



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 457 OF 2006

BETWEEN

PETER KURIA MUNYUIRA.....PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED...1ST DEFENDANT

DANIS MUNA.....2ND DEFENDANT

JUDGMENT

Plaintiff's Case

1. The plaintiff's case is set out in the Further Amended Plaint dated 14th December 2008. As the legal owner of land parcel DAGORETTI/RIRUTA/S.296 ("the suit property"), the plaintiff charged the suit property to the 1st defendant by a charge dated 5th March 1998 to secure a loan of Kshs. 1,520,000.00 repayable in monthly instalments of Kshs. 33,642.00.

2. The gravamen of the plaintiff's case is that on or about 4th August 2006, without any notice, the 1st defendant in collusion with auctioneers raided the suit property and attempted to evict him. He contended that unknown to him, the property had already been sold by an auction that purportedly took place on 31st May 2006 and the property was fraudulently transferred to the 2nd defendant.

3. The plaintiff contended that the auction did not take place on 31st May 2006 and that the 1st defendant did not serve him with statutory notice notifying him of default and its intention to sell the suit property in the event he did not settle the debt. He also stated that the 1st defendant was demanding an unreasonable amount of money from him and that it had failed to give him accounts. He also stated that the 1st defendant colluded with the 2nd defendant to register the property in the 2nd defendant's name while interlocutory applications were pending in this suit. As a result, the plaintiff prayed for the following reliefs:

a) A declaration that the purported sale by auction of all that piece or parcel of land known as DAGORETTI/RIRUTA/S.296 NAIROBI situate in Dagoretti, Riruta within Nairobi by the 1st Defendant to the 2nd Defendant and the threatened eviction of the Plaintiff from therefrom is fraudulent and unlawful.

b) A permanent injunction be issued restraining the Defendants/Respondents by themselves, agents, servants, employees or otherwise, howsoever from evicting, ejecting or in any way interfering with possession or occupation by the Plaintiff of all that piece or parcel of land known as DAGORETTI/RIRUTA/S.296 NAIROBI situate in Dagoretti, Riruta within Nairobi.

c) A permanent injunction be issued restraining the Defendants/Respondents by themselves, agents, servants, employees or otherwise howsoever from selling, transferring, alienating or in any way disposing of all that piece or parcel of land known as DAGORETTI/RIRUTA/S.296 NAIROBI situate in Dagoretti, Riruta within Nairobi.

C(i) An order of rectification directing the Chief Lands Registrar to rectify the Register of all that piece or parcel of land known as DAGORETTI/RIRUTA/S.296 NAIROBI situate in Dagoretti, Riruta within Nairobi by cancelling the registration of DANIS MUNA and restoring the Registration of PETER KURIA MUNYUIRA as the lawful proprietor of the said parcel of land.

d) General damages.

e) Costs.

f) Interests on (d) and (e) above.

1st Defendant's Case

4. The thrust of the 1st defendant's defence was that the plaintiff admitted his indebtedness. It stated that the loan was rescheduled many times at the plaintiff's request but he failed to pay the debt. The 1st defendant further stated that upon default, it issued and sent the statutory notice by registered post in 2005. The statutory notice was never returned and since the plaintiff failed to pay the amount demanded., the 1st defendant proceeded to sell the suit property at an auction on 31st May 2009 after the court dismissed the plaintiff's application to stop the sale. The suit property was sold to the 2nd defendant who emerged as the highest bidder at the auction.

2nd Defendant's Case

5. The 2nd defendant's defence was that he was a bona fide purchaser of the suit property for value. He stated that he attended the auction on 31st May 2009 where he was declared the highest bidder. He paid the full purchase price and the suit property was transferred in to him.

The Hearing and Issues for Determination

6. Although hearing of the case commenced before Gikonyo J., the parties agreed to start the case afresh. They recorded a consent in court on 19th July 2019 where they agreed to deal with the matter as follows:

(1) Parties to proceed on the basis of the Agreed bundle of documents dated 16th July 2019 and filed on 19th July 2019.

(2) The witness statements in the agreed bundle be and are hereby adopted as evidence.

