



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL APPEAL NO 34 OF 2020**

**BANK OF AFRICA KENYA LTD.....1<sup>ST</sup> APPELLANT**

**GARAM INVESTMENTS (AUCTIONEERS).....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ELIJAH JACKTONE ODHIAMBO MUGAH.....1<sup>ST</sup> RESPONDENT**

**GEORGE OCHIENG.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon R. K. Ondieki (SPM) delivered**

**at Kisumu in Chief Magistrate's Court Environment and Land Case No 424 of 2018**

**(formerly Cause No 153 of 2016) on 8<sup>th</sup> June 2020)**

**JUDGMENT**

**INTRODUCTION**

1. In his decision of 8<sup>th</sup> June 2020, the Learned Trial Magistrate, Hon R. K. Ondieki, Senior Principal Magistrate, entered Judgment in favour of the Respondents as against the Appellants as follows:-

- a. An order declaring the agreement between the Appellants and Respondents vitiated by virtue of a fraudulent misrepresentation.**
- b. An order that the Respondents had the right to rescind the agreement.**
- c. An order compelling the Appellants to refund the Respondents their full deposits.**
- d. General damages awarded at Kshs 500,000/=.**
- e. The Appellants to bear the costs of the suit, jointly and severally.**

2. Being aggrieved by the said decision, on 2<sup>nd</sup> July 2020, the Appellants filed a Memorandum of Appeal dated 1<sup>st</sup> July 2020. They relied on thirteen (13) grounds of appeal.

3. Their Written Submissions were dated 4<sup>th</sup> November 2021 and filed on even date while those of the Respondents were dated 8<sup>th</sup> December 2021 and filed on 9<sup>th</sup> December 2021.

4. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

**LEGAL ANALYSIS**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at

its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

**a. Whether or not the Learned Trial Magistrate erred in having found the Memorandum of Sale was not valid and binding on the parties;**

**b. Whether or not the Learned Trial Magistrate erred in having found that the Appellants made false representations to the Respondents herein;**

**c. Whether or not the Learned Trial Magistrate erred in having ordered the Appellants to refund the Respondents the deposit that was paid after bidding for the purchase price of the property Title No Kisumu/Kogony/623 (hereinafter referred to as the subject property);**

**d. Whether the Learned trial Magistrate erred in having ordered the Appellant to refund the Respondents legal fees; and**

**e. Whether the Learned Trial Magistrate erred in having awarded the Respondents general damages for false representations.**

8. All the grounds of appeal were related. However, this court dealt with the same under the following distinct and separate heads.

#### **A. THE CONDITIONS OF SALE AND MEMORANDUM OF SALE**

9. The Respondent did not specifically submit on this issue separately in the manner that the Appellant did. Nonetheless this court considered this issue under this head to determine whether the Memorandum of Sale was binding upon the parties herein.

10. It was the Appellants' submissions that all the bidders at the auction were provided with Conditions of Sale prior to the auction outlining all the duties and responsibilities of the parties, before, during and after the auction. They argued that the Respondents acknowledged reading the conditions at Paragraph 15 of their Amended plaint.

11. They were emphatic that the 1<sup>st</sup> Respondent admitted that he verified the condition of the subject property as per the Conditions of Sale. It was their contention having read the said Conditions of Sale and participated in the auction, the Respondents had undertook to abide by the Conditions of Sale and on emerging the highest bidder, they executed the Memorandum of Sale dated 20<sup>th</sup> May 2016 and paid a deposit of Kshs 875,000/= as required under Clause 5 of the said Conditions of Sale.

12. They added that the Memorandum of Sale required the bidder to pay the balance of the purchase price within thirty (30) days from date of execution failure to which the deposit paid would be forfeited to the Chargee without notice. They pointed out that the Respondents did not pay the balance as required, a fact the Respondents admitted in their testimony. It was their contention that the Respondents executed the Memorandum of Sale willingly and therefore knew the consequence of failing to pay the balance of the purchase price. They submitted that the Trial Court erred in ordering the 1<sup>st</sup> Appellant to refund the deposit.

13. They placed reliance on the case of **Ngere Tea Factory Company Ltd vs Alice Wambui Ndome [2018] eKLR** where the court found that the plaintiff therein had breached the said terms by failing to remit the balance of the purchase price within stipulated time as agreed by the parties and was clearly running away from obligations lawfully imposed and with its full knowledge and participation.

14. They urged the court not to aid the Respondents in running away from their obligations that were imposed with their participation and find that the Conditions of Sale and the Memorandum of Sale were binding upon the Respondents.

