



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO.54 OF 2019**

**STEPHEN BORO GITHIA..... PLAINTIFF**

**VERSUS**

**RURAL URBAN CREDIT FINANCE LIMITED .....DEFENDANT**

**(IN LIQUIDATION)**

**RULING**

(1) Before this Court the Notice of Motion dated **8<sup>th</sup> April 2019** by which **STEPHEN BORO GITHUA**, (the Plaintiff/Applicant) seeks the following Orders:-

**“1. THAT the Defence filed on 15<sup>th</sup> March 2019 be struck out and that summary judgment be entered for the Plaintiff/Applicant against the Defendant as prayed in the Plaint.**

**2. THAT the Defendant refunds a liquidated sum of Kshs.750,000/= with interest at a commercial rate of 18% from June 1994.**

**3. THAT in the alternative the Defendant pays a liquidated sum of Kshs.32,639,500/= being the current market price of the suit property in damages.**

**4. THAT the costs of this application be borne by the Defendant.**

(2) This application was premised upon **Section 1A, 3, 3A of the Civil Procedure Act, Order 36 Rules 1,2 and 3 Orders 51 Rule 1 of the Civil Procedure Rules** and all other enabling laws, and was supported by the Affidavit of even date sworn by the Applicant.

(3) **RURAL URBAN CREDIT FINANCE LTD** the Defendant/Respondent, despite being served with the Application failed to file any response to the same. The Application was argued orally in Court on **30<sup>th</sup> July 2019**. The Respondents who were served with hearing notice vide the Affidavit of Service dated **25<sup>th</sup> June 2019** did not appear in Court to oppose the application. The matter therefore proceeded unopposed.

**BACKGROUND**

(4) On **9<sup>th</sup> June 1994** the Plaintiff/Applicant saw an advert in one of the Daily Newspapers for the sale by public auction of a property known as **L.R.NO.KIGAJO/ KIAMWANGI/208** (hereinafter referred to as the “**suit land**”). The advert indicated that the auction was to be conducted by **Ndarugu Auctioneers** on **30<sup>th</sup> June 1994**, upon the instructions of the Defendant Bank.

(5) The Plaintiff/Applicant attended the auction and bid on the suit property. He was declared the winner at the fall of the hammer and thus purchased the suit property for a sum of **Kshs.750,000/=**. A valuation Report dated **23<sup>rd</sup> November 1993** had indicated a forced sale value of **Kshs.430,000/=**.

(6) The Plaintiff/Applicant paid the required deposit of **Kshs.187,500/=** to the Auctioneer and later settled the balance of **Kshs.562,500/=**. He was issued with a Certificate of sale together with all the transfer documents. On **7<sup>th</sup> October 1994**, the Plaintiff/ Applicant was duly registered as the proprietor of the suit land. The Plaintiff/Applicant avers that he took possession of the property and lived there peacefully for twenty (20) years.

(7) In the year 2014 the original owner of the suit land filed a suit challenging the sale by the Bank of the suit property. That suit being **HCCC NO.4275 OF 1994** was heard all the way to the Court of Appeal and concluded. The Court of Appeal upheld the decision of the trial Court that the Defendant Bank had failed to serve the requisite statutory notices upon the original owner of the suit land before proceeding to sell the same by public auction. The auction at which the Plaintiff/Applicant purchased the suit property was voided on this ground.

(8) Accordingly the transfer of the suit property to the Plaintiff/Applicant was found to be illegal and was cancelled vide the Judgment dated **23<sup>rd</sup> January 2014** in **Civil Appeal No.216 of 2014 STEPHEN BORO GITHIA –VS- NICHOLAS RUTHIRU GATOTO** and 2 others.

