days prior to exercising their Statutory power of sale as stipulated under Section 69A of the Indian Transfer of Property Act (ITPA) now repealed but instead issued a Notice of 14 days. Still that by itself in view of Section 69B (2) (b) of the ITPA could not impeach the appellant's title which we found herein above was properly obtained. In *Lord Waring vs. London and Manchester Co. Ltd.* [1935] Ch 310 at



318 Crossman J. said of the purpose of Section 104 (2) of Transfer of Property Act, 1925 of England which as we have already observed is in pari materia to the entire Section 69B (2) of ITPA, that:

“Its purpose is simply to protect the purchaser and to make it unnecessary for him, pending completion and during investigation of title, to ascertain whether the power of sale has become exercisable. Of course if the purchaser becomes aware, during that period of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then in my judgment, he gets no good title on taking the conveyance”.

31. Further, the Court of Appeal in Euro Bank Limited (In Liquidation) v Twictor Investments Limited & 2 others [2020] KECA 516 (KLR), addressed the consequences of an improper sale and held as follows–

In our view, there was nothing sinister therefore with the Bank proceeding by way of private treaty. The irregularities complained of which arose in the cause of the sale should be equated to irregularities arising at a public auction. As stated in the Amadiva case (supra), if the sale was improper, or caused prejudice to the mortgagor, then in our view, the recourse lay in damages and not in cancellation of the Title Deed. In any event, even if the Court was minded to cancel the 3rd respondent’s Title Deed, then it should have been restored to the position before the sale, and not revert it to the 1st respondent who had not cleared the loan with the Bank.

32. Bound by the aforementioned decisions, it is my finding that following the illegal sale of the plaintiff’s property L.R. No. 7022/151, the only remedy available to him is an award of damages.

33. The plaintiff sought a perpetual injunction against the sale of L.R. Nos. 7022/151 & 161, but L.R. No. 7022/161 was discharged and L.R. No. 7022/151 was sold on 17th June 2005. It is my finding that the foregoing relief has been overtaken by events and cannot be granted in view of the above and the provisions of Section 69B(2) of the Indian Transfer of Property Act, 1882.

34. In regard to the prayer for an order that accounts be taken and made, this Court is bound by the Court of Appeal’s finding in Heineken East Africa Import Company Limited & another v Maxam Limited (supra) where it was held that –

The main argument against the availability of an account of profits as a remedy for breach of contract was that the circumstances where that remedy could be granted would be uncertain. There was no reason why, in practice, the availability of the remedy of an account of profits needed to disturb settled expectations in the commercial or consumer world. An account of profits would be appropriate only in exceptional circumstances.

Normally the remedies of damages, specific performance and injunction, coupled with the characterization of some contractual obligations as fiduciary, would provide an adequate response to a breach of contract. It would be only in exceptional cases, where those remedies were inadequate, that any question of accounting for profits would arise.....

Maxam Ltd laid out a justifiable basis for that relief. It was entitled to an order of account of profits compelling Heineken E.A and Heineken B.V to account for the profits they derived from the utilisation of Maxam Ltd’s capital and infrastructure and therefore the share of Heineken E.A’s and Heineken B.V’s profits which ought to accrue to Maxam Ltd. However, the relief was sought and granted at an interlocutory stage, and was not granted as a final order in a judgment.



The judgment could not remain “open” for the taking of account of profits after final judgment was rendered by the trial Court, absent any exceptional circumstances to justify the order of taking of accounts. However, the entire judgment was not a nullity because it was an “open judgment”, since the offending portion was but one of the orders granted by the trial Court, and was therefore severable.

35. It is not disputed that the plaintiff in a letter dated 2nd February 2010, confirmed full payment of the outstanding debt and requested the discharge of securities, that being the case, an order for taking accounts would be unnecessary, as the plaintiff already acknowledged the debt and made payments. Accordingly, I am not persuaded that this is a proper case for issuance of an order for taking of accounts post judgment.
36. The plaintiff’s request for a declaration that the defendant’s statutory power of sale was not exercisable and for a re-conveyance of mortgages has been overtaken by events, as L.R. No. 7022/161 was discharged and returned to the plaintiff, L.R. No. 7022/151 was sold and the provisions of Section 69B(2) of the Indian Transfer of Property Act, 1882, apply.
37. In the end, it is my finding that the plaintiff has discharged his burden of proof. He is therefore entitled to an order for damages equivalent to the market value of L.R. No. 7022/151 at the time it was sold. According to the Valuation Report produced by the defendant dated 11th June 2005 prepared by Legeno Real Estates, the market value for L.R. No. 7022/151 as at June 2005 was Kshs.1,600,000/= . In the absence of any other Valuation Report to the contrary, I am persuaded that the market value of the aforesaid property was Kshs.1,600,000/= as at 11th June 2005.
38. It is my finding that the plaintiff’s suit against the defendant is successful. Section 27 of the Civil Procedure Act provides that costs follow the event, in view of the foregoing I find that costs of this suit shall be borne by the defendant.
39. I hereby enter judgment for the plaintiff against the defendant and make the following orders-
 - i. General damages of Kshs.1,600,000/= with interest at Court rates from the date of filing suit until payment in full are awarded to the plaintiff;
 - ii. Costs of the suit are awarded to the plaintiff; and
 - iii. Interest in (ii) above at Court rates from the date of judgment until payment in full is awarded to the plaintiff.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MARCH 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wamwayi for the plaintiff

Mr. Kimani for the defendant

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

