Little Hills Flora Limited & 2 others v Industrial and Commercial Development Corporation & 2 others (Civil Case 50 of 2018) [2024] KEHC 5882 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5882 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 50 OF 2018

JRA WANANDA, J

MAY 24, 2024

BETWEEN

LITTLE HILLS FLORA LIMITED ..... 1ST PLAINTIFF

STEPHEN KIPKERING SUGUT ..... 2ND PLAINTIFF

LEAH CHEPCHUMBA SUGUT ..... 3RD PLAINTIFF

AND

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION .... 1ST DEFENDANT

WAKARIMA INVESTMENTS CO. LIMITED ..... 2ND DEFENDANT

JOYLAND AUCTIONEERS ..... 3RD DEFENDANT

JUDGMENT

1. This is another one of those old matters that have taken too long to be concluded. The suit was filed in this Court on 29/04/2005 but was later transferred to the Environment and Land Court before being subsequently returned to this Court and assigned the current case number. The suit has therefore been in Court for more than 19 years which is totally unacceptable.

2. I took over the matter on 7/3/2023 when it was part-heard before S.M. Gihinji J. By consent, the parties requested and I agreed to proceed with the hearing from where it had stopped.

3. The Plaintiff's claim is contained in the Amended Plaint dated 2/11/2017 and filed through Messrs Birech, Ruto & Co., the Advocates currently acting for the Plaintiffs and who replaced the earlier Advocates, Messrs Machio & Co. The Judgment sought is as follows:

    a. A permanent injunction against the Defendants from dealing in any way with the Plaintiff's parcel of land L.R. No. Uasin Gishu/El-Lahre/40.

b. A declaration that the charge registered land parcel L.R. No. Uasin Gishu/El-Lahre/40 and its purported sale are both null and void.

c. .....[deleted]

d. Costs of this suit.

e. That there be a cancellation of transfer of L.R. No. Uasin Gishu/El-Lahre/40 in favour of the 2nd Defendant.

f. That the purported sale of L.R. No. Uasin Gishu/El-Lahre/40 be set aside.

g. A declaration that the purported sale is a nullity.

4. The Plaintiffs' pleaded that in 1996 the 1st Defendant loaned to the 1st Plaintiff a sum of Kshs 10,000,000/- for the purposes of flower farming and the loan was guaranteed by the 2nd and 3rd Plaintiffs who were directors thereof. It was pleaded further that as security or collateral for the loan the 2nd Plaintiff offered his two parcels of land, namely, L.R. No.Uasin Gishu/El-Lahre/40 and L.R. No. 14999/1. It was then pleaded that L.R. No.Uasin Gishu/El-Lahre/40 (hereinafter referred to as "the suit property') is "agricultural land" within the provisions of Section 2 of the *Land Control Act*, Cap. 302, that on 13/05/1996, the 1st Defendant purported to register a fraudulent charge in its favour against the suit property without the consent of the Land Control Board and that such transaction is in the circumstances unlawful and null and void and does not confer upon the 1st Defendant any right to sell the suit property. It was further alleged that on 2/07/2004 the 1st Defendant without issuing and serving upon the 2nd and 3rd Plaintiffs the necessary statutory notices instructed the 3rd Defendant to sell the suit property by public auction to the 2nd Defendant, that the sale is fraudulent and blatant breach of the provisions of Section 74 of the said Registered *Land Act*, Cap. 300 (now repealed), and that the sale was also carried out without issuing a redemption notice. It was also alleged that the sale was below the market price and that there was also failure to register the certificate of sale.

5. In response to the above, the 1st Defendant, through Lazarus M.O. Odongo Advocate, who replaced Messrs M. C. Mulwa & Co, filed its Statement of Defence dated 22/03/2018. It was stated that the 1st Defendant is a statutory State Corporation established under the *Industrial and Commercial Development Corporation Act*, Cap. 445 and as such it is a body corporate with perpetual succession and a common seal with power to hold land and sue in its corporate name. Regarding the issue of Land Control Board consent, the 1st Defendant averred that the same was granted by the Moiben Land Control Board which necessarily allowed the 2nd Plaintiff to charge the property to the 1st Defendant. It was then stated that the 1st Plaintiff defaulted in its obligation to pay interest and other periodic payment under the loan agreement and which default continued for more than 1 month and thus the 1st Defendant became entitled to sell the property, and that the outstanding loan balance was in excess of Kshs 51,418,077.40 by the time that the 1st Defendant exercised its statutory power of sale at the public auction on 2/07/2004. The 1st Defendant further contended that prior to exercising its power of sale, it adhered to all the statutory requirements including issuing statutory notices and also complied with all legal requirements subsequent to the sale.

6. On its part, the 2nd Defendant, through Messrs Tom Mutei & Co. Advocates, filed its Statement of Defence dated 22/07/2008. It was pleaded that the sale took place on 2/07/2004 by public auction at a time and place which the 2nd Defendant learnt of from a public advertisement, that the 2nd Defendant sent representatives whereupon it was declared the highest bidder at the fall of the hammer, that it then made payments as called upon to do and that in the premises, it is the rightful owner of the property.

The 2nd Defendant stated further that there being no privity of contract between it and the Plaintiffs, the claim against it is misconceived, that proprietorship having passed on to the 2nd Defendant and the same duly registered, the Plaintiffs have no claim against the 2nd Defendant and has been overtaken by events.

7. The 2nd Defendant then pleaded that having duly purchased the suit property and being registered as the proprietor, it is entitled to vacant possession and quiet occupation, that in spite of the foregoing, the Plaintiffs have persistently trespassed into, illegally farmed in and destroyed the developments in the suit property to the determent of the 2nd Defendant, that as result, the 2nd Defendant has been denied peaceful enjoyment of its propriety rights. In view thereof, the 2nd Defendant made a Counterclaim for Judgment in the following terms:

    a. That the Plaintiffs' suit against them be dismissed with costs.

    b. A permanent injunction restraining the Plaintiffs by themselves and/or their servants, agents from trespassing, occupying, alienating, disposing or in any way dealing with that parcel of land known as L.R. No. Uasin Gishu/El-Lahre/40.

    c. General damages for trespass and mesne profits.

    d. Costs of the Counterclaim.

8. Together with the Plaint, the Plaintiffs had filed an Application seeking issuance of interlocutory injunction prohibiting registration of the transfer of the suit property to the 2nd Defendant pending hearing and determination of the suit. Ex parte interim orders were initially granted but after inter partes hearing, by the Ruling delivered by M. Ibrahim J (as he then was) on 22/10/2007, the Application was dismissed.

9. After close of pleadings and determination of several interlocutory Applications, the matter eventually proceeded to trial. The Plaintiffs, the 1st Defendant and the 2nd Defendant called 1 witness each.