15. The circumstances of this case were that the 1<sup>st</sup> Appellant granted an overdraft facility of Kshs 1,000,000/= to one Daniel Ochieng Ajulu which charge was secured by a charge over the subject property that was registered in the name of one Joseph Gathitu Gathima. After the Borrower defaulted in repaying the said loan, the 1<sup>st</sup> Appellant proceeded to exercise its statutory power of sale by sale of the subject property by way of public auction by the 2<sup>nd</sup> Appellant herein.

16. This court perused the Conditions of Sale and the Memorandum of Sale dated 20<sup>th</sup> May 2016 that were tendered in evidence by the Appellants and the Respondents respectively in support of their cases.

17. The Conditions of Sale set out the conditions for sale. It was stipulated that a deposit of twenty five per cent (25%) of the purchase price was to be paid to the auctioneer and the purchaser would sign Agreement in the form attached for the completion of the purchase.

18. In the event the purchaser defaulted in paying balance of the purchase price within the stipulated period of thirty (30) days, the chargee was to forfeit the deposit and could without notice re-sell the property.

19. Whereas the Memorandum of Sale dated 20<sup>th</sup> May 2016 incorporated the names and signatures of the parties participating in the auction, one Grace Caroline Atieno who attended the auction and bid on behalf of the Respondents herein did not affix her signature. Only her Identity Card Number was indicated therein. One Milanya W. Odhiambo attested the Memorandum of Sale on her behalf and behalf of the 2<sup>nd</sup> Appellant herein.

20. The question of whether there was a binding agreement between the Appellants and the Respondents arose as the same was not executed on behalf of the latter. However, the fact that the said Grace Caroline Atieno did not affix her signature on the said Memorandum of Sale did not invalidate the agreement. Indeed, there was an offer by the 2<sup>nd</sup> Appellant on behalf of the 1<sup>st</sup> Appellant to sell the subject property by public auction to the Respondents herein and an acceptance of the offer by payment of the deposit in the sum of Kshs 877,500/=.

21. As the Respondents complied with the Condition of Sale of paying the twenty five (25%) per cent deposit of the purchase price of Kshs 3,510,000/=, this court was satisfied that there was a valid and binding contract between the Appellant and the Respondents herein.

## **B. FRAUDULENT MISREPRESENTATION**

22. The Appellant submitted that for there to be misrepresentation, there must be first a representation.

23. Both parties placed reliance on the case of **Gichinga Kibutha vs Caroline Nduku [2018] eKLR** where the court held that with respect to a contract, fraud includes the suggestion as a fact, of that which is not true by one who does not believe it to be true, the active concealment of a fact by one having knowledge or belief of the fact, a promise made without intention of performing it, any other act fitted to deceive and any such act or omission or the law declares to be fraudulent.

24. The Appellants argued that the terms of the auction were contained in Conditions of Sale, the Advertisement in the Daily Newspaper and Memorandum of Sale. They contended that they did not owe bidders a duty of care on matters affecting title and survey beacons and that the Conditions of Sale warned bidders to do their own investigations and not rely on any statement regarding the subject property.

25. They therefore averred that they did not owe the Respondents herein any duties regarding the subject property and placed reliance on the case of **Gichinga Kibutha vs Caroline Nduku** (Supra) in arguing that there was no promise, no concealment of fact or any form of representation that the bidders were told or would have been expected to rely on. They were categorical that the Respondents were expected to carry out due diligence independently.

26. They pointed out that the 1<sup>st</sup> Respondent testified that he met one Odhiambo Milanya at a parking lot in Nairobi who during the meeting informed him that the land was very prime, easily accessible and in a highly developed area. They added that when the 1<sup>st</sup> Respondent asked the said Odhiambo Milanya about any encumbrances, he was informed that there had been a case at the district lands tribunal but that the same was dispensed with and the land charged to the bank.

27. They added that the 2<sup>nd</sup> Respondent (**sic**) further told the Trial Court that she (**sic**) was taken to the site by the said Odhiambo Milanya from the Auctioneers office but that she was taken to a different parcel of land. They argued that she did not explain how that happened despite the Advertisement also describing the subject property and what was contained thereon.

28. To buttress their point, they placed reliance on the case of **Mohamed Shahanaz Butt & Another vs Kenya Revenue Authority & 2 Others [2020] eKLR** where the court held that the plaintiffs therein ought to have done due diligence before purchasing the suit property and having failed to do so, they were the authors of their own misfortune.

