



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: T.W. CHERERE-J)

COMMERCIAL CASE NO. 72 OF 2018

(KISUMU HCCC 05 OF 1993 & HCCC 381 OF 2000 CONSOLIDATED)

(FORMERLY KISUMU ELC 881 OF 2015)

BETWEEN

BOAZ OMOLO ONYIMBO.....PLAINTIFF

AND

KENYA COMMERCIAL BANK.....1ST DEFENDANT

PATRICK NJOGU GICHUNGI.....2ND DEFENDANT

AND

BETWEEN

PATRICK NJOGU GICHUNGI.....PLAINTIFF

AND

BOAZ OMOLO ONYIMBODEFENDANT

JUDGMENT

Background facts

1. Boaz Omolo Onyimbo (*hereinafter referred to as Onyimbo*) charged his Land No. KISUMU/MUNICIPALITY BLOCK 5/166 (*hereinafter referred to as the suit property*) to Kenya Commercial Bank (*hereinafter referred to as the Bank*) for a loan facilitate of Kshs. 100,000/-.
2. *Onyimbo* failed to service the loan as agreed and *the suit property* was by an auction conducted on 14th December, 1992 sold to Patrick Njogu Gichungi (*hereinafter referred to as Gichungi*) for Kshs. 250,000/-.
3. *Onyimbo* was dissatisfied with the sale as a result of which he filed KISUMU HCCC 05 OF 1993 against *the Bank* and *Gichungi* in which he prayed for:

- a) A declaration that the purported sale on 14th December, 1992 was null and void and *Onyimbo* is still the lawful owner of *the suit property* and an order for cancelling the registration of *Gichungi* as proprietor of the said parcel of land
- b) Alternatively, a declaration that the purported sale on 14th December, 1992 was wrongful and in breach of *the Bank's* trust obligations to *Onyimbo* in that the property was sold at a gross undervalue
- c) General damages for wrongful sale

- d) Special damages
- e) Costs of the suit
- f) Interest on (c) and (d)
- g) Further or other relief that the court may deem just

4. On the other hand, *Gichungi* filed **KISUMU HCCC 381 OF 2000** against *Onyimbo* and prayed for:

- a) An eviction order directed at *Onyimbo*, his agents, servants, anybody associated with him or claiming under him be evicted from *the suit property* within 7 days of the court's order and the eviction be enforced under the authority of the Officer Commanding Kisumu Police Station
- b) Kshs. 4,000/- per month being loss of expected profits on *the suit premises*
- c) Costs of the suit

Onyimbo's case

5. In his testimony, *Onyimbo* conceded that he charged *the suit property* to *the Bank* for a loan that he defaulted to pay. *Onyimbo* additionally conceded that a demand notice and notification of sale was served on him in which *the Bank*. He stated that he attended a public auction for the sale of *the suit property* but stated that the same was not sold. He faults *the Bank* for selling *the suit property* to *Gichungi* for Kshs. 200,000/- whereas the reserve price had been set at Kshs. 250,000/-. The witness produced two letters of offer dated 18th July, 1990 and 05th September, 1990 as PXH. 1 and 2 respectively; his acceptance letter dated 22nd September, 1990 PEXH. 3 and repayment schedule as PEXH. 4. He also produced two demand letters from the Bank's advocate. The first one is dated 10th September, 1992 PEXH. 5 and second dated 03rd October, 1992 PEXH. 6 which demanded for payment of Kshs. 47,950/-; the certificate of sale; receipts for partial payment PEXH. 7; letter dated 13th November, 1992 PEXH. 8 by Juhudi Auctioneers informing him of the intended sale; advertisement for sale PEXH. 9; certificate of sale to *Gichungi* PEXH. 10; transfer of charge PEXH. 11; certificate of search confirming the charge PEXH. 12 and his complaint to the DPP concerning the sale PEXH.13.

The Bank's Case

6. Abraham Kapello *the Bank's* Credit Administration manager told court that *Onyimbo* defaulted in repaying the loan to the bank and was served with the statutory notices subsequent to which *the suit property* was sold to *Gichungi* in a public auction conducted on 1st December, 1992 and was later transferred into *Gichungi's* name. The witness produced a demand letter to *Onyimbo* dated 07th April, 1992 DEXH. 1, a demand notice dated 06th June, 1992 DEXH. 2, *Onyimbo's* letter dated 27th July, 1992 DEXH. 3 in which he acknowledged receipt of the statutory notice and offered to pay the outstanding loan in instalments but failed to keep his word. The witness contended that the sale was lawful and further produced a valuation report dated 09th August, 1990 DEXH. 4 which assessed the value of *the suit property* at Kshs. 250,000/-, notification of sale DEXH. 5 and advertisement for sale DEXH. 6.

