



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 506 OF 2008**

**PAUL KARUGA NJUGUNA.....PLAINTIFF**

**VERSUS -**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**PENINAH NJERI HASSAN.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiff, **PAUL KARUGA NJUGUNA**, has brought this case against the defendants, **HOUSING FINANCE COMPANY of KENYA LIMITED** and **PENINAH NJERI HASSAN**, seeking a declaration that the sale of the suit property by **HOUSING FINANCE COMPANY of KENYA LILIMITED** (*hereinafter "Housing Finance"*) to **PENINAH NJERI HASSAN** (*hereinafter "Peninah"*) was null and void.
2. The suit property is **L.R. No. DAGORETTI/RIRUTA/S/272**.
3. The plaintiff sought a declaration that the registration of Peninah as the proprietor of the suit property be cancelled, so that he (**PAUL KARUGA NJUGUNA**) could have his name restored to the Register, as the owner of the suit property.
4. Thirdly, the plaintiff (*hereinafter "Paul"*) sought orders to restrain Peninah from evicting him from the suit property.
5. Paul also sought court orders to restrain Peninah from dealing with the suit property in any manner whatsoever, and in particular from selling, disposing of or alienating the said property.
6. Finally, the plaintiff prayed for costs and interest thereon.
7. It is common ground that Paul had been the registered proprietor of the suit property, and that by a charge dated 5<sup>th</sup> November 1999, he offered the said property to Housing Finance as security for a loan of Kshs. 2,000,000/-.
8. Paul conceded that Housing Finance sought to realize the security by issuing a Demand Notice dated 5<sup>th</sup> December 2005.

9. Paul's further concession was that Housing Finance issued a Redemption Notice dated 8<sup>th</sup> May 2006.
10. Thereafter, Housing Finance issued a Notification of Sale on 30<sup>th</sup> March 2007, specifying that the suit property would be sold on 20<sup>th</sup> April 2007.
11. In the face of that imminent sale, Paul filed a case at the Chief Magistrate's Court, Milimani, Nairobi. The said case was **PAUL KARUGA NJUGUNA Vs. HOUSING FINANCE CMCC No. 3164 of 2007**.
12. It is the plaintiff's case that on 25<sup>th</sup> May 2007, the learned magistrate issued an order in the following terms;

***"This court lacks the necessary pecuniary jurisdiction to entertain any matters herein. The Application dated 16/4/2007 is thus stood over to 4/7/2007 by consent. The file to be placed before the Chief magistrate status quo to be maintained".***

13. In the light of that order, Paul's contention was as follows;

***?7.The said application dated 16/4/07 was for an injunction to halt the auction sale set for 20<sup>th</sup> April 2007 and on 19<sup>th</sup> April, the said sale was suspended by consent of both parties pending the inter partes hearing".***

14. Notwithstanding the said court order, Housing Finance is said to have proceeded to advertise the suit property for sale. The advertisements were said to have been made on 4<sup>th</sup> June 2007 and on 18<sup>th</sup> June 2007.

15. According to those 2 advertisements, the suit property was scheduled for sale on 22<sup>nd</sup> June 2007.

16. Having become aware of the advertisements, Paul lodged a protest and served Housing Finance with a copy of the order which stipulated that the status quo be maintained.

17. At paragraph 9 of the Complaint, Paul pleaded thus;

***"On 4<sup>th</sup> July 2007, the court heard the application dated 16<sup>th</sup> April 2007 inter partes extended its interim orders to 18/7/2007 and delivered its ruling on 19/7/2007 in the presence of both parties".***

18. Paul's case was that he believed that the sale scheduled for 22<sup>nd</sup> June 2007 was put – off, in the light of the court orders which required the status quo to be maintained.

19. Therefore, when Paul received a letter from Housing Finance, dated 1<sup>st</sup> July 2008, informing him that the suit property had been sold on 22<sup>nd</sup> June 2007, he was unable to believe the information.

20. The plaintiff's case was that;

***"...the said sale was in contempt of the court order in force at the time of the sale".***

21. He says that the sale was done behind his back, in an opaque manner, so as to deprive him of his right to redeem the property. Paul emphasized that Housing Finance's actions deprived him of the opportunity to exercise his right;

***"to redeem which exists upto the time the hammer falls at auction sale".***

22. The plaintiff's further case was that Peninah failed to comply with the terms and Conditions of sale, which had been stipulated by Housing Finance. Under the said conditions, the purchaser was due to pay

25% of the purchase price upon the fall of the hammer, and thereafter pay the balance within 30 days of the auction.

