



REPUBLIC OF KENYA



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**Family Shade Africa Limited v Mukuria & another (Environment & Land
Case 100 of 2020) [2023] KEELC 19804 (KLR) (30 August 2023) (Judgment)**

Neutral citation: [2023] KEELC 19804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 100 OF 2020
EK WABWOTO, J
AUGUST 30, 2023**

BETWEEN

FAMILY SHADE AFRICA LIMITED PLAINTIFF

AND

JAMES GITAUS MUKURIA 1ST DEFENDANT

JANE WANJIKU GITAU 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 20th May 2020, the Plaintiff sought for Judgment against the Defendants for:-
 - a. A permanent injunction restraining the Defendants from trespassing on the suit property known as Dagoretti/Waithaka/846.
 - b. An eviction order against the Defendants to vacate the suit property known as Dagoretti/Waithaka/846.
 - c. Mesne profits.
 - d. Costs of this suit.
 - e. Any other relief that this Honourable Court may deem fit to grant.
2. The 1st and 2nd Defendants entered appearance and filed statement of defence dated 21st April 2021. They denied the contents of the plaint and sought for the dismissal of the suit with costs.

The Plaintiff's case

3. It was the Plaintiff's case that it was the registered proprietor of the suit premises known as Dagoretti/Waithaka/846. The Plaintiff averred that the Defendants are husband and wife and that the 1st Defendant was the previous registered proprietor of the suit premises whose title and ownership to



the premises was extinguished through the sale of the property being Dagoretti/Waithaka/846 by way of Public auction.

4. It was also averred that the 1st Defendant herein had been granted a loan from Co-operative Bank of Kenya limited that was secured by a charge that was registered against the title known as Dagoretti/Waithaka/846 in favour of the bank.
5. The Plaintiff purchased the property known as Dagoretti/Waithaka/846 from Co-operative Bank of Kenya Limited by way of a public auction held on 28th May 2015 which was conducted by Legacy Auctioneers for Kshs 8,000,000/-
6. It was also averred that the Plaintiff purchased the suit premises being Dagoretti/Waithaka/846 from Co-operative Bank of Kenya Limited in exercise of their statutory powers of Sale as a Chargee.
7. It was also the Plaintiff's case that after the purchase of the property known as Dagoretti/Waithaka/846 by the Plaintiff, the 1st Defendant through the 2nd Defendant lodged a caution against the said property on 20th July 2015 seeking to restrict the transfer of the said property in favour of the Plaintiff.
8. The 2nd Defendant's caution was subsequently lifted by the Environment and Land Court vide an order issued in ELC Miscellaneous Application No. 300 of 2015 on 29th January 2018 and that after the removal of the caution, consent was obtained from the Land Control Board by the Chargee Co-operative Bank of Kenya Limited to transfer the suit premises to the Plaintiff on 10th October 2018.
9. The Plaintiff averred that the transfer of the suit property being Dagoretti/Waithaka/846 in favour of the Plaintiff effected and the Plaintiff was registered as the proprietor of the suit premises on 16th July 2019.
10. During trial, William Wanjohi Mureithi the Managing Director of the Plaintiff testified as PW1 and was the sole Plaintiff's witness in the suit. He relied on his witness statement and produced bundle of documents dated 20th May 2020 as his evidence in chief and added that the Plaintiff seeks for eviction orders against the Defendants from the suit property.
11. On cross-examination, he stated that the auction took place on 28/05/2015 and the same was held at the Offices of Legacy Auctioneers wherein several people attended the same. He stated that he did not request for a valuation report but had bought the property for Kshs 8,000,000/- from the bank. He also stated that it was not his responsibility to search for the owners of the property or obtain the spousal consent. He also stated that he was not aware of any other case pending.

The Defendant's case.

12. The Defendants filed a statement of defence dated 21st April 2021. The Defendant denied the averments made in the plaint and stated that the purported sale by way of auction was illegal for the reason that the 1st Defendant was never issued with the mandatory statutory notice before the purported auction sale.
13. It was also averred that the lifting of the caution in ELC Miscellaneous Application No. 300 of 2015 did not validate or in any way approve the illegal sale of the suit property and further that the purported transfer of the suit property was not carried out in compliance with mandatory statutory provisions.
14. It was also the Defendant's case that the issues surrounding the legality of the charge and the purported sale are pending before the High Court in HC (Commercial & Tax Case No. 230 of 2019. James Gitau Mukuria –Vs- Peter Kamau Munene and Cooperative Bank of Kenya.
15. During trial, both the 1st and 2nd Defendants testified as DW1 and DW2 respectively.