7. The witness also stated that the Bank had instructed the auctioneer to sell *the suit property* for Kshs. 250,000/- and with reference to *Gichungi's* evidence in **HCCC 138 OF 1997**, asserted that *Gichungi* established that he paid Kshs. 50,000/- on 14th December, 1992 which was the date of sale, a further Kshs. 150,000/- as evidenced by a receipt marked PEXH. 1 and an additional sum of Kshs. 50,000/- as evidenced by a receipt marked PEXH. 2 after *the Bank* rejected Kshs. 200,000/ which was lower than the value of *the suit property*

Gichungi's case

8. Lucy Wanjiru Njogu, widow and administratrix of *Gichungi's* estate told court that she was wholly relying on *Gichungi's* evidence in **HCCC 138 OF 1997**. She urged that *Onyimbo's* case be dismissed and reiterated the prayer for an order of eviction and damages as against *Onyimbo*.

Issues for determination

9. I have considered the parties' respective cases together with the submissions by the parties' advocates and the cited authorities and I have summarized issues for determination as follows:

- a) Whether *Onyimbo* defaulted in repaying the loan to the bank
- b) Whether *Onyimbo* was served with a statutory notice
- c) Whether the sale of the suit property was lawful
- d) What prayers should be granted
- e) Who pays costs

Whether Onyimbo defaulted in repaying the loan to the bank

10. The facts giving rise to this suit are to a large extent not disputed. It is not disputed and **Onyimbo** has conceded that he defaulted in repaying the loan advanced to him by **the Bank**.

Whether Onyimbo was served with a statutory notice

11. From the evidence on record, it is apparent that what **the Bank** refers to as statutory notices are letters dated 10th September, 1992 and 03rd October, 1992 from its advocate to **Onyimbo**. Copies of the two letters were produced by **Onyimbo** as PEXH. 5 and 6 respectively. **Onyimbo** in his letter dated 27th July, 1992 DEXH. 3 acknowledged receipt of the letter dated 03rd October, 1992 which demanded for payment of Kshs. 47,950/- and offered to pay the outstanding loan in instalments.

12. The gravamen of **Onyimbo's case** revolves around whether **the Bank** properly exercised its power to realize the security in **the suit property**. To get an answer to that question, I will have to look at the provisions of Section 90 of the Land Act which provides for the remedies of a chargee as follows:

(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;

13. It is to be remembered that under section 90 aforesaid, the operation of the statutory notice is triggered by strict compliance with the provisions of that section. Reading the contents of the letter dated 03rd October, 1992 *vis a vis* the provisions of Section 90 of the Land Act, it is evident that the said letter only indicated the amount outstanding and interest thereof. The letter called on **Onyimbo** to call on **the Bank** and arrange on how to settle the outstanding sum.

14. I am alive to the fact that this court cannot re-write a contract between parties. (See **Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2015] eKLR** which cited the Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** with approval. I am by the same token in agreement with **Onyimbo** and **the Bank** that all legal steps prior to an auction must be followed. (See **Omari Nyambati v Small Enterprises Finance Co. Ltd & 3 others [2015] eKLR**).

15. I have considered the case of **Yusuf Abdi Ali Co Ltd v Family Bank Limited [2015] eKLR** and **Samuel K. Mungai v Housing Finance Company of Kenya Ltd HCCC No. 1678 of 2001** cited by **Onyimbo**. In the **Samuel K. Mungai** case, **Ringera J** (as he then was) had the following to say with reference a statutory notice under the Registered Land Act: -

“I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages: it is a fundamental breach of the statutes which delegates from the chargor’s equity of redemption. Without service of a valid statutory

notice, the power of sale does not crystallize and any subsequent service of the notification of sale and the actual auction are merely acts pursuant to a pretended power of sale. As such they are a nullity in law.

16. From the evidence on record, I do not find it difficult to agree with **Onyimbo** that the failure by **the Bank** to issue a Notice that strictly complied with the provisions of Section 90 (2) of the Land Act rendered the said Notice dated **03rd October, 1992** defective and null and void *ab initio*.

Whether the sale of the suit property was lawful

17. On the ground that I have found that the notice dated **03rd October, 1992** was defective and null and void *ab initio*, I accordingly find and hold that the power of sale did not crystallize and the purported sale by auction and subsequent transfer of **the suit property to Gichungi** does not have the force of law.

Disposition

18. In view of the foregoing analysis, this court makes the following orders:

i. **Gichungi's claim against Onyimbo fails and is dismissed with costs**

ii. **Onyimbo's claim against Gichungi and the Bank succeeds in the following terms:**

a) **A declaration be and is hereby issued that the purported sale on 14th December, 1992 of Land No. KISUMU/MUNICIPALITY BLOCK 5/166 was null and void and Boaz Omolo Onyimbo is still the lawful owner of the said property**

b) **An order be and is hereby issued cancelling the registration of Patrick Njogu Gichungi as proprietor of Land No. KISUMU/MUNICIPALITY BLOCK 5/166**

c) **Onyimbo is awarded costs as against Patrick Njogu Gichungi and the Kenya Commercial Bank**

DELIVERED AND SIGNED IN KISUMU THIS 31st DAY OF July 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Okodoi

For Boaz Omolo Onyimbo - Mr Theuri/Mr Yogo

For Kenya Commercial Bank - Ms Owuor

For Patrick Njogu Gichungi - Mr Ouma