23. By allowing Peninah to pay the balance after the lapse of 6 months, Housing Finance is said to have introduced a fundamental change to the Conditions of sale.

24. The said fundamental change was said to have been beyond the contemplation of the plaintiff.

25. Indeed, Paul expressed the view that if other bidders had been aware of the change introduced to the Conditions of sale, there could have been a higher price than the sum of Kshs. 3,800,000/- which Peninah had offered.

26. The plaintiff said that the sale was so flawed and so contrived to the point that it was a nullity, as it did not amount to a sale by public auction.

27. It is the plaintiff's case that the resultant registration of Peninah as the owner of the suit property was fraudulent. Therefore, it ought to be cancelled.

28. The following are the particulars of fraud cited by the plaintiff;

***“a) The First Defendant knew that there was a court order ordering status quo when it advertised and purportedly sold the suit property to the Second Defendant.***

***b) The purported sale on 22<sup>nd</sup> June 2007 did not comply with the Conditions of Sale stated therein.***

***c) The purported sale was made at undervalue of the property.***

***d) The purported sale was not transparent and in bad faith?.***

29. In answer to the plaint, Housing Finance stated that the learned Magistrate's court, which gave an order on 25<sup>th</sup> May 2007, lacked the jurisdiction to give any orders.

30. In addition, the Housing Finance stated that the status quo that was prevailing at the time when the magistrate's court gave the order, was;

***“...that the 1<sup>st</sup> Defendant had commenced the realization of the charged property following default in payment by the plaintiff?.***

31. Housing Finance categorically denied having consented to suspend the sale pending the *inter partes* hearing of the application dated 16<sup>th</sup> April 2007.

32. Furthermore, Housing Finance denied having been served with a copy of the order preserving the status quo.

33. As far as Housing Finance was concerned, the plaintiff was fully aware that the suit property was to be sold on 22<sup>nd</sup> June 2007.

34. The Housing Finance's case was that the sale was carried out in accordance with the law. Its further case was that the said sale was through public auction, in line with Section 77 of the Registered Land Act.

35. Therefore, Housing Finance denied the allegations of fraud, and put the plaintiff to strict proof.

36. Housing Finance asserted that the Plaintiff did not disclose any reasonable cause of action against it, and that it ought, therefore, to be dismissed.

37. Meanwhile, the 2<sup>nd</sup> defendant, **PENINAH NJERI HASSAN**, asserted that she was a stranger to the averments concerning the orders which the Magistrate's Court had issued prior to the sale.
38. In any event, if the said Magistrate's Court lacked jurisdiction, the purchaser believes that any orders it may have granted, were a nullity in law.
39. The 2<sup>nd</sup> defendant's position was that she was a *bona fide* purchaser for value. As far as she was concerned, the sale and the subsequent transfer of the suit property was lawful.
40. Thirdly, the purchaser expressed the view that the equity of redemption was extinguished when the suit property was sold by public auction.
41. Therefore, the purchaser contended that the plaintiff had no cause of action against her. But, if there were any cause of action, the purchaser said that that could only be in respect to a claim for compensation, through an award of damages.
42. The purchaser lodged a Counter-claim against the plaintiff. The said Counter-claim was premised on the fact that the 2<sup>nd</sup> defendant was now the registered proprietor of the suit property. Therefore, the purchaser asked the court to compel the plaintiff to give vacant possession, of the suit property, to the purchaser.
43. In his submissions the plaintiff acknowledged that he had the onus of proving that the 1<sup>st</sup> Defendant fraudulently transferred the suit property to the 2<sup>nd</sup> defendant, and that the 2<sup>nd</sup> defendant had knowledge of the fraudulent acts of the 1<sup>st</sup> defendant.
44. However, the plaintiff did not lead evidence to prove the particulars of fraud which he had attributed to the bank.
45. Instead, the plaintiff talked about the bank denying him an opportunity to redeem the property, by concealing the auction sale, which was purportedly conducted on 22<sup>nd</sup> June 2007.
46. For the evidence to advance the plaintiff's case against the bank, the plaintiff ought to have had, as one of his particulars of fraud, an assertion that the bank concealed from the plaintiff, the sale conducted on 22<sup>nd</sup> June 2007.
47. The plaintiff also testified that the bank did not specifically and directly notify him of the sale scheduled for 22<sup>nd</sup> June 2007.
48. Once again, that was not one of the alleged facts which constituted fraud. Therefore, it cannot be said that such evidence had advanced the case which the plaintiff had set out to prove against the bank.
49. The plaintiff submitted that the purchaser was aware of the bank's fraudulent actions, and that the purchaser did not merely collude, but also committed acts of fraud.
50. Regrettably, in the case set out in the Complaint, the purchaser was not alleged to have either colluded with the bank or to have committed any specified acts of fraud.
51. The plaintiff's next contention was that the bank had disobeyed the court order which had preserved the *status quo*.
52. The bank pointed out that on 19<sup>th</sup> April 2007, the parties agreed to suspend the sale scheduled for 20<sup>th</sup> April 2007. The record of the Court proceedings confirms that position.
53. The court records also show that on 8<sup>th</sup> May 2007, the court neither extended the orders suspending

the auction nor issued any order to preserve the subject matter of the application.

