



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 37 OF 2007

SAMUEL KITI LEWA.....PLAINTIFF

VERSUS

1. HOUSING FINANCE OF KENYA LIMITED

2. JAMES K. KAGETE.....DEFENDANTS

JUDGMENT

1. The plaintiff through a Re-amended plaint filed on 6th October, 2010 seeks the following orders:-

(i) A declaration that the charge document dated 11th June, 1998 over title L.R. sub-division No. MN/I/9763 (Original Number 9677/85) is null and void and the money purportedly secured therein is irrecoverable;

(ii) A declaration that the transfer dated 3rd September, 2007 in favour of the 2nd Defendant and entered against Title L.R. sub-division No. MN/I/9763 (Original Number 9677/85) as entry No. 4 is null and void;

(iii) A declaration that a charge dated 3rd September, 2007 in favour of Savings and Loan Kenya Limited and entered against Title L.R. No. sub-division 9763 (Original Number 9677/85) as entry No. 5 is null and void;

(iv) A permanent injunction against the 1st and 2nd Defendants either by themselves, their servants, representatives and/or agents not to evict, dispossess or otherwise interfere with quiet possession and enjoyment by the Plaintiff of premises on plot L.R. No. 9763 (Original Number 9677/85) Section I Mainland North;

(v) General damages for breach of contract;

AND/OR

(vi) In the alternative compensation for the full market value of Title L.R. No. sub-division 9763 (Original Number 9677/85) Section I Mainland North as at 3rd September, 2007; and

(vii) Such further or other relief as this Court may deem fit and just to grant.

2. On 21st October, 2010, the defendants filed their "further further amended statement of defence" and a counter claim vide a consent dated 4th July, 2008 and a court order of 22nd September, 2010. The defendants denied the contents of the plaint and particulars of fraud alleged therein and put the plaintiff to strict proof thereof. They raised a counter-claim seeking the following orders:-

- (i) An order of eviction and vacant possession of the suit property known as LR No. MN/I/9763 (Original number 9677/85) Mombasa Municipality;
- (ii) Costs of this suit plus interest thereof at court rates; and
- (iii) Such further and/or other relief this court may deem fit and just to grant.

3. This case was partly heard Judge Mohamed Ibrahim (now a Judge of the Supreme Court of Kenya) and later by Judge Kasango. PW1 was Samuel Kiti Lewa, the plaintiff herein. He informed the court that he lives on plot No. 9763 Fahari Estate in Bamburi, Mombasa. He testified that he used to work at Kenya Ports Authority but stopped working in the year 2004, after having worked for 24 years.

4. He stated that he has sued the defendants in respect to plot No. 9763 in Bamburi that he purchased in the year 1997. This was through assistance from the Housing Finance Company of Kenya (HFCK) vide a mortgage. He bought it at Kshs. 1,650,000/=. He signed a charge but he was not given a copy of the same. He was to service the loan for 15 years. He stated that he had not completed payment at the time he was testifying in court and that he was not paying any money for the mortgage. He indicated that the title is with HFCK and the property is not in his name.

5. It was his evidence that changes took place on 4th December, 2007 but he was not given a notice of sale. The 2nd defendant bought the property for Kshs. 1.7 Million. He stated that neither HFCK nor the 2nd defendant had asked him to vacate the house.

6. The plaintiff further indicated that he never received a statement of accounts. He had known the 2nd defendant as his co-worker at Kenya Ports Authority for over 10 years but he never told him that he was interested the house. The 2nd defendant knew about the house and the mortgage. The plaintiff informed the court that his house was sold without notice and for that reason he wanted it back or to be compensated. In his view, the house in the year 2007 could have fetched Kshs. 3 Million.

7. On cross-examination, the plaintiff confirmed having executed a charge before Sally Mahihu Advocate and that he read the documents before he signed. He was supposed to pay Kshs. 34,479.00 per month. He stated that he was however paying Kshs. 17,292.00 as interest was reduced for he was a member of Kenya Ports Authority Housing Scheme which had an arrangement with HFCK.

8. He testified that he received a notice from HFCK that he was to pay Kshs. 34,000/= but KPA undertook to pay for two months. Later on he was told he would pay Kshs. 22,000/= but he did not have the letter in court. He had paid over Kshs. 3 Million. The balance was Kshs. 1.4 Million when he left KPA. He confirmed receiving the notice dated 28th November, 2005 and that he paid arrears of Kshs. 58,000/=. The demand was for Kshs. 1.5 Million.

