



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCCC NO. 525 OF 2003

MURAD EBRAHIM MURAD.....1ST PLAINTIFF

HAMID MURAD.....2ND PLAINTIFF

VS

KENYA COMMERCIAL BANK LIMITED...1ST DEFENDANT

ANN WANGUI MWICHARO.....2ND DEFENDANT

JUDGEMENT

1. Murad Ebrahim Murad (the 1st Plaintiff or Murad) and Hamida Murad (the 2nd Plaintiff or Hamid) are man and wife and make a joint effort to retain the ownership of LR No.209/7725 Nairobi (the suit property).
2. Prior to certain events which they complain of, the two were jointly registered as owners of the suit property. It is their case that in 1992 they requested Kenya Commercial Bank Limited (the 1st Defendant or KCB) for an overdraft facility. KCB acceded and granted the facility with a maximum of Kshs. 2,000,000. As security for the facility, the suit property was charged through a charge dated 4th April, 1992 and registered on 5th May 1992.
3. The Plaintiffs complain that although they consistently and diligently serviced the facility, KCB refused to issue them with Statement of accounts notwithstanding several requests. It is asserted that the last statement was issued on 31st December 2002 and which Statement showed a balance of Kshs.1,704,549.49. The Plaintiffs are unhappy about that balance and accuse KCB of charging illegal interest rates, default rates, penalty interest, ledger fees and commission contrary to the contract and statute.
4. While on one hand the Plaintiffs allege that the Bank has not issued Statutory Notices, on the other they aver that the Statutory Notices were incurably effective and null and void as they do not amount to Statutory Notices as contemplated by Section 69 of the Transfer of Property Act 1882.
5. The Plaintiffs also take issue with the process which finally led to the sale of the suit property to Ann Wangui Mwacharo (the 2nd Defendant or Ann) by way of Public Auction that took place on 2nd December 2004. In their Amended Plaint filed on 4th December 2003, the Plaintiffs set out the events leading to that date.
6. That on or about 10th June 2003, KCB instructed Baseline Auctioneers to advertise for sale the suit property and the Auctioneers obliged without issuing the mandatory 45 day Notification for Sale. That on 11th June 2003 (*this is just a day after*) KCB served them with a defective Notification of Sale through another Auctioneer. The defect in the Notification is said to be that it did not reflect the fair value of the charged property as required by law.
7. Once this suit was filed the Plaintiffs obtained a Court order on 2nd December 2004. However, the Plaintiffs aver that notwithstanding that said Order KCB proceeded with the Sale. The Sale is said to be invalid because it was allegedly concluded in disobedience of a Court Order and secondly that it was premature as the Plaintiffs were not served with a valid Redemption Notice or that the mandatory 90 days Notification had not lapsed.
8. The Plaintiffs take a view that KCB was fraudulent, malicious and in breach of Contract and set out the following particulars:-

- a) Auctioning and transferring the suit property with full knowledge that there was a Court Order staying the sale.
- b) Not supplying the Plaintiffs with Bank Statements as ordered by the Court to enable the Plaintiffs redeem their property.
- c) Exaggerating the interest charged on the principal amount.
- d) Proceeding to auction the suit property with knowledge that no proper notification of sale had been issued to the Plaintiffs. In the alternative, proceeding to sell the property with knowledge that the mandatory 90 days as provided for under section 69A of the Transfer of Property Act had not lapsed.
- e) Receiving the deposit of Auction proceeds even before the Auction date.
- f) Receiving the balance of Auction proceeds outside the stipulated time.

9. Ultimately, the Plaintiffs have sought the following orders:-

- a) A permanent injunction do issue restraining the defendant, its employees, servants and or agents and or Baseline Auctioneers from interfering with the quiet possession of LR. NO. 209/725, Nairobi registered in the names of the Plaintiffs herein with all property including all the building structure and development therein.
- b) A declaration that no valid Statutory Redemption Notices were served on the Plaintiffs.
- c) An Order of declaration by this Honourable Court that the purported sale and transfer of the Plaintiff's property is wrongful and illegal.
- d) A declaration that the Plaintiffs are the owners of LR. NO. 209/7725.
- e) An Order for rectification of register to reflect the Plaintiff's names.
- f) Costs of the suit and interest on costs.
- g) Any other relief that this Honorable Court may deem fit.