54. On 25<sup>th</sup> May 2007, Hon. Mrs. D.A. Okundi SRM indicated that she lacked the requisite jurisdiction to entertain the matter. Therefore, she directed that the file be placed before the Chief Magistrate. Meanwhile, the learned Senior Resident Magistrate ordered that the *status quo* be maintained.

55. The case was next in court on 4<sup>th</sup> July 2007, when it was listed before Mrs. M. Odero, Acting Chief Magistrate.

56. Mr. Oundu advocate represented the plaintiff, whilst Mr. Kibuchi advocate represented the bank.

57. Whilst canvassing the application, the plaintiff made it clear that he was asking the court to grant an injunction to restrain the defendant from selling or from disposing of the land, until the suit was heard and determined.

58. As the plaintiff indicated before me, he believed that the suit property had not yet been sold, hence the submissions for an interlocutory injunction.

59. According to the bank, it had taken steps to realize the security, after the court failed to extend the orders on 8<sup>th</sup> May 2007. Therefore, the bank believes that;

***“...there were no orders capable of being extended and the status at the material time was that the 1<sup>st</sup> Defendant had already commenced the realization of the security?.***

60. Black’s Law Dictionary gives the following definition of the phrase “*status quo*?;

***“Latin ‘state in which’***

***The situation that currently exists?.***

61. I understand the situation that currently exists as defining the situation at a particular time. It is not a situation which continues to evolve, when the court orders that it be maintained.

62. If a process had been commenced, but had not been concluded, it must stay at the point where it had reached.

63. It is not open to a party to say that because I had commenced the process, the *status quo* meant that I should proceed to finalise it.

64. In this case, the bank could have informed the learned magistrate and the plaintiff, on 4<sup>th</sup> July 2007, that the application had been overtaken by events, following the sale of the suit property. Instead, Mr. Kibuchi advocate responded to the merits of the application.

65. After both parties had made their respective submissions, Hon. Mrs. M. Odero, Acting Chief Magistrate (*as she then was*), reserved her Ruling. The court fixed the date for Ruling as 18<sup>th</sup> July 2007; and in the meantime, the court ordered that the *status quo* be maintained.

66. From the record of the proceedings, there was not a single moment when the bank or any other person raised the question of any alleged lack of jurisdiction, on the part of the Chief Magistrate.

67. It was the Senior Resident Magistrate who had indicated that she lacked the pecuniary jurisdiction to handle the case, because the suit property had a value which was in excess of Kshs. 2 million.

68. In **TABITHA WAMBUI MUNYAO & 7 OTHERS Vs. PETER NGUGI KAINAMIA & ANOTHER, ELC Hcc A No. 13 of 2014 (At Nakuru)**, Munyao J. held as follows;

**“Magistrates did have jurisdiction to hear cases falling under the Registered Land Act, but their jurisdiction as prescribed by the Act, was limited to a subject matter with a pecuniary value of twenty five thousand pounds (Kshs. 500,000/-) and no more. But we know that certain magistrates have a higher pecuniary jurisdiction as given in the Magistrate’s Courts Act, which goes upto Kshs. 7 million then, and even currently; What test therefore was to be applied? Was it the test in the Registered Land Act, or the test in the Magistrate’s Courts Act? I answer this question by stating that the applicable test was the test given in the Registered Land Act and not that of the Magistrate’s Court Act?.**

69. Having explained the rationale for that decision, the learned Judge pronounced himself thus;

***“It is clear to me that the suit was filed in a court which had no jurisdiction in the first place. The result is that even the order of injunction, which is the subject matter of this appeal, was made without jurisdiction. Having been made without jurisdiction it cannot be of any effect?.***

70. The Judge proceeded to strike out the suit which had been lodged before the magistrate’s court. He also nullified the orders which had been made by the Magistrate’s Court.

71. In my understanding, even though the Magistrate’s Court lacked jurisdiction, any order it had given would remain effective until and unless there was an express pronouncement, by a competent court, that the court lacked jurisdiction.

