



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NUMBER 256 OF 2009**

**LUCY WANJIRU KARITU.....PLAINTIFF**

**VERSUS**

**PETER MACHARIA KARIKI.....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**WAGLY AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**1. Background and Pleadings**

The plaintiff was at all material items the registered owner of land parcel known as **BAHATI KABATINI BLOCK 1/1985 (NDEFFO)** having purchased the same in a public auction from National Bank of Kenya Limited at a price of Kshs.330,000/= on the 25<sup>th</sup> June 2003. Upon purchase the title documents held by the Bank in respect of the property were released to her and upon due process having complied with, registered the property in her name.

However, the 1<sup>st</sup> Defendant who was dispossessed of the land parcel by virtue of the sale and eventual removal of his name from the register failed to give vacant possession to the plaintiff.

2. By her plaint dated 1<sup>st</sup> September 2009 and filed on the 7<sup>th</sup> September 2009 the plaintiff sued the 1<sup>st</sup> defendant Peter Macharia Kariuki and the Bank 2<sup>nd</sup> Defendant for:

***a) A declaration that the plaintiff is the rightful registered owner of land parcel known as BAHATI/KABATINI BLOCK 1/1985(NDEFFO).***

***b) An eviction order directing the 1<sup>st</sup> Defendant to vacate the land.***

3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were enjoined to the suit later in the proceedings by the defendant by a court order upon application.

The 1<sup>st</sup> defendant filed his defence and counter-claim on the 19<sup>th</sup> October 2009 and admitted having owed the bank Kshs.40,000/= from a loan he was advanced in 1989 and which he paid Kshs.6,000/=. He however denied having been served with statutory notices of intention to sell the property to recover the balance. He further denied the sale of the property.

4. In his counter-claim, the 1<sup>st</sup> defendant demanded cancellation of the sale of the property due to illegalities.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their joint defence on the 17<sup>th</sup> February 2011 and stated that the sale of the suit property was procedurally and legally sold in a public auction after serving the necessary statutory notices to the 1<sup>st</sup> defendant and urged the counter claim to be dismissed.

5. In reply to the defence and defence to counterclaim by the 1<sup>st</sup> defendant, the plaintiff reiterated its averments in her plaint and urged dismissal of the counterclaim for failure to disclose a course of action against her.

#### **6. The plaintiff's case:**

The plaintiff's evidence was taken before Honourable W. Ouko(as he then was) on diverse dates in February 2012 and March 2013. Thereafter Justice Emukule took over the plaintiff's case which was closed on the 15<sup>th</sup> July 2014.

7. The defendants case was heard before me on the 26<sup>th</sup> April 2016 after which parties filed their written submissions.

#### **8. The Plaintiff Lucy Wanjiru Karitu testified as PW1**

Her evidence was straight forward. That she bought the suit property in a public auction conducted by the 3<sup>rd</sup> Defendant, Wagly Auctioneers, that she paid the full purchase price of Kshs.330,000/= and was issued with a certificate of sale after which she applied and obtained the Land Board consent to transfer the property by the chargee, National Bank Limited. That after a valuation and payment of a stamp duty to the Government, a title deed was issued in her favour. She produced the following documents in support of her case: Advertisement of sale of the property in the Daily Nation newspaper PExt. 1, payment receipts PExt. 2 and 3, Certificate of sale PExt. 5, Land Control Board consent and Transfer PExt. 6 and 7, Valuation report PExt. 8 and Stamp Duty Payment Receipt PExt. 9, and the Title Deed as PExt. 10.

She further testified that upon requesting the 1<sup>st</sup> defendant to vacate the land and give her vacant possession, he refused to vacate hence this case.

9. **PW2 was Joseph Maina Karitu** and sister to the plaintiff. His testimony was that after PW1 purchased the property, he together with the plaintiff visited the 1<sup>st</sup> defendant who promised to vacate the land but that he did not.

10. **PW3 was the Nakuru Provincial Land Registrar**, Charles Birundu, produced the register for the suit property. He confirmed that the land was transferred to the plaintiff by National Bank as chargee under **Section 77 of the Registered Land Act** (now repealed), upon a charge registered on the 8<sup>th</sup> December 1989.

#### **11. Defendants' Case**

**The 1<sup>st</sup> Defendant DW1** testified and admitted that he obtained a loan of Kshs.40,000/= from National Bank in 1989 and offered the suit property as security, that he only paid Kshs.6,000/= and that he defaulted in paying the balance. He admitted having received demand letters from the Auctioneers and the Bank in 1995 DExt. 1. He denied that they sent to him any other letter but admitted receiving a letter for the sale of the property from the auctioneer DExt.3. He also testified that the sale was not conducted and was postponed but no other letter was sent to him.

12. On cross examination by Mr. Olonyi for the plaintiff, DW1 admitted receiving a letter giving him three months notice to pay or the land would be sold. He also confirmed that the land was advertised for

sale but he did not stop the sale by a court order. He admitted having been given notice by the Bank Advocates and stated that he did not know that the Bank had obtained the Land Control Board consent to transfer the property. He also admitted having been served with a letter informing him that the property had been sold in a public auction.

