



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL CASE NO. 87 OF 2011**

**EMMA KAGENDO NJIRU (As an Administrator of**

**The Estate of the Late RENISON KATHIORI NJIRU.....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED.....1<sup>ST</sup>DEFENDANT**

**RICHARD MUIRURI T/A**

**LEAKAYS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

**A. Introduction**

1. The plaintiff herein filed the instant suit vide plaint dated 22/07/2011 wherein she pleaded that at all material times Renison Kathiori Njiru now deceased was the registered owner of LR. Gaturi/Weru/1514. He was survived by the plaintiff's mother one Margaret Gichuku Njiru and children. After her demise, the plaintiff herein took out the letters of administration in respect of the estate of their late mother who was by then the administrator to the estate of her deceased husband Renison K. Njiru. It was further pleaded that on 17/07/2011, documents namely a 45 days Redemption Notice and Notification of sale were dropped at their family home through the window by an unknown person and bearing the identities of the 2<sup>nd</sup> defendant herein.

2. It was the plaintiff's case that she was not aware of any loan facility ever given to their late father by the 1<sup>st</sup> defendant and that efforts to establish the correct position had proved futile. Further that prior to receiving of the said documents, the plaintiff as the administrator of the estate had not been served with the Statutory Notice and thus the sale was null and void and the defendants were working in collusion with prominent individuals to deprive them of their inheritance. The particulars of collusion were pleaded under paragraph 11. This necessitated the instant suit and wherein the plaintiff prayed judgment against the defendants jointly and severally for: -

*a) A permanent injunction order in relation to LR. Gaturi/Weru/1514 restraining the defendants jointly whether acting by themselves or through their agents, servants or workmen from disposing off, selling by public auction or otherwise parting with possession or further advertising for sale either by private treaty or public auction or in any other manner whatsoever dealing or effecting transactions inconsistent with the Plaintiffs right or to her prejudice.*

*b) A declaration that the 1<sup>st</sup> defendant does not possess in law any right to exercise a Statutory Power of Sale over the property known as Gaturi/Weru/1514.*

*c) Costs and interests of the suit*

*d) Any other relief that the Honourable court may deem fit to grant.*

3. The defendant entered appearance through the firm of Sichangi & Company Advocates and subsequently filed their defense and wherein they denied the averments in the plaint. It was further pleaded that the deceased Renison Kathiori Njiru applied and was granted a facility of Kshs. 200,000/= on or about 1987 by the defunct Homes Savings and Mortgage Limited which was taken over by the 1<sup>st</sup> defendant and whom prior to his death had issued a valid statutory notice and followed all the legal procedures in exercise of its statutory power of sale. That upon the demise of the said deceased, his wife Margaret Njiru continued dealing with the 1<sup>st</sup> defendant and even made proposals on how to pay the outstanding debts and that the 1<sup>st</sup> defendant issued a statutory notice to her as the administrator of the deceased's estate. It

was pleaded that the defendant was entitled to payment of Kshs. 2,661,828.70 by the plaintiff which remained unpaid.

## **B. The Evidence**

4. The plaintiff adopted her witness statement and list of documents as her evidence in chief. In her evidence, she stated that the defendants wanted to sell the suit land but that the notification of sale and the redemption notice were dropped through the window of her parent's house and were not served upon any family member. Further that she had never received any demand notice or any other communication from the 1<sup>st</sup> defendant before the papers were dropped in their home and that the registered owner of the suit land who was the deceased father was the one who was supposed to be served with the said notices. That when she searched the title for the suit land, the encumbrances section had the names of Home Savings and Mortgages Ltd and not the 1<sup>st</sup> Defendant and the amount of Kshs. 200,000/= was indicated as the value of the charge. That the loan as indicated on the Auctioneers Notice (Kshs. 2,661,828.70) was not known to her and when she wrote to the 1<sup>st</sup> Defendant inquiring about the same, she got no response. That the defendants were strangers to her and she did not know of the whereabouts of the original title of the land. She thus prayed for injunctive orders to restrain the defendant from interfering with the family land and other payers on the plaintiff.

