



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 224 OF 1995

MICHAEL KARIUKI KIMANI (Suing as administrator ad litem of the

Estate of the late SAMUEL KIMANI GATHAA).....PLAINTIFF

VERSUS

KIATHAGANA FINANCIAL MANAGEMENT LTD.....DEFENDANT

JUDGMENT

This suit was filed on 20th January 1995 and later amended vide a plaint dated 25th April 2019. It is alleged that on or about September 1994 the defendant agreed to lend the deceased plaintiff Kshs. 200,000 which was to be paid on or before the last day of February 1995. The interest was agreed at Kshs. 40,000 and the deceased plaintiff issued four cheques of Kshs. 40,000 covering the total interest payable. A charge of Kshs. 200,000 was to be registered against plot title number Ngenda/Gathage/702. At the request of the defendant the deceased plaintiff gave the defendant his log book for vehicle number KUH 598.

On 16th January 1995 without prior notice the deceased plaintiff received a letter dated 6th January 1995 from Juhudi Auctioneers which notified him that the auctioneers acting on the instruction of the defendants would be selling the above mentioned property to recover Kshs. 414,720. The defendants further proceeded to repossess motor vehicle No. KUH 598 and sold the same but failed to account for the proceeds. The defendants thereafter proceeded to sell the deceased plaintiff's land through an alleged public auction where the bidder was the defendant herein. The defendant proceeded to transfer the land to itself and is now threatening to evict the beneficiaries of the estate of the deceased plaintiff from the suit land.

It is the plaintiff's case that the actions by the defendants were unlawful and illegal and therefore seeks judgment against the defendant for;

- a. The registration of the defendant as proprietor of Land Parcel No. Ngenda/Gathage/702 be and is hereby cancelled and revoked.**
- b. The land registrar to issue a title in the name of the deceased Samuel Kimani Gathaa for Land Parcel No. Ngenda/Gathage/702**
- c. Costs and Interest.**

The matter proceeded to full hearing where **PW1 Michael Kariuki Kimani** testified and told the court that he is the administrator of the estate of Samuel Kimani Gathaa who was his father. On or about September 1994 the deceased borrowed Kshs. 200,000 from the defendant company which was to attract an interest of Kshs. 40,000. The principle together with interest was to be repaid on or before the last day of February 1995. The deceased offered Ngenda/Gathege/702 as security and at the time the land was valued at Kshs. 850,000. A charge to secure the amount borrowed was duly registered against the title. The defendant additionally asked the deceased to surrender the log book of KUH 598 valued at Kshs. 500,000 as alleged additional security.

On 16th January 1995 the defendant served the deceased with a letter dated 6th January 1995 from M/S Juhudi Auctioneers together with a notification of sale. The property was set to be sold on 31st January 1995 to recover Kshs. 414,720 and by then the deadline for payment of the principle together with the interest was not due. This therefore prompted the filing of the suit herein.

The public auction was conducted on 24th November 1995 and the defendant was the highest bidder at Kshs. 200,000. The defendant thereafter repossessed and sold Motor Vehicle KUH 598 valued at Kshs. 500,000 without accounting for the proceeds. The defendant has since then threatened the family of the deceased with eviction and would be rendered destitute if the defendant carries out the threatened eviction.

Counsel for the plaintiff in his submissions argued that the chargee's statutory power of sale had not arisen and it could therefore not purport to realize the security. The defendant repossessed the plaintiff's vehicle which was valued at Kshs. 500,000 and as such the loan amount had been recovered.

It was also pointed out that the chargee did not serve the chargor with a statutory notice of sale which is mandated by Section 74(1) & (2) of the Registered Land Act and that the burden of proving service of the statutory notice is on the chargee. In support of this contention, reference was made to **Nairobi HCC 329 of 2014 Albert Mario Cordeiro v. Vishram Shamji** where the court cited the holding in **Nyangiro Ochieng v Kenya Commercial Bank CA No. 148/1995 (1996) eKLR** where the court of appeal stated as follows;

“It is for the chargee to make sure that there is compliance with the requirements of S.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”.

Counsel for the plaintiff submitted that the auction conducted by the chargee was unlawful. It was contended that Section 77 of the Registered Land Act enjoins the chargee in exercising its power of sale to act in good faith and have regard to a reserve price and conditions of sale as the chargee thinks fit. At the time there was no outstanding liability the chargor having repossessed and sold the plaintiff's motor vehicle KUH 598. The property was sold at an undervalue price and there is no evidence that the property was subject to a reserve price. The chargee sold the property to itself and shows an element of bad faith in its conduct.

The plaintiffs contended further that the defendant is not licensed under the Banking Act to carry out financial business, not licensed to use the word financial in its name and therefore its business was illegal. The contract between the deceased and the defendant was illegal and no court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal.

Analysis and Determination

At the time of this judgement this court takes notice that the defendant did not file a defence and therefore evidence by the plaintiffs remains unchallenged.

It is apparent to this court that the suit property is registered under the **Registered Land Act** (Cap 300) (now repealed by the **Land Registration Act, 2012**). When the case was filed the Registered Land Act was still in force, its repeal having come on 2 May 2012 when the Land Registration Act, 2012, came into force. Section 159 of the Registered Land Act, provided for the forum where disputes touching on land registered under the regime of the Registered Land Act, ought to be heard. It was drawn as follows :-

159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.

