



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 140 OF 2013

LASET LTD.....PLAINTIFF

- VERSUS -

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JANE NYAMBURA MWANGI AND JANE WAIRIUMU

MWANGI (the Administrators of the Estate of

Wilson Mwangi Karogo, Deceased).....2ND DEFENDANT

JUDGMENT

[1] The Plaintiff herein, **Laset Limited**, sued **Kenya Commercial Bank Limited** (the 1st Defendant) and the Administrators of the Estate of **Wilson Karogo**, now deceased, namely **Jane Nyambura Mwangi** and **Jane Wairimu Mwangi**, vide a Plaint dated **11 April, 2013** which was filed on **12 April 2013**, seeking judgment against the Defendants jointly and severally for:

- a. A declaration that no default has occurred or arisen on the part of the Plaintiff as a guarantor and that consequently the 1st Defendant is not entitled to exercise its legal rights under the security created over TITLE NUMBER KAJIADO/OLOLOITIKOSH/KITENGELA/185.
- b. A declaration that the purported sale of TITLE NUMBER KAJIADO/OLOLOITIKOSH/KITENGELA/185 conducted on or about 30 June, 1992 or at any other date thereafter is unlawful and therefore null and void and the same be rescinded and/or set aside.
- c. A declaration that the purported sale is in any event null and void for failure to obtain consent of the Land Control Board within the prescribed period.
- d. An order compelling the 1st Defendant to allow the Plaintiff redeem the Plaintiff's property TITLE NUMBER KAJIADO/OLOLOITIKOSH/KITENGELA/185.
- e. An order of injunction to restrain the Defendants whether by themselves, their servants or agents or otherwise howsoever from alienating, advertising for sale, offering for sale, taking possession of, leasing, transferring, charging or otherwise in any manner interfering with TITLE KAJIADO/OLOLOITIKOSH/KITENGELA/185 on account of the charge registered against it or at all.
- f. That general and punitive damages be awarded to the Plaintiff as against the 1st Defendant for breach of its fiduciary duty to the Plaintiff and misrepresentation by the 1st Defendant.
- g. Costs of this suit.
- h. Such further or other orders as this Court may deem fit and just to grant.

[2] The Plaintiff is a limited liability company incorporated in Kenya and it averred that presently, and at all material times hereto, it was the registered owner of the parcel of land known as **TITLE NUMBER KAJIADO/OLOLOITIKOSH/KITENGELA/185** (herein 'the suit property'). The background to the suit as set out in the Plaintiff is that on or about **23 January, 1986** the Plaintiff consented to the creation of a Third Party Charge over the suit property by way of Guarantee in respect of a loan facility extended to one of its employees, **Mary Anne Wangai**, by the 1st Defendant. The said **Mary Anne Wangai** subsequently left the employ of the Plaintiff and, as is averred by the Plaintiff, she left with the assurance that she would settle the loan advanced to her by the 1st Defendant. The Plaintiff thereafter lost touch with the said former employee but all along believed that she had settled the said loan.

[3] It was thus the contention of the Plaintiff that it was not until sometime on or about **20 March, 2013** when it received information that some unknown person(s) were attempting to transfer the suit property without their knowledge. The Plaintiff immediately placed a restriction over the suit property to safeguard its interests pending investigations into the circumstances under which the said third parties were attempting to transfer the suit properties. Thereafter, the Plaintiff visited the 1st Defendant's offices to check on the status of the Third Party Charge, only to be informed that the suit property had been sold by way of public auction to one **Willy Mwangi Karogo** on or about **30 June 1992** in exercise of the 1st Defendant's statutory power of sale.

[4] It was thus the contention of the Plaintiff that the sale of the suit property that was allegedly undertaken by the 1st Defendant on or about **30 June 1992** was irregular, null and void as it was tainted with fraud and misrepresentations. The particulars of illegality, fraud and misrepresentation on the Defendant's part were supplied at Paragraph 13 of the Plaintiff and can be summarized as follows:

- [a] Failing to notify them that Mary Anne Wangai (herein the principal borrower) had defaulted in her loan repayment.
- [b] Failing to make any effort to recover the loan from the principal borrower.
- [c] Failing to issue a statutory notice to the Plaintiff.
- [d] Selling and/or purporting to sell the suit property at unreasonably low value having regard to the market value of the property and the amount of the Guarantee.