9. On re-examination, the plaintiff said that he cleared the arrears but ran into financial difficulties.

10. PW2 was Paul Wambua t/a Paul Wambua Valuers. It was his evidence that he made a report on suit property MN/1/9763, Fahari Estate, Bamburi. He visited the property on 24th October, 2009. In his view the property in the year 2007 could have fetched Kshs. 2 Million at market value. He produced his report as plf. exh. 1.

11. On cross-examination, he stated that he visited the house in the year 2007 when he valued it for Savings and Loan. The mortgage value was Kshs. 1.6 Million.

12. The 2nd defendant, James Maragara Kageti, testified as DW1. It was his evidence that he bought the suit property through an agent at Impeccable Properties. He stated that as an employee of KPA, he approached HFCK which was selling the house. They agreed on a price of Kshs. 1.7 Million. He paid 10% and the balance was paid by Savings and Loan. They executed a transfer by charge, transferring the property to his name. He produced a copy of the transfer by charge as def. exh 1, a copy of the title as def. exh. 2 and a search certificate as def. exh. 3. He testified that ever since he purchased the house, he has never occupied it. He prayed for an award as per the counter-claim and an eviction order. He also prayed for costs.

13. On cross-examination, the 2nd defendant stated that he was told that HFCK were the owners of the house. They did not tell him that the house was mortgaged and owned by someone else. He knew the plaintiff as a co-worker in the same department at KPA. He wrote to him to give vacant possession of the house. It was being used as a children's home when he visited it.

14. DW2 was June Njoroge, the 1st defendant's Assistant Manager, Legal Services. She testified that the plaintiff applied for and received a mortgage in the sum of Kshs. 1,515,940/=. A charge dated 11th June, 1998 was registered. She produced the mortgage document as def. exh. 4. She testified that the plaintiff got a preferential rate of 10% under the Kenya Ports Authority Scheme. He did not make regular payments. On 28th November, 2005 they served a statutory notice which she produced as def. exh. 5. She also produced a copy of the registration slip of registered mail as def. exh. 6. She testified that at the time of issuance of the notice, the amount outstanding was Kshs. 1,560,269.15. As for the redemption statement the amount outstanding as at 30th April, 2007 was Kshs. 1,530,091.05. She produced the said statement as def. exh. 7.

15. DW2 further testified that the transfer of the charge was registered on 24th September, 2007, she produced it as def. exh. 8. A valuation was done by their valuer Tysons Ltd., and the market value was established to be Kshs. 1.8 Million. She stated that there was no fraud in the transaction. They did not receive a demand notice. She prayed for vacant possession, an order for eviction and costs of the suit.

16. On cross-examination, DW2 stated that the plaintiff owed Kshs. 1,530,091.58 as at the time the house was sold. The property was sold at Kshs. 1.7 Million. Advertisement was through their office in Mombasa. She indicated that they did not inform the plaintiff when they sold the property or give him a statement after completion. They sold it in excess of the amount due. On further cross-examination, DW2 informed the court that upon closure of the account, the excess amount is transferred to a call account and a letter is sent to a former borrower advising him of his credit to be collected.

17. DW3 was Sally Mahihu, the proprietor of P. Mboya (sic) Mahihu Advocates. She informed the court that she had practiced for 19 years as at the time of testifying. She had been an Advocate for 28 years. It was her evidence that she used to deal with mortgages and charges for HFCK, which was her main and big client. It was her evidence that the transaction in this matter occurred in the year 1998 and she kept the original documents that she witnessed in her office. She produced the original charge document as def. exh. 10. She stated that she would explain the document, the law and sections 69A and 100 of the Transfer of property Act on the power of sale by the lender, to borrowers.

18. On cross-examination, she was referred to the charge document of 11th June, 1998, which she said she was familiar with. She admitted that there was a problem at page 12 in that although the borrower signed, she did not sign and rubber stamp it. She was not sure that she gave the plaintiff a copy of the charge but she explained to him the relevant section.

ANALYSIS AND DETERMINATION

19. On 23rd May, 2012, the parties herein filed their joint list of issues as follows:-

- i. Was the Plaintiff the registered proprietor of Plot L.R. sub-division No. 9763 (Original Number 9677/85) of section I Mainland North?

