



REPUBLIC OF KENYA



KENYA LAW
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**Ongori v Housing Finance of Kenya Limited & another (Civil Case 248 of 2018)
[2022] KEHC 268 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 248 OF 2018
WA OKWANY, J
MARCH 31, 2022**

BETWEEN

IRENE KEMUNTO ONGORI PLAINTIFF

AND

HOUSING FINANCE OF KENYA LIMITED 1ST DEFENDANT

ISAAC NJIRU MWIGE 2ND DEFENDANT

RULING

1. Background

On or about 7th January 2011, the Plaintiff herein, Irene Kemunto Ongori, obtained a loan facility of Kshs. 7,350,000 from the 1st Defendant to be repaid by monthly instalments of Kshs. 174,856.00 in addition to Kshs 1,543.00 as insurance premiums.

2. The Plaintiff consequently executed a Charge dated 7th January 2011 over Land Reference Number 13869/5 (hereinafter “the Suit Property”) in favour of the 1st Defendant as security for the loan facility.

3. The Plaintiff however defaulted in the loan repayments thus precipitating the 1st defendant’s exercise of its statutory power of sale.

4. On or about 22 May 2015, the suit property was sold by public auction to the successful bidder, Isaac Njiru Mwigie, the 2nd defendant herein thereby precipitating the filing of this suit.

The plaintiff’s case

5. The Plaintiff sued the defendants herein through the plaint dated 25th June 2015 and amended on 7th December 2018 seeking the following remedies: -



- i. A permanent injunction, restraining the defendants, their servants, employees, advocate, agents, or auctioneers or any of them from doing the following acts or any of them, that is to say from interfering with the plaintiffs right of possession of the suit property, charging, leasing, sub-leasing, advertising for sale, disposing of, subdividing, selling by public auction or otherwise howsoever completing any conveyance or transfer of any sale conducted by auction or private treaty, leasing, letting or otherwise howsoever interfering with the ownership of title to and/or interest in all that parcel of land known as L.R. No. 13869/5.
 - ii. A declaration that the purported auction sale of L.R. No. 13869/5 by the 1st defendant to the 2nd defendant is illegal, irregular and null and void and ought to be set aside.
 - iii. An order directing the Land Registrar to cancel entry No. 5 on L.R. No. 13869/5 registered as in favour of the 2nd defendant and to reissue a title in the name of the plaintiff over that property.
 - iv. An order that the first defendant do render true and proper complete and accurate accounts of all their dealings and for accounts to be taken.
 - v. General damages.
 - vi. Costs of this suit.
 - vii. Any other relief that the honourable court may deem just and fit to grant.
6. The plaintiff challenges the manner in which the 1st Defendant's exercised its statutory power of sale and states that the 1st defendant did not comply with the provisions of the *Land Act*, 2012 (hereinafter "the Act") which requires it to conduct a forced sale valuation of the charged property prior to the exercise of the power of sale.
 7. The 1st defendant responded to the amended plaint through the amended defence dated 13th November 2019.
 8. At the trial, the plaintiff (PW1) adopted her witness statement dated 10th June 2019 and reiterated that she was at all material times, the registered owner of the suit property which she charged to the 1st defendant as security for the loan facility. She testified that on 10th June 2015, her attention was drawn to a newspaper advertisement contained in the Daily Nation Newspaper of 7th May 2015 advertising the suit property for sale by Public Auction. That she later learnt that the suit property was sold by the 1st defendant, in the purported exercise of its statutory power of sale, to the 2nd defendant for Kshs. 25,500,000.00.
 9. The plaintiff contended that she was not served with the mandatory 45 days Notification of Sale. She faulted the 1st defendant for failing to comply with the mandatory provisions of the *Land Act* 2012 and of the *Auctioneers Act* prior to the exercise of the power of sale. She accordingly contended that the power of sale had not arisen and that the purported sale ought to be set aside.
 10. The plaintiff observed that the valuation of the suit property by the government valuer differed with was at variance with the 1st defendant's valuation and auction price of Kshs. 25,500,000.00.
 11. PW2, Mr. Michael Murimi Gatuku, a valuer, produced a valuation report prepared by one Mr. Njihia Njoroge. The valuation report placed the Market Value and Forced Sale Value of the suit property at Kshs. 53,300,000.00 and 48,800,000.00 respectively.