[4] It is on account of the foregoing circumstances that the Plaintiff filed the present suit for redress, and being apprehensive that the Defendants would transfer the suit property to third parties to the detriment of the Plaintiff, it took measures to obtain interim relief by way of interlocutory injunction as per the Ruling of the Court made on **31 March 2014**.

[5] The 1st Defendant responded to the Plaintiff's claim vide its Defence dated **22 April 2013** and filed on even date. The 1st Defendant admitted that the Plaintiff was the registered proprietor of the suit property and that the Plaintiff created a Third Party Charge over the property in its favour; but denied the Plaintiff's assertion that it is still the legal and beneficial owner of the said property. The 1st Defendant averred that it had since lawfully sold the suit property to the 2nd Defendant in exercise of its statutory power of sale under the Charge; and that the suit property was sold by way of public auction on **30 June, 1992** to **Wilson Mwangi Karogo (the deceased)**.

[6] With regard to the exercise of its statutory power of sale, the 1st Defendant averred that due process of the law was adhered to; and that it provided the Plaintiff with the requisite notices including the Statutory Notice. The 1st Defendant further averred that it duly notified the Plaintiff of the default by the principal borrower prior to exercising its statutory power of sale. It was also the assertion of the 1st Defendant that it made all reasonable efforts to recover the outstanding monies from the principal borrower; and that the suit property was sold at the best obtainable value. In the circumstances, the 1st Defendant denies the allegations of illegality, fraud and misrepresentation as particularized by the Plaintiff in its Plaintiff. On the issue of litigation involving the suit property instituted by the 2nd Defendant at the Machakos, being **Machakos HCCC No. 327 of 2011 (OS)** (hereinafter **the Machakos High Court Case**), the 1st Defendant averred that the suit property having been sold lawfully to a third party by public auction, the Plaintiff could not be made a party to the **Machakos High Court** proceedings, which merely sought the vesting of title.

[7] In addition to the foregoing, the 1st Defendant also pleaded the defence of limitation and averred that the Plaintiff's claim is barred by virtue of **Section 4** of the **Limitation of Actions Act, Chapter 22** of the **Laws of Kenya**, granted that six (6) years had lapsed since the cause of action arose on or about **30 June, 1992** when the suit property was sold by way of public auction.

[8] The 2nd Defendant herein is the deceased **Wilson Mwangi Karogo**, who allegedly bought the suit property at a public auction organized by agents of the 1st Defendant. The estate of the deceased is herein represented by his widows, **Jane Nyambura Mwangi** and **Jane Wairimu Mwangi**. They filed a Defence herein dated **29 April 2013** on **30 April 2013**, basically denying the allegations made in the Plaintiff.

[9] The suit came up for hearing on **13 September 2016**, and in support of its case, the Plaintiff relied on the testimony of its Director, **Prof. Nathan Kahara Muriithi (PW1)**. He adopted his Witness Statement dated **28 May 2015**, in which he made reference to the various documents comprising the Plaintiff's List and Bundle of Documents filed on **12 April 2013**. It was thus the evidence of **PW1** that the Plaintiff is and has always been the registered proprietor of the suit premises; and that having subjected the same to a Third Party Charge in favour of the 1st Defendant to secure a borrowing by one of the Plaintiff's employees, **Mary Ann Wangai**, the 1st Defendant was under obligation to make efforts to recover the loan from the principal

borrower before resorting to the sale of the charged property.

[10] **PW1** further testified that the 1st Defendant never informed the Plaintiff of the default by the principal borrower or give notice of its intention to sell the charged property. He added that he was unaware that the suit property had been advertised for sale by way of public auction in the newspapers, adding that no Notice to Sell was ever served on the Plaintiff by the Auctioneer. He added that he got to learn that the auctioneer was not licensed and that the transfer was not approved by the **Kajiado Land Control Board** as required by the law. It was thus the evidence of **PW1** that no valid sale was undertaken or completed between the 1st Defendant and **Wilson Mwangi Karogo**; and therefore that the suit property has never been part of the estate of the deceased.