10. Following the Sale, the Plaintiffs were evicted from their house. It is the Plaintiffs case that the Order for eviction was issued at the instance of Ann. The Plaintiffs challenged the eviction and appear to have obtained Orders of reinstatement as they are now in possession of the suit property.

11. The Defence of the Bank is that the Plaintiffs were in default of their repayment obligations and were repeatedly granted indulgence. But as the Plaintiffs refused, failed or neglected to repay the facilities, KCB issued and served a proper Statutory Notice.

12. KCB states that the Plaintiffs defaulted in paying interest on their loan obligations for more than 2 months after it had become due and KCB was entitled to exercise its Statutory Power of Sale as Mortgagee in terms of Section 69 (A)(b) of the Transfer of Property Act. Further that, Contact and Baseline Auctioneers duly served Notification of sale and Demands upon the Plaintiffs in compliance with Auctioneers Rules.

13. In respect to the Court Order of 2nd December 2004, KCB states that it was served upon the Auctioneers after the Public Auction had been concluded and was therefore overtaken by events.

14. As an alternative, KCB takes the position that the Plaintiff's remedy, in the circumstances of this suit, if any, has been expressly provided by the Provisions of Section 69(B)(2) of The Transfer of Property Act and Section 99 of the Land Act 2012. However, KCB argues that a Claim for Damages that would have been underpinned by Statute is time barred by virtue of the Provisions of Section 4(1)(a) of the Limitation of Actions Act (Chapter 22 Laws of Kenya).

15. Ann came to learn of this litigation after she was enjoined through an Order of Court of 19th October 2007. She subsequently filed Pleadings and her current pleading is the Statement of Defence filed on 8th January 2008. Her case is that she is an innocent purchaser for value of the suit property. She is aggrieved by the Plaintiffs continued possession of the suit property and has mounted the following Counter Claim:-

- a) An Order for vacant possession directed against the Plaintiffs in respect of L.R No.209/7725.
- b) An eviction Order directed against the Plaintiffs in respect of the suit premises.
- c) Damages for trespass.
- d) Mesne profits at the rate of Khs.35,000/= per month for the period December, 2006 to date.

e) Costs of the suit with interest.

16. On 4th December 2012 the Parties identified 17 issues for determination. These issues can be collapsed into the following:-

- (i) Were the Plaintiffs in default of their facility?
- (ii) Did the Bank provide upto date Statements of Account to the Plaintiffs?
- (iii) Did the Bank levy illegal charges?
- (iv) Did the Bank serve a valid Statutory Notice?
- (v) Was a Notification of Sale served?
- (vi) Did the Auction proceed in defiance of a validly served Court Order?
- (vii) Was the transfer of the suit land to the 2nd Defendant valid?
- (viii) Is the Plaintiffs' Claim against the Defendants time barred?
- (ix) Is the 2nd Defendant entitled to the Counterclaim?
- (x) What is the suitable Order on costs?

17. The evidence by Murad is that in 1992 he took an overdraft facility of Kshs.2,000,000 from KCB. As security, a charge over the suit property was registered on 5th May 1992 (P Exhibit pages 9-37).

18. The Account was in the joint names of Murad and his wife and that he deposited and withdrew money from it. Murad's testimony was that the Bank started to charge interest at 70%. In cross examination he stated,

"The Bank charged exorbitant rate of interest up to 70%. But I cannot confirm without the Statements. I cannot show anything because I do not have Statements".

19. On the part of the Bank, Veresta Kiende (PW1) told Court that under the terms of clause 1(a) of the Charge Document, interest was to be charged on the facility at such rates as the Bank would determine in its sole discretion. The witness made reference to Statements included in its Supplementary Bundle of Documents (D Exhibit pages 14 to 43). The Statements had two account numbers namely 036-271680107 and 1111806152. She explained that the Account would be one but with 2 different numbers depending on the Banking system used.