13. Mr. Githiru for the Bank also cross examined the 1<sup>st</sup> Defendant. He admitted having received notices from the bank, notice for the sale and admitted his failure to pay the balance of the loan to the Bank.

14. **DW2** was Morris Sumba the Banks remedial officer. His testimony was that as at the year 2000, the outstanding loan was Kshs.700,000/= and that all statutory notices were served upon the 1<sup>st</sup> Defendant.

He further testified that the property was legally and procedurally sold to the plaintiff.

On the notices of sale on the 2<sup>nd</sup> date of sale on the 15<sup>th</sup> October 2001, he stated that auctioneers and their Advocates served all the necessary notices. He denied that the Bank had written off the loan.

15. From the above evidence, the issues that comment to me for determination are:

***(a) Whether the plaintiff is a bonafide purchaser for value of the suit property from a public auction.***

***(b) Whether the 1<sup>st</sup> defendant was served with the statutory notices prior to the sale of the property.***

***(c) whether the sale of the suit property was illegal.***

***(d) Whether the plaintiff is entitled to the prayers sought***

***(e) Whether the 1<sup>st</sup> defendant is entitled to prayers in his counter-claim.***

16. I have considered the parties submissions and the evidence adduced.

The following material facts are not in dispute.

That the 1<sup>st</sup> defendant was advanced a loan of Kshs.400,000/= by the 2<sup>nd</sup> defendant, that he paid only Kshs.6,000/=, that the bank in exercise of its chargees power of sale was entitled to sell the charged property to recover the balance of the loan, that all the necessary statutory notices were duly served upon the 1<sup>st</sup> defendant, that he acknowledged having received the same from the Bank Advocates and the Auctioneers.

17. It is also not disputed that the 1<sup>st</sup> defendant was aware of the sale of the property having acknowledged receipt of the notification of sale and the Advertisement in the Daily Nation.

In other words, the 1<sup>st</sup> defendant acknowledged that the sale to the plaintiff was legally and procedurally done through the 3<sup>rd</sup> defendant, Wagly Auctioneers under instructions of the 2<sup>nd</sup> Defendant, National Bank Limited.

18. I have considered the 1<sup>st</sup> defendants submissions against his evidence. I find the submissions without any merit all necessary statutory notices having been served and duly acknowledged. In his own testimony the 1<sup>st</sup> defendant upon cross examination admitted that the bank loan was never written off.

19. Having made a finding that the Bank served all the statutory notices upon the 1<sup>st</sup> defendant, and that the public sale of the property was legal, I now want to determine whether the cancellation of the 1<sup>st</sup>

defendant's name from the register and registration of the title to the plaintiff was lawful.

The Land Registrar (PW3) confirmed that the plaintiff presented a Land Control Board consent for the transfer of the property to the plaintiff, paid stamp duty and had a certificate of sale by public auction.

**Section 143 of The Registered Land Act (now repealed)** empowers a court to rectify the register by a court order of cancellation if the registration was obtained by fraud or through an illegality, or when the land it sold for valuable consideration to a *bonafide* purchaser.

20. The 1<sup>st</sup> defendant did not allege that the title in his favour was fraudulently cancelled. His faint allegation that the cancellation and eventual registration in the plaintiff's favour was illegal was not supported either by evidence or legal submission. It was but a statement that has to remain as such.

21. The evidence by all the parties is in favour of the plaintiff's claims. The 1<sup>st</sup> defendant did not controvert or challenge the plaintiff's evidence which was supported by production of documents to support the legal acquisition and registration of the suit land in her favour.

In its totality, I am satisfied that the plaintiff has proved her case against the 1<sup>st</sup> defendant on a balance of probability, and therefore entitled to the prayers sought in the plaint.

On the other hand the 1<sup>st</sup> defendant's defence and counterclaim are but a sham, and were obviously made to delay the earlier conclusion of the case.

22. Having admitted literally all material facts relevant to the suit, it follows that the 1<sup>st</sup> Defendants claim for cancellation of the title to the suit land and rectification in his favour is a far fetched order. The counterclaim is dismissed, and his prayer for a declaration in terms of prayer (a) in the counterclaim is also dismissed.

23. Consequently I enter judgment in favour of the plaintiff against the first defendant and issue a declaration that the plaintiff is the rightful registered owner of land parcel known as **BAHATI/KABATINI BLOCK 1/ 1985 (NDEFFO)**.

24. A further order is hereby issued that the first Defendant do vacate the land parcel known as **BAHATI/KABATINI BLOCK 1/1985 (NDEFFO)** forthwith failing which an eviction order is issued against the said first defendant, after a period of 30 days from the date of this judgment.

25. The costs of the suit shall be awarded to the plaintiff and shall be paid by the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall not be awarded costs by virtue of the circumstances pertaining to the suit.

It is so ordered.

**Dated, Signed and Delivered this 25<sup>th</sup> Day of May 2017.**

**J. N. MULWA**

**JUDGE**