72. Parties cannot be allowed to determine whether or not a court lacked jurisdiction. Consequently, it was not the mandate of parties to determine whether or not to obey an order granted by the court, even if the parties held the view that the court that had granted any such orders, lacked jurisdiction. To allow parties to make such a determination would be an invitation to anarchy.

73. The correct approach to be taken by any person who doubts the legitimacy of a court order, on the grounds that the said orders were made without jurisdiction or that the orders were otherwise unlawful, illegal or void, would be to seek an appropriate declaration from the court.

74. In **HADKINSON Vs. HADKINSON [1952] 2 ALL E.R. 576, at page 569, Romer L J, said;**

***“It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void?.***

75. So, whereas it is possible that a court lacked jurisdiction when it gave an order, the persons affected by the said order must obey the order until and unless the order was discharged.

76. Accordingly, I find that the bank ought to have obeyed the court order dated 4<sup>th</sup> July 2007.

77. Meanwhile, as regards the order made on 25<sup>th</sup> May 2007, I find that, by her own pronouncement, the learned Senior Resident Magistrate had made it clear that she lacked the requisite jurisdiction to handle the case.

78. Nyarangi J.A. clearly stated that Jurisdiction is everything; and that, therefore, when a court came to the conclusion that it did not have jurisdiction, the court must down its tools. That pronouncement was made in **OWNERS of MOTOR VESSEL ‘LILIAN S’ Vs CALTEX OIL (KENYA) LIMITED [1989] KLR 1.**

79. That means that, by its own declaration, the magistrate’s court lacked jurisdiction to make orders. Accordingly, any orders made by the court, which had acknowledged its lack of jurisdiction was a nullity.

80. In the result, there was no court order which was in force as at 22<sup>nd</sup> June 2007, barring the bank from selling off the suit property.

81. Meanwhile, as regards the plaintiff's contention that the sale was irregular, the plaintiff did concede, during cross-examination by Mr. Issa, the learned advocate for the purchaser that the bank had authority to sell the suit property either by public auction or by private treaty.

82. The said power was provided for by clause 10 (iii) (a) of the Charge Instrument.

83. The same clause also gave to the bank, the authority to vary any contract of sale. The clause reads as follows;

***“The chargee in exercising its statutory power of sale may sell or concur with any person in selling the charged property or any part thereof either subject to prior encumbrances or not and either together or in lots, by public auction or private contract subject to such conditions respecting title or evidence of title or other matter as the chargee thinks fits, with power to vary any contract for sale and to buy in at any auction or to rescind any contract for sale and to re-sell without being answerable for any loss occasioned thereby?.***

84. Therefore, as between the plaintiff and the bank, there was an express contractual authorization to the bank to vary the contract for sale.

85. In the circumstances, the plaintiff cannot now be heard to complain that the variation of the period within which the balance of the purchase price would be payable, was unlawful or irregular.

86. On the issue of the Valuation of the suit property, the plaintiff complained that the property was sold at an undervalue.

87. The plaintiff confirmed that when he filed suit in 2008, he did not complain that the sale price of Kshs. 4.2 million was a sale at an undervalue.

88. The failure to raise that issue when the suit was filed was, however, not a bar to the plaintiff raising the said issue thereafter.

89. The plaintiff testified that if the Terms of the auction had specified that the bank could finance the highest bidder, the auction could have fetched more than Kshs. 4.2 million. Logically, that assertion makes sense. However, logical assertions are not a substitute for evidence. The plaintiff did not, through the said logical assertion, discharge the *onus* of proof.

90. **PW3, DAVID CHEGE KARIUKI** is a licensed and Registered Valuer. He testified that the suit property was valued at Kshs. 25,250,000/- as at 9<sup>th</sup> July 2012.

91. He further testified that as at 2007, the value of the suit property was Kshs. 7,500,000/-.

92. During cross-examination Mr. Kariuki said that he was unaware of the developments which were on the suit property in 2007. Nonetheless, he insisted that his assessment was accurate as the same was based upon comparables.

93. But the comparables were not made available to the court.

94. Upon further cross-examination, the valuer said that the location around Wanyee Road, where the suit property was located, had “*opened up?* in 2009. The opening of Wanyee Road was said to have impacted positively on the value of the land.

95. In the testimony of the valuer, he was unable to help the court determine the Forced Sale Value of the suit property in the year 2007.

96. He did explain that in the year 2007 if the bank wanted to sell a mortgaged property, the bank would do so based on the Forced Sale Value.

97. In his Report, the valuer did not indicate the Forced Sale Value. He only indicated the Market Value, which was Kshs. 7.5 Million.