5. The plaintiff then proceeded to close her case since the defendant did not attend court for the hearing. Later, by consent of the parties, the defendants were allowed to re-open the case and call evidence in support for their case. Subsequent thereto PW1 was recalled to testify and she relied on her earlier evidence and testimony. In cross examination, she reiterated her evidence in chief but further stated that she came to find communications between her father and the bank in a folder and as such she was now aware that her father had taken a loan with Home Savings Ltd for Kshs. 200,000/= however, she said that the property was encumbered with the said facility advanced by Home Savings & Mortgages Ltd and not the 1<sup>st</sup> defendant. In re-examination, she said that there was no evidence that the said Home Savings & Mortgages Ltd was succeeded by the 1<sup>st</sup> defendant and such information had not been provided by the 1<sup>st</sup> defendant.

6. The defense called one Billy Ubindi who testified as DW1 and adopted his witness statement and list of documents as his evidence in chief. In cross examination by the counsel for the plaintiff, he testified to the effect that the loan facility to the deceased was advanced by the now defunct Home Savings & Mortgages Limited and not Consolidated Bank and that the Consolidated Bank being a later creation took over the activities of the said Home Savings & Mortgages Limited in 1987 together with other micro finance institutions performing dismally during the said period. However, no documents were tendered for the said take over. but he had nothing to show the takeover. The 1<sup>st</sup> defendant tried to exercise its foreclosure rights over Kshs. 2,661,823/= owed to it by the estate of the deceased. He further testified that there must be evidence of advancement of a loan facility and subsequent default for a bank to realize foreclosure rights. The facility in issue was for Kshs. 200,000/= payable in 15 years at a rate of 18% with monthly installments of Kshs. 3,332/=.

7. However, the statement for the amount owed was not in his possession. He said the calculations were done which shows the full details. The witness challenged the plaintiff's evidence denying the claim arguing that the 1<sup>st</sup> defendant had produced evidence to that effect. He further stated that the foreclosure was not premature even in absence of a loan statement. The 1<sup>st</sup> defendant's evidence further evidence was that a redemption notice was issued upon the deceased by the firm of Hamilton Harrison & Mathews through registered post to the deceased although the witness said he did not have the postage receipt in court. That a further statutory notice was issued to Margaret Njiru the administrator of the deceased's estate. The land had been advertised for auction twice by the 1<sup>st</sup> defendant with no success on public sale. That the search for the title indicated that the loan was advanced by Home Savings & Mortgages Limited and not by Consolidated Bank.

8. One of the 1<sup>st</sup> defendant's documents was a letter dated 02/12/1987 to the effect that the premises were to be insured at full value and the loan facility was not insured and that it was the duty of the borrower to insure himself against death risk and not the bank and if the borrower died, the bank had to continue with foreclosure. In re-examination, the witness testified to the effect that in 1989 there was an Act of Parliament that authorized Consolidated Bank to take over 9 entities including Home Security & Mortgages Limited. That the arrears in 1990 in the letter at page 29,30 was Kshs. 15,205/= and the Bank wrote to the deceased again and wherein he replied to the effect that he had taken a loan from a Sacco and thus he did not dispute the loan at any time. The witness further stated that the deceased and his late wife engaged the Bank on the said facility in several correspondences and as such this suit was not in good faith.