(9) During the hearing of the suit, the Deputy Registrar of the High Court visited the suit land and submitted a report confirming that the Plaintiff/Applicant had been in occupation of the suit land since 1994. The Court therefore indicated that the Plaintiff/Applicant could seek a remedy against the Bank. In his judgment in **HCCC NO.4275 OF 1994, Hon Justice Ogola** held as follows:-

**“It is unfortunate that this suit is being determined almost 20 years after its inception. It is clear that much has changed with regard to the suit property in terms of development and its value. I understand that the 2<sup>nd</sup> Defendant has been in possession of the suit property since 1994 and has undertaken various developments on the same. In that case the remedy of the 2<sup>nd</sup> Defendant against the 3<sup>rd</sup> Defendant bank will be to obtain a refund of the price paid for the suit property as well as the value of the development made therein...”[own emphasis]**

(10) Based on the above set of facts and being aggrieved by the loss of his land and family home the Plaintiff/Applicant filed this present suit against the Defendant Bank. Thereafter the Plaintiff/Applicant filed this application seeking to strike out the defence.

### **ANALYSIS AND DETERMINATION**

(11) By this application the Applicant herein seeks to have the Defence dated **15<sup>th</sup> March 2019** struck out and prays for judgment in a liquidated amount of **Kshs.750,000/=**, being the purchase price which the Applicant paid for the suit property way back in the year 1994. I have perused the statement of Defence filed in Court on **19<sup>th</sup> March 2019**. I find that no real or substantive issues have been raised. At Para 3 the Defendant Bank insists that they rightfully exercised their statutory power of sale. Immediately thereafter at para 4 the Defendant confirms the court process by which the Court of Appeal found that the Bank had sold the suit land illegally. In the face of a finding by the Court of Appeal to the contrary it is ludicrous for the Defendant to maintain that the suit land had been properly auctioned. This defence is merely vexatious and I find the same to be for dismissal.

(12) The fact that the Applicant purchased and paid for the suit land cannot be in any doubt as annexed to the Plaintiff's Supporting Affidavit dated **8<sup>th</sup> April 2019** is the Memorandum of Sale by Public Auction (**annexture “SBG”3**) which indicates that the purchase price to be **Kshs.750,000/=** and confirms that the Applicant paid the deposit of **Kshs.187,000/=** at the fall of the hammer. The same supporting Affidavit contains Annextures **“SBG 4a, 4b and 4(c)”** which are copies of the Certificate of Sale, Transfer form and Title Deed to the suit land respectively. The Title Deed is in the name of the Applicant herein indicating successful transfer of the property to himself.

(13) It was not until twenty (20) years after the Applicant had purchased the suit land at the auction and after transferring the same to himself, that the original owner challenged the exercise by the Defendant Bank of its statutory right of sale. A legal process followed culminating with a decision by the Court of Appeal that the Bank had sold the property unlawfully. The result of this decision was that the Applicant's title was revoked/cancelled. The Defendant by paragraph 4 of the Defence dated **15<sup>th</sup> March 2019** readily concedes to these facts.

(14) There can be no doubt that at the very least the Applicant is entitled to a refund of the **Kshs.750,000/=** which is the amount he paid as purchase price at the auction. No less than the Court of Appeal has rendered a finding that the Defendant Bank acted unlawfully in selling the suit property.

(15) As noted earlier the Defendant Bank did not file any document in opposition to the present application. Accordingly I find that the bank is liable to refund the Plaintiff this amount of **Kshs.750,000/=**.

(16) Prayer (3) which seeks judgment for a liquidated claim of **Kshs.32,639,500/=** is an alternative to the prayer seeking a refund of the purchase price. In any event prayer (3) cannot be granted at this stage as it would require proof by way of a formal proof hearing.

(17) Accordingly I grant Prayer (2) enter judgment in favour of the Plaintiff/Applicant in the liquidated sum of **Kshs.750,000/=** plus interest and costs at court rates from **18<sup>th</sup> June 1994** until payment in full. It is so ordered.

Dated in **Nairobi** this **26<sup>th</sup>** day of **November, 2019**

**Justice Maureen A. Odera**