29. They questioned why they would trust the auctioneer to take them to see the property when it was clear that the auctioneers was not liable for anything to do with the subject property. They averred that the Respondents did not call the said Odhiambo Milanya to testify.

30. They were categorical that the subject property was clearly described on the Daily Newspaper Advertisement dated 3<sup>rd</sup> May 2016 and that the Respondents ought to have used the same description to visit the property. They argued that the 1<sup>st</sup> Respondent admitted on cross examination that he did not visit the site or obtain a map or obtain a certificate of search.

31. They contended that the Respondents procured the said documents in 2019, which was three (3) years after the auction yet the documents ought to have been obtained before the auction in order to inform their decision of whether to participate in the public auction or not.

32. The Appellants argued that the 1<sup>st</sup> Respondent's action did not meet the standard of due diligence. They argued that being a trained engineer and businessman, he must have understood the duty of a bidder in a public auction to do due diligence on a property before bidding for the same.

33. It was their contention that the court could not rewrite contracts on behalf of the parties or imply terms that are not agreed upon. They were emphatic that a plain reading of the Conditions of Sale showed that the Appellants did not owe any duty to the Respondents regarding the condition of the land and that the Conditions of Sale invited bidders do their own investigations and not to rely on the statements relating to the land.

34. In this regard, they placed reliance on the case of **Gichinga Kibutha vs Caroline Nduku** (Supra) to argue that there was no concealment of facts or any form of representation that bidders were to rely upon. They further placed reliance on the case of **Ngere Tea Factory Company Ltd vs Alice Wambui Ndome** (Supra) where the court held that since the plaintiff was the one buying the land his clear duty was to conduct due diligence.

35. They submitted further that the Learned Trial Magistrate in his decision did not rewrite the agreement between parties. In this regard, they referred this court to the cases of **Hussamuddin Gulamhussein Pothiwalla Administrator, Trustee and Excutor of the Estate of Gulamhussein Ebrahim Pothiwalla vs Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No 330 of 2003** where the common thread was that courts could not re-write contracts between parties and that parties were bound by the terms of their contract, unless coercion, fraud or undue influence were pleaded and proved.

36. They submitted that the transaction was guided by the Conditions of Sale and the Daily Newspaper Advertisement and that none of the documents assigned any duty on the bank or the auctioneer to advise the bidder regarding the subject land. They added that the land laws only imposed a duty on the bank to obtain the best possible price. They pointed out that the Trial Court did not indicate where the duty emanated from. They therefore faulted the Trial Court for having found that the Respondents had established false representation on their part.

37. On their part, the Respondents submitted that the Appellant lied about the true identity of the land and went ahead and showed the 1<sup>st</sup> Respondent's wife a different parcel of land purporting the same to be the subject property to be sold by public auction. They termed this fraudulent representation of the property.

38. They stated that after paying the deposit in favour of the 1<sup>st</sup> Appellant, they went to fence the subject property only to be informed by neighbours that it was not Kisumu/ Kogony/623 but rather it was Kisumu/Kogony/786 and 3772 combined. They argued that the land sold was neither previously a school that was demolished nor a prime piece of land near Kisumu International Airport but that it was a swampy area with three (3) homesteads and streams running through it. It was their contention that they would not have known that the land that the 1<sup>st</sup> Respondent's wife had inspected and approved was not the one really being sold.

39. They were emphatic that these actions by the Appellants were fitted to deceive and to enable them benefit from fraud. They were categorical that they were not negligent as they carried out due diligence but what was on the ground was not what was bid.

40. They were emphatic that the Appellants had a duty to fully disclose and ought to be estopped from gaining at the detriment of the Respondents and added that they carried out due diligence as the 1<sup>st</sup> Respondent sent his wife to view the property and made an application for a search of Kisumu/Kanyakwar/623 which search came out the following day after the auction. They submitted further that having inspected the subject land they were willing to purchase the same.

41. This court looked at the Conditions of Sale and noted that the same provided that the subject property was being sold subject to Acts, rights, easements, covenants, conditions, stipulations, restrictions and other matters affecting and whether the purchaser inspects the title deeds that were in possession of the charge or not was deemed full notice of the documents of title and the nature and extent of the rights, easements, covenants, conditions, stipulations, restrictions, measurements and other matters affecting the property notwithstanding any partial, incomplete or inaccurate statement of such matters or the effect thereof contained in the Particulars of the Property and the sale shall not be annulled nor compensation claimed by the purchaser for the reason of any such partial, incomplete or inaccurate statement. Although there was partial disclosure in the Advertisement in the newspaper because it never disclosed about the pending case, the Appellants were under no duty to disclose the encumbrances on the property as that was the duty for the purchasers, in this case, the Respondents herein.