16. James Gitau Mukuria, DW1 adopted his witness statement and bundle of documents dated 5th June 2021 as part of his evidence in chief. He stated that the Plaintiff bought his land from Cooperative Bank through an auction and the bank never gave him a notice of any default since he only received a notice of the notification of the intended sale by the auctioneer on behalf of the bank.
17. It was his testimony that he never received any loan and he never attended the auction. He also added that he did his own valuation and that the property was valued at Kshs 22,000,000/- yet it was sold for Kshs 8,000,000/-
18. He further stated that at the time of the auction, he was living on the suit property with his family and that his spouse never gave any spousal consent.
19. On cross-examination, he stated that no counterclaim had been filed by the Defendants. He also stated that he is challenging the title in another case even though those pleadings had not been filed in this suit. He also stated that the said case does not involve the Plaintiff since its only between the Defendants and Cooperative Bank of Kenya. He also stated that he is yet to hand over vacant possession to the Plaintiff.
20. When re-examined, he stated that he had indicate in his witness statement that the suit property was undervalued. He also stated that the suit property is his matrimonial property and he has nowhere to go.
21. Jane Wanjiku Gitau, DW2 equally relied on her witness statement and documents produced by DW1 in her evidence in chief.
22. It was her testimony that she is the spouse of DW1 and they got married in 1990 through a customary marriage, then later had a Christian marriage in 2008. It was also her testimony that she has been staying at the suit property since the commencement of their marriage and they are still residing on the same. She also stated that she never gave nor signed any documents giving her spousal consent before the sale of the suit property.
23. When cross-examined, she stated that the bank never gave her any documents to sign. She also stated that the bank has been sued separately by the 1st Defendant in another case which she is not a party. She also stated that she lodged a caution on the property after the auction.
24. When re-examined, she stated that she discovered the property had been sold in 2015 and subsequently thereafter filed a case against the bank.

The Plaintiff's submissions.

25. The Plaintiff filed written submissions dated 12th April 2023 through the law firm of Mungai Kalende & Co. Advocates. It was submitted that the sole issue for determination by this court was whether the eviction orders sought ought to be granted.
26. The Plaintiff further submitted that they purchased the property known as Dagoretti/Waithaka/846 from Co-operative Bank of Kenya Limited by way of public auction held on 28th May 2015 at 11.a.m. by Legacy Auctioneers at kshs 8,000,000/- The Co-operative Bank of Kenya Limited was exercising its statutory powers of sale as the chargee.
27. The Defendants lodged a caution against the title on 20th July 2015 restricting transfer of the suit property in favour of the Plaintiff. The caution was subsequently lifted by the Environment and Land Court vide an order issued in ELC Miscellaneous Application No. 300 of 2015 on 29th January 2018.



28. Upon removal of the caution, the suit property was transferred to the Plaintiff by the Chargee Cooperative Bank of Kenya Limited and the Plaintiff registered as the owner of the suit premises and issued with a title on 16th July 2019.
29. It was also submitted that in the case before this Honourable Court, the 1st and 2nd Defendant have not demonstrated the Plaintiff had any notice of irregular exercise of the statutory power of sale. As per the testimony of the Plaintiff, before the trial court, the Plaintiff action to purchase was based on the offer for sale from the Cooperative Bank of Kenya Limited exercising its powers as a chargee. The Plaintiff duly entered into an agreement for sale with the bank and that the court should therefore be reluctant to diminish the exercise of the statutory power of sale stemming from statute in absence of impropriety being attributed to the purchaser.
30. It was further submitted that no valid grounds have been raised in the suit as against the Plaintiff calling upon this Honourable Court to interfere with law regarding protection of the exercise of statutory power of sale and as rightly held by Ringera J. (as he then was) in *Bii Vs. Kenya Commercial Bank Limited* (2001) KLR 458. Once property is offered as security it by the fact becomes a commodity for sale whose loss cannot be compensated in damages.
31. The Property having been lawfully transferred to the Plaintiff as a bonafide purchaser for value and the Plaintiff being the current registered proprietor of the suit premises entitled to vacant possession, the Defendants have no legal remedies over the property. The Plaintiff urged the court to grant an order of eviction against the Defendants from the suit property being Dagoretti/Waithaka/846.
32. The Plaintiff also relied on the following cases which the court has considered in support of its submissions; *Nancy Khoya Amadiva Vs. Expert Credit Limited and Another*, Civil Appeal No. 133 of 2006, *Bii Vs. Kenya Commercial Bank Limited* (2001) KLR 458, *David Katana Ng'ombe Vs Shafi Grewal Kaka* Civil Appeal No. 43 of 2011 and *Margaret Karwira Mwongera Vs Francis Kofo* (2019) eKLR.