12. DW1, Ms Alice Weru, the 1st defendant's Debt Management Officer, testified that the government value placed the value of the suit property at Kshs. 32,325,000.00 and that the Purchaser/2nd defendant paid 25% of the purchase price on the day of the auction.
13. DW2, Mr. Michael Kaburu, a registered land valuer relied on his Witness Statement dated the 5th December 2019 and narrated how he carried out the valuation of the suit property on the instructions of the 1st defendant.
14. DW3, Isaac Njiru Ntwiga, testified that he was the successful bidder at the auction of the suit whereupon he paid the 25% deposit of the purchase price. He stated that the evidence of the payments could be ascertained from the statement of accounts produced by the Bank in its Bundle of Documents.
15. Parties summarized their respective cases by way of written submissions which I have considered. The main issues for determination are as follows: -
 - a. Whether the 1st Defendant complied with the mandatory statutory requirements before exercising its power of sale.
 - b. Whether, there was fraud, attributed to the Defendants in the exercise of the power of sale.
 - c. Who should bear the costs of the suit.
16. The principles governing the granting of orders of injunction were set out in *Giella vs Cassman Brown* [1973] E.A 358 and restated in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, as follows: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”



17. What constitutes to a prima facie case was discussed by the Court of Appeal in *Mrao Ltd vs First American Bank of Kenya Ltd* [2003] eKLR, as follows:-

“...In civil cases, it is a case in which, on the material presented to the court a tribunal property directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”.

18. Applying the above principles to the present case, I note that it was not disputed that the plaintiff was in default of the loan repayments. I therefore find that the 1st defendant was entitled to proceed with the exercise of its statutory power of sale. It was further not disputed that the suit property was sold to the 2nd defendant at a public auction and that the 2nd defendant paid the full purchase price.

19. The plaintiff however challenged the sale while arguing that the 1st defendant did not comply with the mandatory statutory requirements in the exercise of its power of sale. The plaintiff cited the provisions of the *Land Act* and the Auctioneer's Rules. The 1st defendant, on the other hand, maintained that it complied with all the statutory provisions in the exercise of its power of sale.

20. Section 90(1) of the *Land Act* provides that in the event of a default on the part of the chargor, the chargee shall serve the chargor with a three months' notice before the chargee exercises its power of sale. Section 96(2) of the Act, on the other hand, provides for 40 days Statutory Notice of Sale before the sale takes place. According to the Plaintiff no such notices were served on her prior to the auction. The plaintiff further submitted that under section 97(2) of the Act, 1st the defendant ought to have ensured that a forced sale valuation of the property is undertaken before exercising the right of sale.

21. Section 90 (1) of the *Land Act*, 2012 stipulates as follows: -

If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.

22. Section 96(1) of the *Land Act* on the other hand, provides that: -

Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

23. Section 97(2) of the *Land Act* states that: -

“A charge shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

24. Rule 15(c) and (d) of the *Auctioneers Rules* stipulates that: -

15. Immovable property

Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

(a) record the court warrant or letter of instruction in the register;



- (b) prepare a notification of sale in the form prescribed in Sale Form 4 set out in the Second Schedule indicating the value of each property to be sold;
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
- (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;
- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

25. In *Nyagilo Ochieng & Another vs. Fanuel Ochieng & 2 Others* Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260 the Court of Appeal dealt with section 74(1) of the repealed *Registered Land Act* and held that: -