(3) The 1st defendant to call one (1) short witness for the purpose of explaining the document appearing at page 189 of the Agreed bundle.

(4) Thereafter, the plaintiff to file and serve written submissions within thirty (30) days and the Defendants to file and serve their respective written submissions within thirty (30) days.

7. The parties framed the following issues for resolution by the court:

(1) Whether the plaintiff was served with a statutory notice pursuant to section 74 of the Registered Land Act (now repealed).

(2) Whether the auction of the suit property scheduled for 31st May 2006 was cancelled and never took place.

(3) Whether the suit property was sold below the reserve price.

(4) Whether the transfer of the suit property to the 2nd defendant was lawful.

(5) Whether the Plaintiff owes the 1st Defendant any loan arrears, and if so how much.

8. Pursuant to the consent, the defendant called one witness, Doreen Nkirote Mwenda (DW 1) to explain how the statutory notice was sent to the plaintiff. Since the parties did not call witnesses, it would be difficult to resolve any factual matters requiring oral evidence particularly given that that parties denied themselves the right to cross-examine their respective witnesses apart from PW 1. I shall confine myself to what is clearly documented in line with the agreed issues for determination.

9. It is important to point out that the subject matter of this suit is governed by the **Registered Land Act (Chapter 300 of the Laws of Kenya)** which was in force at the time and which had now been repealed by the **Land Registration Act, Act No. 3 of 2012**. I now turn to consider the issue raised by the parties.

Whether the statutory notice was served

10. DW 1 testified that the statutory notice dated 18th January 2005 was sent to the plaintiff by registered post to his address, P O BOX 11785, Nairobi. She produced the Dispatch Book which had the plaintiff's name and address as entry No. 1191 as shown at Page 092. The page is date stamped 27th January 2005 by the Postal Corporation of Kenya. Attached to the page is a certificate of posting date showing the 1st defendant as the sender and the documents addressed to "1175 -97". PW 1 testified that the Dispatch Book was the one used to record all the letters sent by the 1st defendant by registered post. Counsel for the plaintiff suggested to DW 1 in cross-examination that the certificate of posting was not valid as it did not show the plaintiff's address.

11. It is not in dispute that failure to serve the statutory notice is a fundamental breach of the provisions of **section 74** of the **Registered Land Act (Repealed)** as it derogates from the chargor's equity of redemption. Without service of valid statutory notice, the power of sale does not crystallize and any act done by the Bank to dispose of the suit property is null and void. In **Nyagilo Ochieng & Another v Fanuel Ochieng & 2 Others [1995-1998] 2 EA 260**, the Court of Appeal elucidated the provisions of **section 74(1)** of the **Registered Land Act (Repealed)** as follows:

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.

12. The question for resolution is whether the 1st defendant proved on the balance of probabilities that it sent the statutory notice to the plaintiff. It is not in dispute that the plaintiff's address was P O Box 11785, Nairobi. Although the specific certificate of posting did not show the plaintiff's address, Page 092 show that the letter addressed to the plaintiff was one of the 7 listed letters sent on 27th January 2005. The certificate of posting shows that the letters No. 1175 to 1197 reflected on the certificate of posting were sent on the material day to the plaintiff's address. The Dispatch Book which runs from page 001 to Page 098 from 31st October 2003 to 14th February 2005 shows that because of the volume of letters sent by the 1st defendant, it would list all the addresses names and address from No. 001 to No. 1247. On each date when letters were sent, the serial number corresponding to the address would be endorsed on the certificate of posting. Thus, for example, on the date the letter to the plaintiff was sent, the certificate of posting shows that letters Nos. 1191 to 1197 were sent and to confirm as much, the page of the Dispatch Book was stamped by the Postal Corporation.

13. The Dispatch Book was prepared in the ordinary course of business, it runs in a chronological order and there is no evidence that it has been tampered with. In the circumstances and based on the evidence I have outlined, I find and hold that the statutory notice dated 18th January 2005 was sent to the plaintiff by registered post.