20. Anyhow the point is that even if the Plaintiffs' case was that they had not been provided with copies of the Bank Statements, copies thereof were made available to the Court and Murad had the opportunity to demonstrate that the interest charged was unlawful and outside the Contract. Yet he did not. In their Pleint, the Plaintiffs had averred that,

"5...The last Statement issued by (sic) was on 31st December 2002 and which showed a loan balance of Khs.1,704,549.49.

6. The Defendant has in arriving at said figure of Kshs.1,704,549.49 charged illegal Interest rates, default charges, penalty interest, ledger fees, commissions contrary to the Contract and the laid provisions of the law".

The Plaintiffs were unable to demonstrate any illegality on the charges.

21. Although Murad denied default, he confirmed that the Plaintiffs received a three months' Notice dated 28th March 2002 (*See D Exhibit 1 page 41*). Upon receipt thereof his Advocates wrote to the Bank on September 17, 2002 (D Exhibit 2 page 50). The contents of the letter are of some significance. It reads,

September 17,02

Head

Debt Recovery Unit

KCB

P.O.BOX 48400

NAIROBI

Dear

RE: A/C NO. 271, 680, 107 AT UNIVERSITY WAY BRANCH

I represent Murad Ebrahim Murad in this matter. I understand he has been in to see you and has advanced for your consideration proposals for liquidating the amount owed so that the auction can be called off.

The proposals are:- 1) payment of Khs.150000 on or before September 23, 02; 2) payment of Kshs.150000 on or before September 30, 02 ; 3) payment of Khs.300000 on or before November 30, 02. Upon compliance of these terms there will be a conference in December to discuss the rescheduling of the balance and ultimately the liquidation of the entire debt.

Kindly confirm your acceptance of the proposals. I hope you will in the name of humanity, consider the proposals favorably. I believe KCB is motivated, unlike foreign banks, by values that make KCB exercise its discretion in the welfare of Kenyans without of course losing sight of its banking values and interests.

Sincerely

MUTUNGA & RIBERO

ADVOCATES

Signed

DR WILLY MUTUNGA

ADVOCATE

22. Three things emerge. One, in that letter the Plaintiffs do not complain about not receiving Statements. Two, the Plaintiffs do not protest the interest or other charges. And of great importance Murad makes a proposal on how to pay the outstanding loan. A clear indication that default was acknowledged.

23. This Court has no hesitation in finding that the Plaintiffs were in default of the terms of the overdraft and have been unable to prove unlawful interest or other charges and non-receipt of Bank Statements.

24. It has been submitted by Counsel for the Plaintiff that the Statutory Notice of 28th March 2002 was defective as it did not comply with the terms of the charge dated 24th March 1992. It was submitted that according to the Provisions of Section 69 of The TPA, the Notice ought to have been a 90 days' Notice. An argument is further made that in a Ruling dated 12th February 2007, Hon. Mutungi J. found that the Plaintiffs were not given the Statutory Notice as required by law. Let me examine these arguments.

25. The Statutory Notice of 28th March 2002 is reproduced below:-

28.3.2002

Murad Ebrahim Murad &

Hamilda Murad

P.O. Box 43577

NAIROBI

Dear Sir/Madam

STATUTORY NOTICE

(Under Section 69A of the Transfer of Property Act -1882)

RE: L.R NO.209/7725

KENYA COMMERCIAL BANK LIMITED –VS-YOURSELVES

We act for our above mentioned client Kenya Commercial Bank Ltd and under their instructions HEREBY REQUIRE YOU TO PAY IMMEDIATELY to us on their behalf the sum of Kshs.1,954,549.44 cts which sum continues to accrue interest at the rate of 24% p.a last applied on 28/2/02 until payment in full.

The amount is secured by a Charge over the property L.R No.209/7725 registered in your names securing facilities granted to yourselves full particulars which are well within your knowledge.

TAKE NOTICE that unless we receive in our chambers the amount herein demanded together with our collection fee within THREE (3) MONTHS from the date of service of this statutory notice our strict instruction are to cause the sale by Public Auction of the above property that is to say LR. NO.207/7725 without further reference to you and at your risk as to attendant costs and consequences which please note.