“It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with section 74(1) of the *Registered Land Act* (Cap 300 Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargor’s receiving such notices the bank’s power of sale arises. This is the basis upon which the bank can put up the properties for sale. The appellants stated, in their plaint, that they did not receive any statutory notices. This averment should have put the bank on guard. It is for the chargee to make sure that there is compliance with the requirements of section 74(1) of the *Registered Land Act*. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. Although the last known address of the appellants was correct, it must be understood that in face of the denial of receipt of statutory notice or notices it is incumbent upon the chargee to prove the posting. It would have been a very simple exercise for the bank to produce a slip or letters containing statutory notice or notices. The bank did not do so. Instead, an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the *Interpretation and General Provisions Act*, Cap 2, Laws of Kenya. It is quite possible that such notices were sent but that fact, in the face of the denial of receipt, must be proved. It is possible that the letters addressed to the two appellants were received by the first respondent who avoided telling the appellants of anything about the same as he was the “villain in the matter”. In the absence of proof of such posting the Court is constrained to hold that the sale by auction was void. The learned Judge fell into error and misdirected himself when he held that the notices were sent to their correct address on the supposition alone that the postal address of the appellants was P. O. Box 120, SARE...In coming to the conclusion, the Court has reached, it cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties.”

26. The question that arises is whether the 1st defendant complied with the above statutory requirements when exercising its right of sale. A perusal of the 1st defendant’s bundle of documents reveals that



it exhibited the following documents in support of its compliance with the statutory requirements preceding the exercise of the power of sale.

- a. Three months statutory notice dated 18th June 2013 together with certificate of posting and redemption statement.
 - b. Forty days statutory notices dated 15th November 2013 and 13th May 2014 together with certificates of posting.
 - c. Credit Reference Bureau Pre-listing notification dated 13th May 2014.
 - d. Credit Reference Bureau Notice of Listing dated 16th July 2014.
 - e. 45 days redemption notice and Notification of Sale dated 16th March 2015.
 - f. Auctioneer's Certificate of Service dated 20th March 2015.
27. A further perusal of the Charge document dated 7th January 2011 shows that notices were to be sent to the plaintiff's postal address indicated in the said document. I note that parties agreed that notices were to be deemed to have been properly served on the Chargor if served on the chargor or the personal representative of the chargor personally or if left for the chargor at the chargor's last known place of residence or business in Kenya or is sent by registered post in a stamped envelope addressed to the chargor at the chargor's last known postal address in Kenya. The charge document also indicated that where a notice or demand is sent by registered post it shall be sufficient to prove that the notice or demand was properly addressed and posted.
28. I find that the requisite notices were duly sent to the plaintiff by registered mail as that the 1st defendant and the Auctioneer produced certificates of posting in respect to all the notices that they served on the plaintiff. I further find that having tendered sufficient proof that they effected proper service of notices upon the applicants, the burden shifted to the plaintiff to show that she did not receive the said notices. This is the position that was taken in *Kamunyori & Co. Advocates vs Cannon Assurance (K) Limited* [20061 eKLR where the court placed the evidentiary burden on the chargor to show that he did not receive any notices due to some omission by the 1st defendant.
29. Turning to the plaintiff's assertion that there was non-compliance with Section 97(2) of the *Land Act* that requires the undertaking of the forced sale valuation of the charged property before exercising the right of sale. The plaintiff testified that she only became aware of the 1st defendant's valuation for the first time during discovery when the parties exchanged documents.
30. To support her assertion that forced sale valuation was not carried out on the suit property, the plaintiff stated that there were several highly contested interlocutory applications prior to the hearing of the main suit in which the issue of the defendant's failure to undertake forced sale valuation of the suit property was raised but that the 1st defendant did not tender any evidence of the valuation. According to the plaintiff, failure to produce the valuation report, in spite of specific averment at the interlocutory stage pointed to failure to value the suit property. The plaintiff cited the decision in *Koileken Ole Kipolonka Orumos vs. Mellech Engineering & Construction Limited & 2 Others* [2015] eKLR where Gikonyo J. held that:-

“...the forced sale valuation is not only for purposes of carrying through the public auction or solely for recovering the debt, but reinforces the rights of the charger to have reasonable value for his property. That is why the duty under Section 97(2) of the *Land Act* is statutory and obligatory. It is not left to the whims of the chargee and its agents especially the auctioneers”.