[11] The 1st Defendant called as its witness **Donald Oseko (DW1)**, a Banker by profession and an Assistant Legal Manager in the 1st Defendant Bank. He relied on and adopted his witness statement dated **20 May 2015** as his evidence in chief. He accordingly reiterated the position of the 1st Defendant that the Plaintiff voluntarily agreed to the condition of having the suit property charged to the 1st Defendant for a loan facility of **Kshs. 75,000**; and that upon default by the principal borrower, **Mary Anne Wangai**, the 1st Defendant exercised its statutory power of sale upon giving the required statutory notices. Hence the property was sold by way of public auction on **30 June 1992**.

[12] **DW1** confirmed in cross-examination that among the various documents the 1st Defendant had filed as part of their bundle of documents, was no Statutory Notice issued to the borrower. As for the notification of sale, **DW1** stated that he was aware that the same was served on the borrower as per the assurances they received from the auctioneer. **DW1** confirmed that no such notice or correspondence was sent to the Plaintiff by the 1st Defendant. **DW1** also set out the series of events that led to the filing of the **Machakos High Court Case** and the delay in the issuance of consent by the Kajiado Land Control Board. He therefore denied that the Plaintiff is the registered proprietor of the suit property, contending that the Plaintiff is only so registered subject to the interest of the 1st Defendant as Chargee; and added that the beneficial owner of the property is the 2nd Defendant, to whom it is legally bound to transfer the title.

[13] As regards the sale of the suit property, **DW1** conceded in cross-examination that a valuation was done in **1988** and that it was the said valuation that was used as a basis for selling the suit property in **1992**. It was also his testimony that he was not aware whether the conditions of sale in the Certificate of Sale in respect of the auction herein were complied with; one of which was that the purchase price was to be paid within 30 days. **DW1** further conceded that the balance was not paid within the requisite time as there was some payment that was made **27 August 1992** and **17 September 1992**. **DW1** also conceded that another condition, being the Land Control Board Consent, which was to be obtained within ninety (90) days, was also not complied with. **DW1** produced and made reference to the Bundle of Documents filed by the 1st Defendant herein on **22 April 2013**.

[14] **Jane Nyambura Mwangi**, a widow of the late **Wilson Mwangi Karogo** testified on behalf of the Estate of her deceased husband. She adopted her witness statement dated **29 May 2015** as her evidence in chief. She testified that it was within her knowledge that the deceased saw an advertisement in the newspaper in respect of the sale of the suit property that was to take place on **30 June 1992** at Ngong Township. She added that the deceased attended the auction and successfully placed a bid for the suit property at **Kshs. 180,000**, and upon being declared the highest bidder, paid a deposit of **Kshs. 45,000** at the fall of the hammer, as was required. She confirmed that the deceased thereafter paid **Kshs. 50,000** on **20 August 1992** and made a final payment of **Kshs. 85,000** on **4 September 1992**.

[15] It was therefore the testimony of **DW2** that the deceased purchased the suit property legally and immediately took possession of the same and had it fenced off to ward off trespassers. She added that at the material time, the Kajiado Land Control Board had been suspended and that it was this situation that impeded the deceased's effort to have the title transferred into his name before his demise. **DW2** further stated that, upon the death of the deceased on **1 August 1998**, she and her co-wife, **Jane Wairimu Mwangi**, instituted the **Machakos High Court Case**, to compel the 1st Defendant to transfer the property to them as the administrators of the estate of the deceased. She added that they ultimately obtained the consent of the Kajiado Land Control Board and were in the process of completing the transfer when the restraining order aforementioned was issued herein.

[16] At the close of the hearing, the parties filed and exchanged written submissions. The Plaintiff filed its submissions dated **21 February 2017** on even date. The 1st Defendant filed its undated submissions on **3 March 2017** while the 2 Defendant(s) filed their submissions dated **3 March 2017** on **6 March 2017**. The parties had also filed a joint Statement of issues for determination dated **18 July 2014** setting out the issues for determination as follows:-

- a. Whether the 1st Defendant did issue a statutory notice for sale to the Plaintiff.
- b. Whether Messrs Crown Auctioneers issued a notification of sale to the Plaintiff.
- c. Whether the 1st Defendant had notified the Plaintiff of the default by the principal borrower, **Mary Anne Wangai** and whether the 1st Defendant made any attempt to recover the money from the said borrower.
- d. Whether a binding contract ensues when a purchaser at an auction tenders the purchase price several months past the deadline imposed in the conditions for sale.
- e. Whether in the circumstances, the purported sale is null and void and whether it ought to be rescinded and/or

set aside.

f. Whether the purported sale is null and void for failure to obtain the consent of the Land Control Board within the prescribed period.

g. Whether the suit property constitutes the estate of the deceased in terms of the confirmed grant and whether the 1st Defendant is in law entitled to purport to transfer the Plaintiff's property to the 2nd Defendant.

h. If the answer to the above is in the negative, whether the 2nd Defendant has capacity to claim the Plaintiff's property when the same does not constitute the estate of the deceased and whether the 2nd Defendant can in law purport to transfer the Plaintiff's property to persons other than as authorized by succession cause.

i. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.

j. Who should bear the cost of this suit?