TAKE NOTE that acceptance of part of the sum herein demanded does not constitute a waiver of this notice and any proposals made and installments paid will be without prejudice to this notice.

DATED at NAIROBI this 28th day of March, 2002.

Yours faithfully

For: MACHARIA NJERU

ADVOCATES

The Plaintiffs admit receiving this Notice.

26. As to whether it complied with the law, it must be scrutinized in the context of Section 69A of Transfer of Property Act which provides:-

“69A. (1) A mortgagee shall not exercise the mortgagee’s statutory power of sale unless and until-

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon”.

27. There is proof of default of the facility by the Plaintiffs and a 14 day Notice of 14th March 2002 (D Exhibit page 40) was served upon Murad. After receipt of the Notice, there was continued default and the Statutory Notice of 28th March 2002 followed. The evidence of Murad is as follows;

“page 41 of the 1st Defendants documents. I received the Notice thereto ie. date 28/3/2002. I did not do anything until I received another Notice at page 48 of 1st Defendant documents. But I wrote to them through Mutunga Rebiro and made proposals to repay. I did not demand Statements on that letter at page 50 of 1st Defendant’s documents. I did not pay as I proposed” (my emphasis).

28. The letter of Mutunga Rebiro (dated 17th September 2002) came after three months of the Statutory Notice. The evidence by Murad is that he had not made payments by this time and default continued even after making the proposal on 17th September 2002. There is therefore succinct evidence that default continued for more than three months after service of the Notice.

29. But the Plaintiffs ask me to pay attention to the Ruling of Hon. Mutungi J. made on 12th February 2007. Hon. Mutungi expressed himself as follows,

“The document claimed by the Defendant to be a statutory Notice, under S.69A of the Transfer of Property Act, 1882, states, at the relevant paragraph, as follows:

“TAKE NOTICE that unless we receive, in our chambers the amount herein demanded together with our collection fees within three (3) months from the date of service of this statutory notice our strict instructions are to cause the sale by public auction of L.R No.209/7725 without further reference to you...”

The above is the purported statutory notice that went from the Defendant’s Advocates to the Plaintiffs. The simple question is “does the above meet the statutory notice as per S.69A of the Transfer of Property Act?”

My humble answer is in the negative. The Mortgagor must be given 3 months (90 days) and nothing less, and until that period has lapsed, the mortgagee cannot exercise his statutory power of sale. The words “WITHIN THREE MONTHS” do not, in my view, mean three months. They mean before the expiration of three months, while the simple and clear meaning of the words in the statute is that after, and not before, the three months, the mortgagee can set in motion the exercising of his statutory power of sale”.

30. It is common ground that this decision which was made in the course of interlocutory proceedings was neither reviewed nor appealed from. As a prefatory, this Court must consider whether that Ruling bars me from revisiting the issue of the validity of the Statutory Notice. Yet this may not be a novel question as the Court of Appeal has pronounced itself on it. In Uhuru Highway Development Limited vs. Central Bank of Kenya & 3 others [1996] eKLR, the Court of Appeal opined:-

“Stated simply, a trial Court, as opposed to a Judge sitting in chambers hearing an interlocutory application, applies and must apply its own mind to facts on evidence before it without regard to what may have been expressed by the Judge or an appellate court in regard to the merits of a case in determining whether or not there is a prima facie case. We have no quarrel with that. That is what we said in Civil Appeal no. 126 of 1995 in which the parties were the same and litigating under the same title. We said that to express a concluded view on the merits of the case would hamstring the decision by the High Court. It is for this reason that views expressed by us at an interlocutory stage are not binding on the trial court as facts may emerge in a different light then, or views may change, decisions may change or this Court may not follow its own decision when found to be wrong. Concluded views can only be expressed on facts not in dispute or not disputable facts which stand out as clear as day light”. (*my emphasis*).

31. It has been stated time and time again and it is the law that provisions as to the length of a Statutory Notice is obligatory. The law is that under the provisions of Section 69(A)(1) of the Act, a Mortgagee cannot proceed to exercise its Statutory Power of Sale unless and until it has given a Notice to the Mortgagor requiring payment of the mortgaged money and default has been made in payment of the mortgaged money, or of part thereof, for three months after such service.