Plaintiffs' Evidence

10. PW1 was the 2nd Plaintiff, Stephen Arap Sugut who testified on 3/07/2019 before S.M. Githinj J. Led by his Counsel, Ms. Tum, he stated that the 1st Plaintiff is a company engaged in the business of growing flowers, that it is a family company and the 2nd Plaintiff is his wife but that they had separated. He confirmed the advancing of the loan of Kshs 10,000,000/- to the 1st Plaintiff in 1996, the lodging of the collateral as security and subsequent default in repayment by the Plaintiffs. He claimed that auctioneers sent by the 1st Defendant seized some of his property upon default and that he sold a petrol station to repay part of the loan but the same was still not enough. He claimed further that he later heard and read in the newspapers that his land (suit property) had been placed for sale, that he came to Eldoret and attended the auction on 2/07/20024, that the property was not sold but he later learnt that the same was sold "by some other way". He conceded that the property was charged but claimed that the same was never explained to him, that neither he nor his wife (3rd Plaintiff) attended before the Land Control Board before the charge was lodged and that he never gave consent for the property to be charged. He testified further that he was told that the notice to sell the land was given at home and received by his wife, that the same was not given to him, that his wife called and informed him about it, that he never received a redemption notice or the notification of sale or a valuation report, that he later heard that the property, measuring 60 acres, was sold for Kshs 2 Million but the Certificate of Sale shows it was sold at Kshs 6.8 Million which means that the property was sold at about Kshs 100,000/- per acre.

11. The 2nd Plaintiff testified further that the property was undervalued as the price of 1 acre was about Kshs 3 Million, that he had valued the property in 2004 and the value then was placed at Kshs 22 Million plus improvements Kshs 36,500,000/- and forced value Kshs 18,250,000/-, that the sale at Kshs 6.8 Million was at a throw away price. He stated further he is not aware whether there was a reserve price at the auction and confirmed that the property has since been transferred and registered in the name of the 2nd Defendant. Further, he stated that the Certificate of Sale was never registered and that he does not know whether the 2nd Defendant attended Land Control Board, that the 1st Defendant had never given him an account of the outstanding loan and that although he gave his contact address, "P.O. Box 494 Moi's Bridge", he never received any correspondence from the 2nd Defendant. He claimed that he still lives on the suit property with his children.

12. Under cross-examination by Counsel Mr. Odongo, he conceded that he was not forced or threatened to sign the loan agreement, that his wife (2nd Plaintiff) is also a director of the 1st Plaintiff, and that he was to start repaying the loan after 6 months but he did not do so. He claimed further that he agreed with the 1st Defendant that he would "sacrifice" his petrol station in place of the land and they sold the same jointly. Regarding the auction, he reiterated that he attended it after he saw the notice in the newspaper but insisted that no sale took place on that date as there was no buyer.

13. Under cross-examination by Mr. Juma, Counsel for the 2nd Defendant, the 2nd Plaintiff reiterated that his wife never told him about the notice of sell. He conceded that he was to finalize repayment of the loan in the year 2001, which was in 60 months (5 years).

1st Defendant's Evidence

14. For various reasons including several adjournments and also an Application in respect to which the 2nd Plaintiff was convicted of contempt of Court for defying Court orders, it was not until 13/07/2021 that the defence hearing commenced. One Zephania Kiprop Rono testified as DW1 before S.M. Githinji J.

15. He described himself as an Assistant Manager at the 1st Defendant and adopted the Statement made by a previously listed Witness, one Grace Magunga. She testified that the charge document was registered on 13/05/1996, that prior to registration of the charge, there was an Application for consent of the Land Control Board which was executed by both the Plaintiffs and the 1st Defendant and the consent was given, that the loan was not paid as agreed and only paid partially at a total sum of Kshs 750,000/-. He testified further that when the Plaintiffs failed to repay, the 1st Defendant issued statutory notices addressed to the 1st Plaintiff, "Little Flora Ltd, P.O. Box 494 Moi's Bridge" and was copied to the 2nd Plaintiff, that the Affidavit of Service is on record, that the redemption notice is dated 28/04/2004 and was served upon the recipient but who declined to sign. He confirmed that the property was sold and transferred to the 2nd Defendant.

16. Under cross-examination by Ms. Tum, he stated that the property was valued before it was charged but he could not remember the value and he did not have the Report, that they made an Application to the Moiben Land Control Board on 28/03/1996 and the consent was granted on 22/02/1996. He conceded that this date of the consent appears to have been before that of the Application. Although he conceded that he did not have evidence of supply of statements, he insisted that the same were sent monthly. He then reiterated that the statutory notice was served by registered post. He also stated that the redemption notice was hand delivered and the notification of sale also issued, that they were both dated 28/04/2004 and issued on the same date, that the 45 days' notice was served upon one "Leah", the wife of the 2nd Plaintiff, that the market value of the property was Kshs 9 Million and forced value was Kshs 7 Million, that there was a valuation Report dated 8/07/2004, that he has not seen the Certificate

of Sale and he does not know whether it was registered, that the purchaser was to take the Application for consent to the Land Control Board but he does not know whether this was done or the consent granted. He added that by the time of sale the principal amount due was Kshs 51,419,077.40 including interest, that after the auction they received Kshs 6.8 Million, and that he did not know what happened to the second property charged or that the Plaintiffs' equipment on the farm were carried away and sold. He insisted that the sale was by a public auction and not private treaty.

17. Under cross-examination by Ms. Moraa (Counsel for the 2nd and 3rd Defendants), DW1 stated that he could not tell whether there were other bidders at the auction but insisted that the 2nd Defendant won the bid and who then paid the entire purchase price. He stated further that after fall of the hammer in an auction, a chargor cannot reclaim the property but only claim for damages.

18. Under cross-examination by Mr. Odongo, DW1 stated that he is not a member of the Moiben Land Control Board and that he is not responsible if the Board made an error in the documents. He stated further that spousal consent was not required in the year 2004.

2nd Defendant's Evidence

19. DW2 was one Jackson Ruiru who testified before me on 3/07/2019. Led by his Counsel, Ms. Moraa, he referred to the title deed to the suit property now in his name and stated that on 28/06/2004, he read in the newspaper that the property was being sold and on 2/07/2004 he went to the auction, that among bidders were himself, one Mr. Mbugua (deceased) and a son to one Mzee Kibugi, that the auction process began at 9 am and his bid was the highest at Kshs 6.8 Million, and that he paid Kshs 2 Million and the balance later after which he got a transfer after going to the Land Control Board. He testified further that before the transfer, a Court Order emerged stopping it and it was not until October 2007 when the Court allowed the transfer to proceed after vacating the order, that however the 2nd Defendant has not been able to utilize the property because the Plaintiffs placed goons to stop the 2nd Defendant. He testified further that he purchased the property because he intended to farm on it, and that the Plaintiffs are also selling the trees planted there and that he is seeking for compensation.

20. Under cross-examination by Ms. Tum, he stated that he is a director of the 2nd Defendant. He conceded that he did not bring any witness who saw him at the auction and stated further that he was not shown the value of the property, that he is not aware that the value was Kshs 36.500,000/- and forced value Kshs Kshs 18,250,000/- or whether there was a reserve value as that is not a concern of the purchaser and only matters to the seller. He insisted that he went before the Land Control Board and that he applied for the Board's consent, that he has the Memorandum of Sale but he does not know whether it was registered, that he signed it and handed it over to the 1st Defendant and he also does not know whether the Certificate of Sale was registered. He also conceded that the transfer that he had produced is not registered and is blank at page 2 but insisted that his only duty was to deliver the signed documents to the 1st Plaintiff.

21. Under cross-examination by Mr. Odongo, DW2 insisted that he attended the auction, that he was not forced by anyone to attend and he did so voluntarily, and that he went to the Land Control Board at Eldoret accompanied by a Manager of the 1st Defendant.