9. Both parties filed submissions in this case. In a nutshell, the plaintiff submitted to the effect that the statutory notice was not served upon her and no evidence was submitted to that effect and reliance made to the case of **TSS Salt Manufacturers Ltd –vs- NIC Bank Ltd (2018)eKLR**; that the Redemption Notice was invalid having been sent to a deceased person and reliance made on **Rugui –vs- Barclays Bank of Kenya Limited (2002) eKLR**; that there was no valuation to show that there was any valuation made prior to the intended sale and reliance was made on **Nyando Enterprises Ltd –vs- Barclays Bank of Kenya Ltd (2018) eKLR**; that the 1<sup>st</sup> defendant was a stranger to her as the defendant did not produce any statement of account to show the connection with the deceased or even produce evidence to the effect that they took over from Home Savings & Mortgages Ltd; that the search on the land did not indicate the 1<sup>st</sup> defendant as having interest in the land and therefore it was only the registered chargee who can exercise the statutory power of sale; that in case of any transfer to the said 1<sup>st</sup> defendant, then the same was against the law since there was no evidence of the said transfer and therefore against Section 85(1) of the Registered Land Act (Cap 300) and further that even assuming that the 1<sup>st</sup> defendant had the legal interest in the property, the legal procedure before exercise of statutory power of sale on issuance of the notice to the District Commissioner under Section 77(6) of the Registered Land Act (Cap 300) was not complied with. The plaintiff made reliance to the case of **Registered Trustees Anglican Church of Kenya Mbeere Diocese –vs- The Rev. David Waweru Njoroge (2007) eKLR**

10. The defendants submitted to the effect that there was a valid charge registered over the suit property for Kshs. 200,000/= and the same was proved by evidence. Further that the said charge was registered in favour of Home Savings & Mortgages Ltd but was later taken over by the 1<sup>st</sup> defendant as "successors and assigns" vide Legal Notice No. 5 of 1991 and that courts ought not to uphold arguments questioning the validity of a charge document long after the borrower has received the banking facility, utilized the same and/or is in default. Reliance was made on **Coast Brick & Tiles –vs- Premchand** and **Al-Jalal Enterprises Limited –vs- Gulf African Bank Limited**. The defendant further submitted that the deceased received various notices and on different dates and proceeded to negotiate on the mode of repayment and thus evidence as to lack of service was misleading. Further that since the deceased was in breach of the charge, the 1<sup>st</sup> defendant were within their right to exercise power of sale under Section 96 of the Land Act). Further that the plaintiff was not entitled to the orders of permanent

injunction as she did not satisfy the conditions set in Geilla –vs- Cassman Brown and Co. Ltd.

### **C. Issues for determination**

11. The issues for determination are as follows: -

a) *Whether the plaintiff has made a case for grant of injunctive orders against the defendants.*

b) *Who will meet the costs of the suit.*

12. I have considered the pleadings herein, the evidence tendered in court and further the rival submissions filed by the parties. From the pleadings and evidence on record, the plaintiff does not dispute the fact that the deceased was advanced a loan by the Home Security & Mortgages Limited but pleads lack of knowledge. The signature on the charge document was never disputed and neither was the validity of the correspondences between the deceased and the lender disputed. In cross examination, PW1 confirmed to having seen a file with communications between her deceased father and Home Savings & Mortgages Limited. The evidence tendered by the defendant was satisfactorily clear as to that effect.

13. Further it is not in dispute that the deceased defaulted in repaying the said loan. The plaintiff in cross examination admitted that upon finding the communication between her father and the bank in a folder she became aware that her father had taken a loan with Home Savings & Mortgages Ltd for Kshs. 200,000/= and defaulted in repayment and that the property LR. Gaturi/Weru/1514 was encumbered with the said Home Savings & Mortgages Ltd. The plaintiff disputed the service of Notice of Redemption and other related notices in that she was not served as required by the law. The evidence on record and which was not challenged was that the deceased defaulted the loan repayment a number of times with default notices being sent to him. It was not in dispute that the deceased proceeded to negotiate with the bank on the repayment of the facility. Upon the demise of the deceased, his wife also engaged the bank in negotiations on repayment of the said loan. This means that the first administrator of the deceased's estate was aware of the loan that had not been cleared by the deceased during his lifetime.