32. In the instant case the Bank had made the following demand,

“Take Notice that unless we receive, in our Chambers the amount herein demanded together with our collection fees within three (3) months from the date of service of this Statutory Notice our strict instructions are to cause the sale by Public Auction..... LR NO.209/7725 without further reference to you...” (*my emphasis*).

Hon. Mutungi took the view that the words “*within three months*” did not mean three months. That it meant before the expiration of three months and therefore breached the provisions of Statute which provided for “*after, and not before*, the three months”. Counsel for the Plaintiffs supported this position and asked the Court to give regard to the decision in Trust Bank Limited vs. Eros Chemists Limited [2002] EA 550.

33. What am I to make of this proposition? The word ‘within’ is critical in the Notice. In the Concise Oxford English Dictionary 12th Edition ‘*within*’ is defined as follows:-

- (i) Inside (something). Inside the range of. Inside the bounds set by.
- (ii) Not further off than (a particular distance).
- (iii) Occurring inside (a period of time). *My emphasis*

Construing the word in that manner, the Notice to the Plaintiffs was that if they did not pay the amount demanded inside the period of three (3) months, then the Bank would exercise its Power of Sale. As to how to compute time, regard must be had to Section 57 of the Interpretation and General provisions Act which reads:-

“In computing time for the purposes of a written law, unless the contrary intention appears—

- a) record the court warrant or letter of instruction in the register;
- (b) prepare a notification of sale in the form prescribed in Sale Form 2 set out in the Second Schedule indicating the value of each property to be sold;
- (c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;
- (d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;
- (e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

Section 69A (1) (a) permits the mortgagee to exercise its Power of Sale only upon it issuing a Notice requiring payment of the mortgage money and default has been made in payment or part thereof for 3 months after such service. That is to say the Mortgagee can proceed to exercise its Power of Sale if default continues **outside 3 months after service**. Looked at inversely, the event that permits the exercise of the power is that payment has not been made within 3months after service. It is for this reason that I am unable to reach the same conclusion as Hon. Mutungi J. that the Notice issued constricted the Statutory period as prescribed.

34. My view is fortified by the holding of the Court of Appeal in Trust Bank Limited vs. Kiran Ramji Kotedia (2000) eKLR in which it held:-

“In the case in which these remarks were made, the point in issue was the length of the notice required as the mortgagee had threatened to sell the charged property if the mortgage money was not paid within fourteen days and without specifying that the sale would only take place if payment was not made within three months from the date of service of the notice. In the present appeal, the appellant specifically stated the amount of monies they were demanding from the respondent and it was specifically stated that if the monies were not paid within three months from the date of service of the notice, the charged property would be sold. With respect that, in our view, is what a notice under section 69A (1)(a) of the TPA ought to be”. (my emphasis).

35. I find that the Notice of 28th March 2002 was valid and in compliance with the provisions of Section 69(A) (i) (A) of the Transfer of Property Act.

36. Following continued default Contact Auctioneers (*on behalf of the Bank*) served a Notification of Sale on Murad on 17th July 2002. The Plaintiffs criticize this Notice as failing to comply with Rule 15(b) of The Auctioneers Rules 1997. However it is common ground that no Auction proceeded on the basis of this Notification and it may be needless to examine it.

37. The suit property was sold on 2nd December 2004, on the basis of a Notification of Sale dated 10th November 2004 and served on Murad on 12th November 2004. Murad admits receiving this Notice. The Notice is produced as below:-

10TH November 2004

Murad Ebrahim Murad &

Hamida Murad

P.O. Box 43577

NAIROBI

Dear Sir,

RE: KENYA COMMERCIAL BANK LTD VS. YOURSELVES

LR.NO. 209/7725 GOLF COURSE – NAIROBI

The above refers.

Further to the previously issued forty five (45) days redemption notice and notifications of sale, enclosed please find fresh notifications of sale duly served upon yourselves.

You are required to sign the copy and return the same by registered post.