22. In Re-examination by Ms. Moraa, he confirmed that what he was being shown from the Plaintiffs' exhibit was the Valuation Report dated 12/07/2004 prepared after the auction about 10 days later, and that the Memorandum of Sale is one of the documents he handed over to the Lands Registrar.

Written Submissions

23. Upon close of the hearing, it was agreed, and I directed, that the parties file written Submissions and then highlight the same. Pursuant thereto, the Plaintiffs filed their Submissions on 18/10/2023, the 1st Defendant on 14/12/2023 and the 2nd and 3rd Defendants filed on 24/10/2023. The Plaintiff then, with leave of the Court, filed Supplementary Submissions on 14/12/2023.

Plaintiffs' Submissions

24. Regarding the statutory notice pursuant to Section 74 of the Registered *Land Act*, the Plaintiff's Counsel submitted that although DW1 stated that the same was served via Registered Post, no certificate of postage was produced to demonstrate such service, that although DW1 also referred to an Affidavit of Service, a look at the Affidavit whose deponent was not called to testify shows that it was issued by the 3rd Defendant-Auctioneers even before the 1st Defendant had complied with Section 74 and 77 aforesaid, that the purported issuance of instructions upon an Auctioneer to serve the statutory notice is contrary to the provisions of Section 77 of the Act, that the Auctioneer did not testify to confirm whether indeed it issued the notice or whether they had instructions to do so, that the burden of service appears to have been shifted to the Auctioneer whereas under the Act the burden lies squarely on the 1st Defendant. She submitted further that the Defendants purport to have issued notification of sale and redemption notice on the same day contrary to Rule 15 of the Auctioneers Rules.

25. Regarding the public auction, Counsel submitted that the 2nd Plaintiff stated that he visited the venue of the auction but did not see any auction, that the 3rd Defendant having conducted the auction decided not to testify, and that a party who fails to call evidence in support of his case would fail in terms of Section 107, 108 and 109 of the *Evidence Act*. She added that the 1st Defendant led evidence that the Notification of sale and the 45 days Redemption Notice were both served upon the 2nd Plaintiff's wife by the name "Leah" but that such evidence was hearsay since the person alleged to have served appears to the 3rd Defendant who did not testify. She cited Section 112 of the *Evidence Act* and submitted that in the absence of such evidence, the purported sale was by private treaty and not by public auction.

26. Regarding sale value of the property, Counsel submitted that as per the Notification of Sale, the sale was subject to a reserve price of Kshs 7,000,000/- but according to the 2nd Defendant, it purchased the property at Kshs 6,800,000/- on 2/07/2004. She also observed that according to the Notification of Sale, the market value was Kshs 9,000,000/- and forced value was Kshs 7,000,000/-. She also submitted, the Plaintiffs produced in evidence two valuation reports, that in the 1st Report dated 12/07/2004 the value of the suit property was placed at Kshs 36,500,000/- and forced value at Kshs 18,250,000/-. Regarding the 2nd Report dated 6/02/2018, Counsel observed that the value of the property was placed at Kshs 36,500,000/- and forced value at Kshs 223,900,000/-. It was therefore her contention that the Defendants undervalued the property. Counsel also observed that at the time of the application for the loan in 1996, the property had been valued at Kshs 7,500,000/-, that in Kenya it is trite that the value of land appreciates over time and there is therefore no way that 8 years later the value of the property could have depreciated to Kshs 6,800,000/-. She cited the case of Minolta Limited vs National Bank of Kenya Limited [2018] eKLR. Counsel submitted further that although the 2nd Defendant produced a Memorandum of Sale to demonstrate that he paid Kshs 2,000,000/- as deposit, he however did not adduce any evidence to show that he also paid the balance of Kshs 4,800,000/-.

27. On whether the transfer of the suit property was lawful, it was Counsel's contention that, in view of the foregoing matters, the sale was not fraudulent and is void ab initio and that Article 40(6) of *the Constitution* stipulates that a property unlawfully acquired cannot be protected by the law. He

also cited the case of Raphael Kipsoi Arap Korir v Muskie Limited & 4 Others [2017] eKLR, the case of Maina Wanjigi & Another vs Bank of Africa Ltd & 2 Others [2015] eKLR and also Section 143 of the Registered *Land Act*. She submitted further that the 2nd Defendant produced in evidence a Memorandum of Sale that is undated and an unsigned Transfer Form, and that the Transfer was not registered. She also cited the case of Kaniki Karisa Kaniki v Commercial Bank & 2 Others [2016] eKLR.

28. On whether there was a valid Land Control Board consent to charge the property, Counsel contended that there was none and submitted that the property being "agricultural land", it was subject to the provisions of Section 6 and 7 the *Land Control Act*, that the 2nd Plaintiff stated that he never attended the Board on 22/02/1996 or on any other date, that the Defendants did not provide any receipts of amounts paid at the Land Registry to acquire the consent and that the 3rd Defendant never filed a defence and never testified to establish legality of the auction. According to Counsel therefore, everything was forgery and fraud committed by the Defendants and that a contract founded on illegalities or misrepresentation cannot bind the Plaintiffs and cannot be countenanced by a Court of law. She cited the case of Shakespeare Investments & Another v Paul Kipsang Kosgei [2006] eKLR

1st Defendant's Submissions

29. On his part, Regarding service of the statutory notice, Counsel for the 1st Defendant submitted that DW1 produced the Affidavit of Service of Jackson Muthii Gaturu sworn on 6/06/2003 showing service of the 3 months statutory notice, that the same indicates that the directors of the 1st Plaintiff were served with the notice and that the deponent confirms on oath that he served the 2nd Plaintiff, and that although the Plaintiffs dispute that such service took place, they did not seek to cross-examine the deponent on the contents of the Affidavit of Service. In regard to this issue of service of the notice, Counsel also referred to the Ruling delivered herein on 22/10/2007 in which the Court found that the notice was duly served upon the 1st Plaintiff through its director, the 2nd Plaintiff. He invited this Court to take judicial notice of the finding which the Plaintiffs did not challenge and cited Section 59 of the *Evidence Act*.

30. Regarding the allegation of sale of the suit property at a throw away price and below the reserve price, Counsel cited the two Valuation Reports produced by the 2nd Plaintiff and submitted that the 2nd Plaintiff is not a Valuer and certainly could not muster the professional competence requisite for undertaking a valuation of the suit property let alone having a discourse on its current market value as well as its retrospective value as he purported to do, that the only persons who could successfully produce and adduce evidence on the Reports are their respective authors. He too cited the provisions of Section 107, 108 and 109 of the *Evidence Act* on burden of proof and submitted that it is the Plaintiffs who would fail if no evidence was given on either side and that it is the Plaintiffs who desire that the Court declares that the auction was fraudulent but have failed to discharge this burden. He then cited the case of *Tum & 2 Others vs. Towett & 5 Others (Environment & Land Case 501 of 2017*) KEELC 13970 (KLR) (25 October 2022) (Ruling) on the principle that allegations of fraud must be proved through cogent evidence whose degree of proof must be higher than the ordinary proof of balance of probabilities.