42. The Conditions of Sale further stated that the chargee was not bound to point out any beacons or to replace any missing beacons in respect of the property or to give vacant possession. In addition, it provided that the purchaser was deemed to have bought the property with full knowledge in all respects of the actual state and condition of the property and shall take it as it is.

43. The fact that the property was not in the area the Respondents expected it to be and that it was not in the condition they expected, did not shift the duty to the Appellants because the Conditions of Sale were clear that the Respondents were deemed to have purchased the subject property having full knowledge of its state and condition and would purchase and take it as it was.

44. The Conditions of Sale also stated that the auctioneer would not be liable for any misstatement contained in the particulars of the property and further that the purchaser was deemed to have verified the particulars to his satisfaction.

45. This court came to the firm conclusion that the Appellants did not falsely represent any facts to the Respondent herein. Notably, even though the Appellants denied knowing the said Milanya Odhiambo, it was clear that they interacted with him as he was the one who attested the Memorandum of Sale as their witness. Be that as it may, even if he was the 2<sup>nd</sup> Appellant's employee, the 2<sup>nd</sup> Appellant could not be held liable for his actions of its agent because under the Conditions of Sale, the auctioneer would not be liable for any misstatement contained in the particulars of the property.

46. That notwithstanding, the Respondents were deemed to have verified the particulars to their satisfaction and were only to blame for relying on someone to verify the condition of property that they intended to purchase during an auction. Their due diligence fell below the threshold that would be required of a purchaser who intends to shield himself or herself from suffering loss by proceeding with the transaction. Proceeding without proper due diligence would be taking a risk that could cause losses ahead.

### **C. DOCTRINE OF LIS PENDEN**

47. The Appellant argued that the issue of *lis pendens* was not pleaded by the Respondents but was brought up by the Trial Court and which proceeded to make a judgment on the same. They pointed out that by so doing the Trial Court abandoned its role of an independent and impartial adjudicator and descended into the arena of conflict. In this respect they relied among other cases the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014]eKLR** where the common thread in the said cases was that parties were bound by their pleadings.

48. They submitted that the Trial Court was therefore bound by the pleadings in the Amended Plaint and Defence and that any evidence led by any party which did not support the averments in the pleadings ought to have been disregarded. They submitted further that the 1<sup>st</sup> Respondent testified that the subject land had a restriction on it as there was a case pending in court in **ELC 225 of 2018 Albert Otieno & 2 Others vs Joseph Gathinia & 2 Others**. In this respect, the Appellants argued that if the aforesaid suit was filed in 2018 then, it followed that there was no suit in 2016 when the auction took place.

49. They added that there was no court order in respect of the said suit and the Respondents did not file any in their pleadings and that the 1<sup>st</sup> Appellant's witness had testified that at the time of the auction there were no orders of court stopping the sale. They argued that most importantly, the Respondents did not produce the pleadings of the said suit in court for consideration.

50. In this regard, they relied on the cases of **Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others [2017]eKLR**, **Joseph M. Mbuva vs Pioneer Building Society Limited (In Receivership) & Peter Karanja Ngure [2016]eKLR**, **Ace Engineering & Building Contractors Ltd vs National Bank of Kenya Limited [2019]eKLR**, **Patrick Githitu Kariuki vs Hottensiah Wambui Hinga & Another [2020]eKLR** and **Cieni Plains Company Limited & 2 Others vs Ecobank Kenya Limited [2017]eKLR** where the common thread in the said cases was that the doctrine of *lis pendens* shall not apply as a matter of course to bar exercise of mortgage's statutory power of sale where it was lawfully due.

51. On their part, the Respondents submitted that the Appellants were aware that there was pending litigation in respect of the subject property to wit **ELC 225 of 2018 Albert Otieno & 2 Others vs Joseph Gathinia & 2 Others** but concealed the same.

52. They were categorical that in the year 2011 a restriction was registered against the property which still existed and that at the time of trial, there was another case pending in court over the same property. They contended that *lis pendens* was applicable as per sections 106 and 107 of the Land Registration Act. They placed reliance on the case of **Naftali Ruthi Kinyua vs Patrick Thuita Gachure and Another Nairobi Civil Appeal No 44 of [2014]eKLR** and the case of **Tireito vs Jacob Kipsugut Arap Langat & 2 Others [2018]eKLR** where the common thread in the said cases was that the courts therein recognised the doctrine of *lis pendens*.