Also note that the outstanding amount was Kshs.1,704,549.50 which sum continues to accrue interest at the rate of 19% p.a last applied on 31st October 2004 until payment in full.

Yours faithfully,

For: BASELINE AUCTIONEERS

Signed

R.N. NYARIKI

38. Whilst the Notice was served on 12th November 2004, the Auction was to proceed and did proceeded on 20th December 2004. This was about 18 days later. The Plaintiffs submit that this flouts the law.

39. In this regard Richard Nyariki (DW2), the Auctioneer, stated,

“Notification required was 45 days and thereafter 15 days. We could issue a shorter Notice if we had already issued a previous Notice. This would include the 15 days for advertisement”.

40. The previous Notice alluded to is that of 10th June 2003 (D Exhibit 2 pages 8-11 and D Exhibit 1 page 64). Murad admits having received this Notice. The Notice is reproduced below:-

“NOTICE TO OWNER OF PROPERTY”

TO: MURAD EBRAHIM MURAD & HAMIDA MURAD

P.O. BOX 43577

NAIROBI

Take Notice that you may within Forty Five (45) days from 11th June 2003 redeem the property set out in the Notification of sale now served upon you by payment of :-

Amount Kshs.1,704,549.50 cts plus interest at 24% P.A last applied on 30/3/2003 together with estimated legal costs of Khs.T.B.A.

Estimated Auctioneers fees of Khs.T.B.A.

On expiry of the 45 days without payment in full, the property will be advertised for sale. Note that you shall not be entitled to be given any further Notice in the event that the auction does not take place for whatever reasons.

Signed Signed

13.6.03 For: BASELINE AUCTIONEERS

Served upon DATE: 10.6.03

His testimony was:-

“I received Notice at page 64 of Defendants Documents”.

41. Before considering whether that Notice was in conformity with the law, I would observe that the Auctioneer was correct in his view that having issued the first Notice, it was unnecessary to re-issue another 45 days' Notice. Rule 15(d) of the Auctioneers Rules does not impose an obligation on the Auctioneer to issue fresh Notices each time before putting up a charged property for Sale (*see for example the Decision of Hon. Ochieng J. in Joseph Kiarie Mbugua & Another vs. Garam Investment Limited & Another* [2006] eKRL).

42. Did the contents of that Notice breach the expectations of Rule 15 of The Auctioneers Rules 1997? That Rule reads:-

“15. Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

(a) record the court warrant or letter of instruction in the register;

(b) prepare a notification of sale in the form prescribed in Sale Form 2 set out in the Second Schedule indicating the value of each property to be sold;

(c) locate the property and serve the notification of sale of the property on the registered owner or an adult member of his family residing or working with him or where a person refuses to sign such notification, the auctioneer shall sign a certificate to that effect;

(d) give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement.

For a start, the Notification of Sale ought to be prepared in the form prescribed in Form 2 of the second schedule and should indicate the value of the property to be sold. I have looked at the Notification and observe that it is in conformity with the statutory format in the following respects,

- (i) It gives the names and address of both the Creditor and Debtor.
- (ii) It gives the name and physical address of the Auctioneer.
- (iii) It sets out the date of the Letter of Instructions.
- (iv) It gives the particulars and location of the property and describes it.

(v) It gives the market value and reserve price.

In addition it is a 45 day Notice. The Notice in my view, is adequately detailed and conforms with the law.

43. The Sale is further assailed as being in breach of a Court Order. There is evidence that on the very day (2nd December 2004) of the Auction, Hon. Mutungi J. issued the following Order:-

“Upon perusal of the Notice of Motion herein dated 1.12.2004, the supporting affidavit of Murade Ebrahim Murad of even date, and upon hearing Counsel for the Applicant, this Court grants the following Orders:-

1. *Certifies the Application to be urgent and heard exparte in the 1st instance.*
2. *Stays the intended Auction of the said property L.R No.209/7725, pending the delivery of the Ruling on the Chamber Summons application dated 26/8/03 and heard on 26/11/04.*
3. *Costs of this application to be provided for”.*

44. The evidence emerging is that the Order was served upon the Auctioneer who received it at 11.10am. The person who served the Order did not testify and Murad who was the only witness for the Plaintiffs was not present at the time of service. The evidence of Mr. Nyariki (*the Auctioneer*) is that he was served with the Order after he had concluded the sale. This evidence is not controverted and was in fact supported by the evidence of Martin Gatiba (PW5) who made the Bid on behalf of the 2nd Defendant. I would agree with Counsel for KCB that the order was overtaken by events as it was served after the sale. Although the Plaintiffs' Counsel had submitted that it was impossible to conduct and conclude the Auction in 10 minutes, there was no evidence to back this assertion or that the Account given by the Defence was false.