- ii. Did the plaintiff charge the said Plot L.R. sub-division No. 9763 (Original Number 9677/85) of section I Mainland North for a Mortgage loan to the 1st Defendant?
- iii. If so what was the amount of the mortgage loan?
- iv. What was the repayment period of the said loan?
- v. Did the Plaintiff ever service the said loan mortgage with the 1st defendant?
- vi. If so to what extent and/or amount did the plaintiff service the said loan mortgage?
- vii. Was the said sum Kshs.100,000/= money (sic) rejected by the 1st Defendant?
- viii. Was the plaintiff served with a statutory (sic) prior to the transfer of the suit property by the 1st Defendant to the 2nd Defendant?
- ix. Is the charge document dated 11th June, 1998 null and void?
- x. Did the 1st and the 2nd Defendants commit fraud in transferring the suit property?
- xi. Are the Defendants entitled to eviction of the plaintiff and vacant possession of the suit property?
- xii. Who should pay the costs of this suit?

20. On issue Nos. 1, 2, 3 and 4, this court's finding is that the plaintiff was the registered proprietor of plot No. LR sub-division No 9763 (Original Number 9677/85) of section I Mainland North. This can be gleaned from the charge document produced as def. exhs. 4 and 10 made on 11th day of June, 1998 which was used to secure a mortgage for the sum of Kshs. 1,515,940. Clause 2 of the said charge provides that the borrower was to pay Kshs. 34,479 per month or such adjusted payments, until the whole of such sum with interest was fully paid. It was the plaintiff's evidence that he was expected to service the loan for 15 years.

21. On issue Nos. 5 and 6, from the evidence of the plaintiff and DW1, the plaintiff partly serviced the loan and in his own words he paid over Kshs. 3 Million. The balance outstanding was Kshs. 1.4 Million when he left the employment of KPA.

22. On issue No. 7, the payment of Kshs. 100,000/= to the 1st defendant did not come up during the plaintiff's evidence in chief or through cross-examination and as such, the statement that the 1st defendant rejected a payment of Kshs. 100,000/= from the plaintiff does not arise and cannot be verified.

22. Issue No. 8 is on whether the 1st defendant acted fraudulently and if the plaintiff was served with a statutory notice prior to the transfer of the suit property by the 1st defendant to the 2nd defendant. PW1 stated that he was not given a notice of sale, he was however served with a notice to pay arrears within 3 months. It is however evident from the plaintiff and DW2 that the statutory notice that was issued prior to the sale and transfer of the suit property to the 2nd defendant, did not explicitly state that the consequences that would befall the plaintiff in default of payment of arrears, would be the sale of his property. Since DW2 admitted the said shortcoming, I find that the 1st defendant contravened the provisions of section 69(1) of the Indian Transfer of Property Act 1882 (repealed) which was the applicable law when the charge was made over the suit property.

24. Section 69(1) of the Transfer of Property Act, 1882 of India as amended by the Indian Transfer of Property (Amendment) Act 1959 (repealed) provides as follows:-

“A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee’s statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage document has passed or some event has occurred which, according to the terms of the mortgage document, renders the mortgage-money, or part thereof, immediately due and payable.”

25. Counsel for the plaintiff cited the cases of **Mbuthia vs Jimba Credit Finance Corporation & Another**, Nairobi Civil Appeal No. 111 of 1986, **Elijah Kipengeno Arap Bii vs Samuel Mwehia Gitau & Another** [2009] eKLR to show that the mortgagee is expected to act in good faith and observe the protection of the mortgagor when exercising its statutory power.

26. In the case of **Trust Bank Ltd. Vs Eros Chemists Ltd. & Another**, Civil Appeal No. 133 of 1999, the Court of Appeal held as follows:-

“In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor’s equity of redemption would be extinguished. This would be a serious matter. The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months’ period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months period.”

27. In the instant case, although both parties are in agreement that a statutory notice was issued, the said notice in my view falls way below the holding of the Court of Appeal in the **Trust Bank Ltd vs Eros Chemists Ltd. & Another** (supra). The 1st defendant failed to expressly state that the sale of property sub-division No. 9763 Section I Mainland North in Bamburi, Mombasa would take place after the expiry of the 3 months’ notice. In essence, this means that the notice issued to the plaintiff on 28th November, 2005 was null and void and of no effect.