31. In conclusion, Counsel submitted that the Plaintiff did not include the Land Registrar as a Defendant to answer to the allegations of fraudulent sale of the suit property and also did not sue the Land Control Board as a co-Defendant despite levelling serious allegations of impropriety against them.

2nd & 3rd Defendants' Submissions

32. Regarding validity of the charge, Counsel for the 2nd and 3rd Defendants submitted that the Plaintiffs have failed to demonstrate that the procedures precedent to registration of the charge were not complied with and that this is the essence of Section 37 of the Registered *Land Act* which creates a rebuttable presumption that all the procedures that led to the registration of the charge instrument by the Registrar were complied with. Regarding consent of the Land Control Board to effect the charge, Counsel submitted that the 1st Defendant produced the consent issued by the Moiben Land Control Board. He submitted that in seeking to challenge the legality of the charge on the basis of a lack of consent, the Plaintiff is inviting the Court to interrogate the contract between the 1st Plaintiff and the 1st Defendant and which invitation is time barred pursuant to Section 4(1)(a) of the *Limitation of Actions Act* and that by virtue of the charge being registered, the Lands Registrar must have been satisfied that the requisite consent from the Land Control Board was obtained. Counsel contended further that should the Court find that no consent was obtained then the Court should still find that the 1st Defendant retained a constructive trust over the suit property by virtue of the secured lending and that as guided in the case of Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR, the charge that facilitated financial accommodation in favour of the 1st Plaintiff did not render the transaction unenforceable. Counsel submitted further grounds on why the charge is valid but these I will not recount as they are on matters that are not under contest such as the fact that the Plaintiffs voluntarily executed the loan documents and gave out the properties as security.

33. Regarding service of the statutory notice, Counsel submitted that the 1st Defendant successfully refuted the assertion of non-service thereof as exhibited in the Affidavit of Service by Jackson Muthii Gaturu, and that the Plaintiffs did not disprove this fact and neither did they exercise their right to cross-examine the deponent. Regarding service of the Redemption Notice, Counsel submitted that certificates of service were produced demonstrating that service was effected upon the 3rd Plaintiff who is also one of the directors of the 1st Plaintiff. He submitted further that there was nothing wrong with the 3rd Defendant-Auctioneer effecting service since he was acting as an agent of the 1st Defendant as was held in the case of Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited & Another [2019] eKLR. It was also Counsel's contention that there was nothing wrong with service of the Redemption Notice and the 45 days notification of sale on the same day and submitted that Rule 15 of the Auctioneers' Rules does not specify that the two notices ought to be served separately. He too drew attention to the Ruling delivered hereon on 22/10/2007 which, he submitted, confirmed that service of the notices was effected and urged the Court to invoke Section 59 and 60 of the *Evidence Act* and take judicial notice of the decision.

34. Regarding the allegation of sale below the market value, Counsel submitted that the Plaintiffs did not plead what the market price is to establish that the property was sold at an undervalue, that Rule 11(b) of the Auctioneers Rules which dictates that a valuation be conducted not more than 12 months before the sale and that therefore, the valuation Reports produced by the Plaintiffs are unreliable. Regarding the allegation that the sale was made by private treaty and not by way of public auction, Counsel submitted that no evidence in support was produced and also that the same was not pleaded as it was deleted when the Plaint was amended.

35. Regarding transfer of the suit property to the 2nd Defendant, Counsel submitted that the purchase price, stamp duty and all other charges were paid, that there is no claim by the 1st Defendant against the 2nd Defendant demanding any arrears and that lack of consideration was never pleaded in the first place.

36. Regarding the prayers made by the Plaintiff, Counsel submitted that having established that the relevant statutory notices were served prior to the sale, that the charge was duly executed and registered and that the sale was undertaken in accordance with the law, the only available relief to the Plaintiffs is that of damages as stipulated under Section 77(3) of the Registered *Land Act*, and that in any event, the Plaintiffs have not sought such damages and neither was evidence presented to support claims for damages.

37. In conclusion, Counsel referred to its Counterclaim and urged the Court to grant it. He cited the case of Park Towers Ltd v John Mithamo Njika & 7 Others [2014] eKLR and urged the Court to award damages for trespass to the tune of Kshs 50 Million which is reasonable in light of the sum quoted in the Valuation Report produced by the Plaintiffs. He urged the Court to consider the fact that since the 2nd Defendant purchased the suit property in the year 2004, it has never taken occupation of the same, that DW2 confirmed that the suit property was acquired for purposes of farming but that it has been unable to invest therein close to 20 years, that the Ruling delivered herein on 16/07/2020 whereby the Plaintiffs were found to be in contempt of Court demonstrates that the Plaintiffs went on to cultivate the property and benefited therefrom without legal justification and to the detriment of the 2nd Defendant.

Plaintiffs' Supplementary Submissions

38. Plaintiff's Counsel basically repeated the same matters already captured in her Submissions. Regarding issue of service of the statutory notice by the Auctioneer, Counsel submitted that no letter of instructions to the Auctioneer was produced. She cited the case of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another [2019] eKLR. Regarding the Ruling delivered herein on 22/10/2007, she submitted that the orders were of an interlocutory nature and not final orders and can be vacated at the judgment stage. Regarding the allegation that the property was sold at an undervalue, Counsel contended that the 1st Defendant ought to have within 12 months prior to the sale conducted a valuation of the property to establish its true value.

Oral Highlighting of Submissions

39. The matter then came up on 14/12/2023 for oral highlighting of the Submissions. Counsel for the Plaintiff and Counsel for the 2nd and 3rd Defendants did so but Counsel for the 1st Defendant opted to rely on his written Submissions.

Determination

40. Upon considering the pleadings, evidence presented, Submissions and authorities cited, I find the issues that arise for determination to be the following:

    i. Whether Land Control Board Consent was obtained to sanction registration of the Charge and therefore whether the Charge instrument was valid.

    ii. Whether the statutory notice, redemption notice and 45 days notification of sale were served or properly served prior to exercise of the power of sale.

    iii. Whether the public auction took place, whether the suit property was sold at an undervalue and therefore, whether sale and transfer of the property to the 2nd Defendant was fraudulent.

    iv. Whether the Counterclaim should be granted and the 2nd Defendant awarded damages for trespass and mesne profits.

41. I now proceed to analyze and answer the said issues.

i. Whether Land Control Board Consent was obtained to sanction registration of the Charge and therefore, whether the Charge was valid

42. It is not in dispute that sometime in the year 1996, the 1st Defendant loaned to the 1st Plaintiff a sum of Kshs 10,000,000/- for the purposes of flower farming and that the loan was guaranteed by the 2nd and 3rd Plaintiffs who were directors of the 1st Plaintiff and also husband and wife. It is also not in contention that as security or collateral for the loan, the 2nd Plaintiff offered his two parcels of land, one of which was L.R. No.Uasin Gishu/El-Lahre/40 and L.R. No. 14999/1 ("suit property")

43. The parties are in agreement that the suit property is "agricultural land" and therefore subject to the provisions of the *Land Control Act*. It is however the Plaintiffs' case that the 1st Defendant purported to register the "fraudulent" charge on 13/05/1996 in its favour against the suit property without the consent of the Land Control Board as required under the said Act and that the transaction is in the circumstances unlawful and did not confer upon the 1st Defendant any right to sell the property. He contended further that neither he nor his wife (3rd Plaintiff) attended before the Land Control Board before the charge was lodged and that he never gave consent for the property to be charged.