45. After the Sale, the property was transferred to Anne on 30th November 2006. This, admittedly, is many days after the Order was served. The Plaintiffs submit that the transfer was, again, done inspite of and in contravention of the Order.

46. The Bank on the other hand argues that the order of 2nd December 2004 only stayed the intended Auction and since it was served after the Auction, the Order was not effective to stop the transfer. I observe that on the evidence, the Order was served after the Auction had been concluded. Thereafter the Plaintiffs did not move Court to stop the transfer that would have to follow the Sale. As the Order specifically targeted the stay of the intended Auction, it lacked any efficacy to stop the transfer. At any rate the Order could not reverse a Sale that had happened.

47. The Memorandum of Sale (D Exhibit page 5-9) shows that the price achieved at the Auction was Ksh.7.05 million of which a down payment of Kshs.1.8million was made on 2nd December 2004. The balance of the purchase price was to be paid by 3rd January 2005. The undisputed evidence is that this balance was paid well outside the prescribed date 3rd January 2005 as it was paid on 15th November 2005 (2D Exhibit page 45).

48. Can this late payment defeat the sale as asserted by the Plaintiff? The mortgage, it bears repeating was governed by the Provisions of The Transfer of Property Act. Under the provisions of Section 60, the Plaintiffs Right of Redemption became extinguished upon the mortgage entering a binding Contract for Sale after the Public Auction. But has happened here, the Purchaser may delay in paying the Contract sum yet the Mortgagee is happy to grant the Purchaser more time to pay the balance of the Purchase price. As the Mortgagee's Right of Redemption is extinguished, he cannot be allowed to interfere with the variation of the Contract between the Mortgage and the Purchaser unless it has been shown that the Contract is entered into or varied in bad faith. As Platt JA. observed in Mbuthia vs. Jimba Credit Finance Corporation & another [1998] eKR,

“To answer the Appellants submissions, it must be said that the equity of Redemption is extinguished when the Contract is validly concluded, while the conditions of the Contract may be adjusted between the Mortgagee and the Purchaser as they agree, leaving the Mortgagor no ground upon which to intervene”. (my emphasis)

However, a delay in the payment of the balance of the Purchase Price should not be allowed to prejudice the Mortgagor and so while the Mortgagee may be willing to expand time for payment, it ought to credit the Mortgagor's Account with the full purchase price when it reasonably becomes due. To do otherwise would be to indulge the Purchaser at the expense of the Mortgagor.

49. What the Plaintiffs have failed to demonstrate is that the extension granted to Ann was done in bad faith or in a manner that hurt them. To the contrary, there is evidence that Ann had to pay a further sum of Kshs.700,000 to make up for interest that had accrued because of the late payment!

50. Three other matters in regard to the realization process deserve the Court's attention. The propriety of the Auction was further questioned on the allegation that the Deposit of the Purchase price was paid even before the Auction date. The Auction was carried out on 2nd December 2004. A Deposit of Kshs.1,800,000/= was paid with two bankers cheques. The first is dated 1st December 2004 for Kshs.1,500,000/= and another of 2nd December 2004 for Kshs.300,000/=. If the first cheque was tendered at any time before the Auction then it would be suggestive of collusion between the Auctioneer and the Purchaser. But what should be of concern is not so much the date of the cheque but when it was tendered. Prudent bidders should not be faulted for making preparations ahead of the Auction date and these may include preparing the deposit needed to support their bids.