98. The valuer concluded his evidence thus;

***“I cannot therefore say if Kshs. 3.5 Million in 2007 would be low or high as a forced sale value?.***

99. As the witness was expected to help the plaintiff demonstrate that the price obtained at the auction was way below the proper value of the suit property, his admission that he could not say whether or not Kshs. 3.5 Million was low or high, means that the plaintiff failed to prove that the property was sold at an under-value.

100. **PW2, WILFRED ABINCHA ONONO**, is a Certified Public Accountant. He was the Managing Consultant of the Interest Rates Advisory Centre Limited (**IRAC**).

101. He testified that the plaintiff had asked him to recalculate the interest charged by the bank on the plaintiff’s mortgage account.

102. Having undertaken the task of recalculation, Mr, Onono concluded that as at 31<sup>st</sup> March 2007, the plaintiff owed to the bank, the sum of Kshs. 1,913,238.16, and NOT Kshs. 3,119,662.20 as had been demanded by the bank.

103. PW2’s report is dated 2<sup>nd</sup> May 2012. Therefore, as the suit was filed in court on 8<sup>th</sup> September 2008, Mr. Onono conceded that the suit had been lodged without the benefit of his report.

104. In the plaint, there was no specific claim that the interest debited to the plaintiff’s account had been erroneously calculated.

105. Mr. Onono testified that as an expert, his evidence was supposed to help the court arrive at appropriate decisions. However, in this case, Mr. Onono did not have the benefit of seeing the pleadings before he prepared his report in the year 2012.

106. Having provided his report to the plaintiff, Mr. Onono said that he would have expected the plaint to be amended, so as to reflect the conclusions in the report.

107. In the absence of an amendment to the plaint, I find that the expert report constitutes evidence which does not advance the plaintiff’s claim.

108. I now proceed to answer the 6 Issues which the plaintiff drew up, as follows;

***1. Was there a court order in force on 22<sup>nd</sup> June 2007 in Civil suit CMCC 3164 of 2007 or at any other time during the month of June 2007?***

***Answer - No, there was no valid court order in CMCC No. 3164 of 2007, which could stop the bank from realizing the security. The court had declared that it lacked jurisdiction. Therefore, it had no legal capacity to give any lawful order.***

***2. Was the sale price of the suit property so inordinately low as to amount to a fraud on the plaintiff?***

***Answer - No, the sale price was not so inordinately low, so as to amount to a fraud on the***

**plaintiff. The plaintiff's valuer expressly conceded he was unable to say whether or not the sale price was either low or high.**

**3. Did the sale comply with the conditions of sale set by the auctioneer?**

**Answer - The bank varied the period within which the balance of the purchase price was payable.**

**The variation was expressly allowable pursuant to clause 10 (iii) of the Charge Instrument between the plaintiff and the bank.**

**Consequently, the sale did comply with the conditions of sale set by the auctioneer, as amended by the plaintiff and the bank.**

**4. Did the auction sale meet the criteria defining the meaning of a sale by public auction?**

**Answer - The plaintiff has not demonstrated any particular criteria which the sale failed to meet, so as to be said to have failed the test of a sale by public auction.**

**5. Was the auction sale made in good faith as stipulated in the Registered Land Act which was in force as at the time of the sale?**

**Answer - As the plaintiff has not proved the lack of good faith, I find that the sale was made in good faith as stipulated by statute.**

**6. Was the 1<sup>st</sup> Defendant's conduct in selling the plaintiff's property and then subsequently financing the 2<sup>nd</sup> Defendant to purchase the same, improper under the circumstances?**

**Answer - No it was not improper, as it constituted a variation of the contract of sale, as had been envisaged and authorized in the Charge Instrument.**

**109.** Having answered all the issues raised, I find that the plaintiff's claim against the defendants is without merit. It is therefore dismissed.

**110.** The plaintiff will pay costs of the suit to the defendants.

**111.** Meanwhile, it is common ground that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property.

**112.** In the result, the plaintiff has no lawful basis for continuing to be in occupation of the suit property. Therefore, the counter-claim filed by the 2<sup>nd</sup> defendant against the plaintiff is successful. In effect, the plaintiff is ordered to vacate the suit property, and to hand over vacant possession of the said property, to the 2<sup>nd</sup> defendant.

**113.** The plaintiff is also ordered to pay to the 2<sup>nd</sup> defendant the costs of the counter-claim.

**DATED, SIGNED and DELIVERED at NAIROBI this 18<sup>th</sup> day of August 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Judgement read in open court in the presence of**

Miss Otieno for the Plaintiff

Miss Otieno for Miss Ndumia for the 1<sup>st</sup> Defendant

Miss Mutua for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk.