



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 290 OF 2017**

**PAUL KURIA NGUGI.....PLAINTIFF**

**-VERSUS-**

**BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. When the chips are down, the only real issue for determination in this matter is whether property known as Muguga/Jet Scheme/3575 (the Suit Property) previously charged to Barclays Bank of Kenya Limited (the Defendant or Bank) was sold by the Bank at an undervalue.

2. Paul Kuria Ngugi (the Plaintiff or Ngugi) a former employee of the Bank had charged the suit property to the Bank to secure a loan facility of Kshs.3,400,000/=. He fell into hard times, he defaulted on the loan and the Bank sought to realize the security it held.

3. Although Ngugi had, in his Plaint dated 13<sup>th</sup> April 2017 and filed on even date, complained that he was not served with a notice of sale of the property (he does not specify whether it is that under section 90 or section 96(2) of the Land Act or both!), it turns out that this is a difficult complaint to sustain.

4. The Plaintiff further complains that the property seems to have been sold but that the Bank has refused to furnish him with documents relating to the sale. That the refusal is indicative that the exercise of the power of sale was illegal as the property was not valued and was sold at a throw away price.

5. He seeks the following orders:-

*a) A declaration that the Defendant's exercise of its statutory power at sale was wrongful, illegal, null and void.*

*b) A declaration that the Defendant breached its duty of care to the Plaintiff when it sold the property known as Title Number Muguga/ Jet Scheme/3575.*

*c) An order to compel the Defendant to make full disclosure of all the information and the documents relating to the sale of the property known as Title Number Muguga/Jet Scheme/3575, which should include but not limited to the following;*

*i. The date of sale.*

*ii. Purchase price.*

*iii. Valuation report undertaken prior to sale.*

*iv. Memorandum of sale.*

*v. Plaintiff's bank statement confirming the credit of the purchase price.*

*d) General damages for the wrongful and illegal exercise of the Defendant's statutory power of sale.*

e) General damages for the Defendant's breach of its duty of care owed to the Plaintiff when it sold the property known as Title Number Muguga/ Jet Scheme/3575.

f) Any other relief that this Honourable Court may deem fit and just to grant.

g) Costs of this suit.

6. In its Defence of 28<sup>th</sup> August 2017, the Defendant denies the claim and states as follows:--

a) The Defendant advanced to the Plaintiff a facility to the tune of Kshs.3,400,000/=

b) The Plaintiff fell into arrears and the amount due as at 9<sup>th</sup> July 2015 was Kshs.3,382,289.55.

c) The Defendant consequently issued a statutory notice dated 9<sup>th</sup> July, 2015 and a subsequent Notification of sale dated 2<sup>nd</sup> September 2015.

d) The Plaintiff failed to pay the amount due which prompted the Defendant to exercise its statutory power of sale and sell the Plaintiff's property via public auction on 18<sup>th</sup> November 2015.

e) The auction was conducted procedurally and in compliance with the law.

7. At hearing, Ngugi reiterated his claim and denied receipt of any statutory notices.

8. The Plaintiff witness was David Chege Kariuki (PW2), a registered licensed valuer. He produced a valuation report of the property prepared on 16<sup>th</sup> November 2015. He returned the following values:-

Current market value:

Land..... Kshs.5,500,000/=

Developments..... Kshs.4,000,000/=

Total..... Kshs.9,500,000/=

Forced sale value..... Kshs.7,125,000/=

9. Without calling any witnesses, counsel for the parties agreed to the production of a valuation dated 6<sup>th</sup> February 2015 and it was received as defence evidence. It is a valuation report by Cephas Valuers in which the following values were returned:-

i. Current market value:

Land..... Kshs.1,500,000/=

Improvements..... Kshs.3,000,000/=

Total..... Kshs.4,500,000/=

ii. Estimated Reinstatement Cost of the improvements..... Kshs. 3,000,000/=

iii. Estimated Restricted realization price (Reserved price) .....Kshs.3,000,000/=

10. In the submissions filed at the close of the case the Plaintiff identifies two issues:-

i. Did the Defendant serve the Plaintiff with the statutory notices prescribed by the Land Act 2012?

ii. Was the suit property grossly undervalued and therefore sold at a very low price.