44. In response to this allegation, the 1st Defendant, through PW1, produced in evidence a copy of the consent dated 22/02/1996 and which was issued by the Moiben Land Control Board. Additionally, the 1st Defendant produced a copy of the Application dated 28/03/1996 made to the Board and pursuant to which the consent was issued. On the face of it, the Application is evidently signed by the 2nd Plaintiff and who did not at any time during his testimony or pleadings deny that the signature was his.

45. It is therefore clear that the Plaintiffs have not been candid to this Court on this issue.

46. PW1 conceded that the date of the consent appears to have been before that of the Application but excused himself by arguing that he is not a member of the Moiben Land Control Board and he is not responsible if the Board made any error thereon. This is a plausible explanation and I accept it since it was not controverted.

47. In any event, the burden of proof always lies on the Plaintiff in civil cases and it is his duty to ensure that evidence in support of its case is placed before the Court. If therefore the Plaintiffs had any issue with the consent issued by the Land Control Board or doubted its authenticity, then nothing would have been easier than to move the Court to issue Witness Summons to the Board to send a representative to attend Court to produce the relevant minutes and documents and to be cross-examined on the same. The Charge having been subsequently registered by the Lands Registrar, the Plaintiffs could also have sought similar Summons against the Lands Register to attend Court and shed light on the matters raised. Having chosen not to exercise such right, the Plaintiffs have no foundation to challenge the Application and consent produced in evidence.

48. For the above reasons, and since no other ground was raised against the validity of the charge, I find that the Land Control Board Consent was obtained to sanction the registration of the Charge and that therefore the validity of the Charge has not been controverted.

ii. Whether the statutory notice, redemption notice and 45 days notification of sale were served or properly served prior to exercise of the power of sale

49. It is not in dispute that the 1st Defendant having been said to have exercised its statutory power of sale on 2/07/2004, and the provisions of the *Land Act* (No 6 of 2012) which is the current statute

governing the exercise of statutory power of sale having come into effect on 2/05/2012 after the impugned sale, the law applicable to the transaction herein was the Registered *Land Act*, Cap. 300 (now repealed).

50. Section 74(1) of the Registered *Land Act* provided remedies of a chargee as follows:

> "(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:"

51. It is therefore clear that Section 74 aforesaid gave, as one of the remedies available to a charge, the right to sell the charged property. However, before that right could be exercised, the chargee was required to serve a notice on the chargor in writing, requiring him to pay the money owed. That notice had to be served at least 3 months before the sale, and the sale could only take place if no payment was made. On its part, Section 77 gave the chargee the power to sell the charged property at a public auction through a licensed auctioneer, after the service of appropriate notices.

52. In this case, it is also the Plaintiffs' assertion that the 1st and 3rd Defendants on 2/07/2004 sold the suit property to the 2nd Defendant without issuing and serving upon the Plaintiffs the necessary statutory notice, and that the sale was therefore fraudulent and in breach of the provisions of Section 74 aforesaid.

53. On its part, through DW1, the 1st Defendant testified that when the Plaintiffs failed to repay the loan, the 1st Defendant issued a statutory notice addressed to the 1st Plaintiff as "Little Flora Ltd, P.O. Box 494 Moi's Bridge" and that the same was copied to the 2nd Plaintiff. What is however clear is that no certificate of postage or evidence of any other such registered post service was produced. Service by registered post was therefore never proved.

54. However, DW1 produced the Affidavit of Service sworn by one Jackson Muthii Gaturu on 6/06/2003 demonstrating that personal service of the notice was effected. The deponent described himself as a process server and confirmed on oath that he served the 2nd Plaintiff as a director of the 1st Plaintiff. Quoted verbatim, this is how he framed the Affidavit:

> "2. "Thaton 6th May 2003 I received Ninety (90) Days Statutory Notice from Industrial & Commercial Development Corporation through M/s Joyland Auctioneers with firm instructions to serve the same upon the Directors of the debtor company.
>
> 3. Thaton 5th June 2003 I proceeded to Moi's Bridge where one of the Directors Mr. Stephen Kipkering Sugut resides and upon arrival, I lucky to find him. Mr. Stephen Kipkering Sugut is personally known to me as I had served him earlier. I told him the purpose of my visit. He accepted to be the Director of the debtor company. I tendered to him a copy of the ninety (90) days Statutory

Notice which he accepted by receiving BUT declined to sign citing reasons that he will clear with the Bank""

55. Upon perusing the Affidavit, I agree with Counsel for the Defendants that although the Plaintiffs dispute that such service took place, they did not apply or seek to cross-examine the deponent on the contents of the Affidavit of Service. The practice has always been that where a Process server files an Affidavit of Service in Court alleging service of a document upon a person and the person alleged to have been so served disputes such service, then the person disputing is at liberty to apply for the Process server to be summoned to attend Court and be cross-examined. This is the most appropriate step to assist the Court to unravel the truth. Where, as herein, the person alleged to have been served does not bother to cross-examine the Process server, unless in very obvious instances, the Court will have no material before it to disbelieve the Process server. I therefore agree with the Defendants that regarding service of the statutory notice, the 1st Defendant successfully refuted the assertion of non-service by producing the Affidavit of Service of the said Jackson Muthii Gaturu.

56. The Plaintiffs' Counsel has contended that a look at the process server's Affidavit of Service whose deponent was not called to testify shows that the 3rd Defendant-Auctioneer received instructions even before the 1st Defendant had complied with Section 74 and 77 of the Act, and that the issuance of instructions to an Auctioneer to serve a statutory notice is contrary to the provisions of Section 77 of the Act. She also argued that the 3rd Defendant did not testify to confirm whether indeed it issued the notice or whether it had instructions to do so. According to Counsel, the burden of service appears to have been shifted to the Auctioneer whereas under the Act the burden lies squarely on the 1st Defendant.

57. I beg to disagree with the Plaintiffs' Counsel argument above. I am not aware of any provision in law that prohibits a chargee from instructing an Auctioneer to serve a statutory notice on its behalf. The only condition is to ensure that the service id effected as per the stipulated procedure. In this case, the notice was wholly prepared and signed by the 1st Defendant as the chargor and the same was simply handed over to the 3rd Defendant-Auctioneers to carry out the service. The Process Server's qualifications and manner of effecting the service have not been challenged. As already stated, the Plaintiffs ought to have sought leave to cross-examine the Process Server if they wished to create doubts thereon. In the circumstances, I find that it has not been demonstrated that the service effected or overseen by the 3rd Defendant-Auctioneer's Process Server was in any way in breach of any legal provision.

58. Counsel for the Defendants also referred to the Ruling delivered herein on 22/10/2007 in which the Court found that the statutory notice was served on the 1st Plaintiff through its director, the 2nd Plaintiff. He invited this Court to take judicial notice of the finding which the Plaintiffs did not challenge and cited Section 59 of the *Evidence Act*. In the said Ruling delivered on 22/10/2007, in dismissing the Plaintiff's Application for an interlocutory injunction, M. Ibrahim J (as he then was) made the following findings:

> "I do hereby find that the Statutory Notice was served on the First Plaintiff through the 2nd Plaintiff who received it. The First Plaintiff has not denied service of the Notice as alleged in the Affidavit of Service. The Statury Notice was served physically and personally. I think that this case must be distinguished from those cases where there was no service whatsoever. I think that the Second Defendant received the Notice, knew of the contents and the intention of the First Defendant. It is to split heirs to state that the Notice should have been addressed to him personally and not copied to him.