The Defendants Submissions.

33. The Defendants filed their written submissions dated 12th May 2023 through the firm of Achach & Associates Advocates. Counsel outlined the following issues for determination by the court.
 - i. Whether the auction was conducted in a lawful manner.
 - ii. Whether the Plaintiff acquired good title.
34. It was submitted that Section 90 of the *Land Act*, No. 6 of 2012 provides for remedies of charge in the event of default of payment. Section 90(1) of the *Land Act* provides for issuance of a notice to the chargor.
35. It was further submitted that the *Land Act*, No. 6 of 2012 provides for a second notice which should be issued to a defaulting chargor. This is provided for in Section 96(2) of the *Land Act* which stipulates as follows;

“Before exercising the power to sell the charged land, the charge 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 charge land until at least forty days have elapsed from the date of the service of that notice to sell.”



36. Rule 15(b) of the Auctioneers Rules 1997 also provides for a notice to sell;
- “Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property.....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.”
37. Counsel submitted that, it is trite law that before exercising the power of sale, a chargee needs to serve the notices to the defaulter and the guarantor as has been highlighted in various case law. The chargor failed to issue the notices which is a fundamental breach of procedure.
38. Reliance was placed in the case of *Albert Mariod Cordeiro & Another Vs Vishram Shamji* (2015) eKLR, the court pronounced itself on the issue on notices and stated as follows;
- “Some arguments I have encountered seem to suggest a Notice of Redemption under Rule 15 of the *Auctioneers Act* is sufficient for purposes of Section 96(2) of the *Land Act*. I think, there is clear legal bifurcation between these two laws and any attempt to fuse the two only increases the confusion of the purpose of section 96(2) of the *Land Act*. I may speculate here. Perhaps one may think that the Redemption Notice under the *Auctioneers Act* is sufficient because; it comes after the statutory Notice; it is for 45 days which is more than the 40 days under section 96(2) of the *Land Act*; serves the purpose of giving an opportunity to the Chargor to redeem the property; and notifies the charger of impending sale of the property if the sum demanded is not paid within the period of 45 days provided in the Notice. But I should state that the requirements under section 96(2) of the *Land Act* are mandatory and quite separate from the requirements under the *Auctioneers Act*. The Redemption Notice under the *Auctioneers Act* is also mandatory but it is issued separately from and after the one under section 96(2) of the *Land Act*; strictly in that sequence.”
39. The Defendants also cited the case of *David Limo Bundotich V Housing Finance Company of Kenya Limited* (2022) eKLR where the court stated as follows;
- “.....the absence of a Notice to sell under section 96(2) of the *Land Act*, the Statutory Power of Sale will not have legally accrued even if a redemption notice has been issued.”
40. It was also submitted that Section 89 of the *Land Act*, No. 6 of 2012 provides for equity of redemption and that the equity of redemption had not been properly extinguished owing to the fact that the Defendants were not served with the proper notices.
41. It was also argued that Section 97(2) of the *Land Act*, No. 6 of 2012 provides for the duty of the chargor to conduct a sale valuation of the property before exercising the right to sell.
42. Counsel for the Defendants submitted that the 1st and 2nd Defendants are married having conducted a tradition ceremony in the year 1987 and later held a Christian marriage in the year 2008 and that the Defendants settled in the property after their wedding.
43. It was the Defendants submission that the auction was carried out unprocedurally and therefore the same was not lawful.
44. On whether or not the Plaintiff acquired a good title, it was submitted that the Plaintiff did not acquire a good title because the land was obtained unprocedurally. Reliance was placed on the cases of *Kenya National Highway Authority –Vs- Shalien Masood Mughal & 5 others* (2017) eKLR Republic –Vs-



Minister for Transport & Communications & 5 others Ex parte Waaship Garbage Collection & 15 others Mombasa HCMCA No. 617 of 2003 (2006) 1 KLR (E & L)563.