[18] Having carefully considered the pleadings, the evidence adduced, including the Bundles of Documents relied on by the parties, as well as the submissions made herein, there appears to be no dispute that the Plaintiff, at all time material to this suit, was and still is the registered proprietor of the suit property. It is not in dispute that on or about the **23 January 1986**, the Plaintiff consented to the creation of a Third Party Charge in favour of the 1st Defendant as security for a borrowing of **Kshs. 75,000** by one of the Plaintiff's employees, **Mary Anne Wangai**. It is not in dispute that the said **Mary Anne Wangai** thereafter left the employ of the Plaintiff, and that while it was the assumption of the Plaintiff that the loan was being serviced, the principal debtor defaulted in discharging her obligation.

[18] There appears to be no dispute that, consequent upon the default by the principal debtor, the 1st Defendant opted to exercise its statutory power of sale and caused the suit property to be put up for sale by public auction; and from the evidence led herein, it can hardly be disputed that the sale took place at Ngong Township on **30 June 1992**, whereat the deceased successfully bid and purchased the property for some **Kshs. 180,000, Kshs. 45,000** whereof was paid at the fall of the hammer. He however died before perfecting his title to the suit property, which included the requisite consent from the Kajiado Land Control Board.

[19] Accordingly, the dispute revolves around the 1st Defendant's exercise of statutory power of sale and in particular whether the said right was exercised lawfully. The other pertinent issue is that of the consent from the Land Control Board and whether the transaction is null and void for failure to obtain the requisite consent within the period stipulated by law. In the premises, the issues for determination herein can be summarized as follows:-

- a. Whether the 1st Defendant in exercising its statutory power of sale did so lawfully;
- b. Whether failure to obtain the consent from the Land Control Board rendered the sale null and void.
- c. Whether the Plaintiff is entitled to the prayers sought for in the Plaintiff.

Whether the 1st Defendant in exercising its statutory power of sale did so lawfully

[19] A copy of the Charge was exhibited by the 1st Defendant in its Bundle of Documents and there is no gainsaying that the same was drawn pursuant to the provisions of the **Registered Land Act, Chapter 300, Laws of Kenya** (now repealed) which was then the applicable legislation. Accordingly, by dint of **Section 74(1)** of the **Registered Land Act**, it was imperative a notice be issued to the Chargor prior to the exercise by the 1st Defendant of its statutory power of sale. The provisions stated as follows:

"If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be."

[20] Needless to say that the Plaintiff having raised the question of service, the burden shifted to the 1st Defendant to satisfy the Court that such notice was duly issued. In the case of **Nyangilo Ochieng & Another v Kenya Commercial Bank, Civil Appeal No. 148 of 1995 (1996) eKLR**, the Court of Appeal stated as follows in this regard :-

"It is for the chargee to make sure that there is compliance with the requirements of s.74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non-receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent".

[21] Whereas the 1st Defendant was of the firm posturing that the Statutory Notice was served on the Chargor, it did not have a copy of the same for production herein, contending that it had been destroyed by their Advocates in **2008** having been kept in the archives for the requisite period. The 1st Defendant placed reliance on the **Digest of Professional Conduct and Etiquette, 1982 by the Law Society of Kenya**. The said digest provides time guidelines that are to be followed when client files are to be

disposed. It stipulates as follows:-

“It is agreed that the following periods are reasonable but not obligatory for the disposal of records:-

- a. **Conveyancing- after 20 years.**
- b. **Debt Collection files- after 6 months.**
- c. ...”