The Environment and Land Court was mooted in the Constitution of Kenya, 2010 which was promulgated on 27 August 2010. **Article 162 (2) (b)** of the Constitution, mandated Parliament to establish a superior court to hear disputes related to land and the environment. Pursuant to this, the **Environment and Land Act, 2011** was passed, which statute created the Environment and Land Court (ELC). That Act provided for what should happen to matters that were pending before courts through the transitional provision at **Section 30** which is drawn as follows :-

30. Transitional provisions

(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

It is discerned that pending matters, before a court of competent jurisdiction, are to continue to be heard by the same courts until the ELC is established or as may be directed by the Chief Justice or the Chief Registrar. In other words, the statute gave power to the Chief Justice or Chief Registrar to give directions on the hearing of cases that were pending before courts of competent jurisdiction, before and after the establishment of the ELC.

The above provisions echo what is prescribed in **Section 22 of Schedule 6** of the Constitution which deals with Transitional and Consequential Provisions on judicial proceedings. It provides as follows:-

22. All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.

It can therefore be inferred from the above authorities that since this matter was pending in this court before the Environmental and Land Court came into operation the jurisdiction of this court to hear and determine the matter is unaffected. Having come to that conclusion this court shall therefore proceed to determine the matter on its merit.

It is the plaintiff's position that he is the legal representative of the estate of Samuel Kimani Gathaa. The plaintiff indicated that the deceased on or before September 1994 borrowed Kshs. 200,000 from the defendant that was to accrue interest of Kshs. 40,000 a month. The sum together with the interest was to be fully paid on or before the last day of February 1995. A charge for Kshs. 200,000 was registered on the deceased's title No. Ngenda/Gathage/702 and further the deceased surrendered the log book of his motor vehicle KUH 598 as additional security. On perusal of the file it is clear that the deceased fell into arrears which prompted the defendant to auction the deceased's said plot and motor vehicle.

It is however the plaintiff's allegation that the defendant's actions were unlawful and illegal as the chargee's statutory power of sale had not arisen, the chargee did not serve the chargor with a statutory notice of sale and that the defendant repossessed the deceased's motor vehicle and did not account for the proceeds.

It is a precondition that to exercise the statutory power of sale legally, there must be established a default in the fulfillment of the obligations under the charge followed with strict compliance with the requirement that the chargee issues the various notices under the law. For this case the charge having been executed and the resort to exercise of power of sale sought during the tenure of **Registered Land Act**, the Defendant was bound to have issued and serve notices under **Section 65 and 74** of the said Act. This court will therefore consider the Repealed Registered Land Act because it was the law applicable at that particular time before the enactment of the Current Land Act No. 6 of 2012. Section 65 (2) of the Registered Land Act, states as follows:-

“65 (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.”

This court's reading and interpretation of this Section is persuaded by the decision by Judge Munyao Sila in **Susan K. Baur & another v Shashikant Shamji Shah & 2 others [2017] eKLR** where held that:-

“This section 65(2) needs to be properly understood and it invokes two scenarios. In the first scenario, there is a debt but the date of repayment is not specified. Let us assume that Tom gives Jerry a loan of Kshs. 1 Million, which is secured by a charge over Jerry's property, but in their transaction, it is not mentioned when Jerry needs pay the debt to Tom. In other words, the date of repayment is not specified. In such a case, before Tom can move to sell, he must first call the debt by giving Jerry a notice of 3 months. It is on expiry of this 3 month notice that the debt can now be said to be payable. The second scenario is where there is a date specified for repayment of the debt. Let us say, that Tom agrees with Jerry that the debt is payable on 31 December of the given year. Here there is a specific date of repayment. In such a case, Tom in the event that he has not been paid by the due date, needs to demand the debt on the date specified. If he does not demand the debt on the date specified, and that day passes, then Tom needs to give Jerry a 3 month notice calling for the debt. I think the law envisages that if the call is not made on the date specified, then this is treated as a waiver, which means that a notice of 3 months calling for the debt, now requires to be made. That to me is the interpretation of what I would give to Section 65 (2) of the Registered Land Act.

In the case of **Kipsang Sawe Sisei V Kenya Commercial Bank Limited [2005] eKLR**, the court had this to say;

“However, the notice cannot be given until the principal sum has become due which in this case is three months after a demand has been made under Section 65(2).”

On expiry of the notice under Section 65(2) is when a statutory notice under Section 74 would kick in. Section 74 is drawn as follows:-

74 (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:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

On perusal of the list of documents produced by the plaintiff's advocates for the defendant wrote a letter to the Crown auctioneers dated 26th October 1995 instructing them of the sale of Ngenda/Gathage/702 by auction to be carried out on 30th November 1995. The said property was thereafter sold to the defendants by auction on 24th November 1995.

Indeed, there is nothing on record showing that a notice was ever served upon the plaintiff as the defendant herein did not appear in court to defend this suit even after several summons were issued. The court of appeal in **Nyangilo Ochieng & Another v Kenya Commercial Bank (supra)** held that once a chargor alleges non receipt of a statutory notice it is for the chargee to prove that such notice was in fact sent.

In this instant suit the plaintiff denies receiving a notice and the fact that the defendants has not provided any evidence to rebut the same then one can infer that no demand notice under Section 65 was sent and therefore no proper notice was served upon the plaintiffs. This therefore means that the auction that was conducted on 24th November 1995 was unlawful and illegal for being contrary to the provisions of the statute.

I am satisfied that the plaintiff has proved his case on a balance of probabilities. Judgment shall be entered in favour of the plaintiff against the defendant as follows:-

1. The registration of the defendant as proprietor of Land Parcel No. Ngenda/Gathage/702 be and is hereby cancelled and revoked.

2. The land registrar to issue a title in the name of the deceased Samuel Kimani Gathaa for Land Parcel No. Ngenda/Gathage/702.

Costs and Interest of the suit to the plaintiffs.

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021

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S. CHITEMBWE

JUDGE