45. The Defendants concluded their submissions by urging the court to dismiss the suit with costs and also revocation of the Plaintiff's title.

Issues for determination.

46. I have considered the pleadings filed by the parties, the documents adduced in evidence and the oral testimony tendered by the witnesses. I have also read the written submissions filed by the parties. The facts of the case are already summarized herein above and there is no need to repeat them. In the court's considered view, the issues for determination in this matter are as follows: -
- i. Whether the sale and transfer of the suit property to the Plaintiff was lawful.
 - ii. Whether the Plaintiff is entitled to the orders sought in the plaint.

Analysis and Determination.

47. I shall now proceed to analyze the issues sequentially.
48. The Defendants are currently residing in the suit property even though the Plaintiff is claiming its ownership.
49. From the evidence that was tendered herein, it is evident that the Plaintiff purchased the suit property through a public auction on 28th May 2015 which auction was conducted by Legacy Auctioneers at Kshs 8,000,000/-. The Defendants alleged that the auction was done unprocedurally and the same is illegal. However, during trial there was no evidence of any illegality that was brought out by the Defendants.
50. In the instant case, after purchasing the suit property through the auction, the Plaintiff was subsequently registered as its owner of the suit on 16th July 2019 and a copy of the title confirming the same was produced during trial. It is also not in doubt that even after the purchase, the Plaintiff has been unable to take possession of the suit property since the Defendants herein have failed to vacate. Section 26(1) of the [Land Registration Act](#) states as follows: -

“The certificate of title issued by the Registrar upon registration or to a purchase of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named is proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that property shall not be subject to challenge except...”

The suit property is currently registered in the names of Family Shade Africa. The same is therefore prima facie that the said Family Shade Africa is the proprietor of the suit land and is the indefeasible and absolute owner and further it enjoys all the rights conferred to an absolute owner by section 24 and 25 of the [Land Registration Act](#). Section 24 of the [Land Registration Act](#).

51. What is evident herein, is that the Plaintiff is the proprietor of the suit property. As a proprietor, its right to property is guaranteed by Article 40 of [the Constitution](#) of Kenya. The Plaintiff herein did purchase the suit property and it has the right to own it and no one should deprive the Plaintiff of the said property or any interest or right over the same.



52. Having now carefully considered the evidence tendered and submissions by the parties, the court finds that the Plaintiff has proved on a balance of probability that it acquired the suit property through auction and it is also the registered proprietor and has been denied access by the Defendants.

Issues No. 2

Whether the Plaintiff is entitled to the prayers sought.

53. The Plaintiff sought for a permanent injunction and eviction orders, together with mesne profits and costs of the suit. However, In respect to mense profits. Section 2 of the Civil Procedure Act defines mesne profits as follows:

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

54. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:

- “(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
- (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until-
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

55. From the above reading of the law and as posited by the Court of Appeal in the case of Attorney General vs Halal Meat Products Limited [2016] eKLR, mesne profits are profits accrued during the time the rightful owner was excluded from his land. A claim for mesne profits, being one in the nature of special damages, must be specifically pleaded and proved. This position was affirmed by the Court of Appeal in the case of Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR where the court held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne



profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

56. No specific amount was submitted and no evidence was adduced to show the payable mesne profits, the court cannot order for an inquiry into the payable mesne profits neither can the court grant an award of a blanket figure in respect to the same. That being the case, there is no basis upon which the court can make an order for mesne profits herein.
57. In respect to costs, the same follows the event and considering that the Plaintiff is the successful party the same shall be paid by the Defendants.

Final Orders.

58. In conclusion, the court finds that the Plaintiff has been able to prove its case against the Defendants to the required standard.
59. Consequently, the court hereby enters judgment for the Plaintiff against the Defendants as follows: -
- a. A permanent injunction is hereby issued restraining the Defendants from trespassing on the suit property known as Dagoretti/Waithaka/846.
 - b. The Defendants are hereby ordered to vacate the suit property known as Dagoretti/Waithaka/846 within (90) ninety days from the date of service of the decree herein failure of which an eviction order shall issue.
 - c. Costs of the suit to be borne by the Defendants.

Judgment accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH AUGUST 2023.

E.K. WABWOTO

JUDGE

In the virtual presence of:

Mr. Masinde h/b for Mr. Mungai for the Plaintiff.

Ms. Kariuki h/b for Mr. Achach for the Defendants.

Court Assistant – Caroline Nafuna.