31. On its part, the 1st defendant maintained that it complied with the requirements of Section 97(2) of the *Land Act* concerning the forced sale valuation. To support this position, the 1st defendant produced, as exhibit 1, its letter of instructions to the valuers to carry out at the valuation of the suit property so as to establish the current market value, forced sale value, insurance value and maintainable rental value for auction purposes. The defendant exhibited the valuation report showing the details of the location of the subject property, photographs of the property, its nature and improvement condition. The report further indicated the property market value of Kshs. 32,500.00.00 and market value with special assumptions/Reserve Value (forced sale value) of Kshs. 24,380,000.00.
32. At the hearing, DW1 Alice Weru, testified that the Bank undertook a valuation of the suit property, prior to the sale by public auction, as required by the law. DW2, Humphrey Kaburu Michael, the valuer compiled the valuation report dated 10th March 2015 which he produced as an exhibit at the trial.
33. The Plaintiff, on the other hand, disagreed with the 1st defendant's valuation report and argued that it undervalued the property. She produced her own counter-valuation report dated 17th March 2015 which indicated that the property had a higher value than the amount stated by the 1st defendant's valuer.
34. I however note that while the 1st defendant's valuation report was prepared and produced in court by DW2, a qualified valuer who also tendered his professional credentials as exhibits at the hearing, the maker of the plaintiff's valuation report was not called to testify and be cross examined on the contents of his report. The plaintiff's valuation report was produced by one Michael Murimi Gathuku who not only conceded that he never visited the suit property prior to the valuation, but did not also produce any proof of his registration as a valuer.
35. Courts have taken the position that it is not sufficient to merely allege that the property was undervalued by producing a counter-valuation report but that satisfactory grounds must be presented before a valuation report can be disregarded. (See *Zum Investment Limited vs Habib Bank Limited* [20141 eKLR]). My finding is that the plaintiff has not provided satisfactory grounds to warrant this court's rejection of the 1st defendant's valuation report. The plaintiff has not demonstrated, for example, that the 1st defendant's valuation report was made by a person who is incompetent or that the valuer considered irrelevant facts or that it was done long before the intended sale. I therefore find that the 1st Defendant carried out a valuation of the suit property as required in Section 97(2) of the *Land Act*.
36. As regards the alleged non-compliance with the conditions of sale, the plaintiff submitted that there was breach of the mandatory provisions of the *Land Act*, Auctioneers (Practice) Rules and the mandatory terms of sale set out by the bank. The plaintiff maintained that the 2nd defendant could not be afforded protection under the *Land Act* as he was a party to the flawed process, fraud and collusion in the realization of the security.
37. The plaintiff highlighted the Conditions for Sale for the public auction held on 22nd May 2015 and argued that under Clauses 4 and 6 of the Memorandum of Sale the buyer was enjoined to immediately pay the auctioneer a deposit of 25% of the purchase and the balance thereof within 90 days being Kshs. 6,375,000 and 19,242,999.58 respectively. According to the plaintiff, the 2nd defendant did not meet the said conditions of sale as it did not tender evidence to show that the 25% deposit was paid to the auctioneer on the same day of the sale.
38. It was further, the plaintiff's case that the 2nd Defendant did not meet the condition precedent on payment of the refundable deposit of Kshs. 100,000.00 by way of cash or Banker's Cheque at the auctioneer's offices in order to get a Bidding Number. She added that the statements of account do



not reflect a credit by way of bank transfer as alleged by the defence witnesses and that an examination of the said statements reveal that the 25% deposit of Kshs. 6,245,863.42 was paid on the 22nd of July 2015, 60 days after the purported auction sale.