28. On the validity of the charge document dated 11th June, 1998 for the plaintiff, it was signed before DW3, Sally Mahihu Advocate. The said document was produced by DW2 as def. exh. 4. The Advocate however failed to sign her respective part indicating that she had prior to the execution of the charge explained to the plaintiff the effect of section 69(1) and Section 100A(1) of the Transfer of Property Act 1882 of India as incorporated by the Indian Transfer of Property (Amendment) Act 1959.

29. DW3 however produced def. exh. 10 being a charge similar to the one produced as def. exh. 4. The one she had was however properly executed at page 12. She explained that def. exh.10 was her office copy whereas def. exh. 4 is the one which was retained by the bank. This Court is not in a position to determine if def. exh. 10 was doctored as suggested by Counsel for the plaintiff for purposes of this case. I will therefore give DW3 the benefit of the doubt that she duly executed her office copy of the charge document on the day the plaintiff signed the said document in her office.

30. In his evidence, PW1 confirmed having read the charge before he signed it. From the evidence adduced with regard to the execution of the charge, I find it is binding on the plaintiff. I therefore decline to declare that it is null and void and that the money securing it is irrecoverable. Such a holding would have the effect of conferring a benefit to the plaintiff free of the outstanding mortgage payments. Banks are established to carry on business and make profits.

31. In her written submissions Counsel for the plaintiff stated that the plaintiff's property was sold fraudulently and without any notice as pleaded in at paragraph 12 of the plaint. Counsel submitted that the particulars of fraud were not denied by the defendants in their statement of defence. In paragraph 10 of the defendants "further further amended defence" and counter claim, they deny the particulars of fraud alleged and put the plaintiff to strict proof thereof. It further states that the defendants shall at the most opportune time crave leave of the court to refer to the said charge.

32. Counsel for the plaintiff referred to the provisions of Order 2 rule 11 of the Civil Procedure Rules, 2010 to show that the defendants admitted the particulars of fraud contained in the plaint due to their failure to specifically traverse the same in their defence and submitted that a general denial of such allegations, or a general statement of non-admission of them was not sufficient traverse of the same.

33. The defendant's Counsel in response to the above submitted that the plaintiff totally failed to prove the allegations of fraud and that he admitted having received a statutory notice. It was further submitted that the 1st defendant's Valuer gave the market value for the property in issue at Kshs. 1.8 Million but the Valuer for the plaintiff gave a market value of Kshs. 2 Million but stated that Kshs. 1.7 Million was a reasonable value for the property. He was thus of the view that the amount the property was sold at was not below the market value.

34. In the case of **Vivo Energy (K) Ltd. vs Maloba Petrol Station Ltd. & Others** [2013] eKLR, the Court of Appeal while citing **R.G. Patel vs Lalji Makanji** [1957] EA 314 stated as follows:-

"allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something than a mere balance of probabilities is required."

35. The particulars of fraud could not have been traversed in any other manner but by the defendants calling evidence to rebut the said allegations. In the said circumstances, the defendants cannot be held to have admitted the particulars of fraud. In line with the decision of **R.G Patel vs Lalji Makanji** the burden of proof required to prove fraud is above that of a balance of probabilities. The evidence adduced herein on the said allegation does not meet that threshold. I do not see any elements of fraud in this case.

36. Since this court has established that the statutory notice issued to the plaintiff did not expressly inform him of the impending sale of his property after the expiry of 3 months, I declare the transfer dated 3rd September, 2007 in favour of the 2nd defendant entered against Title L.R sub-division No. MN/I/9763 (original Number 9677/85) as entry No. 4, null and void. As a consequence thereof, I declare the charge dated 3rd September, 2007 in favour of Savings and Loan Kenya Ltd., entered against Title L.R. sub-division No. MN/I/9763 (original number 9677/85) as entry No. 5 in favour of the 2nd defendant, null and void.

37. The plaintiff has been in occupation of the property the subject of this case, he has therefore suffered no loss that is capable of compensation. He also has outstanding dues unpaid from the mortgage he took in the year 1997. The plaintiff herein is therefore granted 60 days to make good the outstanding payments failing which the 1st defendant will be at liberty to issue him with a statutory notice befitting the holding in **Trust Bank Ltd. vs Eros Chemists Ltd. & Another** (supra). The foregoing outcome means that the counter-claim that seeks an order for eviction of the plaintiff and vacant possession of the suit property is dismissed with costs to the plaintiff. Costs of the suit are awarded to the plaintiff.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of July, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mokaya E. holding brief for Mr. Mokaya K. for the plaintiff

No appearance for the defendants

Ms Bancey Karimi - Court Assistant