> The Court appreciates what the First Defendant did. They demanded payment of the outstanding sum from the Principal Debtor and gave Notice of the Intention to Sale. By the same Notice they copied the contents to the Second Plaintiff who was the director of the Company, most likely a shareholder, a guarantor of the liability and finally the Chargor. Having personally been served, I hereby hold that he was served in all those capacities"

59. On the above findings made in the Ruling, I agree with the Plaintiffs' Counsel that the Ruling was of an interlocutory nature and thus cannot amount to binding final findings. Indeed, the Court is at liberty to depart from the said findings after hearing witnesses at the trial. However, for the Court to so depart from findings made by a fellow Judge at the interlocutory stage, there must be demonstration of a material change of circumstances such as, for instance, fresh evidence presented at the trial or that more convincing arguments on the issue at hand were made by the witnesses at the trial or were better articulated or that cross-examination of witnesses unearthed a set of facts different from what was believed to be the true position at the interlocutory stage. In this case, I cannot find any such new or compelling evidence or any more convincing arguments on the issue of service of the statutory notice that has been made. The evidence and arguments made at the interlocutory stage is the same as what was presented and referred at the full hearing and thus no change of circumstances has been demonstrated. In the circumstances, I find myself constrained to reach similar findings as those made in the Ruling of 22/10/2007.

60. The Plaintiff's Counsel also argued that no letter of instructions to the Auctioneer was produced. However, the 1st Defendant having confirmed that it indeed gave such instructions and there being no contrary evidence to prove otherwise, there is no material before me to disbelieve the Defendants.

61. Regarding service of the Redemption Notice, Rule 15(e) of the Auctioneers Rules 1997 provides that:-

> " 15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immoveable 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;
>
> .....

62. Counsel raised issue with the fact that the Notification of Sale and the Redemption Notice were issued and/or served on the same day, which according to her, was contrary to Rule 15 of the Auctioneers Rules. Indeed, it is not in dispute that the two respective notices are each dated 28/04/2004 and were served concurrently. A similar argument came up before Ombwayo J in the case of Simon Kipkoech Kwambai v Sidian Bank Limited & another [2018] eKLR and the Judge ruled as follows:

> " The plaintiff main argument is that there is no valid redemption notice and notification for sale in respect of the subject land. It is the plaintiff's contention that the redemption notice was served concurrently with the notification of sale and that this was unprocedural.
>
> Rule 15 of the Auctioneers Rules provides that a notification of sale must be served prior to a sale of immovable property. The notification of sale must give 45 days upon which to redeem the property.

> This court is of the considered view that the two notices can be issued concurrently. The notice to sell is in a prescribed form and should be issued by the chargee. The chargee should not proceed and complete any contract of sale of charged land until at least forty (40) days have lapsed from the date of service of the notice to sell. Under Rule 15 of the Auctioneers Rules, the auctioneer is required to give a notification of sale of 45 days before the sale.
>
> The 40 days given in section 96(2) is to pre-empt the entering into contract of sale in respect of the charged land but does not mean that the auctioneer has to wait for the lapse of 40 days in order to issue the notification of sale. It is my considered view that the notification of sale under the Auctioneers Rules can be issued concurrently with the notice to sell under section 96(2) of the *Land Act*.
>
> It is trite law and principle of statutory interpretation that when two competing acts construed to further the purposes behind them produce a conflict, the court may resolve the conflict by taking into consideration as to which Act represents the "superior purpose" in addition to other relevant factors. In applying a principle construction in addition to other relevant factors, this court finds that the two notices are separate and distinct and provided for under different legislation and therefore, can be issued concurrently.

63. Needless to state, the above holding of Ombwayo J is not binding on this Court, being a decision of a Court of equal status. It cannot however be said not to be based on sound logic. On the contrary, I find it quite well reasoned and I fully adopt it. I too do not agree that anything has been presented to demonstrate that the Defendants' act of simultaneously or concurrently serving the Redemption Notice and the 45 days Notification of Sale is contrary to the law or was unprocedural or amounted to a clog on the Plaintiffs' right of redemption. I therefore do not find the concurrent or simultaneous service of the two notices to be a sufficient ground for invalidating the whole process of the exercise of the Defendant's statutory power of sale.

64. Regarding the manner in which service of the Redemption Notice and the Notification of Sale were effected, DW1 stated that the same were hand-delivered. He produced a copy of the letter dated 28/04/2004 from the 3rd Defendant in which it was stated that that the Redemption Notice and 45 days Notification of Sale were served at the 2nd Plaintiffs' homestead and was served upon "the wife of the debtor" who accepted service but declined to sign. In the copies attached, the "wife of the debtor" referred to is expressly named as "Leah", the wife of the 2nd Plaintiff and who also happens to be the 3rd Plaintiff, a co-guarantor and also a co-director of the 1st Plaintiff. The 3rd Plaintiff, the said "Leah", although being one of the Plaintiffs in this suit, having not testified and the Plaintiffs having not exercised their right to apply to cross-examine the person who allegedly served, the Defendant's contention that the Redemption Notice and the Notification of Sale were served upon the 3rd Plaintiff in her own capacity and as the wife of the 2nd Plaintiff and as a co-director of the 1st Plaintiff remains uncontroverted and this Court has no reason to rule otherwise or disbelieve the the Defendants.

iii. Whether the public auction took place, whether the property was sold at an undervalue and therefore, whether sale and transfer of the property to the 2nd Defendant was fraudulent

65. In his testimony, the 2nd Plaintiff claimed that he heard from a third party or third parties and read in the newspapers that the suit property had been placed for sale. He stated that he then came to Eldoret and attended the auction on 2/07/20024 but that no sale took place. He further stated that he later learnt that the property was sold "by some other way". His conclusion was therefore that the sale was by private treaty, and not by way of public auction.

66. In taking a completely opposite position, DW2, the 3rd Defendant's director, one Jackson Ruiru insisted that the auction indeed took place. It was his testimony that he read in the newspaper on 28/06/2004 that the property was being sold and on 2/07/2004 he attended the auction, that among other bidders were himself, one Mr. Mbugua (deceased) and a son to one Mzee Kibugi. He submitted further that the auction process began at 9 am and that his bid was the highest at Kshs 6.8 Million.

67. The Court is therefore faced with two conflicting positions. However, the Defendants have supplied the Court with the post-publication documents including the Memorandum of Agreement, Certificate of Sale and relevant correspondence. On how to unravel the conflict between the two versions, both sides referred to Section 107, 108 and 109 of the *Evidence Act* which provide as follows:

> "107. Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. Incidence of burden
>
> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. Proof of particular fact
>
> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

68. Although both parties claim that Section 107, 108 and 109 of the *Evidence Act* above are in their favour, I find that except in few specified circumstances, which this case is not, the general rule is that the burden of proof always lies on the Plaintiff. It is therefore the Plaintiffs who will fail in this case if the Court is left in a position where it is unable to conclusively resolve which of the two conflicting set of facts presented is the true position. For that reason, I find that the Plaintiffs have failed to demonstrate that the public auction did not take place.