### **D. Applicable law and determination of the issues**

14. On whether the 1<sup>st</sup> Defendant effectively took over the assets and liabilities of Home Security and Mortgages Ltd, this court will consider the evidence on record and the law applicable. The plaintiff's case was that the 1<sup>st</sup> defendant was not known to her and that she knew Home Security and Mortgages as the institution that advanced a loan to the deceased. The fact was supported by the official search of LR. Gaturi/Weru/1514 that showed that the charge was Home Security & Mortgages. The plaintiff further submitted that the said transfer of the suit land to the 1<sup>st</sup> defendant herein was unlawful for failure to comply with Section 85(1) of the Registered Land Act regarding the registration of the transfer. DW1 testified that Home Security & Mortgages Ltd was taken over by the 1<sup>st</sup> defendant vide a Legal Notice. The Plaintiff testified that the said Legal Notice which was a public document and that it was not necessary to transfer the lieu in favour of the 1<sup>st</sup> defendant. As for the plaintiff, she argued that the 1<sup>st</sup> defendant was obligated to formalize the transfer of the former bank to itself and have the encumbrance Section of the title amended.

15. It is trite law that he who alleges must prove. The burden of proof in civil cases being that of balance of probabilities. However, under Part III of the Evidence Act, some matters do not require evidence to prove such as written law and those facts that a court may take judicial notice under section 60 thereof. Subsection (1) provides that: -

*“The courts shall take judicial notice of the following facts— (a) all written laws, and all laws, rules and principles, written or unwritten, having the force of law, whether in force or having such force as aforesaid before, at or after the commencement of this Act, in any part of Kenya.....”*

16. I have perused the Consolidated Bank Act Cap 488C Laws of Kenya and indeed the long title therein provides that it is: -

*“An Act of Parliament to make provision for the transfer of the assets and liabilities relating to the businesses of subsidiaries of the Consolidated Bank of Kenya Limited, and for connected purposes.”*

17. The effect of this Act has been recognized by the Courts in many instances. For instance, in Patrick MwangiRunyora –vs- Consolidated Bank of Kenya Ltd & another [2009] eKLR (and which decision is I am guided by) M.S.A. Makhandia J (as he then was) held as thus: -

*“However, it should be noted that the loan was advanced to the plaintiff by Home Savings & Mortgages Limited. On 25<sup>th</sup> July, 2007, the Minister for finance through a legal Notice No.136 of 2002 in the exercise of powers conferred by Section 3 (1) of the Consolidated Bank of Kenya Act made a vesting order vesting all the undertakings of amongst others Home Savings and Mortgages Limited to the 1<sup>st</sup> defendant. Under Section 5 of the said Act, the 1<sup>st</sup> defendant assumed powers to enforce all contracts, agreements, conveyance, undertakings, securities and other instruments entered into by Home Savings and Mortgage Limited as if it was a party thereto.”*

18. The Court of Appeal also recognized the takeover of Home Savings & Mortgages Ltd by Consolidated Bank in John Mburu v Consolidated Bank of Kenya [2018] eKLR- Civil Appeal No. 162 of 2015 where the court stated that: -

*“The genesis of the dispute goes back 25 years ago in 1983 when the appellant borrowed KShs. 440,000/= from Home Savings &*

19. That being the case, the defendant was not under a legal duty to prove the existence of the said Legal Notice. The Consolidated Bank Act is clear in that the 1<sup>st</sup> defendant took over all the assets and liabilities of the former banks. It is my opinion that the takeover of Home Security & Mortgages Ltd by Consolidated Bank was well satisfied in favour of the defendant. The 1<sup>st</sup> defendant by virtue of the legal notice properly and legally assumed powers to enforce all contracts, agreements, conveyance, undertakings, securities and other instruments entered into by Home Savings & Mortgage Limited before the takeover. An Act of Parliament exist to the effect and this court cannot ignore the law that is valid and applicable.

20. The contract between the deceased and the defunct Home Security & Mortgages is under the ambit of the 1<sup>st</sup> defendant's functions. The 1<sup>st</sup> defendant acquired the interest of the lien in charge on the same status as Home Security & Mortgages. The 1<sup>st</sup> defendant has the right to exercise redemption remedy as against the administrator of the deceased's estate provided the loan borrowed by the deceased has not been fully repaid.