[22] Needless to say that the said timelines are not mandatory, and are but a guideline to the membership on the disposal of records. It is questionable whether in the circumstance, it was a prudent move for the Advocates for the 1st Defendant to destroy these critical documents, while knowing well that the title was yet to be perfected. As matters stand therefore, the 1st Defendant cannot be said to have discharged the burden of proving that it did comply with the provisions of **Section 74(1)** of the **Registered Land Act** as to the issuance of the Statutory Notice before exercising its power of sale. It is trite law that he who alleges must prove. (See **Section 107** of the **Evidence Act, Chapter 80 of the Laws of Kenya**).

[23] Similarly, although it was the contention of the 1st Defendant that the Plaintiff was served with a Notification of sale by the Auctioneers, there was no evidence to that effect that was placed before the Court. The evidence of **DW1** was simply that the Auctioneer informed them that such notice was served upon the principal borrower. There is however no evidence to show that the same was served as alleged, either on the principal debtor or on the Plaintiff as the owner of the charged property; yet **Rule 15 (c)** of the **Auctioneers Rules** is explicit that:

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

- a. ...
- b. ...
- 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. ...
- e. ...”

In the foregoing premises, I would resolve the first issue in the Plaintiff's favour and find that no such notice was served.

Whether failure to obtain the consent from the Land Control Board rendered the sale null and void.

[24] **Section 8 (1)** of the **Land Control Act, Chapter 302 of the Laws of Kenya** provides thus:-

“(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.

[25] The Plaintiff's contention that this was a controlled transaction and that the consent of the Kajiado Land Control Board was not obtained within the requisite time was not refuted by the Defendants. Indeed, Counsel for the 1st Defendant in his submissions acknowledged as did the Defence Witnesses that at the time of the auction there was no Land Control Board in place for Kajiado. Nevertheless, the 2nd Defendant later applied for consent and the same was granted on **10 April 2013**, never mind that the conditions of sale in the Certificate of Sale (dated **7 July 1992** exhibited in the 1st Defendant's Bundle of Documents) required the purchaser to obtain the consent within 90 days.

[26] Granted that the sale by auction was done on **30 June 1992**, the Consent ought to have been obtained at the very latest by **30 December 1992** or thereabouts. The same having been procured twenty one years (21) after the purported sale, was hopelessly outside the period stipulated in **Section 8** of the **Land Control Act** aforesaid. Moreover, there was no indication that any effort was made to obtain extension of time from the High Court as recognized by **Section 8 (1)** of the **Land Control Act**. Clearly, the said consent is ineffectual for the purposes of the sale of **30 June 1992**.

[27] In **Onyuka vs Migwalla [2005] eKLR**, the Court of appeal expressed itself thus in a similar situation:

“...In retrospect it would appear that the agreement for sale was entered into at the beginning of 1991. Hence by August 1991 the parties to the transaction ought to have made the application for the necessary consent from the relevant Land Control Board as per section 8 (1) of the Land Control Act.

Since there was no evidence that any of the parties applied to the High Court for extension of time in which to apply for consent of the Land Control Board, the transaction became null and void after the expiry of six months after the making of the agreement which was stated as 31st March, 1991. From that date six months expired by 30th September, 1991 and without extension of time by the High Court for application for consent that transaction became null and void...”

[30] In the circumstances the consent obtained by the 2nd Defendant in **April 2013** is of no legal effect and consequently the sale by way of public auction conducted on **30 June 1992** is null and void for all purposes. Accordingly, it would be superfluous to consider whether the sale was valid, granted that the purchase price was paid outside the terms set out in the Certificate of Sale.

Whether the Plaintiff is entitled to the prayers sought for in the Plaintiff.

[31] In the light of the foregoing, it is evident that the Plaintiff has demonstrated that it is entitled to Prayers (b), (c), (d), and (g) as set out in the Plaintiff. It has however not been shown that the 1st Defendant was not entitled to exercise its statutory power of sale; nor was a case made by the Plaintiff for the award of general or punitive damages as claimed herein. Thus, the only orders that commend themselves to the Court are:

- a. A declaration that the purported sale of TITLE NUMBER KAJIADO/OLOLOITIKOSH/KITENGELA/185 conducted on or about 30 June, 1992 is unlawful and therefore null and void.**
- b. An order compelling the 1st Defendant to allow the Plaintiff redeem the Plaintiff's property TITLE NUMBER KAJIADO/OLOLOITIKOSH/KITENGELA/185.**
- c. Costs of this suit.**

The rest of the Plaintiff's prayers are accordingly dismissed.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF AUGUST, 2017

OLGA SEWE

JUDGE