In addition to these issues, the Bank raises the question whether the Plaintiff is entitled to the prayers sought.

11. In the matter before the Court, the law requires two statutory notices to be issued upon the chargor prior to the sale of charged land.

12. The first is under section 90 of The Land Act:-

“Remedies of a chargee

(1) 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 in 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.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters—

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under, subsection (1), the chargee may—

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver of the income of the charged land;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land;

(4) If the charge is a charge of land held for customary land, or community land shall be valid only if the charge is done with concurrence of members of the family or community the chargee may—

(a) appoint a receiver of the income of the charged land;

(b) apply to the court for an order to—

(i) lease the charged land or if the charge is of a lease, sublease the land or enter into possession of the charged land;

(ii) sell the charged land to any person or group of persons referred to in the law relating to community land.

(5) The Cabinet Secretary shall, in consultation with the Commission, prescribe the form and content of a notice to be served under this section.”

13. And the second is provided for under section 96 (2):-

“Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

14. In respect to the Bank’s failure to issue a statutory notice, the Plaintiff pleads:-

“The Plaintiff avers that by the time he was served with the aforesaid notification of sale, he had not received from the Defendant a statutory notice of their intention to exercise their power of sale.”

15. So while the Plaintiff does not specify which of the two notices was not served on him, he testifies that he never received the statutory notices, presumably then both notices. This stance is however at odds with the Plaintiff’s own documentary evidence. In his bundle of documents is a letter dated 23<sup>rd</sup> June 2016 in which his lawyer writes:-

“Anthony Burugu & Co. Advocates

23/6/2016

Barclays Bank of Kenya Limited

RE: STATUTORY SALE OF TITLE NUMBER MUGUGA/ JET SCHEME/3575 (the “property”) – PAUL KURIA NGUGI – ACCOUNT NO. 2022946563 CARD NO. 4263991006239259

We refer to the above referenced matter and act on behalf of Mr. Paul Kuria Ngugi.

Our instructions are that under various loan agreements between our client and the Bank, our client procured banking facilities secured by a charge dated 15<sup>th</sup> November 2010 over Title Number Muguga/ Jet Scheme/3575.

In a letter dated 8<sup>th</sup> April, 2015 from the Bank’s Advocate Muriu Mungai & Co. Advocates the Bank issued our client the statutory notice required by law in the event of default in payment of any sums secured by a charge.

Pursuant to the statutory notice of sale our client, in a letter dated 2<sup>nd</sup> September, 2015 from Regent Auctioneers with instructions from the Bank was served with a Notification of Sale of the property through a public auction.

Our client is reliably informed that the sale of the property took place as indicated in the letter from the auctioneers. However, the details of the sale were not disclosed to our client.

In view of the foregoing, kindly procure to within fourteen days (14) of this letter, furnish us with the details of the sale as follows:-

1. The date of the sale;
2. The purchase price;
3. The purchaser;
4. Valuation report of the property prior to the sale;
5. Any agreements entered into between the Bank and the purchaser;
6. Any other document relevant to the sale.

We look forward to your prompt response.

Yours faithfully,

ANTHONY BURUGU & CO. ADVOCATES

Cc: Client.”

16. There lies an admission that “the statutory notice required by law” was served. No complaint is made in respect of service of either of the notices required by law.

17. So in regard to the first issue, I find that the Plaintiff has failed to prove that he was not served with the statutory notices required by statute.

18. On valuation, this Court has before it four valuation reports:-

Date Valuer Market Value Forced Sale Value

8<sup>th</sup> October 2010 Highlands 2,300,000/= 1,700,000/=

28<sup>th</sup> June 2012 Zenith 5,500,000/= 4,400,000/=

16<sup>th</sup> November 2015 Tuliflocks 9,500,000/= 7,125,000/=

5<sup>th</sup> February 2015 Cephas 4,500,000/= 3,000,000/=

19. From the Defence, and this is not disputed by the Plaintiff, the property was sold by public auction on 18<sup>th</sup> November 2015.