**a. Whether the Redemption Notice and Notice of Sale was duly served upon the plaintiff**

21. As I have indicated herein, it is not in dispute that the loan borrowed by the deceased is still owing to the 1<sup>st</sup> defendant. I have also stated that 1<sup>st</sup> defendant has a right to exercise its legal rights which include statutory power of sale. However, exercise of such rights must be within the confines of the law and as per the procedures provided by the law. The notices required to be issued must be issued. The plaintiff pleaded to the fact that redemption notice and notification of sale was dropped in her deceased father's house through the window by unknown person and bearing the identities of the 2<sup>nd</sup> defendant herein and hence disputed service.

22. The plaintiff did not dispute the fact that Statutory Notice was served and as such service of the same needed not to be proved in compliance with the Court of Appeal's dictum in **Nyagilo Ochieng & Another Vs. Fanuel Ochieng & 2 Others Civil Appeal No. 148 of 1995 [1995-1998] 2 EA 260**. What the plaintiff is disputing service is the Redemption Notice and the Notification of Sale.

23. Under Rule 15 of the Auctioneers Rules, a Notification of Sale and the Redemption Notice must be served prior to a sale of immovable property. On the expiry of the period of notice and if no payment has been made, the auctioneer should proceed to sell the property by public auction not earlier than fourteen days after the first newspaper advertisement. However, in the instant case, the plaintiff stated that she found the Notification of sale and the Redemption Notice having been dropped in her father's house through the window. It is therefore not known when the documents were served or received by the plaintiff. The service was disrupted and the 1<sup>st</sup> defendant was obligated to produce evidence of service which was not done in this case. The defendant did not controvert the evidence as to failure to properly serve the statutory notice on the plaintiff. It is my considered opinion that the Notification of Sale and the Redemption Notice were not properly served upon the Plaintiff as required by the law. The defendant herein failed to discharge its obligations on service of the notice.

24. The plaintiff sought for an order of permanent injunction restraining the defendants from selling the suit property. The deceased had defaulted on the repayment of the loan. There was no evidence any payment was made by his deceased wife or by the plaintiff who took over the administration of the estate from her late mother. An order of injunction being an equitable remedy must be sought by a person with clean hands. It is my opinion therefore that the defendants cannot be restrained from enforcing their contractual rights in the absence of any evidence that the contract was invalid or illegal. Parties are bound by their contract and the court cannot interfere with the terms of such contract.

25. The plaintiff has not satisfied the requirements of Order 40 on granting injunctive orders against the defendants. Order 40 of the Civil Procedure Rules and principles set out in decided cases on grant of injunctions is not applicable in this case. This is a case that can only be guided by the law of contract.

26. On the prayer for a declaration that the 1<sup>st</sup> Defendant does not possess in law any right to exercise a Statutory Power of Sale over the property known as Gaturi/Weru/1514, as I have noted in this opinion, the 1<sup>st</sup> defendant took over the obligations of Home Security & Mortgages Ltd vide a legal process. As such the 1<sup>st</sup> defendant assumed powers to enforce all contracts, agreements, conveyance, undertakings, securities and other instruments entered into by Home Savings and Mortgage Limited as if it was a party thereto. In my considered opinion, the 1<sup>st</sup> defendant possesses the right to exercise a Statutory Power of Sale in regard to the security LR. Gaturi/Weru/1514 which is still the security for the loan advanced or any balance thereof.

27. Having found that the defendants failed to effect proper service of the Statutory Notice and the notice of the sale on the plaintiff which led to the institution of this suit, it is my considered opinion that no proper service was ever effected on the plaintiff as required by the law. In compliance with Section 96(2) of the Land Act and Rule 15 (c) of the Auctioneers Rules the said redemption notice must be done afresh. Any sale or transaction in respect of the security LR. Gaturi/Weru/1514 made under the defective service is hereby rendered null and void.

28. It is my finding that the plaintiff has failed to prove her case regarding the injunctive orders sought on the balance of probabilities.

29. This case is accordingly dismissed and each party will meet their own costs.

30. It is hereby so ordered.

**DELIVERED, DATED and SIGNED** at EMBU this 24<sup>th</sup> day of September, 2020.

**F. MUCHEMI**

**JUDGE**

Judgment delivered through Video Link in the presence of: -

Mr. Omondi for Mr. Gachie for Plaintiff