39. The plaintiff also claimed that debit arrears entries on the plaintiff's statements of accounts reveal that the amount of interests, on arrears, and interest on capital from 31st May 2015 to 1st July 2015 discredit the defendants' allegation that the 25% deposit was credited into the Plaintiff's account. It was the plaintiff's case that the evidence overwhelmingly establishes that not only did the 2nd Defendant not meet the conditions preceding sale by public auction but that the alleged sale of the suit property to the 2nd Defendant was in the circumstances clearly by way of a private treaty and not sale by public auction.
40. The plaintiff maintained that the sale was therefore irregular, invalid and unlawful, in which case, the 2nd defendant is not entitled to the protection afforded by Section 99 of the *Land Act*. The said section stipulates as follows: -
- “ A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has been a default by the chargor, or that a notice has not been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation of other dishonest conduct on the part of the chargee, of which that person has actual of constructive notice”.
41. The plaintiff cited the decision in *Maina Wanjigi & Another Vs. Bank of Africa Limited* HCCC 237 of 2014 where the purchaser failed to meet the conditions of sale and the court held that: -
- “...Since there was no auction as deemed by the law, whatever transpired on 3rd June 2014 purported to be a public auction, was not a public auction, was an unlawful process which was incapable of conferring any tide or proprietary rights to the alleged successful bidder - the 3rd Defendant. I therefore reject the submission that the Third Defendant had acquired title which needs to be protected by law. A title can only be acquired through lawful process which this was not.”
42. On their part, the defendants contended that the allegation of non-compliance with the conditions of sale is unfounded, as they had exhibited sufficient proof of how and when the purchase price was paid.
43. The 2nd defendant submitted that he was not privy to the contract between the plaintiff and the 1st defendant as he was an innocent purchaser of the subject property for value after making a successful bid at the public auction. He maintained that he should not be deprived of the property which he lawfully acquired.
44. I have perused the 1st Defendant's Further Supplementary bundle of documents dated 9th December 2019, which was produced as exhibit 3. The document shows that Kshs. 6,375,000.00, being 25% of the purchase price, was paid on 22nd May 2015 being the day of the auction. A perusal of the 1st defendant's bundle of documents at page 95 shows that on 22nd July 2015 the sum of Kshs 19,242,999.58 was credited into the Plaintiff's account being "Refund from mortgage JV 20" or the excess after the loan amount was cleared. It is noteworthy that the plaintiff did not protest, reject or return the amount credited to her account to the 1st defendant. I am, in the circumstances of this case, unable to find that there was anything untoward or irregular with regard to the sale of the suit property.
45. The plaintiff also sought an order directing the Land Registrar to cancel entry No. 5 on L.R. No. 13869/5 registered as in favour of the 2nd defendant and to reissue a title in her name. The question



which arises is whether, even assuming, for arguments sake, that the sale by public auction was irregular, this court can order a cancellation of the registration of the title and a reissue of the title to the plaintiff.

46. Courts have taken the position that an improper auction is not reversible. This is the position that was taken in *Joyce Wairimu Karanja vs James Mburu Ngure & 3 Others* [2018] eKLR where the court held that: -

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

47. A similar position was adopted in *Bomet Beer Distributors Ltd & Another vs. Kenya Commercial Bank Ltd & 4 Others* [2005] eKLR, where the court held that: -

“The fact that they have alleged that the sale by public auction was fraudulently conducted by the chargee does not prima facie proof that they are entitled to the orders of injunction sought. Statutory provisions in the event of such an eventuality is clear. If a party is aggrieved by the way the sale was conducted by public auction, he can only seek to be awarded damages...What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages...The balance of convenience tilts in favor of the 5th Defendant who purchased the property at the public auction. He has invested his financial resources but has been unable to enjoy the use of the said properties. It would be inequitable to keep the 5th Defendant away from his property just because the plaintiffs feel aggrieved by the way the chargee exercised its statutory power of sale in a public auction.”

48. From the above-cited case, it is clear that even if this court was to find that the sale of the suit property at the public auction was irregular, the same cannot be reversed, as the only remedy available to the plaintiff, if she had established the irregularity, is the award of damages.

49. Having found that neither the debt nor the default were denied, and that the charge was also not challenged, I find that the bank was within its rights to exercise its statutory power of sale. I have also found that the defendants complied with the statutory requirements by issuing the requisite notices and carrying out the forced sale valuation prior to the sale. I have further found that the 2nd Defendant complied with the conditions of sale after which it paid a refund of Kshs. 19,242,999.58, being the excess after sale of the property, to the plaintiff's account. I find that the plaintiff's case was not proved to the required standards and I consequently dismiss it with costs the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Odera for Plaintiff.

Mr. Kimani for 1st Defendant.

Court Assistant – Abdi