Whether the auction took place on the date scheduled

14. In the plaint and witness statement, the plaintiff states that the suit property was advertised for sale on 31st May 2006 and that he was never notified but found out about the sale from the advertisement. He stated that the auction did not take place as he approached the 1st defendant who agreed to call off the auction whereupon he deposited Kshs. 100,000/- in his mortgage account and proposed to settle the outstanding amount in monthly instalments of the Kshs. 60,000/-. He stated that the 1st defendant confirmed receipt of the Kshs. 100,000/- and promised to consider the proposal by 3rd August 2006. It is only later that he learnt that the property had been sold.

15. The 1st defendant denied the plaintiff's allegations. From its defence and witness statement of the Legal Manager, Migui Mungai, the auction was scheduled for 31st May 2006, and two days prior to the auction, the plaintiff filed Constitutional Petition No. 276 of 2006 against the 1st defendant in which he sought an injunction to stop the auction and a declaration that his fundamental rights and freedoms had been infringed. The application was dismissed on 30th May 2006 and the auction proceeded on 30th May 2006.

16. It is the burden of the plaintiff to prove, on the balance of probabilities, that the auction did not take place. On the basis of the material before me, I am more inclined to hold that the auction took place. It took place after the court dismissed the plaintiff's application for injunction to restrain the sale. The auctioneer, Joseph Mungai Gikonyo t/a Garam Investments, in his statement dated 29th October 2015 gave an account of the auction he conducted. He produced the attendance list of the bidders and the memorandum of sale which showed that the 2nd defendant was the highest bidder. The fact that the auction took place was also supported by the 2nd defendant in his statement.

17. In accordance with the parties consent to admit their respective statements as evidence, I do not find any basis to reject the auctioneers or 2nd defendant's statement. On the other hand, the plaintiff does not state in any of his statements that he went to the auction venue and found that the auction did not take place as advertised and scheduled in accordance with the notices published in the Daily Nation of 15th and 29th May 2016. I therefore find and hold that the plaintiff has not established on the balance of probabilities that the auction did not take place.

Whether the property was sold below the reserve price

18. Although this issue was framed, it is not apparent from the plaint that it was pleaded as part of the plaintiff's cause of action. The basis of

such a claim must be a valuation report to show the market value, forced sale value and reserve price at the time the auction was conducted. The plaintiff did not produce any valuation report in evidence to establish the value of the property before or at the sale. I therefore find and hold that the plaintiff has not proved that the suit property was not sold below the reserve price.

Whether the transfer of the suit property to the 2nd defendant was lawful.

19. I have found that the 1st defendant sent the statutory notice to the plaintiff hence the 1st defendant's statutory power of sale had arisen and it was entitled to sell the property. I have also found that the auction took place on 31st May 2019 and that the 2nd defendant, being the highest bidder bought the property. The plaintiff's equity of redemption was therefore extinguished (see ***Savings and Loan Kenya Limited v Mayfair Holdings Limited KSM CA Civil Appeal No. 152 of 2006 [2012] eKLR***). The plaintiff has not proved any fraud involving the 2nd defendant hence I find and hold that the transfer of the suit property to the 2nd defendant was lawful.

Whether the Plaintiff owes the 1st Defendant any loan arrears, and if so how much.

20. From the documentary evidence on record, there are clear admissions from the plaintiff that he was indebted to the 1st defendant. The plaintiff did not pray for accounts from the 1st defendant. The 1st defendant did not have an opportunity to answer to that request and also produce accounts. I also note that the 1st defendant did not file any counterclaim for judgment for any outstanding amount. I therefore decline to enter into the inquiry on how much the plaintiff owed the 1st defendant.

Conclusion

21. I find that the plaintiff has failed to discharge his burden of proving his case against the defendants. The court cannot grant the prayers sought in the Further Amended Pleadings. Consequently, I dismiss the suit with costs to the defendants.

DATED and DELIVERED at NAIROBI this 30th day of JANUARY, 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr K'Bahati instructed by K'Bahati and Company Advocates for the plaintiff.

Mr Mbaluto instructed by Oraro and Company Advocates for the 1st defendant.

Mr Ogoro instructed by Ogoro Juma and Company Advocates for the 2nd defendant.