69. Regarding the allegation that the property was sold at an undervalue, Section 77(1) of the Registered *Land Act* provided that:

> " A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction through a licensed auctioneer for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit."

70. It is therefore trite law that a chargee has a duty to act in good faith, have regard to the interests of the chargor, obtain the best price for the property realized to pay off the debt for the benefit of both the chargor and the chargee, and ensure that its power of sale is not exercised fraudulently, and ensure that the chargor's right of redemption is only lost pursuant to a valid sale. The mortgagee therefore has a duty to ensure that the exercise of the statutory power of sale is not tainted by some kind of impropriety.

(See the Court of Appeal case of *Marteve Guest House Limited v Njenga & 3 others (Civil Appeal 400 of 2018*) [2022] KECA 539 (KLR) (28 April 2022) (Judgment) (with dissent - W Karanja, JA))

71. In other words, there is a duty upon a creditor who resorts to recover the loan by means of selling the collateral property, to obtain the best possible market price when the secured creditor resorts to selling the security to recover its loan. In such circumstances, the creditor must ascertain the said value as much as possible and then dispose the property at a price as near as possible to the value of the property in question.

72. Long before the advent of the current Constitution, it was held by the Court of Appeal in Mbuthia vs Jimba Credit Finance Corporation & Another, Civil Appeal No. 111 of 1986 - as hereunder:

> "What is meant by having "regard to the interest of the mortgagor?" there is similar legislations in England (see section 101 of the Law of Property Act (1925)) ..... In Halsbury's Laws of England, 4th ed. Vol. 32 para. 276 it is stated:
>
> > "If the mortgager seeks relief promptly a sale will be set aside if there is fraud or if the price is so low as to be in itself evidence of fraud.
>
> ...So far as mortgagees are concerned the law is set out in Cuckmere Brick Co. Ltd vs Mutual Finance Ltd (1972) 2 ALL E.R. 633, (1971) Ch.939. If a mortgagee enters into possession and realizes a mortgaged property it is his duty to use reasonable care to obtain the best possible price which the circumstances of the case permit. He owes this duty not only to himself (to clear off as much of the debt as he can) but also to the mortgagor so as to reduce the balance owing as much as possible ... There are several dicta to the effect that the mortgagee can choose his own time for the sale, but I do not think this means that he can sell at the worst possible time. It is at least arguable that, in choosing the time he must exercise a reasonable degree of care."

73. In this instant case, Counsel for the Plaintiff contended that the 1st Defendant ought to have within 12 months prior to the sale conducted a valuation of the property to establish its true value. It is indeed true that the Defendants have not provided any evidence of the property having been valued within 12 months of the sale. However, unlike Section 97 of the now prevailing *Land Act*, 2012, the now repealed Registered *Land Act* did not have such a requirement as a mandatory step. The requirement for valuation was and still is found in Rule 11 of the Auctioneers Rules 1997 which provides as follows:

> " 11(1) A court warrant or letter of instruction [to the auctioneer] shall include, in the case of:-
>
> (a) .....
>
> (b) Immoveable property:-
>
> (x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale".

74. Regarding the application of Rule 11(b) above, in the case of Margaret Wangui Gachara v Bank of India Limited [2008] eKLR, Lesiit J (as she then was) held as follows:

> "The Applicant has argued that the Defendant was purporting to sell the suit property without a valuation on the property within 12 months of the date of the sale in accordance with rule 15(e) of the Auctioneers Rules. For that preposition the Plaintiff' relies on the case of Joseph Kariuki vs. Equity Bank (Milimani) HCCC 85 of 2008. I have considered

that authority. The reason an injunction was granted in that case was based on the court's finding that no statutory notice was served contrary to the provisions of section 74 of the Registered *Land Act* and that prima facie, that finding entitled the Applicant in that case to an order of injunction. In the instant case, I have found as a fact that the Plaintiff was served with the requisite statutory notice as required under section 74 of Registered *Land Act* and also with the notification of sale as required under rule 15 of the Auctioneers rules.

A valuation of the property before sale is a requirement contained in the subsidiary legislation and not in substantive law under the *Auctioneers Act*. Following the principles of interpretation, a substantive law takes precedence over subsidiary legislation. It is my view that rule 15(e) of the Auctioneers Rules cannot oust the provisions of section 74 of Registered *Land Act*, to require that a valuation of within 12 months of the date of sale is a prerequisite to the crystallization of a Chargee's statutory power of sale."

75. It is therefore evident that there is a judicial school of thought which is of the view that as regards exercise of the statutory power of sale under the former Registered *Land Act* regime, the carrying out of a valuation by a chargee within 12 months of the sale of property by public auction was not expressly mandatory. In light of this apparent lack of unanimity on the correct position on this issue, it will be unjust to penalize the Defendants for the omission to conduct the Valuation Report. This, I believe, is perhaps what informed the introduction of the 12 month valuation requirement in Section 97 of the now prevailing *Land Act*, 2012 as a mandatory requirement prior to a public auction.

76. On the allegation of sale at a throw away price, the 2nd Plaintiff testified that the property was undervalued by the Defendants as the price of 1 acre was about Kshs 3 Million. He urged that he had valued the property in 2004 and the value then was placed at Kshs 22 Million, that plus improvements the value escalated to Kshs 36,500,000/- and forced value to Kshs 18,250,000/-. He produced the valuation Report dated 8/07/2004, thus prepared 10 days after the public auction was conducted on 2/07/2004. According to him therefore, the sale at Kshs 6.8 Million was an undervalue.

77. The 2nd Plaintiff also produced a 2nd Report dated 6/02/2018, which is 14 years after the auction, and which placed the value of the property at Kshs 36,500,000/- and forced value at Kshs 223,900,000/-. This later figure of Kshs 223,900,000/- is however inclusive of the value of trees and coffee which, not having been captured in the earlier valuations, I presume were new additions not in existence at the time of the public auction. For this reason, this subsequent Report may not be of much assistance.

78. It is true that as per the Notification of Sale, the sale was subject to a reserve price of Kshs 7,000,000/- but the property was purchased at Kshs 6,800,000/- on 2/07/2004. According to Counsel for the Plaintiffs, at the time of the application for the loan in 1996, the property had been valued at Kshs 7,500,000/-, that in Kenya it is the position that value of land appreciates over time and there is therefore no way that 8 years later the value of the property could have depreciated to Kshs 6,800,000/-.

79. I note from the record that at the time of taking the loan of Kshs 10,000,000/- in April 1996, the Plaintiffs gave two separate properties as collateral, one of which was the suit property. I have not however been supplied with any Valuation Report for the suit property prepared before or at the time of taking the loan. Further, from the Loan Agreement dated 24/04/1996, it is simply stated that the value of the two properties given as security was in aggregate Kshs 17,500,000/-. There is no indication on the respective values of each separate property. I cannot therefore independently verify what the individual value of the suit property on its own was. I am also not a Valuer by profession but going by the Plaintiff's Counsel's submission that the value of the suit property as at the time of taking the loan was Kshs 7 Million, in the absence of evidence of any drastic change of circumstances in the factors that ordinarily affect property values, the conclusion in the Plaintiffs' Report that the value had by July 2004

when the property was sold, escalated to a whooping figure of Kshs 36,000,000/-, an increase of an astonishing 314%! appears on the face of it to be a deliberate exaggeration. This apparent exaggeration becomes more apparent when it is also considered that the property is situate in Moiben, a rural setting which would ordinarily not attract such a huge property rush to the extent alluded to in the Valuation Reports.