20. The first two valuations were conducted over three years prior to the sale of the property while the one of 5<sup>th</sup> February 2015 by Cephas Valuers was commissioned by the Bank and given that it was 9 months to the sale, it was a current valuation in the contemplation of section 97 of the Act. The valuation commissioned by the Plaintiff and conducted by Tuliflocks was carried out just two days before the sale.

21. The difference in values returned by the two last reports is significant. In respect to the forced sale price, the difference is Kshs.4,125,000, that of the Plaintiff being higher.

22. The Plaintiff's counsel submits that it is astounding that the Bank's valuation has a drastic difference with prior valuations. Further, that a close scrutiny of the report reveals that the Bank's valuer did not have access to the property given that the pictures used in the valuation report were taken from an angle which appears to be outside of the property.

23. It seems that the Plaintiff's counsel may have a valid argument in respect to whether the Bank's valuer accessed the property. This is what the valuer remarks in her report:

“The values advised are therefore estimates based on casual observations of the property and full enquiries. For a more detailed and inclusive report, we would request that we be granted proper access to fully inspect the property.”

24. This is an admission by no less the valuer that her valuation may not truly depict the value of the property as she did not, in her words, have “proper access to fully inspect.” In other words, the valuation report was based on limited access and inspection of the property.

25. It does not help the Bank's cause that it did not call the valuer to explain herself. To, for instance, defend the veracity of the valuation notwithstanding that it was arrived at in difficulty of access and inspection.

26. It is in these circumstances that the valuation carried out on behalf of the Plaintiff becomes attractive. It was carried out just two days before the property was sold and the valuer had access to the property. On the value of the improvements, the valuer explains that he used the cost of construction on development at 2,500 per square foot for a plinth area of 1500 square feet. His testimony in this regard was not shaken in cross-examination.

27. The only downside to this report is that the valuer's used comparables for purposes of arriving at the value of the land yet he did not share those comparables with Court. He confessed that it would have explained his report better.

28. Notwithstanding that one setback, the Court is inclined to accept that through the valuation report of Tuliflocks, the Plaintiff has, on a balance of probabilities, proved that the forced sale value of the suit property at the time of sale was Kshs.7,125,000/=

29. In the Plaintiff, the Plaintiff had pleaded that the Defendant sold the suit property at a throw away price in breach of its duty of care. For this breach the Plaintiff had sought general damages (prayer e). The damages would be the difference between the reserve price and the price at which the property was sold.

30. One of the grievances of the Plaintiff is that the Bank refused to furnish him with documents relating to sale. He reiterates this in his written testimony when he states:-

“I have never known for how much the property was sold.”

This assertion was not challenged at hearing. In addition, the Bank did not call any evidence to disapprove that complaint. In prayer (c) of the Plaintiff, the Plaintiff bespeaks disclosure of the purchase price. He has successfully made out a case for it.

31. In the end I enter Judgment for the Plaintiff against the Defendant as follows:-

1. The Defendant shall within 7 days hereof furnish the Plaintiff and the Court, information and documents in support of:-

a) The sale price achieved at the public auction of 18<sup>th</sup> November 2015.

b) The amount credited into the Plaintiff's account on realization of the suit property.

2. The Plaintiff shall have general damages being the difference between the forced sale value of Kshs.7,125,000/= and the purchase price achieved at the auction.

3. The Plaintiff shall also have costs of the suit.

4. The Court shall appoint a return date when it shall receive the information and documents directed in order 1 and to make final orders.

**Dated, Signed and Delivered in Court at Nairobi this 22<sup>nd</sup> Day of January 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Miss Feksi for Plaintiff.

Kenneth Wilson for Defendant.

Court Assistant: Nixon.