53. They agreed with the Appellants that although suit was instituted in 2018, there was a restriction placed against any dealing in the land subject to the finalisation of land tribunal matter.

54. Clearly, whereas the doctrine of *lis pendens* was applicable in the circumstances of this case having been registered in 2011 before the Land Act, 2012 that came into force on 27<sup>th</sup> August 2012 and was applicable by virtue of Section 106 and 107 of the Land Registration Act No 3 of 2012, Section 106 of the Land Registration Act provides that:-

**“Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts.”**

55. Further, Section 107(1) of the Land Registration Act stipulates that:-

**“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”**

56. It was evident from the Certificate of Search that the Charge against the subject property was registered on 31<sup>st</sup> January 2011. It was made as Entry No 3. Rights under Section 83 and 84 were reserved. The Restriction Letter restricting dealing with the land until the dispute case was finalised by the Land Tribunal was lodged on 21<sup>st</sup> February 2011. It was Entry No 8. The rights of the 1<sup>st</sup> Appellant superseded the rights of the party that lodged a restriction.

57. As the Appellants argued, there was no court order that barred the 1<sup>st</sup> Appellant from exercising its statutory power of sale once its rights crystallised following the default of the payment of the loan it had advanced to the said Daniel Ochieng Ajulu and secured by a Charge of the subject property that was owned by the said Joseph Gathitu Gathima.

58. The circumstances would have been different had the 1<sup>st</sup> Appellant charged the subject property after the Restriction had been lodged. Doing so would have been to act at its own peril. The question of whether there had been no court order barring the Appellants from disposing of the subject property would have been immaterial. This is the scenario that the Trial Court contemplated. In other words, this court agreed with the Trial Magistrate that the Appellants would have had to obtain a court order to lift the Restriction so as to sell the subject property by way of public auction.

59. This court was thus persuaded by the Appellants' submissions that the Trial Court erred when it determined that the Restriction superseded the 1<sup>st</sup> Appellant's rights and interests. This court came to the firm conclusion that the Respondents did not prove their case to the required balance which in civil cases is proof on a balance of probabilities. The Respondents took a risk by not doing the due diligence before bidding and having been bound by the terms of the agreement, this court found and held that it could only find in favour of the Appellants and thus interfere with the Trial Court's decision in its entirety.

#### **D. SPECIAL DAMAGES AND GENERAL DAMAGES**

60. As the court found and held that the Memorandum of Sale was binding on the parties herein, that the Appellants were not guilty of any false representation and that the 1<sup>st</sup> Appellant's rights overrode the rights of the person who had placed a Restriction against the subject

property, special damages and general damages were not payable herein.

61. The Trial Magistrate therefore erred in having ordered the Appellants to refund the deposit that was paid at the auction and Kshs 100,000/= being legal fees that were said to have been paid as legal fees. It was clear from the Conditions of Sale that the legal fees by the Purchaser would be paid at the time of completion of the transfer. As the transfer had not been effected, the Appellants' advocates were not entitled to any legal fees.

62. Having said so, this court looked at the acknowledgment of the sum of Kshs 100,000/= that was received by Walter Odhiambo and noted that the same was titled Cash/Disbursement. It did not bear any stamp from the Appellants' advocates' law firm. It also had alterations by hand. As it was not clear what exactly the monies were paid for, this court was reluctant to find and hold that the same were legal fees that were envisaged in the Conditions of Sale.

#### **DISPOSITION**

63. For the foregoing reasons, the upshot of this Court's decision was that the Appellants' Appeal lodged on 2<sup>nd</sup> July 2020 was merited and the same be and is hereby allowed. The effect of this decision is that the judgment that was delivered in Kisumu in Chief Magistrate's Court **ELC No 424 of 2018 (formerly Cause No 153 of 2016)** on 8<sup>th</sup> June 2020 be and is hereby set aside and/or vacated and replaced with an order that the Respondents' case in Kisumu in Chief Magistrate's Court **ELC No 424 of 2018 (formerly Cause No 153 of 2016)** was not merited and the same be and is hereby dismissed with costs to the Appellants herein.

64. In view of the disparity in economic might between the Appellants and the Respondents herein, each party will bear its own costs of the Appeal herein.

65. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MARCH 2022**

**J. KAMAU**

**JUDGE**