80. I also agree with the Defendant's Counsel that the Plaintiffs' Valuation Reports ought to have been produced by the makers thereof who would then have explained to the Court how they reached the figures alleged. They would then have been cross-examined and only thereafter could the Court have been in a vantage position to appreciate the formulae adopted and make its own independent assessment on whether the property was sold at an undervalue. It does not matter that the Defendants do not seem to have opposed production of the Reports by the 2nd Plaintiff. The makers not having been called as witnesses, the probative value of the Valuation Reports remains minimal and incapable of leading to a conclusion of an undervalue sale. In light of the foregoing, I find that that no sufficient evidence has been presented to convince this Court that the sale at Kshs 6.8 Million was at a gross undervalue to warrant a declaration that the sale was unlawful or invalid.

81. Concerning sale of the property at the public auction at the figure of Kshs 6,800,000/- below the reserve price of Kshs 7,000,000/-, I agree that reserve price is not only for the benefit or information to bidders but is also meant to protect and safeguard the interests of the borrower and as much as possible, such reserve price should be observed by the auctioneer. In this case, although the Defendants did not give an explanation on why the sale price was below the reserve price, my understanding is that sale below the reserve price is not prohibited and acceptable where, for instance, in previous auction attempts, the property either attracted very low bids or none at all. The mere fact that a sale was below the reserve price is not therefore by itself sufficient to warrant invalidation of the whole sale process. In this case, the difference between the sale price and the reserve price being only Kshs 200,000/-, and although the Defendants ought to have given an explanation, I do not find that the Kshs 200,000/- made such a significant difference in figures that in any away materially affected the whole sale process. I am in the circumstances prepared to find that the Auctioneers as much as possible made genuine efforts to achieve the reserve price.

82. Regarding the Plaintiffs' allegations that the transfer of the suit property to the 2nd Defendant and issuance of the title deed were effected without the required legal documentation, again the Plaintiffs having not made any efforts to either join the Land Registrar as an Defendant in this suit or at least even have him summoned to Court to give his side of the story, the Plaintiffs' allegations cannot be interrogated or verified and fail on this ground.

83. For the above reasons, I find that the Plaintiffs have failed to substantiate by sufficient evidence, the allegations of fraud allegedly committed by the Defendants in the course of arranging or executing the public auction in which the sale of the suit was conducted and the property subsequently transferred to the 2nd Defendant.

iv. Whether the Counterclaim should be granted and the 2nd Defendant awarded damages for trespass and mesne profits

84. The 2nd Defendant pleaded that having purchased the suit property and being registered as the proprietor, it was entitled to vacant possession and quiet occupation but that in spite of the foregoing, the Plaintiffs have persistently trespassed into, illegally farmed in and destroyed the developments in the suit property to the determent of the 2nd Defendant, and that as result, the 2nd Defendant has been denied peaceful enjoyment of its propriety rights. In view thereof, the 2nd Defendant lodged a Counterclaim against the Plaintiffs for Judgment for damages for trespass and mesne profits and

also for a permanent injunction to restrain the Plaintiffs from interfering with the 2nd Defendant's occupation of the suit property.

85. Counsel for the 2nd Defendant has urged the Court to award damages for trespass to the tune of Kshs 50 Million which, he stated, is reasonable in light of the sum quoted in the Valuation Report produced by the Plaintiffs. Counsel urged the Court to consider the fact that since the 2nd Defendant purchased the property in the year 2004, it has never taken occupation of the same, that although the property was acquired for purposes of farming, the 2nd Defendant has not been able to invest in it close to 20 years now. Counsel also contended that the Ruling delivered herein on 16/07/2020 whereby the Plaintiffs were found to be in contempt of Court demonstrates that the Plaintiffs proceeded to cultivate the property and benefited therefrom without legal justification and to the detriment of the 2nd Defendant.

86. While I agree with the 2nd Defendant that it may have been denied the opportunity to occupy and invest into the property and may very well have suffered financial losses, I am not convinced that the 2nd Defendant has made any efforts to demonstrate what investments it had earmarked to implement in the suit property. Merely proclaiming that it intended to carry out flower farming without presenting any documentary evidence such as a feasibility study for instance or even a budget, is no enough. The proposal that the Court should award a figure of Kshs 50 Million as damages on the basis of the Valuation Reports produced by the Plaintiffs is first, unsubstantiated since the 2nd Defendant gave no justification thereof, and secondly, I have already poked holes into the same Valuation Reports as they were, among others, produced without calling the makers and further, appeared obviously grossly exaggerated.

87. In my view, the 2nd Defendant's case for an award of damages would have been stronger had the claim being framed and presented as special damages then particularized and strictly proved at the trial.

88. It is also, I believe, evident that although I have ruled against the Plaintiffs on all fronts, I have nevertheless also, to some extent, faulted the 1st and 3rd Defendants for failing to observe expected good practice while exercising the statutory power of sale. For instance, I have faulted the failure to carry out a proximate valuation of the suit property to ascertain its value before conducting the public auction and also the failure to explain the omission to fully adhere to the reserve price fixed by themselves. The reason why these omissions did not lead to invalidation or nullification of the sale process is because the law did not expressly mandatorily require the Defendants to act otherwise, because the Plaintiffs failed to call their own crucial witnesses and more importantly, because the Defendant's omissions did not at the end of the day, significantly or materially adversely affect the validity of the sale process considered as a whole. The outcome might have been different had the *Land Act*, 2012 had already come into effect as at the time of the public auction.

89. For the said reasons, and even if the 2nd Defendant had proved its claim for damages, I would still find it unjust to further penalize the Plaintiffs or compound their misery further by again ordering them to compensate the 2nd Defendant in damages. If any party were to be ordered to compensate the 2nd Defendant, then it would have had to be the 1st and 3rd Defendants. However, having found that the 2nd Defendant did not adduce sufficient evidence to prove its loss, I decline to award any damages to the 2nd Defendant.

90. The 2nd Defendant is however obviously entitled to the order for permanent injunction to restrain the Plaintiffs from interfering with the 2nd Defendant's occupation of the suit property.

Final Orders

91. The upshot of my findings above is that I rule as follows:

a. The Plaintiffs' suit is dismissed in its entirety.

b. The 2nd Defendant's Counterclaim is partially allowed and only to the extent that a permanent injunction is hereby issued restraining the Plaintiffs by themselves and/or their servants, agents from trespassing, occupying, alienating, disposing or in any way dealing with the parcel of land known as **L.R. No. Uasin Gishu/El-Lahre/40** now transferred to and registered in the name of the 2nd Defendant as lawful owner having purchased the same pursuant to the public auction the subject of this suit.

c. For reason of the omissions committed by the 1st and 3rd Defendants in the course of conducting the public auction, I decline to award any costs to the 1st and 3rd Defendants.

d. I however award costs to the 2nd Defendant and which, for the same stated in (c) above, I order to be borne by the 1st Defendant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF MAY 2024

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of: