



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.55 OF 2012

OCEAN BLUE LIMITED.....PLAINTIFF

=VERSUS=

LEONARD JEFWA KALAMA.....DEFENDANT

J U D G M E N T

Introduction

1. This suit was commenced by way of a Plaint dated 17th April 2012. in the Plaint, the Plaintiff averred that by a charge dated 21st June 1996, the chargee advanced a sum of money stated therein to the chargor and in consideration thereof, the chargor charged his property known as Gede/Dabaso/536 (the suit property).
2. The Plaintiff has averred that the suit property was advertised for sale and that at a public auction held on 15th July 2011, the Plaintiff successfully bid and purchased the subject property and subsequently became the registered proprietor having paid the consideration of Kshs.5.5 million.
3. The Plaintiff is seeking for vacant possession of the suit property and a permanent injunction restraining the Defendant from trespassing on the land.
4. On 2nd March 2015, this court dismissed the Defendant's Defence for being scandalous, frivolous, vexatious and otherwise an abuse of the court's process.
5. The ground for dismissing the said Defence was on the basis that having filed Petition number 23 of 2012 (Mombasa) challenging the validity of the charge and the subsequent sale of the suit property, which Petition was dismissed by Muriithi J, there was no valid Defence before this court.
6. The matter proceeded for formal proof on 10th September 2015.

The Plaintiff's case:

7. The Plaintiff's director, PW1, informed the court that he became aware of a public auction in respect of parcel of land known as Gede/Dabaso 536 vide an advertisement that was carried in the "Star" newspaper of 16th May, 2011.
8. According to the statement of PW1, he visited the auctioneers offices in Mombasa and was shown a

copy of the Title Deed, the duly registered charge and the Notification of Sale dated 7th March, 2011 and that on 15th July, 2011, he attended the auction where he successfully bid for the suit property.

9. After purchasing the suit property, PW1 informed the court that he was shocked when he found the Defendant engaging in the cultivation of various crops and raring of crops on the land.

10. The Plaintiff produced in evidence the copy of the advertisement, the title document, the charge, the statutory notices by the chargee, the Notification of Sale by Kinyua & Co. Auctioneers, the receipts evidencing the payment of the purchase price and the stamp duty, the Memorandum of Sale, the Transfer by Chargee and the Title Deed in the name of the Plaintiff that was issued to it on 8th September 2011 to support his claim.

Submissions:

11. The Plaintiff's counsel submitted that the Plaintiff has proved its case on a balance of probabilities.

12. Counsel submitted that the court in Mombasa Petition Number 23 of 2012 found that the auction that was conducted by the chargee which precipitated into the sale of the suit property to the Plaintiff was done in accordance with the law.

13. The Plaintiff's counsel submitted that the Plaintiff should be allowed save for the prayer for mesne profits.

14. The Defendant's counsel submitted that the Defendant is hostile to the orders being sought by the Plaintiff because the family's graves are on the said plot.

15. Counsel submitted that majority of Africans have religious attachments to their dead family members.

16. Indeed, counsel submitted, the Bill of Rights in the Constitution protects the right of the dead; that people believe that the dead or their ancestors continue to be members of the family even after death and that in a sense, those living pray and make request to God through the dead.

17. Consequently, it was submitted, this court is not competent to give orders sought in the Plaintiff.

18. Notwithstanding the above, the Defendant's advocate submitted that the Defendant is willing to pay the Plaintiff Kshs.4,000,000 in full and final settlement of the entire subject matter to enable him continue to look after the dead and their spirits.

Analysis and findings:

19. It is not disputed that the Plaintiff purchased the suit property in a public auction after the chargor (the Defendant) defaulted in paying the chargee the sum that was due and owing to it.

20. The Plaintiff produced in evidence a copy of the Title Deed for Gede/Dabaso/536 in the name of the Defendant which was charged by consolidated Bank of Kenya on 8th July, 1996.

21. The duly registered charge document and the statutory notices that were issued to the Defendant were also produced by PW1 in court.

22. PW1 also produced in evidence the Notification of sale that was issued to the Defendant by Kinyua & Co. Auctioneers dated 7th March 2011 and the copies of the cheques that he issued to the said Auctioneers after the public auction.

23. After paying the requisite purchase price, the Plaintiff's representatives and the Bank executed the Transfer by chargee and the same was registered on 8th September 2011.

24. The Plaintiff was eventually issued with the Title Deed on 8th September 2011 which was also produced in evidence.

25. The evidence before this court shows that the Defendant challenged the sale of the suit property to the Plaintiff in Mombasa Petition number 23 of 2012.

26. In the Petition, the Defendant herein averred that the Bank's statutory power of sale had not arisen; that the right of redemption had not been extinguished; that the sale was not done in accordance with the law and that the Respondents were in breach of the provisions of Article 40 and 57 of the Constitution.

27. After hearing the Petition, Muriithi J dismissed it as follows:-

“Accordingly, I hold that in the absence of proof to the required standard of any fraud, the 1st Respondent's exercise of the chargee's power of sale in accordance with the provisions of the Registered Land Act which was then in force cannot be deemed to be unconstitutional as having deprived the Petitioners of their fundamental right to property under Article 40 of the Constitution or as having violated the 2nd Petitioners spousal rights under Article 60 of the Constitution of Kenya 2010....”

28. The court in Mombasa, which has concurrent jurisdiction with this court, dealt with the issue of the constitutionality of the sale of the suit property.

29. This court can do no better than reiterate the position of that court by holding that the purchase of the suit property was lawful and the Defendant should give way.

30. The argument by the Defendant's counsel in his submission that the Defendant and his family cannot hand over the suit property because of the presence of the family graves on the land is not supported by any law.

31. Indeed, if that was the case, the question that begs an answer is why the Defendant offered the property as a security knowing very well that the same was bound to be sold in the event he defaulted in paying the loaned amount. The Defendant cannot have his cake and eat it.

32. In the circumstances, and on the basis of the evidence before me, I am satisfied that the Plaintiff has proved its case on a balance of probabilities, save for the prayer for mesne profits.

33. For those reasons, I allow the Plaint dated 17th April 2012 in the following terms:

(a) The Defendant to give to the Plaintiff vacant possession of all that property comprised in Title Number Gede/Dabaso 536 forthwith.

(b) A permanent injunction be and is hereby issued restraining the Defendant, his servants, agents and or any one of them from trespassing upon or remaining on the Plaintiff's portion of land aforesaid.

(c) Costs of this suit to be paid by the Defendant.

Dated and delivered in Malindi this 26th day of February, 2016.

O. A. Angote

Judge