51. Martin Gatiba (DW5) made the bid on behalf of Anne. In his witness statement he states:-

“13. On the Auction day, 2nd December 2004, I arrived at Baseline Auctioneers Offices in time for the Auction and found about 10 other interested buyers.

14. At 11.00am on the said date, the Auctioneers started the Auction.

15. I was the highest bidder at Kshs.7.05 million, with the closest at a bid of Kshs.6.7.million.

16. I paid the required deposit of Kshs.1.8 million for Plot No. LR 209/7725 on behalf of my aforesaid Aunt”.

The Witness was not cross-examined as to why he had a Banker's cheque dated 1st December 2004. As for the Auctioneer (DW2) his evidence was that the entire deposit was paid at the fall of the hammer. In the face of this evidence, the Plaintiffs failed to prove that the deposit was paid earlier than the Auction date.

52. There was then a faint attempt to argue that the Auction was defeated by the doctrine of *lis pendens*. Faint because it is neither pleaded nor taken up during hearing and appears for the first time at the submission stage. It therefore did not feature as one of the issues to be determined and it would be needless to even consider it.

53. But even if I did, it does not shore up the Plaintiffs' case. The Bank's enforcement of its Statutory Right of Sale had begun prior to the presentation of this suit on 27th August 2003. Indeed the Bank's attempt to enforce that right is what jolted the Plaintiffs into Action. There is now a string of Decisions that the Doctrine of *lis pendens* cannot be invoked to stop or defeat a Mortgagee from continuing with a realization process that has begun before the presentation of the suit. (See for example Argos Furnishers Ltd vs. Ecobank Kenya Ltd & Another [2014] eKLR). To hold on the converse would be to grant an automatic restraining Order on the exercise of that Statutory Power by simply filing suit without the need of a party justifying and obtaining an order of Injunction. A most preposterous prospect!

54. Another issue raised at submission was that the property was sold at an undervalue. This was neither pleaded nor presented to Court as an issue for determination. The Plaintiffs are attempting to travel beyond their pleadings and issues placed before Court for determination. This must be discouraged and will not be permitted.

55. It is now clear that the view of this Court is that the Auction of 2nd December 2004 cannot be faulted. And even if I was to find that the Transfer of the property to Ann should not have been effected because of the Order of 2nd December 2004 and it should be cancelled, I cannot fault the Auction and that the Plaintiffs equity of Redemption was extinguished upon the entry of the Contract between the Auctioneer and the Purchaser.

56. On her part Ann mounted a Counterclaim seeking the following prayers:-

- a) An Order for vacant possession directed against the Plaintiffs in respect of L.R No.209/7725.
- b) An eviction Order directed against the Plaintiffs in respect of the suit premises.
- c) Damages for trespass.
- d) Mesne profits at the rate of Kshs.35,000/= per month for the period December, 2006 to date.
- e) Costs of the suit with interest.

57. This Court has found that the purchase of the property by Ann, through Martin, was lawful and she is deserving of occupation thereof.

58. As to mesne profits, it is defined as follows in the Civil Procedure Act, “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”.

59. Ann seeks mesne profits at the rate of Kshs.35,000 per month and in her testimony says that this consists of rental income she would have earned. There is no doubt that reasonable rental income can form a good basis for working out mesne profits but there must be proof of that rental income (See Mistry Valji vs. Janedra Raichand & 2 others [2016] eKLR). Such proof can come from a Valuer. However, no effort was made by Ann to establish the possible rental income of the property and the Claim for mesne profit was therefore not proved.

60. The upshot is:-

60.1 The Plaintiffs' claim is dismissed in its entirety with costs to the Defendants.

60.2 The 2nd Defendant's Counterclaim for vacant possession succeeds.

60.3 The Plaintiffs shall grant vacant possession of the suit property to the 2nd Defendant within 60 days hereof, failing which the 2nd Defendant shall be entitled to an eviction Order.

60.4 The 2nd Defendant shall have costs of the Counterclaim.

Dated, Signed and Delivered in Court at Nairobi this 19th Day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Onindo for Plaintiff

Guserwa for 2nd Defendant

Guserwa h/b Mwangi for 1st Defendant

Nixon – Court Assistant